

From: Taylor, Richele

To: Blankenship, Dottie <Dottie.Blankenship@admin.sc.gov>

CC: Avant, David <David.Avant@admin.sc.gov>

Haltiwanger, Katherine <KatherineHaltiwanger@gov.sc.gov>

Date: 11/9/2016 4:03:27 PM

Subject: Employee exemptions

Attachments: Brewster v. Barnes.eml

§ 553.11 Exclusion for elected officials and their appointees..eml

BLAND v. THE STATE OF NEW YORK, 00-CV-6522 (ERK_CLP) (E.D.N.Y. Mar. 7, 2003) _ Casetext.html

U.S. Department of Labor — Wage and Hour Division (WHD) — FLSA2005-23.html

Dottie,

Thank you for the call regarding the Governor's staff and the new exempt employee salary threshold. I agree that it would be great to meet with you, Kathrine, and David over this. Here is my thought process, and I have taken the liberty to include David. Please forward to whomever you believe would be helpful.

As we know, to be exempt, an employee has to meet (1) the salary test and (2) the duties test. With the change in the salary level, we had six employees that no longer meet the salary test. Thus, they are not salary exempt employees unless there is an exception.

The only applicable exemption I have found for governor staff is 29 CFR 553.11, which holds that individuals directly supervised by the elected official who also are "personal staff members" or in "policymaking positions" would qualify.

We applied this to the six employees who are under the salary threshold, and one does meet this exemption. The others would not as they do not report to her and are not in these type roles. For example, the receptionist.

The guidance I looked at for the Governor's personal assistant position includes an August 26, 2005 letter where the WHD included an elected officials' personal secretary, but specifically states not the "secretary to an assistant."

Unfortunately, Fourth Circuit case law has a string of cases looking at small, elected sheriff's offices holding that to qualify for this exemption the person must be a personal staff member privy to highly sensitive personal information and in a policy position. However, I believe this is based on bad facts. There is a great tenth circuit case, Bland v. The State of New York, rejecting these cases and pointing out the combination of the exclusion is incorrect as the regulation separates them. I agree with this case, and the WHD letter as well as the regulation make clear it is either – personal staff or policy position. And there is one fourth circuit case, Brewster v. Barnes, that implies the Fourth Circuit would agree with this exemption as it left untouched a judges' personal secretary who fell into this exception. When it is all said and done, I am comfortable excluding the Governor's personal assistant based on her position that is privy to highly sensitive information and a direct report to the Governor. I have attached these items referenced.

For the other five positions, none report directly to the governor, and only one deals with policy. I do not see any way to fit them into the exemption, but I welcome feedback if you have other ideas.

Thanks so much,

Richele

There is no support
Richele K. Taylor
Chief Legal Counsel
Office of the Governor
O: 803-734-8465

C: 803-231-9763

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