

FLSA-443

March 18, 1993

This is in reply to your letter concerning the application of the Fair Labor Standards Act (FLSA) to account representatives (AR) employed by one of your clients. You ask whether the AR qualifies as an exempt administrative employee under Section 13(a)(1) of the FLSA.

You state that your client publishes a telephone yellow pages directory for a regional area. In order to sell the yellow pages advertising, the company employs ARs. The ARs assist, develop and service a customer's yellow page advertising program.

The AR prepares and evaluates the customer's business and mutually agrees on a program that best serves the customer's business goals and objectives. The AR uses marketing research and local survey data in order to develop an initial marketing plan for a customer. The AR, having determined the customer's market, will then evaluate how best to advertise for that market. The AR determines how a customer will be listed, under what headings and in what directories. The AR designs the layout of the advertising, assists in determining the wording of the copy, the use of drawings or pictorials, the use of color and shading and the print style. The AR must be knowledgeable about your client's various discount programs, and about pricing in order to maximize a customer's advertising budget.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined in Regulations, 29 CFR Part 541. In order to qualify for exemption under Section 13(a)(1), an employee must meet all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the Regulations. An employee who is paid on a salary or fee basis of at least \$250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty is office or non-manual work directly related to management policies or general business operations of his or her employer (or the employer's customers) that includes work requiring the exercise of discretion and independent judgment. A determination of the exempt or nonexempt status of an employee must be made on an individual basis that takes into account all of the pertinent facts relating to the actual work performed by the employee in question.

Activities contemplated by the Regulations as being "directly related to management policies or general business operations" of an employer are those related to the administrative operations of a business, as distinguished from the basic tasks of the employer's business, that is, the "production" work of the business. The administrative exemption is limited to persons who perform work of substantial importance to the business of their employer or the employer's customers, and includes "white collar" employees engaged in "servicing" a business. Examples of such activity include personnel administration, labor relations, research, planning, or assisting a management official to carry out the executive or administrative function of that official. In general, "administrative employee" means a person who is engaged in staff functions as opposed to the line functions of an employer. In this regard, see Section 541.205 of the Regulations.

Based on the information you have provided, it appears that the AR's primary duty involves the basic tasks of your client's business - the selling of yellow pages advertising - i.e., the "production" work of your client. We conclude, therefore, that the AR is carrying out the day-to-day functions of your

client's business rather than its management policies or the management policies of your client's customers. Where such an employee's primary duty consists of such nonexempt work, the employee cannot be found to be qualified for exemption as a bona fide administrative employee under section 541.2 of the Regulations. Since the AR is a nonexempt line employee, he or she must be paid in accordance with the minimum wage and overtime pay provisions of the FLSA.

We trust the above satisfactorily responds to your inquiry.

Sincerely,

Acting Administrator