



December 16, 2005

FLSA2005-54

Dear *Name* * :

This is in response to your request for a formal opinion on the application of Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to several paralegals employed by a client's law firm. You request that we evaluate the employees' status under the administrative and professional exemptions in the final implementing regulations that took effect on August 23, 2004. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. part 541).

You state that the work of the paralegals is non-manual and that they are paid at least \$455 per week. You refer to *Missouri v. Jenkins*, 491 U.S. 274, 287-88 (1989), and point out that your client's firm bills its customers different hourly rates for work performed by paralegals and attorneys. The fact that courts compute compensation for paralegals' work in attorneys' fee awards at market rates has no bearing on the determination of whether paralegals' job duties meet the particular regulatory criteria that define the FLSA's exemptions for bona fide administrative and bona fide professional employees.

Following is a restatement of the primary duties of the six paralegals you describe:

Paralegal A has a Bachelor of Arts degree and an Associate of Liberal Arts degree and 11 years' experience in the legal field. About 55% of her time is spent "drafting contracts (real estate, stock purchase agreements, acquisitions of entities, corporate mergers and acquisitions, etc.); assisting in the performance of due diligence (preparing corporate resolutions, officer certifications, obtaining various documents needed to meet due diligence requirement, etc.); reviewing abstracts and preparing title notes; and preparing formation and dissolution documents for various domestic and foreign entities."

Paralegal B has worked as a paralegal for 10 years. Her education and training include significant on-the-job training. She spends about 55% of her time "reviewing and analyzing documents received from all parties during the discovery process and assisting in preparing reports and exhibits during the discovery process, as well as assisting in preparing for hearings and trial. She often accompanies attorneys to hearings and trial to aid them in their presentations and the introduction of evidence."

Paralegal C has a Master of Business Administration degree in General Business, a Bachelor of Business Administration degree in Accounting, and an Associate of Applied Science in Legal Assistant Technology. Paralegal C also has passed the Uniform CPA exam. Approximately 75% of her time is spent "preparing and filing documents online, by fax or by mail to form, dissolve or change entities or check name availability; drafting documents including partnership agreements, limited liability company regulations, bylaws or minutes; emailing and calling clients for information or to report status; obtaining tax ID number from IRS online, and filling out and filing other IRS forms; conducting Internet research on entity requirements in different jurisdictions; constructing spreadsheets tracking stock transfers, organizational charts, timelines and multi-step reorganization charts of entities; reviewing and interpreting statutes, principally within the business organization codes of Texas and other states; coordinating with registered agents and taxing entities; obtaining checks and sending documents for recording or filing; assisting and conferring with attorneys and other office staff; reading tax and law updates."

Paralegal D has a Bachelor Degree in Business Administration and spends approximately seventy-five percent of her time "drafting pleadings, discovery, and



correspondence; reviewing and organizing document production; and assisting attorneys in preparation for hearing or trial.”

Paralegal E has an Associate of Science degree and a Bachelor of General Studies degree. She “holds Certified Legal Assistant status from the National Association of Legal Assistance, and the *Name** Board of Legal Specialization granted her status as a Board Certified Legal Assistant in Estate Planning and Probate Law.” Approximately 95% of her time is spent “drafting ...wills and codicils, trusts, and powers of attorney; preparing and filing gift tax returns; preparing and filing application for probate; assisting in the valuation and extent of an estate’s assets and liabilities; preparing and filing United States estate tax returns and State of *Name** inheritance tax returns; assisting executors and will beneficiaries with estate disputes; conducting online tax research; drafting articles of incorporation and bylaws for partnerships and corporations; and drafting real estate documents and retirement plans.”

Paralegal F holds a Bachelor of Science degree and has Certified Legal Assistant status from the National Association of Legal Assistants. More than 90% of her time is spent “preparing and drafting title opinions dealing with ownership of oil and gas interests (work includes calculating ownership percentages, reviewing conveyances of title, and researching relevant law); assisting attorneys in the preparation of wills and administering an estate in the probate process (work includes contact with clients, and preparing estate inventories and appraisals); drafting documents for the formation of corporate and partnership entities; and drafting real estate documents and overseeing real estate closings.”

Section 13(a)(1) of the FLSA provides a complete 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 29 C.F.R. part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary are met. Under 29 C.F.R. § 541.300(a) of the final regulations, the term “employee employed in a bona fide professional capacity” is defined as:

any employee: (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...; and (2) Whose primary duty is the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Under 29 C.F.R. § 541.301(a), the primary duty test under the learned professional exemption includes three elements: “(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.” The phrase “work requiring advanced knowledge” means “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment as distinguished from performance of routine mental, manual, mechanical or physical work.” 29 C.F.R. § 541.301(b).

“The phrase ‘customarily acquired by a prolonged course of specialized intellectual instruction’ restricts the exemption to professions where specialized academic training is a *standard prerequisite for entrance into the profession*. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.” 29 C.F.R. § 541.301(d) (emphasis added). Conversely, section 541.301(d) further clarifies that “the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in *any* field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired



their skill by experience rather than by advanced specialized intellectual instruction.” 29 C.F.R. § 541.301(d) (emphasis added).

You state you are aware that 29 C.F.R. § 541.301(e)(7) contains the statement that “Paralegals and legal assistants generally do not qualify as exempt learned professionals,” but also state a further belief that this does not appear to be conclusive because “the rule is conditioned on the educational and professional background of each paralegal.” Rather, as the preamble to the final rule explains (at 69 Fed. Reg. 22,150), the revised final regulations for the learned professional exemption, as under the prior rule, essentially require two separate inquiries. “*First*, as in the [previous] existing regulations, the occupation must be in a field of science or learning where specialized academic training is a standard prerequisite for entrance into the profession.” *Id.* Thus, while the learned professional exemption is available for lawyers, doctors and engineers, it is not available for skilled technicians in occupations that do not require “specialized academic training at the level intended by the regulations as a standard prerequisite for entrance into the profession. *Second*, employees within such a learned profession can then only qualify for the learned professional exemption if they either possess the requisite advanced degree or ‘have substantially the same knowledge level and *perform substantially the same work* as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.’” *Id.* (Emphases in original.)

As your request points out, while some two and four-year colleges offer coursework and certification in paralegal studies, no minimum education or training requirements are established that a person must satisfy before using the occupational title “paralegal.” This indicates that the occupation lacks a requirement of “knowledge of an advanced type . . . customarily acquired by a prolonged course of specialized intellectual instruction” as required under 29 C.F.R. § 541.300(a)(2). As further explained in the preamble to the final rule, “[s]ome jobs require only a four-year college degree in any field or a two-year degree as a standard prerequisite for entrance into the field. Other jobs require only completion of an apprenticeship program or other short course of specialized training. The final section 541.301(d), drawn from [previous] existing subsection 541.301(d) and proposed section 541.301(f), makes clear that such occupations do not qualify for the learned professional exemption.” 69 Fed. Reg. at 22,150.

As section 541.301(e)(7) expressly provides, paralegals and legal assistants generally do not qualify for the professional exemption because an advanced specialized academic degree is not a standard prerequisite for entry into the field. See Opinion Letter dated January 7, 2005. For example, your letter does not indicate that Paralegal B has had other than on-the-job training. Similarly, Paralegal A has a Bachelor of Arts and an Associate of Liberal Arts degree, Paralegal E has a Bachelor of General Studies degree, and Paralegal F has a Bachelor of Science degree. None of these is evidence that an advanced specialized degree is a standard prerequisite for entry into the paralegal field. Thus, while many paralegals hold four-year degrees, it does not follow that they can qualify for the learned professional exemption. Most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available when a paralegal, who possesses an advanced specialized degree in other professional fields, applies advanced knowledge in that field to the performance of his or her primary duty. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer could qualify for exemption. Paralegal C, who possesses an MBA and an accounting degree and passed the uniform CPA exam, might similarly qualify for exemption if she performed primarily expert work in her advanced fields of study. Paralegal C’s primary duties, however, appear to be those of a conventional paralegal. Indeed, consistent with the final rule that states paralegals generally do not qualify as exempt learned professional employees, there is insufficient evidence that Paralegals A through F perform, as their primary duty, work requiring advanced knowledge acquired by a prolonged course of specialized intellectual instruction at the level intended by the regulations, instead of general knowledge acquired through an academic degree in any field or through an apprenticeship or training.



As for the administrative exemption under 29 C.F.R. § 541.200(a), “[t]he term ‘employee employed in a bona fide administrative capacity’ shall mean any employee: (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...; (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”

“The phrase ‘directly related to management or general business operations’ refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201(a). “Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.” 29 C.F.R. § 541.201(b). Additionally, “[a]n employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, for example, employees acting as advisers or consultants to their employer’s clients or customers (as tax experts or financial consultants, for example) may be exempt.” 29 C.F.R. § 541.201(c).

“To qualify for the administrative exemption, an employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.” 29 C.F.R. § 541.202(a).

“The phrase ‘discretion and independent judgment’ must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.” 29 C.F.R. § 541.202(b). Federal courts generally find that employees who meet at least two or three of these factors mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required. See 69 Fed. Reg. at 22,143.

“The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” 29 C.F.R. § 541.202(e). As the court noted in *Clark v. J.M. Benson*, 789 F.2d 282, 287 (4th Cir. 1986), it is not sufficient that an employee makes decisions regarding “when and where to do different tasks, as well as the manner in which to perform them.” Nor is it sufficient that an employee may make limited decisions within clearly “prescribed parameters.” *Dalheim v. KDFW-TV*, 706 F.Supp. 493, 509 (N.D.Tex. 1988), *aff’d*, 918 F.2d 1220 (5th Cir. 1990) Rather, there must be true discretion and



independent judgment exercised on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers.

Based on the information you provide, it is our opinion that the paralegals you describe do not qualify as bona fide administrative employees under the final regulations at 29 C.F.R. § 541.200. You mention that past Wage and Hour Division opinion letters (August 17, 1979; September 27, 1979; June 12, 1984; April 13, 1995; and February 19, 1998) have taken the position that paralegals are nonexempt, and that often a deciding factor has been the level of judgment and discretion exercised by the paralegal and the amount of supervision the attorneys provide. It continues to be our opinion that the duties of paralegal employees do not involve the exercise of discretion and independent judgment of the type required by section 541.200(a)(3) of the final regulations, thus an analysis of whether their work is related to management or general business operations is not necessary. The outline of the duties of the paralegal employees you provide describes the use of skills rather than discretion and independent judgment. The paralegals typically are drafting particular documents to assist attorneys on a particular case or matter. The paralegals are not themselves formulating or implementing management policies, utilizing authority to waive or deviate from established policies, providing expert advice, or planning business objectives in accordance with the dictates of 29 C.F.R. § 541.202(b). Thus, like the inspectors and investigators described as non-exempt in 29 C.F.R. § 541.203(j), the paralegal employees appear to fit more appropriately into that category of employees who apply particular skills and knowledge in preparing assignments. Employees who apply such skills and knowledge generally are not exercising independent judgment, even if they have some leeway in reaching a conclusion. In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. Under the American Bar Association's Code of Professional Responsibility, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work produced. The implication of such strictures is that the paralegal employees you describe would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

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

Sincerely,

Alfred B. Robinson, Jr.,
Deputy Administrator

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