



FLSA2021-7

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Camille A. Olson
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Dear **Camille A. Olson**:

This letter responds to your request for an opinion regarding whether certain local small-town and community news source journalists are creative or learned professionals under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) and therefore exempt from the Act's minimum wage and overtime requirements. We conclude that the journalists you describe may qualify for the creative professional exemption.

BACKGROUND

You write on behalf of several employers in the print, broadcast, and digital media industries throughout the United States. They are predominantly small-town community and large metropolitan daily newspapers, but also include local broadcast stations that deliver news and analysis for their communities and neighborhoods.

You state that technological advancements have changed the way in which news is gathered, packaged, and reported. As a result, the duties of local and community journalists have likewise changed considerably over the last half century. Your letter explains that media employers often emphasize specialized education in journalism, focus on "context-based" reporting rather than the "just the facts" approach of decades past, and ultimately prioritize substantive analysis and commentary in the stories reported. You state that these industry-wide shifts have not only changed the nature of the written and analytic component of journalism for these employers, but also have resulted in far fewer of the "rewrite" and "leg" activities that used to make up a significant percentage of journalists' duties.

The qualifications for all journalists employed by your clients include a minimum of a four-year specialized bachelor's degree in the field of journalism or communications (or a related degree, or a bachelor's degree in the specialized subject matter the journalist is covering) or equivalent experience. You describe the journalists' duties and requirements as including the following:

- Originating and developing creative, engaging, shareable, content-driven stories and live shots (including the story ideas for them), relying on creativity, memorable storytelling, and unique perspectives;

- Identifying, researching, and, when appropriate, interviewing sources of background information, sources of current information, subjects, and witnesses;
- Composing and producing unique and captivating stories;
- Using creative photographic techniques to capture stories through photographs and video presentations;
- Using creative techniques, such as graphics and new forms of media (viewer pictures, webcam interviews, etc.), to enhance stories;
- Identifying and synthesizing documents and data from numerous sources to develop original content, sometimes for specialized rather than general audiences, independent of daily news events;
- Interpreting and analyzing developing news stories;
- Maintaining a strong, creative, and engaging social media and community presence to engage readers or viewers directly to drive readership or viewership;
- Operating autonomously and without constant supervision, subject to occasional check-ins and final editorial review for print or broadcast; and
- Maintaining composure and professionalism while continuing to execute their duties as a journalist, without direction, during live, breaking news situations.

GENERAL LEGAL PRINCIPLES

The FLSA exempts those employed in a bona fide executive, administrative, or professional capacity from its minimum wage and overtime pay requirements.¹ Among those employed in a “professional capacity” are creative professionals—those who meet the exemption’s salary requirements and whose primary duty is to perform work that requires “invention, imagination, originality[,] or talent in a recognized field of artistic or creative endeavor.”² (For purposes of this letter, we assume that the journalists you describe satisfy the exemption’s salary requirements.)

Our regulations specifically identify journalism as a field whose duties may qualify an employee as a creative professional.³ Not all journalists, however, qualify; they are not exempt “if they only collect, organize[,] and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.”⁴ This includes “reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events[,]” as well as those whose “work product is subject to substantial control by the employer.”⁵ On the other hand, journalists whose “primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns[,] or other commentary; or acting as a narrator or commentator” may be exempt.⁶

¹ 29 U.S.C. § 213(a)(1).

² 29 C.F.R. § 541.300(a).

³ See 29 C.F.R. § 541.302(d).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

The Wage and Hour Division (WHD) formerly read the FLSA’s exemptions strictly. However, because there is no statutory warrant for such a reading, it now gives the creative professional exemption a “fair (rather than a narrow) interpretation[.]”⁷ The exemptions, after all, are “as much a part of the FLSA’s purpose as the [minimum wage and] overtime-pay requirement[s].”⁸

OPINION

We conclude that the journalists you describe who satisfy the primary duties test are exempt as creative professionals. It is the journalists’ duties, not who employs them—whether small-town or rural newspaper, major metropolitan daily newspaper, or local broadcast station—that are relevant to this determination. Because we conclude that the journalists can be exempt creative professionals, we do not address the learned professional exemption or other exemptions, such as those for certain employees of small-market broadcasters.⁹

A. Early analyses of journalists and the professional exemption.

Whether journalists are exempt creative professionals has been a question since the federal government’s first attempts to regulate wage-and-hour issues. Shortly after the FLSA charged the Secretary of Labor with the responsibility of defining and delimiting an exemption for professional employees,¹⁰ WHD began to distinguish among different categories of professionals. Though not given those names at the time, these included distinctions between learned professionals, whose work “requir[ed] knowledge of an advanced type in a field of science or learning[.]” and creative (sometimes called artistic) professionals, whose work was “predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the [employee’s] invention, imagination, or talent[.]”¹¹ The first reported appellate case to focus on whether reporters and editors are exempt professionals, however, did not draw this distinction, instead upholding a district-court finding that newspaper employees were not exempt professionals because “few newspaper employees are graduates of specialized schools of journalism” and because of the belief by “editors of long experience and trained judgment” that “the only practical school of journalism is the newspaper office.”¹² Interpretive guidance issued by WHD a few years later in 1949 to further clarify the creative professional exemption stated, “Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on invention, imagination, or talent.”¹³

⁷ *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (cleaned up).

⁸ *Id.*

⁹ See 29 C.F.R. § 541.301 (learned professionals); 29 U.S.C. § 213(b)(9), 29 C.F.R. part 793 (small-market broadcasters).

¹⁰ 29 U.S.C. § 213(a)(1).

¹¹ 5 Fed. Reg. 4077 (Oct. 15, 1940).

¹² *Sun Publishing Co. v. Walling*, 140 F.2d 445, 449 (6th Cir. 1944).

¹³ 14 Fed. Reg. 7730, 7741 (Dec. 28, 1949) (internal quotation marks omitted).

B. Later analyses of journalists and the professional exemption.

“No one disputes that the technological revolution that has swept this society into the so-called Information Age has rendered ... untenable” the assumption that occupations in broadcast journalism “exist today as they did forty years ago,” wrote the Fifth Circuit in an opinion that is itself now thirty years old.¹⁴ Similarly, the Second Circuit wrote that “[d]izzying technological advances and the sophisticated demands of the news consumer have resulted in changes in the news industry over the past half-century”—now meaning over the last 75 years.¹⁵

These changes resulted in a wave of litigation on whether journalists qualified as exempt creative professionals. In one of the first of these cases, *Dalheim v. KDFW-TV*, the court faced the “knotty” problem of the status of general assignment reporters for a television station. There, the plaintiff reporters contended that they did not perform original and creative writing, because, in part, they were “discouraged from including their own commentary or opinion in a story[,]” and even the formulaic aspects of packaging a story were restricted and directed by management.¹⁶ Conversely, the TV station argued that reporters had a “presence” on camera, and were hired “not only for their journalistic skills but also because of intrinsic qualities with respect to their personality, voice, and manner,” and were thus exempt as artistic professionals.¹⁷ The court acknowledged that reporters could be artistic professionals “because significant technological advances in how broadcast news is gathered and presented ... have required that reporters produce work that is original and creative in character,” but it held that the station had not met its burden to establish that the plaintiffs in that case did so.¹⁸

Not long afterward, the district court in *Sherwood v. Washington Post* considered whether a reporter whose work activities included gathering facts, originating story ideas, piecing together seemingly unrelated facts, analyzing facts and circumstances, and presenting news stories in an engaging style was an exempt creative professional.¹⁹ That court declined to defer to WHD’s interpretive guidance of how the creative professional exemption applied to reporters, stating that the guidance relied “upon an outdated conception of the news profession” that did not reflect the significant changes to the field since the interpretation had been promulgated in 1949.²⁰ According to that court, “the era of the leg men and rewrite men has passed, and the average reporter at the *Washington Post*”—as opposed to “small town reporting” and “small press reporter[s]”—“displays invention, imagination, and talent” sufficient to qualify as an exempt creative professional.²¹

Following those cases, the Second Circuit in *Freeman v. NBC* rejected a district court’s finding that certain news-division employees were nonexempt because their work was “predominantly

¹⁴ *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990).

¹⁵ *Freeman v. Nat’l Broad. Co. (NBC)*, 80 F.3d 78, 85 (2d Cir. 1996).

¹⁶ *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 502 (N.D. Tex. 1988).

¹⁷ *Id.*

¹⁸ *Id.* at 495, 503–04; *see also* 918 F.2d at 1229 (holding that this conclusion was not clearly erroneous).

¹⁹ 871 F. Supp. 1471, 1473 (D.D.C. 1994).

²⁰ *Id.* at 1481.

²¹ *Id.* at 1481–82.

functional[.]”²² It instead held that the “functional nature of their positions ... in no way rendered them insufficiently creative to qualify for exemption as artistic professionals.”²³ As with the *Sherwood* court, the *Freeman* court found the Department’s interpretive guidance unpersuasive in part due to the “[d]izzying” changes to journalism since the 1940s. It concluded that the employees were exempt creative professionals with “talents [that] far surpass those of journalists who work for local newspapers or smaller television stations.”²⁴

In addition, the First, Third, and Ninth Circuits have examined the exemption status of journalists for smaller newspapers. The Third Circuit relied on WHD’s regulations and interpretive guidance in holding that staff writers for a chain of small community newspapers were nonexempt, noting that “the type of fact gathering done by [those writers was] not the type of fact gathering that demands the skill or expertise of an investigative journalist for the *Philadelphia Inquirer* or *Washington Post*, or a bureau chief for the *New York Times*.”²⁵ The First Circuit similarly relied on the Department’s regulations and interpretive guidance in concluding that a group of reporters was nonexempt in part because while some of their work “demonstrated creativity, imagination, and talent, their writing did not exhibit these qualities on a day-to-day basis.”²⁶ That court noted with approval the *Sherwood* court’s distinction between “small town reporting” and “the work of reporters at *The Washington Post*[.]”²⁷ In line with these decisions, the Ninth Circuit concluded that reporters for a Chinese-language newspaper were not exempt in part because that newspaper was “much closer to the community newspapers ... than to the *New York Times* or *Washington Post*” and the newspapers’ articles did “not have the sophistication of the national-level papers at which one might expect to find the small minority of journalists who are exempt.”²⁸ The courts in each of these cases emphasized the Department’s characterization of the “majority” of journalists as nonexempt.²⁹

C. WHD’s 2004 amendments to the creative professional exemption regulations.

When WHD amended the Part 541 regulations in 2004, we updated our position on applying the professional exemption to journalists. We stated in the preamble to the rule that “[t]he majority of journalists, who simply collect and organize information that is already public, or do not contribute a unique or creative interpretation or analysis to a news product, are not likely to be exempt.”³⁰ However, this statement merely reflects respective factual conclusions that several courts had drawn based on the particular fact patterns in each case.³¹ Indeed, WHD also acknowledged in the preamble that “[a]s stated in the case law, the duties of ... journalists vary

²² *Freeman*, 80 F.3d at 83 (internal quotation marks omitted).

²³ *Id.*

²⁴ *Id.* at 85–87.

²⁵ *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 700 (3d Cir. 1994).

²⁶ *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1075 (1st Cir. 1995).

²⁷ *Id.* at 1075 n.12.

²⁸ *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 753 (9th Cir. 2010), *vacated on other grounds*, 565 U.S. 801 (2011).

²⁹ *Gateway Press*, 13 F.3d at 699–700; *Newspapers of New England*, 44 F.3d at 1075; *Wang*, 623 F.3d at 751–52.

³⁰ See 69 Fed. Reg. 22122, 22158 (Apr. 23, 2004).

³¹ *Id.*

along a spectrum from the exempt to the nonexempt, regardless of the size of the news organization by which they are employed.”³² Further, this preamble language projecting where the “majority” of journalists may fall on that spectrum does not appear in the regulation itself, which when amended, deleted the statement that the “majority of reporters” are not exempt. Instead, the new regulation states in relevant part, “Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy.”³³ The regulation states that “reporters who merely rewrite press releases[,]” “who write standard recounts of public information by gathering facts on routine community events[,]” and whose “work product is subject to substantial control by the employer[,]” are not creative professionals, but that “journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.”³⁴

D. The current status of journalists and the professional exemption.

You ask us to consider whether, in light of substantial changes to the field of journalism, the primary duties of small-town or local journalists meet the duties test for the creative professional exemption. We assume your statements are true that the changes to the profession have resulted in a shift from “just the facts” reporting to “context” based reporting, which requires significantly more autonomy, independence, and originality, and that this shift has affected the primary duties of at least some journalists for local and small-circulation outlets. We thus confirm that journalists employed by local or small-circulation outlets can qualify for the creative professional exemption if they have the appropriate primary duties.

WHD also stresses that the cases that declined to apply the creative professional exemption to local journalists were decided before the Supreme Court’s decision in *Encino*.³⁵ Until recently, exemptions to the FLSA were construed narrowly—and its minimum wage and overtime requirements broadly—in furtherance of the FLSA’s “remedial” purpose.³⁶ But the Court “reject[ed] this principle” because it relies on the “flawed premise that the FLSA pursues its remedial purpose at all costs.”³⁷ Instead, the Court instructed that exemptions be afforded the same fair interpretation as any other statutory provision because the FLSA’s exemptions are “as much a part of the FLSA’s purpose as the [minimum wage and] overtime-pay requirement[s].”³⁸ The

³² *Id.*

³³ 29 C.F.R. § 541.302(d); *see* 69 Fed. Reg. at 22158.

³⁴ 29 C.F.R. § 541.302(d).

³⁵ *Encino*, 138 S. Ct. at 1134.

³⁶ *See, e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

³⁷ *Encino*, 138 S. Ct. at 1142 (cleaned up); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (the “proposition that remedial statutes should be interpreted in a liberal manner” cannot “substitute for a conclusion grounded in the statute’s text and structure” because “almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial ... no legislation pursues its purposes at all costs.”) (internal quotation marks and citations omitted).

³⁸ *Encino*, 138 S. Ct. at 1142 (citing and quoting *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (“Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage.”)).

cases declining to apply the creative professional exemption to local journalists appear to be driven at least in part by the pre-*Encino* narrow-construction framework for assessing exemptions.³⁹ Although WHD’s preamble explanation of the 2004 amendments to the creative professional exemption regulations stated that “the majority of journalists ... are not likely to be exempt,”⁴⁰ neither the FLSA nor our regulations reserve the creative professional exemption for national network or major-market journalists; all journalists may qualify as long as they satisfy the primary duties test.

Journalism is “a medium in which creativity is possible.”⁴¹ Even if small-market journalists are not necessarily at what some may perceive as “the pinnacle of accomplishment and prestige”⁴² in their field, it would be a “misconception” of modern journalism to assume that the entirety of apparent routine reporting is “effectively reported by sending out an individual to tell the reader ‘just the facts.’”⁴³ It is true that conveying facts is instrumental in reporting, but in many cases “[t]he journalist is constantly making judgments regarding which facts to include and which to omit, which facts to emphasize, and how the story should be slanted.”⁴⁴ Journalists whose primary duty requires “invention, imagination, originality, or talent” are not confined to national networks and major media markets. To the extent that the cases interpreting the creative professional exemption as it applies to journalists can be read that way, through drawing generalized conclusions from the specific fact patterns that each court examined, WHD disagrees. Further, to the extent that WHD’s past observations about “the majority of journalists” have suggested as much, based on those same cases, we clarify that they should not be so construed.

Every journalist who performs the appropriate primary duties qualifies for the creative professional exemption. Every journalist—regardless of the size, prestige, or geographic reach of the journalist’s employer—whose primary duties are work requiring invention, imagination, originality, or talent, as opposed to work which depends primarily on intelligence, diligence, and accuracy, whose work product is not subject to substantial control by the employer, and who meets the exemption’s salary level requirements, is exempt as a creative professional.

CONCLUSION

For these reasons, we conclude that the journalists described in your request who satisfy the primary duties test are creative professionals who are exempt from the FLSA’s overtime and minimum wage requirements.

³⁹ See, e.g., *Newspapers of New England*, 44 F.3d at 1070 (“[B]ecause of the remedial nature of the FLSA, exemptions are to be narrowly construed against the employers seeking to assert them[.]”) (internal quotation marks and citations omitted).

⁴⁰ 69 Fed. Reg. at 22158.

⁴¹ *Gateway Press*, 13 F.3d at 700.

⁴² *Freeman*, 80 F.3d at 86 (internal quotation marks and citation omitted)

⁴³ Edward D. Cavanaugh, *Journalists as Professionals: Rethinking the Professional Exemption Under the Fair Labor Standards Act*, 16 Loy. L.A. Ent. L.J. 277, 289 (1995).

⁴⁴ *Id.*

This opinion is based exclusively on the facts you have presented and on your representation that you do not seek this opinion for a party that WHD is currently investigating or for use in litigation that began before your request. This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act and may be relied upon in accordance with section 10 of that 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.”⁴⁵

We trust that this letter responds to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

⁴⁵ 29 U.S.C. § 259.