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October 5, 1998

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SENT BY MAIL AND FAXED
TO (415) 434-0513

Re: Applicability of the Administrative Exemption to Insurance Company Claims Representatives

Dear Ms. Berman:

This is in response to your letter of September 14, 1998, requesting an opinion as to whether insurance company claims representatives are covered by the overtime provisions of Industrial Welfare Commission Wage Order 4-98 [Cal. Code of Regulations § 11040, hereinafter referred to as IWC Order 4][1] or whether said employees are exempt as "persons employed in administrative capacities" as described in Section 1 of the Wage Order.[2]

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[1] Sections 3 ("Hours and Days of Work") and 11("Meal Periods") of Wage Order 4 were amended, effective January 1, 1998; other amendments mandated by increases in State and Federal minimum wage statutes were also incorporated into the reprinted Wage Order, which amended Wage Order 4-89. There were no changes to Sections 1 and 2, which include the language relevant to your inquiries on exemptions.

[2] The inclusion of the administrative exemption in IWC Wage Orders dates back to 1947. The minutes of an IWC meeting on March 7, 1947 state at p. 3 that the Commission received and acknowledged evidence and argument that failure to exempt "executive, administrative and professional women" (IWC Wage Orders only applied to women and minors at that time) imposed a roadblock to advancement for employees in such positions. The minutes further state at p. 4 the intent of the Commission to include such exemptions in its Wage Orders using the federal criteria as a guide. See "Executive, Administrative, Professional...Outside Salesman Redefined" *Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition,* United States Department of Labor, October 24, 1940, for the federal criteria in existence at the time of the inclusion of said exemptions by the IWC. The Wage Orders were later amended to apply to employees of both genders, see *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal. 3d 690, 700-701.

Both the Fair Labor Standards Act and the Wage Orders promulgated by the Industrial Welfare Commission are remedial in nature. Accordingly, "[t]he employer bears the burden of proving an employee is exempt. (*Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197) Exemptions are narrowly construed against the employer and their application is limited to those employees plainly and unmistakably within their terms. (*Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220, 1224.)" *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562.

As I am sure you are aware, neither federal nor state agencies, when interpreting regulations relating to exempt status, nor courts hearing such matters, place any reliance on the job title, but focus on the actual job duties performed. "Titles alone are of little or no assistance in determining an employee's exempt or nonexempt status." *Freeman v. NBC* (S.D.N.Y. 1993) 846 F. Supp. 1109, 1115, *rev'd on other grounds,* 80 F.3d 78 (2nd Cir. 1996). "Titles can be had cheaply and are of no determinative value." 29 C.F.R. §541.201(b).

Thus, a determination as to whether an employee or group of employees are exempt or non-exempt from overtime provisions requires a thorough investigation as to the actual work performed by the employee(s). This is a fact intensive inquiry, and for this reason, the Division generally cannot issue a ruling as to the exempt or non-exempt status of any specific employee(s) without either conducting our own investigation or by ascertaining the relevant facts in an adjudicatory capacity through an evidentiary hearing. However, there are occasions when material facts are not in dispute, or when we are requested to set forth the Division's opinion in response to a statement of facts provided by the requesting party. Such opinion letters are authorized by statute as a means of providing guidance to the public, and may be considered by a court confronting a similar issue. (Labor Code section 1198.4; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 ["agencies may provide parties with advice letters, which are not subject to the rulemaking provisions of the APA."]; *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1 [discussing the degree of deference to be accorded by

courts to agency opinion letters interpreting statutes or regulations].)

In your letter, you set forth the job duties of insurance company claims representatives as follows:

> "This claims representative handles claims under personal (as opposed to commercial) auto insurance policies. In accordance with company guidelines setting forth estimating policies and procedures, he estimates the extent of auto damage and repair cost, in addition to allowable medical and related costs attendant to bodily injury claims sometimes filed in connection with a car accident. In the course of this claims processing, he passes along to the insurance company any information which may suggest potential fraud or which may provide the insurance company the opportunity to obtain reimbursement from another party to the accident ('subrogation'). Before closing a claims file, he must get higher approvals if the amount of the estimate exceeds the dollar authority level granted to him by the insurance company."

You ask two questions. First, you ask whether, in determining whether certain employees function in an "administrative" capacity, the DLSE would apply the same analysis as that applied under federal regulations; that is, would our analysis focus on whether the employees' job activities are *"directly related to management policies or general business operations"* or are *"production"* in nature. Second, you ask if the facts set forth in your letter would lead DLSE to conclude that the employees described therein are nonexempt because their duties demonstrate that they are engaged in *"production"* activities.

To answer your first question, California law is not identical to federal law on the issue of exempt status. The Fair Labor Standards Act provides, at 29 U.S.C. §213(a)(1), that the minimum wage and overtime provisions of the Act [29 U.S.C. §§ 206 and 207, respectively] do not apply to:

> "Any employee employed in a bona fide executive, administrative, or professional capacity (including any

> employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)...."

Wage Order 4 [Section 1(A)] provides the following exemption for administrative, executive or professional employees:

> "Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless ....
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> (1) The employee is **engaged in work** which is **primarily** intellectual, managerial, or creative, and which requires the exercise of discretion and independent judgment, and for which the remuneration is not less than $1,150 per month. . . ."[3] (emphasis added.)

As you can see, the language of the Fair Labor Standards Act differs somewhat from that of the IWC Wage Order. The FLSA simply requires that the employee be employed in an administrative capacity, while Wage Order 4 requires that the person be **engaged in**

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[3] The following subparagraph exempts employees engaged in various enumerated licensed professions, and employees engaged in occupations that are "commonly recognized as a learned or artistic profession." These exemptions are clearly inapplicable to insurance claims representatives.

work which is **primarily**[4] intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment.

The federal scheme allows the Secretary of Labor, through appropriate regulations, to define the terms used to describe exempt employees. The Department of Labor, which is headed by the Secretary of Labor, has promulgated such regulations at 29 C.F.R. §541 *et seq.* These regulations outline both the "long" and "short" tests of bona fide administrative employee status. Section 541.2(a) through (e) (the "long test") defines the term "employee employed in a bona fide administrative capacity" as being an employee:

> (a) [w]hose primary duty consists of....
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> (1) the performance of ... office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers,....and
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> (b) [w]ho customarily and regularly exercises discretion and independent judgment; and
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> (c)...(3) [w]ho executes under only general supervision special assignments and tasks; and
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> (d) [w]ho does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section...; and
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> (e) (1) [w]ho is compensated for his services on a salary or fee basis at a rate of not less than $155 per week."

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[4] Section 2 of Wage Order 4 defines "primarily" to mean "more than one half of the employee's work time." In 1993, Wage Orders 4 and 5 were amended to provide a relaxed definition of "primarily" that is expressly limited to employees in the "health care industry."

Section 541.214 (the "short test") provides:

> "(a) Except as otherwise noted in paragraph (b) of this section, §541.2 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or non manual work directly related to management policies or general business operations of the employer or the employer's customers,...where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in §541.2 (a) through (e).

Thus the "short test" exempts employees who meet that test's higher salary threshold **AND** whose "primary duty" is "directly related to management policies or general business operations of the employer" (or the employer's customers) **AND** where such work requires the exercise of discretion and independent judgment.

The key difference between either federal test and the IWC Wage Order is the distinction between the federal focus on "primary duty" and the state focus on whether the employee is actually engaged in exempt work for more than half of the hours worked in the workweek. Unlike the strictly time-based definition of "primarily" contained in each of the IWC orders[5], the federal regulations expressly provide that "time alone . . . is not the sole test", allowing for a finding of exempt status even "in situations where the employee does not spend over 50% of his time in [exempt] duties." 29 C.F.R. §§541.103, 541.206(b). In addition to this difference between the federal "primary duty" test and the state "primarily engaged in" test, the IWC orders (unlike the federal "long" and "short" tests) do not provide for a lower level

[5] With the exception, as discussed above, of employees in the "health care industry" covered by IWC Orders 4 or 5.

of scrutiny for higher compensated employees.[6] These differences between state and federal law notwithsatnding, the Division of Labor Standards Enforcement has traditionally followed federal cases and federal regulations, to the extent that such cases and regulations are not inconsistent with state wage and hour provisions, in interpreting and enforcing the various IWC wage orders, including Wage Order 4. Thus, in an opinion letter dated January 7, 1993, DLSE Chief Counsel H. Thomas Cadell explained:

"Again, in determining the exemption status under the administrative category, the key phrase is 'engaged in' and not, as under the federal regulations, 'primary duty' (29 C.F.R. §541.2(a)) With this exception, the DLSE accepts the general definition of 'administrative duties' set out by the DOL at 29 C.F.R. §541.2. Generally, administrative work must be nonmamual, related to management policies or general business operations of the employer or the employer's customers and must involve the customary and regular exercise of discretion and independent judgment. The Department of Labor's regulations discuss the administrative exemption in detail at 29 C.F.R. §541.201 through §541.208 and the DLSE adopts these definitions. However, it must be noted that certain of the regulations not contained within the above cited sections inconsistent with the IWC Orders and cannot be relied upon."[7]

29 C.F.R. §541.205 is thus one of the federal regulations that DLSE follows in enforcing the provisions of IWC Order 4. Section 541.205(a) defines the phrase "directly related to management policies or general business operations of [the employee's]

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[6] In contrast to the federal regulations, the IWC Orders do not set out different exemption tests for lower salaried and higher salaried employees. Order 4, for example, contains a threshold requirement of $1,150 per month; that is, if the employee's salary falls below that amount, the employee, even if "primarily engaged in" administrative or executive duties, is non-exempt. As to employees whose salary is not less than this amount, no matter how highly compensated the employee may be, one set of criteria are appplied in determining whether the employee is exempt or non-exempt.

[7] For example, DLSE will not rely on federal regulations under which nurses may be considered exempt because the IWC has expressly provided that nurses are not exempt from coverage of Order 4. Likewise, the IWC has defined "teaching" in a manner that does not exempt certain teachers, thereby precluding reliance on federal regulations dealing with the exemption for teachers.

employer or [the] employer's customers" as "those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." Furthermore, Section 541.205(a) "limits the exemption to persons who perform work of substantial importance to the management or operation of the business of [the] employer or [the] employer's customers." Thus, in answer to your first question, DLSE uses the test set out at 29 C.F.R. §541.205 in determining the applicability of the administrative exemption under IWC Order 4. In other words, if an employee is primarily engaged in "production" or "sales" work, rather than in activities "directly related to management policies or general business operations," the employee does not fall within the administrative exemption from IWC Order 4's overtime requirements.

In response to your second question, it appears, based upon the description of duties set forth in your letter, that the insurance claims representatives described therein are not primarily engaged in activities "directly related to management policies or general business operations," and thus, are not exempt from overtime under Order 4. In reaching this conclusion, we rely upon federal regulations, subject to the limitations discussed above, and federal case law.[8]

Numerous courts have held that the "concept of 'production' in 29 C.F.R. §541.205(a)'s administrative/productive work dichotomy is not to be understood as covering only work involving the manufacture of tangibles. The concept is not limited to manufacturing activities. . . . [N]on-manufacturing employees may therefore be 'production' workers for purposes of the dichotomy." *Martin v. Cooper Electric Supply Co.* (3rd Cir. 1991) 940 F.2d 896, 903, *cert den.* 503 U.S. 936, 112 S.Ct. 1473 (1992). See also, *Reich v. State of New York* (3rd Cir. 1993) 3 F.3d 581 [holding that production/administrative dichotomy applies outside the manufacturing context, and that investigators employed by the State

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[8] "Federal interpretations of federal labor laws may provide persuasive authority for interpreting state law; with the persuasiveness of federal authority being less when the state law differs from the federal." *Aguilar v. Association for Retarded Children* (1991) 234 Cal.App.3d 21, 31. "Because the California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance." *Nordquist v. Mc-Graw Hill Broadcasting Co., supra,* 32 Cal.App.4th at 562.

Police Bureau of Criminal Investigation, and who are responsible for conducting investigations, are engaged in non-exempt "production" work because investigations are part of a law enforcement agency's "product"].

"The distinction §541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." *Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F. 2d 1220, 1230 (emphasis added). In applying §541.205, the Fifth Circuit held that news producers, directors and assignment editors were not exempt administrators because their work related to the "production" of the product being marketed by the employer, namely, the newscast, and had little or nothing to do with "setting business policy, planning the long- or short-term objectives of the news department, promoting the newscast, negotiating salary or benefits with other department personnel, or any of the other types of 'administrative' tasks noted in §541.205(b)."[9] *Id.* at 1231. Thus rejecting the employer's argument that the term "production," as used in section 541.205(a) applied only to "blue collar manufacturing employees," the *Dalheim* court concluded that where the "product" which the enterprise exists to produce and market is a service, the employees whose work consists of providing that service are engaged in "production" and are not exempt administrative employees.

This analysis has become the touchstone of judicial determinations of exempt administrative status. Administrative activity, as defined at C.F.R. §541.205(b), "denotes employment activity ancillary to an employer's principal production activity, whether that be production of a 'commodity or commodities, . . . goods or services', see *Dalheim, 918 F.2d at 1230,* or [in the case of a wholesale distributor] production of wholesale sales." *Martin v. Cooper, supra,* 940 F.2d 896, 904-905 [holding that inside salespersons employed by a wholesale distributor are engaged in

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[9] 29 C.F.R. §541.205(b) provides, in relevant part, that "[t]he administrative operations of the business include the work performed by so-called white collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control."

"production" within the meaning of section 541.205(a), that negotiating with customers in the course of making wholesale sales does not constitute administrative "servicing" of the business within the meaning of 29 C.F.R. §541.205(b), and thus, that such employees are non-exempt].

The Ninth Circuit applied this same analysis, in *Bratt v. County of Los Angeles* (9th Cir, 1990) 912 F. 2d 1066, *cert. den.* 498 U.S. 1086 (1991), in holding that county probation officers, who conducted investigations of adult offenders and/or juvenile detainees, and who advised the court as to appropriate sentencing or other case disposition, did not meet the test of performing work directly related to management policies or general business operations. The Court held that the essence of the distinction between activities "directly related to management policies" and those related to "production" was that between "the running of a business, and not merely . . . the day-to-day carrying out its affairs." *Id.* at 1070. The work of the probation officers at issue was held to involve the day-to-day carrying out of the business of the probation department, as opposed to the overall operational management or policies of that agency. The court further held that recommendations made by the probation officers as to appropriate sentencing did not relate to the operation of the courts or court policy, but merely served to provide information to be used by the courts in the exercise of the court's discretionary functions.

District courts applying this analysis have concluded that employees responsible for estimating or investigating insurance claims, when employed by businesses engaged in the estimation or investigation of such claims, are non-exempt "production" employees. In *Reich v. American International Adjustment Company* (D. Conn. 1994) 902 F.Supp. 321, 325, the court held that automobile damage appraisers employed by a business engaged in the appraisal of damage claims, who inspect vehicles, determine the extent of necessary repairs, estimate repair costs, and, when necessary, negotiate with body shops regarding repair costs "perform the day-to-day activities of the business . . . [and, therefore] do not administer the business of [the employer]." Similarly, in *Gusdonovich v. Business Information Company* (W.D. Penn. 1985) 705 F.Supp. 262, the court held that an investigator, employed by a company that investigates and collects information for insurance companies, and whose primary duty consisted of

investigating insurance claims, was non-exempt because the employer's "business is 'producing' information for its clients, and the plaintiff's duties consisted almost entirely of gathering that 'product'. Thus . . . plaintiff was engaged in 'production' within the meaning of the regulation." *Id.* at 265.

Of course, this analysis requires us to look not only at the nature of the employee's work, but also at the nature of the employer's business. Investigators employed by a law enforcement agency are considered to be engaged in non-exempt "production" work (*Reich v. State of New York, supra*), while postal inspectors employed by the U.S. Postal Service have been held to be exempt "administrators" (*Sprague v. United States* (Ct. Cl. 1982) 677 F.2d 865). These seemingly conflicting results are easily explained. "[T]he business of the Post Office is delivering the mail. An employee who works for the Post Office in an investigatory role would not appear to be performing a line function in that organization." *Adam v. United States* (1992) 26 Cl. Ct. 782, 791 [holding that U.S. Border Patrol agents, whose duties include conducting investigations and preparing cases for prosecution, are non-exempt because these agents carry out the "end function of the Border Patrol"].

Thus, in *Haywood v. North American Van Lines, Inc.* (7th Cir. 1997) 121 F.3d 1066, the court held that an employee employed by an employer in the business of shipping household goods for consumers relocating within the United Sates or Canada, and whose job duties consist of negotiating and resolving billing disputes and customer claims regarding damages or delays concerning shipped goods, is not engaged in "production" activities within the meaning of 29 C.F.R. §541.205(a), but rather, is engaged in administrative activities by "servicing" the business within the meaning of section 541.205(b). The court explained that the defendant's "product" consists of moving household goods, and that plaintiff's duties are "ancillary to the production process of actually moving the household goods." *Id.* at 1071-1072. The court compared plaintiff's job functions to those of "claims agents" and "adjustors," job categories that are expressly mentioned in the federal regulations.

To be sure, 29 C.F.R. §541.205(c)(5) states that "many persons" employed as "advisory specialists and consultants of various kinds," including "claims agents and adjustors," meet

"[t]he test of directly related to management policies or general business operations."[10] In seeming contrast, 29 C.F.R. §541.205(c)(2) provides:

> "An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks.... An inspector, such as, for example, **an inspector for an insurance company**, may cause loss to his employer by the failure to perform his job properly. but such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in §541.2." (emphasis added.)

Taking into account, again, that it is the duties (or in state law, the work performed), rather than the titles, that determine exempt status, it would appear that the apparent conflict between subsections (c)(2) and (c)(5) of section 541.205 turns on the production/administration dichotomy. The types of employees listed at §541.205(c)(5) function as advisors either to the employer or the employer's customers, and the advice rendered concerns either the inner workings of the employer's business or the business affairs of the customer. A claims adjustor employed by an employer whose principal business is not that of handling claims is not engaged in production work, and falls under the ambit of section 541.205(c)(5). In contrast, the processing and resolution of claims constitutes the principal product of an insurance company, so that an insurance company claims adjustor is nothing more than a line worker, engaged in the "production" of his or her employer's

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[10] This reference to "claims agents and adjustors" is derived from the 1940 DOL Report which defined the "administrative" exemption . See *fn. 2, supra.* The Report did not expressly refer to **insurance company** claims agents or **insurance company** adjustors. The Report did give an example of a "claim agent for a large oil company," with authority to settle large claims, as an employee who would come within the administrative exemption. Obviously, such an employee is not engaged in the day-to-day "production" work of his or her employer. (*"Executive, Administrative, Professional . . . Outside Salesman" Redefined, Report and Recommendations,* October 24, 1940, at pp. 24-25.)

principal product. An adjustor employed by an insurance company (as opposed to a claims adjustor employed by, for example, an oil company) cannot be said to be performing work that is "directly related to management policies or general business operations" or that is "of substantial importance to the management or operation of the business." For this reason, section 541.205(c)(2) tells us that an insurance company "inspector" is not engaged in exempt "administrative" work.

In the instant query, the product being marketed is the service which is attendant to the purchase of the policy of insurance. In other words, when the consumer is involved in an accident, the "service" rendered by the insurer is assessment of the damages and estimation of the cost of making the insured whole for the loss incurred, including diminution of that cost by passing on information obtained regarding the possible liability of third parties. In processing insurance claims, the insurance company claims representative is therefore engaged in producing the precise product or service that is sold by his or her employer to its customers. Such activities are not administrative in nature, within the meaning of the IWC Wage Order.

Your query further states that the claims representative also "passes along to the insurance company any information which may suggest possible fraud." In this regard, the insurance company claims representative functions in the same manner as the probation officers in *Bratt*. The transmittal of information as to which others will exercise discretion and independent judgment as to the course of action to be followed indicates the absence of discretion essential to the administrative exemption. Your stated facts also aver that to the extent an estimate exceeds the monetary limits set by the insurance company, the claims representative must seek approval from someone who has the authority to override such limits. This procedure suggests that the claims representative plays no role in setting such limits, and thus, does not perform exempt administrative "work of substantial importance to the management or operation of the business." We therefore conclude that the insurance company claims representatives described in your letter are not primarily engaged in work that is "directly related to management policies or general business operations of [their] employer or [their] employer's customers."

Under IWC Order 4, the administrative exemption will not apply unless the employee receives the minimum required remuneration **and** "is engaged in work which is primarily intellectual[11], managerial, or creative **and** which requires exercise of discretion and independent judgement[12]." (emphasis added.) These requirements are expressed in the conjunctive; the absence of any one defeats the exemption.

The requirements for establishing the administrative exemption under the federal regulations are also expressed in the conjunctive. All five of the criteria set forth §541.2 must be met before an employee will be considered exempt under the federal "long test" and deprived of the protection of the FLSA. *Mitchell v. Williams* (8th Cir. 1969) 420 F.2d 67, 69. Most cases interpreting the regulations have focused on the first two requirements, found at section 541.2(a) and (b), which essentially correspond to the criteria under the "short test" discussed at 29 C.F.R. §541.214. The separate components of the "short test" have been held to be "analytically distinct," and thus, a determination that employees primarily function in a "production" capacity makes it unnecessary to also determine whether those employees exercise discretion and independent judgment. In other words, once it is determined that the employee's primary duty does not consist of "work directly related to management policies or general business operations of [the] employer or [the] employer's customers," further inquiry is unnecessary, and the employees will be found to be non-exempt. *Martin v. Cooper Electric Supply Co., supra,* 940 F.2d at 907, fn. 10; *Bratt v. County of Los Angeles, supra,* 912 F.2d at 1071.

Consequently, we would conclude that the insurance company claims representatives described in your letter are not exempt without considering whether their work requires the exercise of

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[11] The Wage Order does not define the term "intellectual" work. However, in view of the IWC's expressed intent to use the federal exemption criteria as guidance (see *fn. 2, supra)*, this term can only be understood to embrace the requirements of 29 C.F.R. §541.2(a)(1), that is, within the meaning of the IWC Order, "intellectual work" is "office or nonmanual work directly related management policies or general business operations of [the] employer or [the] employer's customers."

[12] This requirement closely mirrors the language of 29 C.F.R. §541.2(b).

discretion and independent judgment. However, we will take this opportunity to state that the Division, in determining whether an employee is primarily engaged in work that "requires exercise of discretion and independent judgment," within the meaning of the various IWC wage orders, would rely on the federal guidelines set out at 29 C.F.R. §541.207. Under that regulation, the employee, to be exempt, must have the authority or power to make independent choices "free from immediate direction and supervision, and with respect to matters of significance." (§541.207(a).) Moreover, "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." (§541.207(d)(1).) Also, to be exempt, the employee must exercise discretion and independent judgment "customarily and regularly." (§541.207(g).) Finally, the regulations warn:

> "Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. 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 and independent judgment within the meaning of §541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard."

29 C.F.R. §541.207(c)(2).

Applying these criteria to the facts stated in your letter, we cannot conclude that the claims representatives customarily and regularly exercise discretion and independent judgment as to matters of significance. Indeed, insofar as claims must be handled "in accordance with company guidelines setting forth estimating policies and procedures", it would appear that the functions of the claims representative are best described by section 541.207(c)(2). Furthermore, the requirement that claims representatives obtain the approval from higher level employees when the amount of the

estimate exceeds the "dollar authority level granted . . . by the insurance company," suggests that whatever discretion and independent judgment is exercised is confined to matters that are not substantial, and that the claims representatives do not have the authority to make independent choices, free from immediate direction and supervision, with respect to matters of consequence.

Thank you for your interest in California labor law. I trust the above addresses the matters raised by your inquiry. If you have any additional questions, please feel free to contact the undersigned.

Sincerely,

Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen