



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 30, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-04

Mark N. Suprenant, Esq.
General Counsel and Secretary
Wawa, Inc.
260 West Baltimore Pike
Wawa, PA 19063

Dear Mr. Suprenant:

We are responding to your advisory opinion request on behalf of Wawa, Inc. (“Wawa”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the status of certain Wawa employees as members of Wawa’s “executive or administrative personnel.”

The Commission concludes that the five Wawa employees at issue in this advisory opinion request may be regarded as members of Wawa’s “executive or administrative personnel.”

Background

The facts presented in this advisory opinion are based on your letter received on March 11, 2010.

Wawa is a corporation organized under the laws of the State of New Jersey. Its separate segregated fund is the Wawa Political Action Committee. Wawa’s primary business is the operation of more than 575 convenience stores located in Pennsylvania, New Jersey, Delaware, Maryland and Virginia. Wawa maintains corporate headquarters in Pennsylvania.

From its corporate headquarters, Wawa manages the operation of its convenience stores located across the several States. Among the salaried managerial employees working at Wawa's corporate headquarters are: (1) the Loss Prevention Manager, (2) the Payroll Manager, (3) the Retail Accounting Manager, (4) the Retail Accounting Assistant Manager, and (5) the Inventory Accounting Manager. While the Loss Prevention Manager and the Inventory Accounting Manager directly supervise only salaried employees, the Retail Accounting Manager directly supervises five salaried employees and one hourly employee. The Payroll Manager and the Retail Accounting Assistant Manager directly supervise only hourly employees. These hourly employees are full-time "at will" employees who are eligible for Wawa benefits, and there is an expectation of their continued employment. The advisory opinion request includes detailed job descriptions of these five managers and the employees that they directly supervise. Below is a summary of these positions.

Loss Prevention Manager

The Loss Prevention Manager works in the Accounting and Finance Department. This individual directly supervises six employees and reports to the General Counsel and Secretary.

Principal duties include identifying and addressing risks to the Wawa organization from criminal acts, company policy violations, and workplace improprieties and indiscretions. This individual conducts high-level corporate investigations and provides recommendations for their resolution, conducts internal investigations for fraud and other violations, and recommends policies and practices that will minimize risk, financial losses, and employee misconduct.

Payroll Manager

The Payroll Manager manages the activities of the Payroll Department and reports to Wawa's Controller. This individual directly supervises two payroll specialists, three senior payroll specialists, and one payroll team leader.

Principal duties include managing the payroll preparation and distribution for approximately 17,000 Wawa employees; establishing, coordinating, and directing the payroll department objectives; recruiting, hiring, developing, and training departmental employees; and representing Wawa at Federal, State, and local wage and hour audits.

Retail Accounting Manager

The Retail Accounting Manager manages the Retail Accounting and Accounts Payable Department, which is a division within the Accounting and Finance Department, and reports to Wawa's Controller. This individual directly supervises six employees, most of whom are themselves managers or supervisors.

Principal duties include providing strategic leadership and managing the day-to-day activities of the Department; establishing departmental standards, policies, and procedures; ensuring the timely flow and quality control of information related to sales, inventory, and invoices; and managing staffing, including training, evaluating, coaching, and developing departmental employees.

Retail Accounting Assistant Manager – Sales Audit

The Assistant Manager manages a Sales Audit team and reports to the Retail Accounting Manager. This individual directly supervises four employees, some of whom themselves manage or supervise other employees.

Principal duties include managing the day-to-day activities of the Sales Audit staff; overseeing and directing the Retail Accounting Department's projects that impact Sales Audit; managing resources and project plans; directing training and development efforts of the Sales Audit team; and preparing performance evaluations of the Sales Audit team.

Inventory Accounting Manager

The Inventory Accounting Manager works in the Accounting and Finance Department and reports to the Retail Accounting Manager. This individual directly supervises four employees, some of whom manage or supervise other employees.

Principal duties include reviewing and distributing work product prepared by the supervised employees; ensuring that all reporting practices are consistent with generally accepted accounting practices and internal reporting requirements; supervising inventory investigations and ensuring their timely resolutions; managing inventory accounting resources; ensuring compliance with financial reporting deadlines; recruiting, hiring, and supervising the workload; and the development of subordinates.

Questions Presented

Are the five Wawa employees described in the advisory opinion request “executive or administrative personnel” as defined in the Act and the Commission regulations?

Legal Analysis and Conclusions

Yes, the five employees described in this advisory opinion request are “executive and administrative personnel” of Wawa for purposes of the Act and Commission regulations.

The Act and Commission regulations define “executive and administrative personnel” as (1) individuals who are employed by a corporation, (2) are paid on a salary rather than hourly basis, and (3) have “policymaking, managerial, professional, or supervisory responsibilities.” 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c). Based upon this statutory language, Commission regulations set forth categories of individuals who would or would not qualify as executive and administrative personnel. Individuals who run the corporation’s business, such as officers, other executives, and plant, division, and section managers; and professionals such as lawyers and engineers (so long as they are not represented by a labor organization), would qualify as executive and administrative personnel. 11 CFR 114.1(c)(1) and (2). In contrast, “[s]alaried foremen and other salaried lower level supervisors having direct supervision over hourly employees” would not. 11 CFR 114.1(c)(2)(ii).

Where there is a question as to whether an individual would be considered as part of the executive and administrative personnel, the inquiry must primarily focus on whether the three requirements of section 441b(b)(7) are met. Based on the information provided in Wawa’s request, the first two requirements are met. Whether its managers, who supervise hourly employees, meet the definition of section 441b(b)(7) must turn on whether they have “policymaking, managerial, professional, or supervisory responsibilities.” *Id.* Commission regulations state that the Fair Labor Standards Act (“FLSA”) and its regulations may serve as a guideline to determine whether an individual has such responsibilities. 11 CFR 114.1(c)(4).¹ The five individuals described in this request are salaried employees of Wawa who have policymaking, managerial, or supervisory responsibilities. They supervise and direct the work of other employees, notably including other managers and supervisors. They manage staffing, including recruiting, hiring, and training of employees, and plan and control the day-to-day activities of their departments and sections. These duties are typical of those performed by managers. *See, e.g.*, 29 CFR 541.102.

All five individuals are division or section managers who run the corporation’s business. *See* 11 CFR 114.1(c)(1). They each work at corporate headquarters and manage departments or sections that affect Wawa’s general business operations, such as payroll, accounting, inventory, and sales audit. Work in these kinds of functional areas is described under FLSA regulations as directly related to management or general business operations. *See, e.g.*, 29 CFR 541.201(b). The Payroll Department and sections of the Accounting and Finance Department that are managed by the five Wawa managers also are units that have permanent status and function within Wawa’s corporate hierarchy.

¹ While the FLSA may provide general guidance as to the definition of executive, administrative, or professional employees, it is not determinative as a matter of law as to whether an individual is a member of an organization’s “executive or administrative personnel” for purposes of the Act or Commission regulations. *See* Advisory Opinion 1993-16 (Blue Cross of California) at n.3 (“[A]ccording to the legislative history of the Act, FLSA is relevant . . . only to the limited extent it provides general guidance as to the definition of executive, administrative, or professional employees.”); *see also* 122 Cong. Rec. S6368 (daily ed. May 3, 1976) (statement of Sen. Cannon).

Such “customarily recognized” departments or sections are typically managed by salaried executive employees. *See, e.g.*, 29 CFR 541.100 and 541.103. Thus, the five Wawa managers appear to fit the description of “executive or administrative personnel” under the Act and the Commission regulations.

Nonetheless, because three of the five Wawa managers supervise one or more hourly employees, the question remains whether these three managers would be considered “salaried foremen and other salaried lower level supervisors having direct supervision over hourly employees,” and hence whether section 114.1(c)(2)(ii) would exclude them from the definition of “executive or administrative personnel.”

The legislative history of the Act indicates that Congress intended to exclude from the definition of “executive or administrative personnel” foremen and other lower level supervisors, rather than any supervisor who oversees hourly employees. *See* H.R. REP. NO. 94-1057, at 62 (2d Sess. 1976) (Conf. Report) *reprinted in* LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 1056 (1977) (section 441b(b)(7) did not intend to include “*foremen* who have direct supervision over hourly employees or other lower level supervisors such as ‘strawbosses’”) (emphasis added). Although three of the five Wawa managers supervise hourly employees, and two of them directly supervise only hourly employees, the Commission concludes that this fact alone does not convert these managers into foremen or other lower level supervisors. Rather, typical of executive or administrative personnel, the managers must exercise discretion and independent judgment on matters of significance in performing their duties. *See, e.g.*, 29 CFR 541.202. As their job descriptions demonstrate, these individuals carry out major assignments in conducting the operation of Wawa’s business, provide expert advice to senior management, interpret or implement corporate policies or operating practices, investigate and resolve matters of significance, and make recommendations for action.

Moreover, the supervised hourly employees at issue here are in some respects similar to salaried employees. They are full-time employees who are eligible for Wawa benefits and have an expectation of continued employment. Indeed, some of the supervised hourly employees themselves manage or supervise other employees. Thus, the fact that the three Wawa managers supervise hourly employees does not negate their status as executive or administrative personnel.

Accordingly, the Commission concludes that the five Wawa managers may be regarded as part of Wawa’s executive or administrative personnel.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the

transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinion is available on the Commission's Web site at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Matthew S. Petersen
Chairman