



FLSA2007-2NA

August 23, 2007

Dear **Name***:

This is in response to your request for an opinion regarding whether a court reporter qualifies for the executive, administrative, or professional exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).¹ It is our opinion that the court reporter does not qualify as an exempt employee.

The court reporter's primary duty is recording all criminal, civil, and other court proceedings. The court reporter is required to have knowledge of state statutes; legal, medical, and other technical terminology; proper English, grammar, spelling, vocabulary, and punctuation; current court reporting trends, practices, and developments; and the use, adjustment, and maintenance of stenographic equipment. Additional job responsibilities include: reading back the record in court; preparing transcripts of the proceedings, for which she is paid separately; maintaining accurate records and files of work performed; maintaining confidential information; communicating effectively both orally and in writing; establishing and maintaining an effective working relationship with the judge and court staff; and dealing professionally and courteously with the bar and the public in general.

The court reporter is required to possess a Certified Shorthand Reporter certificate issued by the state's court reporting board and must have at least two years experience as a court reporter. The only educational requirement is possession of a high school diploma and successful completion of an accredited court reporting course. The court reporter is also responsible for supervising and coordinating transcript production if more than one court reporter is involved in the proceedings, but does not supervise anyone on a regular basis. The court reporter states that she "runs [the] office" and works independent of supervision; however, her job description states that she receives general supervision provided by the court's executive officer.

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. An employee may qualify for exemption if all of the pertinent tests relating to duties and salary are met.

Under 29 C.F.R. § 541.100, the term "employee employed in a bona fide executive capacity" means "any employee":

- (1) Compensated on a salary basis at a rate of not less than \$455 per week . . . ;

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.

- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Id.

Under 29 C.F.R. § 541.200, the term “employee employed in a bona fide administrative capacity” means “any employee”:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . ;
- (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.

Id. The term “exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” 29 C.F.R. § 541.202(a). Additionally, the following factors should be considered when determining whether an employee exercises the requisite discretion and independent judgment:

whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects the business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of

management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

Under 29 C.F.R. § 541.300(a), the term “employee employed in a bona fide professional capacity” means “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.

Under 29 C.F.R. § 541.301(a), the primary duty test for the learned professional exemption includes three elements: “(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.” The phrase “work requiring advanced knowledge” means “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.” 29 C.F.R. § 541.301(b).

“The phrase ‘customarily acquired by a prolonged course of specialized intellectual instruction’ restricts the exemption to professions where specialized academic training is *a standard prerequisite for entrance into the profession*. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.” 29 C.F.R. § 541.301(d) (emphasis added). Conversely, section 541.301(d) further clarifies that “the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in *any* field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.” 29 C.F.R. § 541.301(d) (emphasis added).

The court reporter does not qualify for the executive exemption at least because she does not regularly supervise two or more full time employees. 29 C.F.R. § 541.100(a)(3). Also, the court reporter does not qualify for the administrative exemption at least because her primary duty does not involve the exercise of discretion and independent judgment in matters of significance. 29 C.F.R. § 541.200(a)(3). The court reporter does not appear to meet any of the factors listed above for discretion and independent judgment; rather, she performs manual

transcription work, which does not qualify as an administratively-exempt activity. 29 C.F.R. § 541.202(b).

Additionally, the court reporter occupation does not involve a primary duty of work requiring advanced knowledge “customarily acquired by a prolonged course of specialized intellectual instruction” as required for the professional exemption. Work that can be performed by employees with education and training that is less than a required bachelor’s degree in a particular discipline generally does not qualify as learned professional work under the regulations. *See Wage and Hour Opinion Letters August 26, 1994 and July 23, 1984* (court reporters are not exempt professionals) (copies enclosed). The court reporter position does not require an advanced academic degree; instead, it requires completion of only a court reporting course and certification by the state board. Therefore, the court reporter does not qualify for the professional exemption from the minimum wage and overtime requirements of the FLSA.

Finally, the job description states that the court reporter is “paid separately for transcriptions.” Under FLSA § 7(o)(6), time spent by an employee of a public agency performing court reporting transcription duties will not be considered hours worked if the employee

is paid at a per-page rate which is not less than - (i) the maximum rate established by State law or local ordinance for the jurisdiction of [the] public agency, (ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or (iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and . . . the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee’s attendance) pursuant to the employment relationship with such public agency.

You have not provided enough information to enable us to determine whether some or all of the court reporter’s transcription duties would be governed by this provision 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 this letter is responsive to your inquiry.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures:

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