



WHD-OL-1998-0007

February 19, 1998

NAME*

This is in response to your letter requesting an opinion concerning the application of section 13 (a) (1) of the Fair Labor Standards Act (FLSA) to individuals classified as academic counselors and enrollment advisors. Specifically, you would like to know where academic counselors meet the requirements for the academic administrative exemption and whether enrollment advisors meet the outside sales exemption under FLSA. You represent an institution of higher learning that offers students baccalaureate degree programs as well as graduate programs leading to advanced degrees.

Academic counselors work without close supervision and are assigned to the Department of Academic Affairs. Their primary duty is to advise undergraduate and graduate students regarding degree requirements and to develop degree plans. They are required to have at least a bachelors degree, with a masters degree preferred. Among their varied duties, academic counselors (1) act as liaison between the school and the students with respect to admissions, degree options, requirements and progress, and also provide students with access to information on school policy, practices and rules; (2) play a lead role in assisting students who have academic and/or attendance problems and in resolving student complaints; (3) are responsible for administering the school's testing programs, including admissions testing, testing for advanced placement in math and English, and the College Level Examination Programs which grants credit based on test scores; (4) conduct new student orientation to provide general information on course and degree requirements as well as school policies and services; (5) work as a team to prepare the school's calendar of courses, (6) monitor the attendance and progress of the students; (7) have the power to recommend removal of instructors or to recommend that their contracts not be renewed; and (8) plan and execute mid-year and year-end graduation ceremonies.

The school's enrollment advisors work under very limited supervision and report to the Director of Enrollment. Their mission is to recruit undergraduate and graduate students for the school. While they have offices on school premises, at least 80% of their working time is spent off campus engaged in recruiting activities or performing work incidental to and in conjunction with those efforts. Their primary functions are to identify and meet with prospective students for the purpose of selling them on attendance at the school, and to obtaining enrollment applications. You state that a successful recruitment is one in which the enrollment advisor personally obtains a signed enrollment application from a prospective student, along with a nonrefundable \$50.00 application fee.

Enrollment advisors are assigned specific territories as well as corporate/government accounts. They exercise complete judgement and discretion concerning their weekly schedules, sales techniques, and presentations of promotional activities. Furthermore, they are responsible for (1) developing leads in their spheres and taking action on enrollment inquiries directed to the school; (2) scheduling between 10 to 15 appointments with prospective students per week; (3) meeting with individuals or groups interested in the school who live outside the metropolitan area where the school is located at mutually agreed upon sites; (4) spending a significant amount of time promoting the school at corporate and governmental locations, as well as at “educational fairs” and “learning centers”; and (5) contacting the human resources department at existing or prospective corporate offices to introduce the school and explain its value in increasing the educational and skill level of the workforce.

For purpose of your request, we are to assume that all individual in the job classifications of academic counselors and enrollment advisors are paid on a salary basis well in excess of \$250 per week. Therefore, the so-called “short test” of the regulations applies. See 29 CFR 541.2 (e).

Section 13 (a) (1) of the FLSA provided a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity. In order to qualify for exemption under this section, an employee must meet all of the tests relating to duties, responsibilities, and salary that are contained in the appropriate section of Regulations, 29 CFR Part 541.

With regard to the administrative exemption, the regulatory criteria require, in part, that the employee’s primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer’s customers (29 CFR 541.2 (a) (1); or the performance of functions in the administration of a school department or subdivision thereof, in work related to the academic instruction or training carried on there (21 CFR 541.2 (a) (2), and require that the employee exercise discretion and independent judgement (29 CFR 541.2 (e). Furthermore, section 541.202 (e) indicates that “academic administrative” personnel is a category of administrative work limited to a class of employees engaged in academic administration. Academic administration denotes administration relating to the academic operations and functions in a school rather than to administration along the lines of general business operations. “Academic administrative” personnel are performing operations directly in the field of education. Since the principal duties of the academic counselors (i.e., administering testing programs, advising students concerning degree requirements, developing degree plans, monitoring student attendance and academic progress, assisting students with attendance and/or academic problems, conducting orientation sessions on courses and requirements, preparing the school’s calendar of courses, advising student government representatives, and resolving student concerns) relate directly to the educational function of the school, it is in our opinion that the academic counselors satisfy the first requirement for the academic administrative exemption under FLSA. Also, given that the academic counselors make binding decisions concerning degree plans and the acceptance of transfer credits, and make recommendations concerning the extension of academic probation and the resolution of various student problems and complaints, such as the removal of instructors or the nonrenewal of their contracts, it is our view that these employees also meet the discretion/independent judgment criterion for the exemption.

Concerning the outside sales exemption, the regulations define “outside salesman” as an employee who is employed for the purpose of and who is customarily and regularly engaged away from his employer’s place of business in making sales within the meaning of the FLSA, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid, and whose hours of work in other activities do not exceed 20% of the hours worked in the workweek by nonexempt employees of the employer, provided that work performed incidental to and in conjunction with the employee’s own outside sales is not considered as nonexempt work. See 29 CFR 541.5.

You state in your letter that the enrollment advisor’s primary duty is student recruitment. Ordinarily, an individual who regularly performs recruitment for a college is not engaged in making sales of the college’s services, or obtaining contracts for its services. Rather, college recruitment activity appears analogous to sales promotion work, since, like a promotion person who solicits customers for a business, the college recruiter is engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant. Therefore, it is our opinion that the outside sales exemption does not apply to the college enrollment advisors which you describe.

These opinions are based exclusively on the facts and circumstances described in your request and are given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that these opinions are not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

John R. Fraser
Acting Administrator

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