



FLSA2020-13

August 31, 2020

Dear **Name***:

This letter responds to your request for an opinion regarding the applicability of the learned professional exemption and the highly compensated employee test to part-time employees who provide corporate-management training and are paid a day rate with additional hourly compensation. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in litigation that began before your request. We conclude that the employees likely perform learned professional duties; that their day rate does not constitute payment on a salary basis; that if the employees were otherwise exempt, the payment of additional hourly compensation would not affect their exempt status; and that they would not qualify as highly compensated employees if they receive only a pro rata portion of the required total annual compensation amount based on the number of weeks worked.

BACKGROUND

You write on behalf of a company that furnishes executive education to a variety of companies. The company's employees perform two types of duties. The first, which you refer to as delivery work, generally consists of presenting the education program to the client companies, operating the interactive models that are part of the program, and evaluating the results of the participants' activities. The second, which you refer to as development work, consists of creating new content and interactive models for the programs. You state that the delivery work is the employees' primary duty and that it requires "a constant and consistent exercise of discretion and judgment[.]"

The employees' work for the company is almost exclusively part time, though some work on a nearly full-time basis and others work as few as 15 days per year. You describe them as highly educated and state that they must have advanced knowledge in business finance and adult education. Among the qualifications prescribed for the employees are a master's degree in finance, accounting, adult learning, or "business discipline"; a Ph.D. is preferred, but not required. The employees are also required to have, among other qualifications, at least 10 years of practical business experience in an executive leadership role and "deep hands-on experience in Microsoft Word, PowerPoint, and Excel, including VBA programming."

The company's employment agreement states that the company will offer to each employee opportunities for delivery or development work "from time to time." The employees are not

required to accept an offered opportunity; the company is not required to offer a minimum number of opportunities. For delivery work, the company pays a flat daily rate of \$1,500, exclusive of board, lodging, and other facilities. Each delivery work program lasts at least one day. For development work, the company pays \$50 per hour, again exclusive of board, lodging, and other facilities. Employees are not paid during weeks in which they perform neither delivery nor development work.

You ask four related questions. First, are the employees' primary duties those of learned professionals under 29 C.F.R. § 541.301?¹ Second, do the company's payments for delivery work satisfy the salary basis requirement of 29 C.F.R. § 541.300(a)(1) for the learned professional exemption? Third, assuming the employees are otherwise exempt from the Fair Labor Standards Act's (FLSA) overtime pay requirements, does the hourly development work compensation affect their exempt status? Fourth, can a part-time employee qualify as exempt if the employee's pay for the number of weeks worked is proportional to the minimum annual amount required under the highly compensated employee test as set forth in 29 C.F.R. § 541.601?

Based on the facts as you have represented them, we conclude that the employees likely satisfy the duties test required to qualify as exempt learned professionals, but do not satisfy the salary basis test for that exemption or the highly compensated employee test under any of the scenarios you present.

GENERAL LEGAL PRINCIPLES

Under the FLSA, employees are entitled to be paid a minimum wage for each hour worked and to be paid one and a half times their regular rate of pay for each hour in excess of 40 hours worked in a workweek.² Certain employees are exempt from these requirements, including employees who are "employed in a bona fide executive, administrative, or professional capacity ... or in the capacity of outside salesman."³ The Secretary of Labor, exercising the power delegated to define and delimit those terms, created a three-part test to determine which employees qualify as exempt professionals.⁴

- First, the *salary basis test*: With certain exceptions not applicable here, the employee must be compensated on a salary or fee basis.⁵ Compensation on a salary basis means

¹ You phrase this as, "Are the Company's employees learned professionals[?]" Because this phrasing subsumes your second question, we rephrase it as indicated.

² 29 U.S.C. §§ 206(a), 207(a).

³ 29 U.S.C. § 213(a)(1).

⁴ *Id.*; 29 C.F.R. § 541.300.

⁵ 29 C.F.R. § 541.300(a)(1).

receiving each pay period (1) a predetermined amount that is all or part of the employee's compensation (2) on a weekly or less frequent basis (3) that is not subject to reduction because of variations in the quantity or quality of work performed.⁶

- Second, the *salary level test*: The salary paid must meet a minimum specified amount. With certain exceptions not applicable here, that amount must be at least \$684 per week.⁷
- Third, the *duties test*: The employee's primary duty must be to perform work that requires either (1) "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" or (2) "invention, imagination, originality[,] or talent in a recognized field of artistic or creative endeavor."⁸

An alternative to this three-part test is the highly compensated employee test. Because a "high level of compensation is a strong indicator of an employee's exempt status," the highly compensated employee test "eliminate[s] the need for a detailed analysis of the employee's job duties."⁹ Under that test, an employee qualifies as exempt if the employee customarily and regularly performs at least one exempt executive, administrative, or professional duty and receives total annual compensation of at least \$107,432.¹⁰ The total annual compensation must include at least \$684 per week paid on a salary or fee basis.¹¹

The FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum-wage] and overtime-pay requirement[s]," and, therefore, must receive a "fair (rather than a narrow) interpretation[.]"¹² WHD, therefore, interprets the Act neither expansively nor narrowly, but according to conventional canons of statutory construction.

OPINION

A. The employees likely perform exempt learned professional duties.

Learned professional duties are those that (1) require advanced knowledge (2) in a field of science or learning (3) that is customarily acquired by a prolonged course of specialized

⁶ 29 C.F.R. § 541.602(a).

⁷ 29 C.F.R. § 541.300(a)(1).

⁸ 29 C.F.R. § 541.300(a)(2).

⁹ 29 C.F.R. § 541.601(c).

¹⁰ 29 C.F.R. § 541.601(a)–(b).

¹¹ *Id.*

¹² *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal citations and quotation marks omitted).

intellectual instruction.¹³ Based on your description, we conclude that the employees' duties likely qualify.

- *Advanced knowledge*: Work requires advanced knowledge if it is predominantly intellectual in character and includes the consistent exercise of discretion and judgment.¹⁴ This work generally includes analyzing, interpreting, or making deductions from varying facts or circumstances.¹⁵ The employees' primary duty here—delivery work—which involves lecturing on a number of leadership and related business disciplines, presenting hypothetical scenarios to corporate executives, and critiquing and evaluating the executives' responses, meets these criteria.¹⁶
- *Field of science or learning*: These include traditional professions and occupations similar to those professions that have a recognized professional status, as distinguished from the mechanical arts or skilled trades. Our regulations cite accounting, teaching, and actuarial computation as examples.¹⁷ As the employees' delivery duties include teaching advanced, finance- and business-related material to executives, and evaluating and quantifying the executives' work, we conclude that the advanced knowledge required to perform those duties is in a field of science or learning.
- *Specialized intellectual instruction*: This restricts the learned professional exemption to occupations where “specialized academic training is a standard prerequisite....”¹⁸ This prerequisite is satisfied here, as the employees are required to have a master's degree in a relevant field to qualify for employment. We have routinely concluded that a position that requires a degree in a specific field directly related to the position's duties and requires the employee to apply the advanced knowledge gained in the course of earning that degree satisfies this requirement.¹⁹

¹³ 29 C.F.R. § 541.301(a).

¹⁴ 29 C.F.R. § 541.301(b).

¹⁵ *Id.*

¹⁶ While you ask us to assume that the employee's delivery duties involve the “constant and consistent exercise of discretion and judgment,” we note WHD's longstanding position that teaching, by its very nature, requires exercising discretion and judgment. *See, e.g.*, WHD Opinion Letter FLSA2008-11, 2008 WL 5483049, at *1 (Dec. 1, 2008) (*quoting* WHD Fact Sheet 17D).

¹⁷ 29 C.F.R. § 541.301(c).

¹⁸ 29 C.F.R. § 541.301(d).

¹⁹ *See, e.g.*, WHD Opinion Letter FLSA2005-28, 2005 WL 3308599, at *3–4 (Aug. 26, 2005) (sales engineers who were required to have engineering degrees and whose primary duties could not be performed without that specific knowledge); WHD Opinion Letter FLSA2005-50, 2005 WL 3308621, at *2 (Nov. 4, 2005) (social workers who were required to have master's degrees in one of six specific fields and who worked in the field of their degree); *see also* 29 C.F.R. § 541.301(e)(1)–(9) (examples of employees who generally do or do not meet the duties test for learned professionals).

B. The company’s payments for delivery work do not satisfy the salary basis test.

Under the plain language of the regulation, to satisfy the salary basis test, an employee must receive each pay period a predetermined amount that is all or part of the employee’s compensation on a weekly or less frequent basis that is not subject to reduction because of variations in the quantity or quality of work performed.²⁰ The company’s payments for delivery work do not meet this test. First, the payments for delivery work are not a predetermined amount. They may be as low as \$1,500 during a workweek in which the employee performs one day of work; they may be more than \$10,000 per week. Second, the amounts are not calculated on a weekly or less frequent basis. They are based instead on the number of days worked.

The Fifth Circuit recently addressed a similar question, holding that an employee paid a daily rate, with no minimum weekly guarantee, is not paid on a salary basis.²¹ The *Hewitt* plaintiff, like the employees here, was paid per day of work.²² The court summarized the plain language of the salary basis test as requiring “that an employee know the amount of his compensation for each weekly (or less frequent) pay period during which he works, *before* he works.”²³ The *Hewitt* plaintiff, however, “had to take the number of days he worked (past tense) and multiply by the operative daily rate to determine how much he earned,” thus knowing “his pay only *after* he worked through the pay period.”²⁴ “[H]e did *not* receive a ‘predetermined amount’ ‘on a weekly, or less frequent basis’—rather, he received an amount contingent on the number of days he worked each week” and was therefore “not paid on a ‘salary basis[.]’”²⁵

The court further supported its conclusion by noting that an “exempt employee must receive the *full* salary for any week in which the employee performs any work *without regard to the number of days or hours worked.*”²⁶ The *Hewitt* plaintiff, however, like the employees here, “was paid on a daily rate—so he was paid ‘*with*’ (not ‘*without*’) ‘regard to the number of days or hours worked,’ in direct conflict with the plain language” of the salary basis test.²⁷

²⁰ 29 C.F.R. § 541.602(a).

²¹ *Hewitt v. Helix Energy Sols. Group, Inc.*, 956 F.3d 341 (5th Cir. 2020).

²² *Id.* at 342.

²³ *Id.* at 343 (citing 29 C.F.R. § 514.602(a)).

²⁴ *Id.* at 344 (emphasis in original).

²⁵ *Id.* (emphasis in original).

²⁶ *Id.* (quoting 29 C.F.R. § 541.602(a)(1)) (emphasis added in opinion).

²⁷ *Id.* (emphasis in original). Our conclusion is further supported by WHD’s having specified certain instances when exempt executive, administrative, or professional employees may be paid a daily rate while not more generally permitting a day rate to satisfy the salary basis test. In some circumstances, employees in the motion-picture industry who are paid per day of work may qualify as exempt executive, administrative, or professional employees. 29 C.F.R. § 541.709. That is, WHD knows how to include in the exemption certain employees whose pay is calculated on a daily basis; it has chosen not to do so broadly. Compare 29 C.F.R. § 541.602(a) with 29 C.F.R. § 541.709. “The familiar ‘easy-to-say-so-if-that-is-what-was-meant’ rule of [] interpretation has full force here.”

C. The development work payments would not affect the status of an otherwise exempt employee.

If the employees were otherwise exempt learned professionals, the development work payments would not affect that status. We take your use of “otherwise exempt” to mean only that: If the employees qualified as exempt learned professionals (i.e., if they satisfied the salary and duties tests) when the development work payments were not considered, would they retain that status if those hourly payments were considered? If the employees were exempt, they would be paid a fixed amount on a weekly or less frequent basis that would not vary based on the quantity or quality of their work. Adding to that fixed salary amount additional payments for each hour of development work they performed would not change their status. As long as the employee is guaranteed to receive at least the minimum required salary for each workweek on a salary basis, the employer may pay the employee additional compensation on a commission, flat, bonus, straight-time, or other basis.²⁸ This would include a per-hour payment for each hour of development work performed. The employees here, however, are not paid on a salary basis, so the premise of this question would not be satisfied.

D. Proportional payments to part-time employees do not satisfy the highly compensated employee test.

There are two compensation requirements to qualify as exempt under the highly compensated employee test. Neither of them varies based on an employee’s part-time or full-time status. First, the employee must receive at least the minimum salary level, currently \$684 per week, on a salary or fee basis.²⁹ Second, the employee must receive annual compensation of at least \$107,432.³⁰ The only exception to this requirement is that an employee who begins work after the year starts or leaves work before the year ends may be paid total compensation proportional to the amount of the year that the employee worked for the employer.³¹

The regulations include no exception for part-time employees—neither in the sense of working fewer than 40 hours per week nor in the sense of working during some weeks but not others. An employee satisfies the highly compensated employee test only by satisfying in full the weekly and annual compensation requirements.

C.I.R. v. Beck’s Estate, 129 F.2d 243, 244 (2d Cir. 1942) (footnote omitted). *See also Amazon.com, Inc. v. C.I.R.*, 934 F.3d 976, 991 (9th Cir. 2019) (agency’s express use of certain language in one provision showed that it “clearly knew how to write its regulations” to accomplish a certain goal, and supported a conclusion that the language did not apply to provisions from which it was absent).

²⁸ 29 C.F.R. § 541.604(a).

²⁹ 29 C.F.R. § 541.601(b)(1).

³⁰ 29 C.F.R. § 541.601(a)(1).

³¹ 29 C.F.R. § 541.601(b)(3).

CONCLUSION

For these reasons, we conclude that the employees likely perform exempt learned professional duties, that the employer's payments for delivery work do not satisfy the salary basis test, that the development work payments would not result in the loss of an otherwise-applicable professional exemption, and that the highly compensated employee test cannot be satisfied by payments proportional to the amount of work performed by a part-time employee.

This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act.³² This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."³³

We trust that this letter responds to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

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

³² See 29 U.S.C. § 259.

³³ *Id.*