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This is in response to your letter of April 15, 1996 concerning application of section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 201 et seq., and the implementing regulations, 29 C.F.R. Part 541, to your client's employees who work as college admissions counselors. Specifically, you have asked whether these employees may be considered exempt under section 13(a)(1), as either administrative employees or outside salespersons. We regret the delay in responding to your inquiry.

According to the position description enclosed with your letter, the college admissions counselor plans and implements student recruitment programs and related activities assigned by the Director of Admissions; participates in developing effective recruitment strategies; is responsible for all recruiting activities and follow-up of prospective students; visits and participates at high schools, colleges, churches, college fairs, college day/night programs, student conferences, financial aid workshops, and other events, to recruit students, provide information to prospective students and their parents, and promote the college; facilitates campus visits; implements the Director of Admissions' policies and procedures on visits; conducts and supervises campus tours; prepares correspondence for prospective students; conducts telemarketing operations; responds to mail and telephone inquiries; visits prospective students at their homes; conducts interviews; speaks to student groups on the college selection and admissions process; obtains necessary student documentation; implements policies on new student admission; develops and maintains effective working relationship between admissions personnel and other college personnel and alumni to strengthen recruitment and retention programs; directs and maintains quality control of work study personnel; and is involved in various professional organizations as assigned by the Director of Admissions.

Your letter explains further that the college admissions counselors spend the majority of their time away from the campus recruiting students, and that their primary responsibility is to "sell" students and their parents on the college. In addition, they plan their own agenda and coordinate their work with the Director of Admissions. According to your letter, they are also authorized to offer financial aid, "at their discretion," to prospective students.

An employee may qualify for the administrative exemption if all

the pertinent requirements relating to duties, payment on a salary basis, and salary amount are met. See 29 C.F.R. 541.2. Your letter does not provide sufficient information for us to make a definite determination regarding the college admissions counselors' status as administrative employees. Nevertheless, the following information may be of assistance to you.

The regulatory criteria for the administrative exemption 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 C.F.R. 541.2(a)(1)), or the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on there (29 C.F.R. 541.2(a)(2)), and require that the employee customarily and regularly exercise discretion and independent judgment (29 C.F.R. 541.2(b)). The work of the college admissions counselors does not satisfy the academic administration prong of "the primary duty" test because employees who qualify under that part of the test must have as their primary duty work that is directly related to academic administration or general academic operations of the school, i.e., they must perform work directly in the field of education. See 29 C.F.R. 541.202(e), 541.206(a). The counselors' principal activity of student recruitment, however, is work that is directly related to the general business operations of the college. Consequently, the counselors meet the "business administration" prong of the primary duty standard.

From the information you have provided, however, we are not able to determine whether these employees exercise the discretion and independent judgment contemplated by the regulations. In general, the exercise of discretion and independent judgment entails the comparison and evaluation of possible courses of conduct and acting or making a decision, after consideration of the various possibilities. It implies that the employee has the authority to make an independent choice without immediate direction or supervision and with respect to matters of significance. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes or other categories, with or without the use of testing or measuring devices, is not exercising discretion within the meaning of the regulation See 29 C.F.R. 541.207. In your client's case, the requisite discretion and independent judgment would be met, for example, if the college admissions counselors have the authority to independently decide where they will visit to recruit students or the kinds of students they will recruit, or to independently decide to offer financial aid, irrespective of any specified financial aid criteria.

Your letter, which states that "the counselors are paid in excess

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of the [regulatory] salary requirements," is also unclear concerning whether the counselors are paid on a salary basis as defined in the regulations (see 29 C.F.R. 541.118), and whether the compensation exceeds the salary requirement of only the regulations' "long" test or that of the "short" test as well. If an employee is compensated weekly on a salary or fee basis at a rate of \$250 or more and satisfies the primary duty and the discretion/independent judgment requirements, he/she qualifies for the exemption under the "short" test. If the employee is paid on a salary or fee basis at a rate of \$155 or more, but less than \$250, per week, then the "long" test applies. Under the "long" test, there are additional criteria, which the employee must meet. See 29 C.F.R. 541.2(c)-(e).

Concerning the outside salesman exemption, the regulations define an "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 Act, 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 does not exceed 20% of the hours worked in the workweek by nonexempt employees of the employer, provided that work that is incidental to and in conjunction with the employee's own outside sales are not considered as nonexempt work. 29 C.F.R. 541.5.

According to your letter, the college admissions counselor'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. Accordingly, it is our opinion that the outside salesman exemption does not apply to the college admissions counselor position which you describe.

We hope this information will be of assistance to you. If you have further questions on this matter, do not hesitate to contact us.

Sincerely,



Daniel f. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team

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