

June 12, 1985

This is in response to the February 5 letter from \*\*\* and your March 18 letter with which you enclosed copies of position descriptions for the following employees of \*\*\* living writers, city and county reporters, and an assistant to the personnel manager. All of the writers and reporters have college degrees and they, as well as the assistant to the personnel manager, are paid on a salary basis of at least \$250 per week. You inquire as to whether the employees in the above positions would qualify as exempt professional and administrative employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

According to the position description, the living writers develop ideas, set up and conduct interviews, and write two or three major stories per week for the "Living Today" and "Food" sections of \*\*\* gather outline information and set up photographs for birthdays, anniversaries, showers, fashion tabs, and other supplements as needed; meet weekly with the "Living Today" editor to review assignments and to plan a 3-week budget; and work every third Saturday to proof pasted-up Sunday pages and to lay out Monday inside pages. Eventually, after all the new staff members are trained, the living writers lay out section fronts, size photographs, and write headlines and cutlines; proof material which has previously been typeset to go onto pages; and proof pasted pages and make corrections.

The city and county reporters cover breaking news inside the city of Decatur; cover meetings of Government agencies, the courts, and schools; develop feature articles from assigned beats, and do in-depth articles about issues from those beats. They also develop news budgets for a 10-day period and write Sunday columns. In addition to a college education, these reporters are required to have 2-years' experience as newspaper reporters, a command of grammar, the ability to work well under deadline pressure, and the ability to type and to spell.

The position description for the assistant to the personnel manager indicates that this employee types correspondence for the personnel department and for \*\*\* Inc., receives and processes employment forms for all new employees; maintains employee files and makes sure that employment and termination notices are processed on a timely basis; processes time reports and insurance claims; keeps and records sick leave, vacations; birthdays, and stand-by time; files and follows up on workers compensation claims; maintains cash balances for \*\*\* Inc., and reports to the director of finance and administration; updates and gives weekly cash balances to the controller; and maintains a list of employees who are eligible for insurance, retirement, and the thrift plan. In addition to skills in typing, mathematics, the operation of office machines, and accuracy in filing reports and gather information, the job also requires experience in accounting, business, payroll procedures, and a knowledge of insurance and retirement plans.

The FLSA is the Federal law of most general application concerning minimum wage, overtime pay, and recordkeeping requirements. This law requires that all covered and nonexempt employees be paid a minimum wage of at least \$3.35 an hour for all hours

worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 13(a)(1) of FLSA provides a 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 the enclosed copy of Regulations, 29 CFR Part 541. In order to qualify for exemption under this section, an employee must meet all of the pertinent test relating to duties responsibilities, and salary, as discussed in the appropriate sections of the regulations. A determination of the exempt or nonexempt status of any employee must be made on an individual basis that takes into consideration all of the pertinent facts relating to the actual work performed by the employee in question and not on the employee's job title or content of the position description.

The requirements for exemption for a bona fide professional employee are contained in section 541.3 of the regulations. Generally speaking, the term "professional" as used in the regulations has application to those employees in the "learned" professions, such as engineers and lawyers, and to those in the "artistic" professions, such as actors and writers. Certain news writers may be deemed exempt professional employees of the "artistic" type under section 541.3(a)(2). Those are columnists, editorial writers, and "top-flight" writers of analytical and interpretative articles that are "predominantly original and creative in character."

News writing that is analytical, interpretative, or highly individualized in considered creative in nature. However, the reporting of news, the rewriting of stories received from various sources, or routine editorial work is not predominately original and creative in character within the meaning of section 541.3 and must be considered nonexempt work. Thus, a reporter or news writer who ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication is considered to be engaged in nonexempt work. See section 514.303(f)(2) of the regulations.

There is not enough information contained in your letter for us to determine whether or not the living writers you have in mind qualify for exemption as bona fide professional employees under section 541.3. However, the above discussion may be of assistance to you in making a determination. With regard to the county and city reporters, it appears that these employees are not performing the kind of creative work contemplated by section 541.3 for exemption as bona fide professional employees.

With regard to the assistant to the personnel manager position, we have considered the possible application of section 541.2 for bona fide administrative employees. Such employees who are paid on a salary or fee basis of a least \$250 per week may qualify for exemption as bona fide administrative employees if they have as their primary duty office or nonmanual work directly related to management policies or general business operations of their employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

In deciding whether an employee meets the primary duty test discussed above, the phrase "directly related to management policies or general business operations of the employer or the employer's customers" limits the exemption to persons who perform work of substantial importance to the management or operation of the employer's business or the businesses of the employer's customers. As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management or business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those whose work affects policy or whose responsibility it is to execute or carry it out. An employee who performs routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though the employee may exercise some measure of discretion and judgment as to the manner in which the clerical tasks are performed.

In addition to meeting the primary duty test, the work must also require the use of discretion and independent judgment. The term "discretion and independent judgment" implies that the individuals in question have the authority or power to make independent choices, free from immediate direction or supervision, and with respect to matters of significance. For example, employees, who merely apply their knowledge of prescribed techniques, procedures, and specified standards in the performance of their duties, are not exercising the level of discretion and independent judgment contemplated by section 541.207 of the regulations.

The description of the duties and responsibilities of the assistant to the personnel manager indicates that the employee would not qualify for exemption as a bona fide administrative employee. The employee does not appear to be performing work of \*\*\* importance to the management or operation of the employer's business or the business or the businesses of the employer's customers, as required by the regulations. Nor does the employee appear to be exercising the requisite discretion and independent judgment in the performance of his or her duties, as required by section 541.207 of the regulations.

In connection with your concerns regarding the requirement that professional employees turn in time cards, we are enclosing a copy of Regulations, 29 CFR Part 516 which contain the recordkeeping requirements under FLSA. As explained in section 516.1(a), no particular order or form of records is required by the regulations. The recordkeeping requirements for employees who are subject to the monetary provisions of FLSA are contained in section 516.2, and those for bona fide executive, administrative, and professional employees who are exempt from the monetary provisions of the Act are contained in section 516.3.

We trust that the above information is responsive to your inquiry. However, if you have any additional questions, please let us know.

Sincerely,

Herbert J. Cohen  
Deputy Administrator

Enclosures