



FLSA2020-9

June 25, 2020

Dear **Name***:

This letter responds to your request for an opinion on whether emergency-management coordinators employed by a county government qualify for the learned professional or administrative exemptions under Section 13(a)(1) of the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in litigation that began before your request.

BACKGROUND

The employer is a county government that employs a Director of Emergency Management who is responsible for the county's response to emergencies such as fires and floods, furnishing services and assistance to residents, and mitigation activities to prevent or lessen the impact of disasters. The director is assisted by two Emergency Management Coordinators. The coordinator positions require a bachelor's degree in public administration, political science, emergency management, or a related field; certification in specific courses offered through the Federal Emergency Management Agency's (FEMA) Emergency Management Institute; and, soon, a state certification in emergency management. You describe the coordinators' duties as including the following:

- Coordinating activities with volunteers, clerical staff, and County Emergency Support Function personnel when the Emergency Operations Center is activated;
- Providing community outreach and education for various diverse groups throughout the county and in partnership with towns and cities;
- Assisting in the development and maintenance of a 24-hour Emergency Operations Center and/or Recovery Coordination Center when activated;
- Coordinating activities of large and diverse agencies and organizations;
- Organizing disaster drills and exercises for all phases of emergency management, reviewing results and making improvements;
- Working with all local agencies and media in impending or actual disasters, and in exercises to coordinate emergency response and recovery;
- Coordinating community resources, reporting activities and conditions accordingly, and requesting assistance as needed;
- Composing correspondence, reports, project plans, news release bulletins, and other materials, and acting as press information officer if needed;
- Keeping the County Manager, County Commissioners, Sheriff, and necessary parties fully informed of all Emergency Management matters;

- Preparing and distributing disaster-preparedness material to citizens with the intent of offering appropriate means of education;
- Recruiting volunteer personnel;
- Supervising and scheduling work;
- Giving presentations to community organizations;
- Assisting schools, organizations, and industries with emergency operations plans;
- Ensuring adequate disaster alerting, warning, and in-place sheltering procedures are developed, implemented, and exercised;
- Planning and organizing seminars, workshops, and training in the emergency-management field for county personnel and the public;
- Participating in various committees and boards related to program activities and responsibilities;
- Writing and reviewing grant proposals;
- Working on resilience efforts for the Office of Emergency Management, including both social and built infrastructure and community systems;
- Working across departments and divisions, and with local communities to maximize innovation and minimize shocks and stressors;
- Providing geographic information system (GIS) mapping support to the Office of Emergency Management; and
- Working outside normal work hours and on nights and weekends as needed for coordination activities and emergencies, including on-call status and 24-hour operations.

You represent that if the coordinators' duties qualify as exempt, you would change their compensation so that they would be paid on a salary basis of at least the standard salary level. You also represent that the coordinators exercise a high level of independent judgment and discretion with regard to matters of significance.

GENERAL LEGAL PRINCIPLES

To qualify for either the professional or administrative exemption, with certain exceptions not applicable here, an employee must be compensated on a salary or fee basis at no less than the standard salary level. 29 C.F.R. §§ 541.200(a)(1), .300(a)(1). Both exemptions also require that the employee have a certain primary duty. An employee's primary duty is the principal, main, major, or most important duty the employee performs. Determining which duties are the primary ones depends on factors including the relative importance of the exempt versus nonexempt duties, the amount of time spent performing exempt work, the employee's relative freedom from direct supervision, and how the employee's salary compares to the wages paid to other employees for the kind of nonexempt work performed by the employee. 29 C.F.R. § 541.700.

For an exempt learned professional, the primary duty must be performing work that requires advanced knowledge, which is work that is predominantly intellectual in character and requires the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and customarily be acquired through a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.301(a). However, the exemption "is also available to employees in such professions who 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.” 29 C.F.R. § 541.301(d).

An exempt administrative employee’s primary duty must satisfy three requirements. First, his or her primary duty must be performing office or non-manual work. Second, it must include exercising discretion and independent judgment with respect to matters of significance. Third, the primary duty must directly relate to the management or general business operations of the employer or the employer’s customers. 29 C.F.R. § 541.200(a)(2)–(3). The regulation describes “work directly related to management or general business operations” in an illustrative list of “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; ... public relations; government relations; ... [and] legal and regulatory compliance.” *Id.* § 541.201(b).

The FLSA’s exemptions, such as the administrative and professional exemptions, are “as much a part of the FLSA’s purpose as the [minimum-wage] and overtime-pay requirement[s],” and, therefore, must receive a “fair (rather than narrow) interpretation[.]” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal citations omitted). As a result, WHD interprets exemptions to the Act according to conventional canons of statutory construction and neither expansively nor narrowly.

OPINION

To qualify for the administrative exemption, each coordinator’s primary duty must relate to the management or general business operations of the employer or the employer’s customers. 29 C.F.R. § 541.201(a). In this case, the employer is the county government. Thus, the work would be directly related to management or general business operations of the employer if it relates to assisting with the “running or servicing” of the county government itself. *Id.* As governments exist to serve their citizens, we assume that the “customers” in this instance would be the county’s residents.

A. Determining Which Duties are Exempt.

WHD has often found it useful to distinguish between “production” and “staff” functions when evaluating whether job duties are exempt under the administrative exemption. *See, e.g.*, 29 C.F.R. § 541.201(a); WHD Opinion Letter FLSA-1173, 1988 WL 1534556, at *2 (May 19, 1988); 69 FR 22122, 22140–42 (Apr. 23, 2004). This distinction can be more vexing to draw for government positions because it is sometimes difficult to determine what a government is “producing” for its citizens’ “consumption”; at least one court has noted the “scarce authority ... regarding what constitutes the general business operations of a [government].” *O’Neill v. City of Palo Alto*, No. C-05-04515, 2007 WL 9733770, at *5 (N.D. Cal. May 4, 2007). As with other occupations involving services rather than goods, we find it more useful in the government-employment context to ask whether job duties involve, on the one hand, the day-to-day carrying

out of the government's functions or, on the other, running the government (or a component of the government) itself or determining its overall course and policies.¹

Applying this framework to the information you have provided, we conclude that some of the coordinators' duties appear to involve the government's management and general business operations; some involve the government's day-to-day operations; and some will depend on the circumstances of how and when those duties are exercised and precisely what those duties entail.

1. Planning and Business Management Duties.

Many of the coordinators' duties involve planning for the county government's general, rather than day-to-day, operations, particularly regarding the continuity of the government's operations themselves—what you appear to describe as the government's "resilience efforts." This would be exempt administrative work because it directly relates to the management or general business operations of the employer or the employer's customers.

The duty to organize disaster and emergency-management drills and review the results of those drills to improve disaster and emergency-management response is a central part of that exempt work, as are planning and furnishing emergency-management training to county personnel. The same is true of composing reports and project plans about and for emergency-management operations, particularly if they are how the officials charged with supervising and running the county government receive information they use in their own governance and long-term activities.

Some other duties would be exempt under certain circumstances. Maintaining and operating the Emergency Operations and Recovery Coordination Centers would be exempt to the extent that those are continuity-of-government and government-operations duties. Coordinating with "County Emergency Support Function personnel when the Emergency Operations Center is activated" would also be exempt assuming that this "activation" happens only in extraordinary situations. Similarly, to the extent that the coordinators' geographic information system mapping support is used, for instance, to plan where and how to stage personnel and supplies in anticipation of or in response to a disaster, it would be exempt. If that maintenance, operation, support, and coordination involves the day-to-day furnishing of government services, however—for instance, using the centers as dispatch centers to respond to law-enforcement or firefighting calls, or using geographic information system skills to plot the locations of county work teams and road or sewer repairs—they would be nonexempt. Likewise, the coordinators' work on alert, warning, and in-place sheltering procedures could be exempt or nonexempt depending on whether it concerns the functioning of the government itself or the government's day-to-day obligation to furnish public-safety programs.

¹ See WHD Opinion Letter, 1997 WL 971811, at *2 (Sept. 12, 1997) (citing *Bratt v. Cnty. of L.A.*, 912 F.2d 1066, 1070 (9th Cir. 1990)). See also *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230–31 (5th Cir. 1990) (affirming that administrative exemption did not apply to plaintiffs who carried out day-to-day functions of producing newscasts rather than, for instance, "setting business policy [or] planning the long- or short-term objectives of the news department").

Finally, one of the coordinators' duties is "assisting schools, organizations, and industries with emergency operations plans." Continuance-of-operation functions are general business operations, and the coordinators' work on those functions for "customers" of the county government is exempt. 29 C.F.R. § 541.201(c).

2. Government Relations Duties.

Many of the duties also involve handling the county's relationships with other governments and government entities. You specifically mention "coordinat[ing] activities of large and diverse agencies," including local agencies; "coordinating community resources"; and "requesting assistance as needed." If these agencies, resources, and assisters are federal, state, municipal, and other local and county governments, then these are government-relations duties within the county's general, rather than day-to-day, operations and are exempt. 29 C.F.R. § 541.201(b). If they are instead different branches of the county government, they would be considered as discussed above, since communications between different branches of the same government are not "government relations" as the term is used in WHD's regulations.

3. Public-Facing Duties.

Preparing news releases, acting as a press officer, and furnishing information to the media are public-relations duties related to the county's general, rather than day-to-day, operations and are exempt. 29 C.F.R. § 541.201(b); *see Copas v. E. Bay Mun. Util. Dist.*, 61 F. Supp. 2d 1017, 1023–26 (N.D. Cal. 1999).

The coordinators' educational duties might be exempt. As the coordinators' duties include "preparing and distributing disaster-preparedness material," "community outreach," and "giving presentations to community organizations," it appears, much as many fire departments' missions have expanded from firefighting to include fire prevention, that the emergency-management department's public-safety mission includes preventive education rather than simply emergency response. If so, delivering educational lectures, materials, and presentations would be day-to-day work and would be nonexempt. Depending on the particular work involved, preparing those materials might be exempt administrative work—"preparing" that creates or develops original materials or presentations or evaluates and recommends materials or programs based on community needs would more likely be exempt planning work, as opposed to "preparing" that merely assembles already-available materials into a display or distributable folder. *See Kohl v. The Woodlands Fire Dept.*, 440 F. Supp. 2d 626, 639–40 (S.D. Tex. 2006). And if "community outreach" is information-gathering on the needs of different stakeholders and how to integrate those needs into the county's emergency-management operations—rather than a phrase describing the delivery of educational materials and presentations—that would be exempt planning work. *See id.*; *Copas*, 61 F. Supp. 2d at 1031–33.

The coordinators' participation "in various committees and boards related to program activities and responsibilities" might be exempt if they are doing so to represent the county—if they are acting "very much like [an] ambassador," presenting the county government's positions and concerns and reporting back to the county government on the proceedings of those other bodies. *See Dambreville v. City of Boston*, 945 F. Supp. 384, 391–93 (D. Mass. 1996). However, if their duty on those bodies is more clerical than representative—if their duties, for instance, are more

like furnishing public presentations or acting as a courier or messenger between the county government and the other body—they would less likely be exempt.

4. Volunteer and Grant Writing Duties.

The coordinators' duties to recruit, supervise, and schedule volunteers are exempt personnel-management tasks. *See* 29 C.F.R. § 541.201(b) (listing “personnel management” as an example of exempt work). Their duties to write and review grant proposals are exempt budget and finance tasks. *Id.*; *see also* WHD Opinion Letter FLSA2005-43, 2005 WL 3308614, at *2 (Oct. 24, 2005).

B. Primary Duty.

Whether a coordinator qualifies for the administrative exemption depends upon which of these many duties is the primary duty—the principal, main, major, or most important duty the coordinator performs. 29 C.F.R. § 541.700(a). Because we have only a list of duties, we do not have the information necessary to opine on which of them is the primary one.

C. Discretion and Independent Judgment on Matters of Significance.

Finally, we did not analyze whether the coordinators exercise discretion and independent judgment on matters of significance to the county government because you represented that they do so. The management-and-operations evaluation we undertook looks only at the *type* of work the coordinators perform. *See* 29 C.F.R. § 541.201. The discretion-and-judgment evaluation, which is equally necessary to determine whether the administrative exemption applies, looks to the *scope* of the coordinators' work and the *manner* in which they perform it. *See* 29 C.F.R. § 541.202. The conclusion that certain duties may be exempt is not a comment on or opinion regarding whether the duties as the coordinators actually perform them involve the exercise of discretion and independent judgment on matters of significance.²

CONCLUSION

For these reasons, we conclude that the coordinators, depending on which duty is their primary duty, may be exempt administrative employees.

This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

² Based on the information provided, we cannot determine whether the coordinator position qualifies for the learned professional exemption.

We trust that this letter responds to your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl M. Stanton". The signature is written in black ink and includes a long, sweeping horizontal line at the end.

Cheryl M. Stanton

Administrator

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