



FLSA2006-45

December 21, 2006

Dear **Name***:

This is in response to your letter requesting an opinion regarding whether copy editors and senior copy editors qualify as “administrative” employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA) and 29 C.F.R. Part 541,¹ and, therefore, are exempt from the minimum wage and overtime pay requirements of the FLSA. It is our opinion that the copy editors and senior copy editors are not exempt administrative employees.

Your company is a direct marketing firm that focuses on the sale of books and promoting sales through several book clubs. The copy editors and senior copy editors review materials used for marketing and promoting books to book club members; they do not review the content of the books themselves. Your correspondence describes the two positions using virtually identical terms, with the exception of the required experience. The copy editor position requires two years of copy editing experience; the senior copy editor position requires four years of this experience. In addition, with respect to “work autonomy,” the copy editor position is rated at three (on a scale of one to five, with one representing the least autonomy), and the senior copy editor position is rated at four on the same scale. Although both positions report to the supervisor of copy editing, the senior copy editor’s work apparently is monitored less closely than the work of the copy editor. Each position requires a bachelor’s degree in either English or Journalism.

Employees in each of the two positions read club marketing promotional materials prepared by copywriters and make any necessary corrections for structure, grammar, comprehension, spelling, clarity, and accuracy. They correct the keying of test versions, check for adherence to legal requirements for trademarks and copyrights, and ensure compliance with postal rules and scanning standards. The copy editors and senior copy editors also review the accuracy of publication titles, authors’ names, code numbers, and prices, and ensure that the company’s requirements for style and procedures are met. They organize work priority to meet deadlines according to promotion schedules. They make decisions on workflow and communicate these decisions to club copywriters.

If a particular job is late, the copy editors and senior copy editors are responsible for making a judgment call concerning the level of review and whether to release the materials to prepress. They identify and implement streamlining ideas. On occasion, they head special projects assigned by management. They attend professional seminars and classes, as may be needed, to keep their skills current. They act as liaison with the legal department on legal compliance issues and with the operations department to assure all postal and scanning standards are correct. They attend departmental and book club status meetings.

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

Section 13(a)(1) of the FLSA exempts from its minimum wage and overtime pay provisions “any employee employed in a bona fide . . . administrative . . . capacity.” The exemption is determined not by occupational title or job classification, but rather by the duties and salary of the individual employee involved. *See* 29 C.F.R. § 541.2. The regulatory provisions relevant to your inquiry are contained in 29 C.F.R. §§ 541.200-.203. As provided in the regulations, the administrative exemption in section 13(a)(1) of the FLSA applies to “any employee”:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . exclusive of board, lodging or other facilities;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a).

We understand that the copy editors and senior copy editors receive at least \$455 per week on a salary basis. Therefore, the first requirement for the exemption is satisfied.

The primary duty of the copy editors and senior copy editors is “office or non-manual work.” We do not believe their primary duty, however, is “directly related to the management or general business operations of the employer or the employer’s customers.” As explained in the preamble to the 2004 revisions to the Department’s Part 541 regulations, this exemption is limited to those employees whose duties relate to the administrative, as distinguished from the production, functions of a business. Thus, the exemption applies to employees whose work involves servicing the business itself. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,121, 22,141 (Apr. 23, 2004).

Although the “production versus staff” dichotomy in the test is instructive, it is not dispositive of exempt status. In *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002), for example, the Ninth Circuit found the dichotomy “useful only to the extent that it helps clarify the phrase ‘work directly related to the management policies or general business operations.’” *Id.* at 1126 (citation omitted). The court further stated:

This approach is sometimes appropriate because, as we have said, the dichotomy is but one analytical tool, to be used only to the extent that it clarifies the analysis. Only when work falls ‘squarely on the production side of the line,’ has the administration/production dichotomy been determinative.

Id. at 1127 (citation omitted).

As noted in the preamble to the final rule, the Department has adopted the Ninth Circuit's approach in *Phase Metrics* that the "production versus staff" dichotomy is but one analytical tool that is determinative only if the work falls squarely on the production side of the line. *See* 69 Fed. Reg. at 22,141. The primary duty of the copy editors and senior copy editors described in your request does seem to fall squarely on the production side of the line for their employer, a direct marketing firm, and, thus, the employees are non-exempt.

As indicated above, these employees read and make any necessary corrections to club marketing promotional materials for structure, grammar, comprehension, spelling, clarity, and accuracy. They correct the keying of test versions and check for adherence to legal requirements for trademarks and copyrights and postal and scanning standards. They also review the accuracy of publication titles, authors' names, code numbers, and prices and ensure that the company's requirements for style and procedures are met. All of these processes appear to be technical steps involved in the production of the employer's marketing materials.

The copy editors and senior copy editors attend professional seminars and classes, as needed, to keep their skills current. They also attend departmental and book club status meetings. These activities do not appear to be administrative duties related to the management or general business operations of the employer. Although attending club status meetings might be viewed as an activity related to the general business operations of the employer's customers, *i.e.*, the book clubs, you provide no information that suggests how the employees' particular duties during this activity may affect the management or general business operations of the clubs themselves in significant matters. *See* 29 C.F.R. § 541.201(c). Consequently, the copy editors and senior copy editors do not appear to meet the second prong of the administrative exemption.

The third prong in the test for the administrative exemption requires that the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. "The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.202(c). As further clarified in 29 C.F.R. § 541.202(e), "[t]he exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." Many of the duties described above (checking materials for grammar, spelling, clarity, etc.) involve the use of skill rather than the exercise of discretion and independent judgment. *See* Wage and Hour Opinion Letter [FLSA2006-14NA](#) (June 29, 2006) (employee who reviewed government contract bid proposals, client reports and government reports for grammar, accuracy, completeness, and "plain English" did not exercise discretion and independent judgment). In this case, the employees also organize work priorities to meet production deadlines set by management. We believe this activity does not demonstrate the exercise of discretion with respect to matters of significance because of the nature of the decision itself and the fact that management has already set the production deadline for these employees. Similarly, although they make decisions on workflow within their areas and communicate these decisions to club copywriters, the discretion exercised is fairly narrow because of the deadlines set by others. In this regard, it is not sufficient that an employee makes decisions regarding "when and where to do different tasks, as well as the manner in

which to perform them.” *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287 (4th Cir. 1986). Rather, the regulations emphasize both the nature and the level of importance of an employee’s decisions as they relate to managing the employer’s business operations. See 29 C.F.R. § 541.202(b); Wage and Hour Opinion Letters [FLSA2006-27](#) (July 24, 2006) and [FLSA2005-21](#) (August 19, 2005).

On occasion, when a particular job is late, the employees make a judgment call regarding the level of higher review needed and on releasing the material to prepress. Although this activity does suggest discretion and independent judgment, the arrangement seems akin to management policies in which members of the staff are delegated some special authority for unusual or emergency circumstances. This function, however, does not appear to be a routine or normal part of the employees’ primary duty.

The copy editors and senior copy editors identify and implement streamlining ideas. On occasion, they head special projects assigned by management. Whether these functions are part of the employees’ primary duty and require discretion and independent judgment on matters of significance depends on the individual circumstances. It does not appear that these employees have broad discretion outside their specialized areas of responsibility to implement policy changes or to carry out special assignments on matters of significant impact to the company. Moreover, these functions do not appear to be essential to the performance of the employees’ primary duty.

For the reasons stated above, we do not believe the primary duty of the copy editors and senior copy editors is directly related to the management or general business operations of the employer or the employer’s customers or includes the exercise of discretion and independent judgment with respect to matters of significance. It is our opinion that these employees do not qualify for the administrative exemption and must, therefore, be paid in accordance with the minimum wage and overtime pay provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Paul DeCamp
Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**