

FLSA-438

September 4, 1970

This is in reply to your letter of July 6, 1970, concerning a meeting you attended with Mr. Francis J. Costello of my staff, at which was discussed the possibility of flower designers qualifying as bona fide professional employees under section 541.3 of Regulations, Part 541, for the purposes of applying the minimum wage and overtime pay exemption provided by section 13(a)(1) of the Fair Labor Standards Act.

An employee may qualify for exemption as a bona fide professional employee if all the pertinent tests relating to duties, responsibilities, and salary contained in section 541.3 of the regulations are met. One such test requires that an employee's primary duty consist of the performance of work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends primarily on the invention, imagination, or talent of the employee.

The requirement that work must be original and creative in character would be, general speaking, met by a flower designer who is given a subject matter, theme or occasion for which a floral design or arrangement is needed and creates the floral design or floral means of communication an idea for the occasion. Work of this type is original and creative and depends primarily on the invention, imagination and talent of the employee. Such activities would qualify as exempt type work under section 541.3 of the regulations. On the other hand, an employee whose duties consist of copying standard designs or ideas such as those contained in catalogs developed by florist wire services, is not performing work which is original and creative within the meaning of section 541.3 of the Regulations.

Applicability of the exemption cannot be determined, of course, without a full development of the facts. On the basis of the information you have submitted, we conclude that the facts may vary widely from one employee to another.

Sincerely,

Francis J. Costello
Assistant Administrator

Robert D. Moran
Administrator