



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-02

Ms. Katherine J. Dickinson
Associate General Counsel
Wawa, Inc.
260 West Baltimore Pike
Wawa, PA 19063

Dear Ms. Dickinson:

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

The Commission concludes that the Area Managers and General Managers described in this advisory opinion request are members of Wawa’s restricted class because they are part of Wawa’s “executive or administrative personnel” and thus may be solicited at any time.

Background

The facts presented in this advisory opinion are based on your letter dated November 4, 2011, and on e-mails received on December 19, 2011 and January 11, 2012.

Wawa is a corporation organized under the laws of State of New Jersey. Wawa maintains corporate headquarters in Pennsylvania. Wawa’s primary business is the operation of more than 580 convenience stores located in Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and, starting in July 2012, Florida. It has a separate segregated fund – the Wawa Political Action Committee (“Wawa PAC”).

This request concerns two types of Wawa employees: Area Managers and General Managers. Wawa’s 41 Area Managers cover a defined geographic territory, and 12 to 17 General Managers, who are in charge of stores, report to each Area Manager.

The advisory opinion request includes detailed job descriptions for Area and General Managers, and also descriptions of the employees whom the General Managers supervise. These positions are summarized below.

Area Manager

The Area Manager works in Wawa's Department of Store Operations and reports to the Director of Store Operations. The Area Manager is paid on a salaried basis.

The Area Manager's principal duties include: (1) leading, coaching, mentoring, and facilitating the development of General Managers; (2) workforce planning; (3) developing, implementing, and maintaining operational plans to maintain corporate standards; (4) ensuring compliance with corporate policy and procedures and with local, State, and Federal regulations; (5) resolving crisis situations; (6) analyzing financial statements and developing action plans with General Managers; and (7) participating in the budgeting process.

The Area Managers do not supervise the day-to-day work of the General Managers who report to them. They do have the authority to hire and fire the General Managers, evaluate the General Managers' performance, and have the authority to discipline them. Area Managers by themselves do not determine the General Managers' advancement and promotion prospects, but they may be invited to serve on panels of decision-makers that do have that authority. Even if an Area Manager is not invited to serve on such a panel, the panel accords great weight to the Area Manager's opinions on the advancement and promotion of General Managers.

Area Managers work with General Managers to resolve store operations issues that may arise. If a General Manager has a grievance connected with the General Manager's own work, the Area Manager will attempt to resolve it, but the Area Manager does not have final authority to do so and the General Manager may pursue the grievance at higher levels. Area Managers do not unilaterally set or adjust General Managers' salaries, but the General Managers' salaries are partly based upon their individual performance evaluations, which the Area Managers complete.

General Manager

The General Manager manages the entire operation at each convenience store. The General Manager works in Wawa's Department of Store Operations and reports to the Area Manager who administers the area within which the General Manager's store is located. The General Manager is compensated on a salaried basis and is a full-time employee.

The average General Manager supervises twenty-nine or thirty store employees, and some General Managers supervise as many as fifty store employees. Among the store employees a General Manager supervises are other managers. The General Manager supervises both full and part-time employees, and, with the exception of the

Assistant General Manager, all supervised employees are hourly employees. The Assistant General Manager is a full-time employee and has certain supervisory responsibilities.¹

The General Manager's principal duties include: (1) supervising the day-to-day work, and performance, of store employees; (2) managing all matters relating to employees, including recruiting, hiring, training, coaching, and managing their performance; (3) ensuring that store employees follow all safety, security, quality, and store operations policies, procedures, and practices; (4) "analyzing results and trends and preparing action plans to leverage the store's strengths and address areas of opportunity"; (5) planning and preparing employees' work schedules, and coordinating their daily assignments and activities; and (6) "executing strategy through planning."

General Managers spend approximately ninety to ninety-five percent of their time supervising hourly employees. Additionally, the General Managers undertake manual tasks in the stores as needed. General Managers have the authority to discipline the store employees. They plan the work to be done in the store and determine the techniques to be used, dividing the work among the employees.

The General Managers determine at their own discretion whether to work manually and what kind of manual work they will do.

General Managers usually do not determine which merchandise to buy and sell in the stores; Wawa has a centralized corporate procurement process that makes these decisions.

Question Presented

Are Wawa's Area Managers and General Managers "executive or administrative personnel" as defined in the Act and the Commission regulations such that they fall within the restricted class of employees who may be solicited at any time?

Legal Analysis and Conclusions

Yes, Wawa's Area Managers and General Managers are "executive or administrative personnel" as defined in the Act the Commission regulations.

The Act prohibits corporations from making any contribution in connection with a Federal election. 2 U.S.C. 441b(a). The definition of "contribution" does not, however, include expenses paid by a corporation for "the establishment, administration, and solicitation of contributions to" the corporation's separate segregated fund ("SSF"). 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A corporation or its SSF may solicit contributions to the SSF from a restricted class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11

¹ The Assistant General Manager supports the General Manager in managing store operations by recruiting, hiring, training, coaching, managing, and disciplining store employees.

CFR 114.5(g)(1). A corporation's restricted class consists of its executive and administrative personnel and stockholders, and the families of those persons. 11 CFR 114.5(g)(1), 114.1(j).

The Act and Commission regulations define "executive or administrative personnel" as individuals who are employed by a corporation, are paid on a salaried basis, and have "policymaking, managerial, professional, or supervisory responsibilities." 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c). This definition includes individuals who run the corporation's business, such as officers, plant, division, and section managers, and professionals, such as lawyers and engineers. 11 CFR 114.1(c)(1). It does not include "[s]alaried foremen and salaried lower level supervisors having direct supervision over hourly employees." 11 CFR 114.1(c)(2). In determining which individuals have "policymaking, managerial, or supervisory responsibilities," the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.* ("FLSA") and the regulations issued under FLSA, 29 CFR 541, "may serve as a guideline."² *See* 11 CFR 114.1(c)(4).

The Area Managers and General Managers described in this request are salaried employees of Wawa. They also have policymaking, managerial, or supervisory responsibilities. Area Managers and General Managers are division or section managers who "run the corporation's business." 11 CFR 114.1(c)(1). They work in defined units or divisions of the business, at defined geographic areas and at individual convenience stores, and their work has company-wide effect. Both the geographic areas that the Area Managers superintend and the individual stores that the General Managers oversee are "unit[s] with permanent status and [continuing] functions" in the Wawa corporate structure. 29 CFR 541.103. Thus, their responsibilities are consistent with those of managers under the FLSA regulations, under which "customarily recognized" departments or sections are typically managed by salaried executive employees. *See, e.g.,* 29 CFR 541.100, .103.

Area Managers and General Managers also have responsibilities similar to the managerial responsibilities of executive employees described in the FLSA. Area Managers have the authority to hire and fire General Managers. They also evaluate the General Managers' performance, may serve on panels that decide their advancement and promotion prospects,³ and discipline them when appropriate. *See, e.g.,* 29 CFR 541.100, .102. Further, while Area Managers do not directly set or adjust the General Managers' pay rates, they do have substantial influence over the General Manager's pay rates by evaluating their performance.

² Although the FLSA regulations provide general guidance as to the definition of executive, administrative, and professional employees, the FLSA definitions do not determine as a matter of law whether an individual is a member of an organization's "executive or administrative personnel" for purposes of the Act or Commission regulations. Advisory Opinion 2010-04 (Wawa), n.1.

³ Area Managers are not always invited to serve on such panels. Even in such cases, however, the panels assign great weight to the Area Managers' recommendations on these subjects.

General Managers closely supervise the day-to-day work of many store employees. Among other responsibilities, they hire and fire the store employees, evaluate their performance, discipline them, plan the work to be done in the store, and determine the techniques to be used. *See, e.g.*, 29 CFR 541.102.

Finally, the Area and General Managers both exercise the kind of discretion and independent judgment that FLSA regulations attribute to managers. The Area Managers formulate, affect, interpret, and implement management policies or operating practices; carry out major assignments in conducting the operations of the business; perform work that affects business operations to a substantial degree; and plan long- and short-term business objectives. The General Managers interpret and implement management policies and operating practices; perform work that affects business operations to a substantial degree; and help to plan long- and short-term business objectives. *See, e.g.*, 29 CFR 541.202.

Area and General Managers thus fit the description of “executive or administrative personnel” under the Act and the Commission regulations. The Commission concludes that Area and General Managers may be regarded as part of Wawa’s executive or administrative personnel.

The Commission reaches this conclusion with respect to General Managers notwithstanding the fact that they spend most of their workday supervising hourly employees, and may, at their discretion, perform manual tasks. These facts require the Commission to consider whether they are “foremen [or] other lower level supervisors having direct supervision over hourly employees.” 11 CFR 114.1(c)(2)(ii).⁴

In Advisory Opinion 2010-04 (Wawa), the Commission considered whether five Wawa managers working at its corporate headquarters were members of Wawa’s “executive or administrative personnel.” Two of the managers at issue in that request supervised only hourly employees. Nonetheless, the Commission concluded that neither was comparable to “salaried foremen” or “other salaried lower level supervisors.” The Commission noted that “the supervised hourly employees at issue [were] in some respects similar to salaried employees.” Advisory Opinion 2010-04 (Wawa). The Commission reasoned that these managers exercised discretion and independent judgment on matters of significance, and otherwise performed managerial and policymaking functions similar to those performed by executive and administrative employees in the FLSA regulations. *Id.*

Similarly, the facts in this request suggest that General Managers exercise the same kinds of managerial discretion and independent judgment as executive employees under the FLSA regulations. Specifically, the General Managers have discretionary authority in matters affecting the existence of the stores (e.g., receiving or refusing

⁴ *See also* Response to Advisory Opinion Request 1976-75 (Communicators-Political Action Club) (principal function of supervision of hourly employees may indicate foreman status unless there is strong evidence to the contrary).

inventory shipments, management of safety programs, analysis of store profit and expense statements, and hiring and firing their employees). Request at 3 and 16. Additionally, although the General Managers supervise mostly hourly employees, approximately 41% of the hourly store associates are considered full time and eligible for benefits, and some supervise other hourly employees. Request at 17. As such, many of the hourly employees supervised by General Managers are in some respects similar to salaried employees. *See* Advisory Opinion 2010-04 (Wawa).

Further, although the General Managers may perform some manual work in the stores, such work is merely incidental to their managerial duties. How much work they perform is entirely within their own discretion. Accordingly, the Commission concludes that General Managers are not foremen or lower level supervisors, but rather qualify as Wawa's executive or administrative personnel. *Cf.* Advisory Opinion 1978-27 (Morrison) ("unit managers" were executive or administrative personnel where they did not spend more than forty percent of their weekly hours performing manual tasks unrelated to their executive functions, and the decision to perform any manual tasks was within the unit manager's sole discretion).⁵

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 opinions are available on the Commission's Web site at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair

⁵ This conclusion is also consistent with the description of executive employees under FLSA regulations, which recognize that executives may perform some non-managerial work in the course of their managerial responsibilities. *See, e.g.*, 29 CFR 541.106(a), .700(b), (c).