U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 26, 2005 **FLSA2005-26**

Dear ***Name****,*

This is in response to your letter inquiring whether certain employees of one of your clients (the Company) are eligible for the Section 13(a)(1) exemption from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). Specifically, you contend that the Company's employees at issue perform work that is original and creative in character and therefore, should be exempt in light of their training and skills.

You describe the Company as a leader in advanced graphic arts technology. The Company specializes in graphic art wraps (Wraps), which you described as "advertisements printed on large sheets of a flexible vinyl with an adhesive back." The Wraps are durable and flexible so that they may be applied to curved or irregular surfaces and protuberances, or may be suspended as free-hanging banners.

There are two types of Wraps, apparently based on the weight of the vinyl, and employees become familiar with installing both types through on-the-job training. Employees travel to the site where the Wrap will be installed, inspect the object on which the Wrap will be applied, position each Wrap or segment thereof in place temporarily, and finally remove the adhesive back and adhere the Wrap to the designated surface. Because Wraps are difficult to remove, it is imperative that they are applied correctly on the first attempt. Employees must take into account such variables as long-term wear, possible shrinkage, temperature changes, challenges presented by uneven surfaces, and the possibility of vandalism. They must assure that the customer's logo is not obscured by shadow or placed in an inappropriate location. They must place the most important messages in the most visible locations. You believe that the ten individuals who apply the Wraps may have met the criteria discussed in 29 C.F.R. § 541.3(a)(2) of the former regulation for professionals who perform work that is "original and creative in character in a recognized field of artistic endeavor." You argue that the employees should be exempt from the overtime requirements of the FLSA "[i]n view of the training, experience, level of skill and freedom of expression inherent in the position held by these employees."

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. Part 541 of the revised overtime security regulations which took effect August 23, 2004. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary are met.

Under 29 C.F.R. § 541.300 (copy enclosed) of the revised final regulations, "[t]he term employee employed in a bona fide professional capacity…shall mean any employee: (1) Compensated on a salary or fee basis at a rate of not less than $455 per week…, and (2) Whose primary duty is the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."

"To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training." See 29 C.F.R. § 541.302(a) (copy enclosed). The work performed "must be 'in a recognized field of artistic or creative endeavor.' This includes such fields as music, writing, acting and the graphic arts." See 29 C.F.R. § 541.302(b). "The requirement of 'invention, imagination, originality or talent' distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of

exempt creative professional status, therefore, must be made on a case-by-case basis." See 29 C.F.R. § 541.302(c).

Your letter does not mention the individual or individuals who create the designs on the vinyl wraps, but apparently the ten employees in question have no part in that process. While a graphic designer or graphic artist performing work that is original and creative could qualify for the creative exemption because the results of their work are dependent primarily upon the invention, imagination or talent of the employee, the ten employees who apply the vinyl wraps do not perform work that meets the requirements to qualify for the section 13(a)(1) exemption. Based on the information provided, they are not "artists" themselves, but are skilled employees who perform manual or physical work to install an artistic product created by someone else. Their work requires diligence and accuracy rather than invention and originality. Thus, they would not qualify for the exemption. See Opinion Letters dated March 26, 1978 and July 2, 1996 (stating that a graphic designer or artist doing an original and creative work is exempt, while graphic arts technicians performing support work or reproducing drawings are not)(copies enclosed).

Please note that your letter states that currently the Company pays these employees "pursuant to a Belo plan," however, nothing in your letter details the basis for applying a Belo plan to the Wrap installers. The provisions for use of so-called Belo plans are provided in Section 7(f) of the FLSA and we make no judgment as to their applicability here.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a 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. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990).

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

Sincerely,

Alfred B. Robinson, Jr.,
Deputy Administrator

Enclosures:
29 C.F.R. Part 541.300
Opinion Letters dated March 26, 1978 and July 2, 1996

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