

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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JOHANNA Y. HSU, Assistant Chief Counsel

October 29, 2007

Adam J. Soibelman
Robyn M. McKibbin
Stone Rosenblatt Cha
21550 Oxnard Street, Main Plaza, Suite 200
Woodland Hills, CA 91367

Re: *Request for Opinion Regarding Administrative Exemption Applicable to Three IT Managers of National Company Providing Equipment Rental, Temporary Fencing, Mobile Storage Containers and Temporary Power to Construction Companies*

Dear Mr. Soibelman and Ms. McKibbin:

Your request for an opinion has been directed to me for response. Based on the information you have provided we cannot render an opinion regarding whether three managers of your client's IT Department who report to an IT Director are administratively exempt. You have indicated that the Supervisors are currently paid hourly and are paid a minimum of \$35.00 per hour. You have also stated the Supervisors would not qualify under the computer professional exemption because they are paid less than \$49.77 per hour¹ and that it is arguable whether the Supervisors meet the requirements of California's learned professional exemption. The analysis below is limited to your request for an opinion regarding whether the Supervisors would qualify as exempt based on the administrative exemption and assumes they would be paid a monthly salary equivalent to two times the minimum wage.

As we have stated in past opinion letters, whether an individual employee is exempt or non exempt is a question that depends on the particular facts of the case and is governed by the actual duties the employee performs. An employee must be "primarily engaged" in exempt duties in order to meet the test of the exemption: That is the employee must spend more than 50% of his or her time "engaged" in exempt duties. You state the IT Managers perform exempt duties over 50% of their time. However, you have not provided a breakdown of the actual job duties performed by each

¹Recent legislation has reformulated the hourly amount to \$36.00 per hour, with annual adjustments equal to the percentage increase in the California *Consumer Price Index for Urban Wage Earners and Clerical Workers*.

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manager nor the percentage of time for each task. Rather, you have only provided the job description for each Manager. Such descriptions form an inadequate basis for determining whether a particular worker is exempt or non exempt.

Despite the fact we cannot provide a determination regarding the exempt versus non-exempt status of the three supervisors, you may find the information below helpful in advising your client. You have indicated the three supervisors spend more than 50% of their time overseeing the work of the Technicians. The supervisors all report to the IT Director and the department has 11-12 technicians. The employer is a national employer that assists construction companies and event professionals with equipment rental and services such as installing temporary fencing, mobile storage containers and temporary power. You have indicated the Help Desk Supervisor is generally responsible for the installation, maintenance, and general support of desktops, laptops, monitors, printers copiers, scanners, fax machines and telephones. The Supervisor assigns tasks to the Technicians and determines the order of importance in responding to requests. The Systems Administrator Supervisor has overall responsibility for the maintenance of the company's database, network and infrastructure. He manages the Technicians who install, configure, maintain and troubleshoot activities on the local area computer server networks and associated assemblies. The Reporting Specialist Supervisor is responsible for the business analysis, reporting and application development support of all IT applications. She oversees Technicians who produce reports for the Operations, Sales, Finance and HR departments.

The *DLSE Manual* provides, at Section 52, the text of the Industrial Welfare Commission Orders related to the Administrative Exemption. Those Orders provide:

A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(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

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge, or

(e) Who executes, under only general supervision, special assignments and tasks, and

///

(f) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210 and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

Subdivision (f) above, provides that it is the "work actually performed by the employee during the course of the workweek [which] must, first and foremost, be examined and the amount of time the employee spends on such work" This language was derived from the California Supreme Court's decision in *Ramirez v. Yosemite Water* (1999) 20 Cal 4th 785. As explained in that decision and in the Industrial Welfare Commission's *Statement of Basis*, the first and foremost consideration is the actual duties performed by the employee. (See *DLSE Opinion Letter* 2003.05.23, at pages 17 and 18.) Only if there is a dispute concerning the actual work performed by the employee do job descriptions and evaluations become relevant to the realistic expectations of the employer and the realistic requirements of the job. (*Id.*)

As you investigate the actual job duties of the three IT Supervisors you may find the 2003.05.23 opinion instructive as it sets forth the applicable legal standard concerning the administrative exemption from California's overtime law provisions, including an examination of the applicable federal regulations. In addition, to those regulations discussed in the 2003.05.23 opinion letter, please note 29 C.F.R.. Section 205(c)(7) which provides:

In the data processing field some firms employ persons described as systems analysts and computer programmers. If such employees are concerned with the planning, scheduling and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations.

In consulting the federal regulations which the IWC deemed applicable to determining the exemption question, you should be aware of a recent California case, *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal App. 4th 1363, which rejected the employer's reliance on 29 C.F.R. section 541.205(c). The employer had argued an exempt administrative employee is one who "carries out major assignments in conducting the operations of the business or whose work affects business operations to a substantial degree." (*Id.* at 1373.) The Court of Appeal in *Eicher* stated:

[W]e have found no evidence that California courts have found persuasive under California law this expansive definition of an exempt administrative employee as someone who carries out major assignments. The command to interpret exemption statutes narrowly to protect employees leads us to believe such an expansive interpretation is not appropriate.

(*Id.* at 1374; *see also Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th 785, 794-795.)

In *Eicher*, the Court of Appeal affirmed the trial court's ruling that an employee who implemented an employer's software product at customer venues and supported customers was not an exempt administrative employee as he was engaged in the core day-to-day business of his employer. Although this decision relied on the application of the administrative/production dichotomy, it also discusses the above regulation as applied to the "directly related to management policies or general business operations of his employer or his employer's customers." (*See* 29 C.F.R. section 205(c).) The Court of Appeal in *Eicher* also cited and distinguished two federal cases finding an employee who modifies computer programs to meet the specific needs of customers is an exempt administrative employee where the employee also participated in company policy-making, which squarely placed the employee within the realm of administrative employees. (*Id.*, citing *Horne v. Singer Business Machs., Inc* (W.D. Tenn 1976) 413 F. Supp. 52) [first-level manager had duties including the coordination of design and implementation of internal telecommunications projects within [the employer's]southern region, providing administrative and technical support through interaction and consultation with users of such equipment, and coordinating design configuration analysis identifying interdepartmental impact, designing project team coordination, and user training]; *Eicher, supra*, citing *Levie v. AT & T Communications, Inc* (N.D. Ga 1990) 52 Fair Empl.Prac.Cas. (BNA 664, 1990 WL 61174 affirmed at 929 F.2d 706 (11th Cir. 1991).)

In addition, we were able to locate a federal case that examined the administrative exemption as applied to certain technicians who keep a company's overall computer and technological systems operating. (*See Turner v. Human Genome Sciences, Inc.* 292 F. Supp. 2d 738 (2003 D. Maryland).) In *Turner*, the district court denied the employer's motion for summary judgment determining that as a matter of law the computer technicians were not administratively exempt employees. The Court described the level of discretion and independent judgment required by the federal regulations "generally refers to those 'decisions normally made by persons who formulate policy within their spheres of responsibility or who participate in this process or who exercise authority to commit the employer in a substantial respect, financial or otherwise.'" (*Cooke v General Dynamics Corp.*, 993 F. Supp. 56, 65 (D. Conn. 1997), citing 20 CFR § 541.207(d)(2); *Turner, supra* 292 F. Supp.2d 738, 747.) The Court in *Turner* concluded the work of troubleshooting the company's internal technological systems, including "diagnosing various problems, considering alternative solutions, and determining and implementing solutions that they believed to be the best alternative" did not involve the level of discretion required by the regulations. Also, deciding how and when to address and resolve system problems are not sufficient nor relevant under the regulations and published case law to come within the exemption. (*Id.*)

Mr. Soibelman and Ms. McKibbin

October 29, 2007

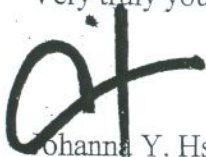
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As previously indicated, the job descriptions you provided would not provide a proper basis to examine the exemption question. Rather, any trier of fact will necessarily need to determine whether a particular employee is "primarily engaged" in exempt or non-exempt duties.

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 questions 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 this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

I hope this letter provides you with some useful guidance.

Very truly yours,



Johanna Y. Hsu,
Assistant Chief Counsel for the Labor Commissioner

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P. O. Box 420603
San Francisco, CA 94142

Re: *Request for Opinion*

Dear Mr. Jones:

After actively researching the following issue, we have been unable to find a California decision or prior DLSE opinion on point. Our research included California case law, the DLSE website, and the DLSE Enforcement Policies and Interpretations Manual. Our request for an opinion is sought neither in connection with anticipated or pending private litigation, nor is the opinion sought in connection with an investigation or litigation between a client or firm and the DLSE.

One of our clients is a national employer that assists construction companies and event professionals with equipment rental and services such as installing temporary fencing, mobile storage containers and temporary power. The company has an IT department that is comprised of a Director, three (3) Supervisors, and 11-12 Technicians. We respectfully request your opinion on whether the Supervisors qualify as administratively exempt employees.¹

¹ The Supervisors do not meet the requirements of the Computer Professional Exemption because they are paid less than \$49.77/hour. It is arguable whether the Supervisors meet the requirements of California's learned professional exemption concerning the attainment of "advanced knowledge" through work experience rather than study."

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Robert Jones
Acting Chief Counsel
DLSE
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Currently, the Supervisors are paid hourly and must record their time. The client wants to treat the Supervisors as exempt, *e.g.*, pay them a set salary and stop requiring them to record their hours.² The Supervisors themselves would also like to be treated as exempt. All of the Supervisors report to the IT Director. All of the Supervisors oversee no less than two (2) Technicians, who perform most of the day-to-day IT tasks. The Supervisors spend more than 50% of their time overseeing the work of the Technicians. They regularly exercise discretion and independent judgment to accomplish the tasks of their respective departments. Enclosed are copies of the department's organization chart and the Supervisors' job descriptions for your reference.

The Help Desk Supervisor is generally responsible for the installation, maintenance, and general support of desktops, laptops, monitors, printers, copiers, scanners, fax machines and telephones. The Supervisor assigns tasks to the Technicians and determines the order of importance in responding to requests.

The System Administrator Supervisor has overall responsibility for the maintenance of the company's database, network and infrastructure. He manages the Technicians who install, configure, maintain and troubleshoot activities on the local area computer server networks and associated assemblies.

The Reporting Specialist Supervisor is responsible for the business analysis, reporting and application development support for all IT applications. She oversees Technicians who produce reports for the Operations, Sales, Finance and HR departments.

Thank you for your consideration.

Sincerely,

STONE | ROSENBLATT | CHA



ADAM J. SOIBELMAN
ROBYN M. MCKIBBIN

RMM/
Enclosures

² The Supervisors are paid a minimum of \$35.00/hour, and participate in the company's bonus compensation program along with the IT Director. Thus, they would qualify as exempt under the salary portion of the administrative exemption test.

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