

DEPARTMENT OF LABOR OPINION LETTERS ASSIST EMPLOYERS IN CLARIFYING EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT

The single biggest mistake employers continue to make involves misclassifying employees as exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA”) without applying criteria for exempt status to the employees’ *actual* job duties and responsibilities. Employees’ position titles are not determinative. On occasion, the United States Department of Labor (“DOL”) issues opinion letters, when specifically requested to do so by an employer, although the DOL’s response may be anything but timely. In such cases the employer identifies the specific facts upon which the DOL will base its opinion, and the DOL’s opinion applies only to that employer. However, the DOL publishes its opinions (without identifying the employer), which may be of use to other employers with similar queries and similar facts. The following summary of opinion letters published by the DOL in the last year may be helpful in determining whether certain of your employees meet criteria for exempt status. (See citations at www.dol.gov for complete facts and analyses.)

- *Loss Prevention Managers* of a large retail business operating over 200 stores qualify for the “administrative” exemption because their work was focused on the economic business of the employer. (Wage and Hour Opinion Letter, FLSA 2006-30; 9/8/06, released 9/27/06.)
- *Mortgage Loan Officers* who used discretion and independent judgment in assessing alternatives and making recommendations to customers satisfy the requirements of the “administrative” exemption. (Wage and Hour Opinion Letter, FLSA 2006-31; 9/8/06, released 9/27/06.)
- *Service Stations Managers* who performed traditional management roles, including hiring and firing staff, qualify for the “executive” exemption even though they also *occasionally* worked as attendants at stores they did not manage due to a shortage of help. (Wage and Hour Opinion Letter, FLSA 2006-29, 9/8/06, released 9/27/06.)
- A *Senior Legal Analyst* for a corporation who had a two-year studies degree and eight years of experience in legal research and analysis and who spent almost 90% of his time analyzing facts, identifying legal issues and providing an interpretation of the law in a memo format for attorneys’ review was deemed *non-exempt* under the “learned professional” analysis, which applied the DOL’s “paralegal” analysis. Note: Paralegals are deemed non-exempt. (Wage and Hour Opinion Letter, FLSA 2006-27, 7/24/06, released 9/27/06.)

- *Respiratory Therapists* also did not qualify for the “learned professional” exemption because the standard educational requirement in the industry for state certification only includes two to four years of specialized instruction, leading to an Associate’s or a Bachelor’s degree; thus, they are *non-exempt*. (Wage and Hour Opinion Letter, FLSA 2006-26, 7/24/06, released 9/27/06.)
- *Land Acquisition Agents, Relocation Agents and Property Management Agents* who exercise independent judgment and perform work related to the general business operation of their employers should qualify for the “administrative” exemption. The Acquisition Agents in question negotiate, analyze appraisals, and make recommendations based on legal concepts, government standards and regulations. They also prepare closing documents, and work in the areas of purchasing, procurement, and legal compliance. The Relocation Agents in question appraise property, evaluate replacement properties, and make recommendations as to the amount to be paid to displaced property owners. They also advise property owners on the moving process and represent clients in appeals concerning the relocation payment amount. The Property Management Agents in question are liaisons with government authorities, utilizing companies, contractors and consultants during conversion of property for public use. (Wage and Hour Opinion Letter, FLSA 2006-23, 6/29/06, released 8/15/06.)
- *Social Workers* who have Master’s degrees in social work, drug and alcohol abuse prevention, education, counseling, psychology, or criminal justice, plus two years of post Master’s experience, who make independent decisions about the course of therapy best suited to the needs of individuals and families with whom they work, and who develop treatment plans qualify for the “learned professional” exemption. *Case Workers* who have Bachelor’s degrees in social science, who provide specialized services such as supportive, interactive or training groups for adolescents and conduct assessments or home studies and who make referrals to other services do not have the “specialized” academic training necessary to qualify for the “learned professional” exemption. (Wage and Hour Opinion Letter, FLSA 2005-51, 11/5/05, released 11/21/05.)
- *Sales Engineers* with at least a four-year degree in mechanical or electrical engineering who primarily perform engineering tasks such as the production and distribution of motors for automotive components, audio and visual products, information, and communication equipment, qualify for the “learned professional” exemption even though they are also responsible for increasing sales. (Wage and Hour Opinion Letter, FLSA 2005-28, 8/26/05, released 10.17/05.)



For further information regarding properly classifying employees as exempt or non-exempt, please contact Joan M. Eagle at (312) 845-5439 or jeagle@schwartzcooper.com, or any other member of Schwartz Cooper Chartered's Employment Practice Group.