



March 17, 2005

FLSA2005-14

Dear **Name***,

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to a nonexempt office assistant who chooses to also work in another capacity as an exempt coordinator for the same public employer.

You state that the currently unfilled exempt coordinator position has the authority, among other duties, to suspend and fire others. The office assistant wants to perform the coordinator's duties in the evenings, during her off-duty hours. The two positions are separate and distinct. The work performed as the coordinator will be more than occasional or sporadic.

You ask two questions below:

1. If an employee wishes to work two separate and distinct positions for a public employer, one exempt and the other nonexempt, can the employer treat the positions separately and therefore pay the employee for each position separately?
2. If not, and an employee is hired for two separate and distinct positions, to which position is overtime pay suppose to be computed? In your situation, one position is nonexempt and the other is exempt. The exempt position is the higher paying position.

Please note that the Department of Labor issued revisions to 29 CFR Part 541, the regulations implementing the Section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, effective August 23, 2004. See 69 Fed. Reg. 22122 (April 23, 2004). The revised Part 541 regulations apply prospectively, beginning on August 23, 2004. Our response is applicable under the updated regulations that clarify the primary duty test requirements for the executive, administrative, and professional exemptions. This response assumes that the coordinator position, which you describe as exempt, meets all the applicable duty, salary level, and salary basis requirements for an exempt position under 29 CFR Part 541.

As explained in section 541.700 of the revised regulations, an employee's "primary duty" must be the performance of exempt work in order for the minimum wage and overtime exemption of Section 13(a)(1) to apply. The term "primary duty" means the "principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 CFR 541.700(a).

The regulations further state that the "amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." 29 CFR 541.700(b).

Based on the discussion and guidance above, if the primary duty of this employee is the performance of work as the exempt coordinator, it is our opinion that the exemption(s) under Part 541 would apply. In that case, no additional compensation beyond the guaranteed salary required for exemption would be mandatory; of course an employer



may choose to provide additional compensation to exempt employees who perform extra work. See 541.604(a). However, if the primary duty is comprised of duties performed as a non-exempt office assistant, then the exemptions under Part 541 would not apply. See opinion letters dated December 11, 1988, and April 20, 1999. In the latter case, overtime is computed based on the combined total hours for both positions.

As you correctly indicated, Section 7(p)(2) does not apply to this situation. Section 7(p)(2) of the FLSA provides that where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs must not be combined for the purpose of determining FLSA overtime liability. The term “occasional or sporadic” means infrequent, irregular or occurring in scattered instances (see 29 CFR 553.30). Since, as you state above, the amount of time figured to be spent by the office assistant working as the coordinator would be more than occasional or sporadic, Section 7(p)(2) cannot apply. In this situation, the public employer may not calculate overtime for each position separately, but must aggregate the total hours spent on both jobs in a workweek to determine the number of overtime hours worked.

Once the combined total number of hours is determined, the rate of overtime pay due may be computed using either of two methods. 29 CFR Section 778.115 states that where an employee in a single workweek works at two or more different types of work for which different straight-time rates of pay (not less than the minimum wage) have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings for all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Pursuant to Section 7(g)(2) of the FLSA, an employer alternatively may pay an employee overtime at one-and-one-half times the bona fide rate applicable to the type of work being performed during the overtime hours. See 29 CFR 778.415 - .421.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than 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 is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Note: * The actual name(s) was removed to preserve privacy.