



January 25, 2007

Dear **Name***:

This is in response to your request for an opinion regarding the application of Section 13(a)(1) of the Fair Labor Standards Act (FLSA) and 29 C.F.R. Part 541¹ to a superintendent employed by your company. As described in more detail below, it is our opinion that the project superintendent position qualifies for the executive exemption, subject to the assumptions noted.

Your company is an environmental engineering and consulting company that performs construction projects on miscellaneous government sites. The project superintendent's primary function is to supervise the day-to-day activities of the construction project. The superintendent oversees the work of subcontractors employed on the project and supervises the labor force employed for the project, consisting of regular company personnel, project-specific temporary personnel, and/or union personnel. You indicate that the superintendent usually supervises at least two employees, if not more, throughout the duration of the project. The superintendent meets with the client's representatives, makes decisions regarding the scope of work of subcontractors, makes purchasing decisions as needed for the project, and reports and makes recommendations to the project manager regarding employee advancement, firing, and change of status. The superintendent is paid "far in excess of \$455.00 per week."

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties and salary are met. Section 541.100 states that an employee is employed in a "bona fide executive capacity" for purposes of the exemption if the employee is:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week . . . , exclusive of board, lodging or other facilities;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

You indicate that the superintendent is paid “far in excess of \$455.00 per week,” but provide no other details that would enable us to determine whether the payment is “on a salary basis” as defined in 29 C.F.R. § 541.602. We will assume for purposes of our response that the superintendent is compensated “on a salary basis,” as the regulations define that term, at a rate in excess of \$455.00 per week.

Under 29 C.F.R. § 541.100(a)(2), an exempt executive’s “primary duty” must be management of the enterprise or of a customarily recognized department or subdivision of the enterprise. Primary duty is defined in § 541.700(a) as the “principal, main, major, or most important duty that the employee performs.” Factors to consider in determining an employee’s primary duty include “the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” 29 C.F.R. § 541.700(a). The primary duty determination is based on all of the facts and circumstances in each individual case with the major emphasis on the character of the employee’s job as a whole. Further, although the amount of time spent on exempt work can act as a guide, time alone is not the sole test. Generally, employees who spend more than 50 percent of their time performing exempt work will satisfy the primary duty requirement. *See* 29 C.F.R. § 541.700(b).

Section 541.102 contains a non-exhaustive list illustrating the type of activities constituting “management,” including:

activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102. The project superintendent’s duties, as you describe them, are included in the type of activities constituting “management” within the meaning of the regulations.

Under 29 C.F.R. § 541.100(a)(3), an exempt executive employee must “customarily and regularly direct the work of two or more other employees.” “Two or more other employees” means two full-time employees or their equivalent. 29 C.F.R. § 541.104(a). Only other employees employed by the same employer may be considered when making this determination under the executive exemption; the supervision of employees of independent contractors, subcontractors, or any other “non-employees” in relation to the employer are not considered for purposes of meeting this test. *See* 69 Fed. Reg. 22,121, 22,135 (Apr. 23, 2004)

(noting that an individual supervising subcontractors would not meet the executive exemption but could still meet the administrative exemption). In addition, while the supervision can be distributed among two (or more) employees for purposes of this test, each employee claimed to be exempt as an executive “must customarily and regularly direct the work of two or more other full-time employees or the equivalent.” 29 C.F.R. § 541.104(b). Furthermore, “[h]ours worked by an employee cannot be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement.” 29 C.F.R. § 541.104(d). Assuming your statement that there are usually at least, if not more than, two employees who are supervised by the project superintendent during the construction project means that the project superintendent customarily and regularly supervises two employees who are employed by the superintendent’s employer, this requirement appears to be satisfied. The failure to meet either aspect of this test, however, would result in the opposite conclusion as to the executive exemption.

The final element of the executive exemption duties test requires that the employee must have “the authority to hire or fire other employees or [have their] suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees [be] given particular weight.” 29 C.F.R. § 541.100(a)(4). “To determine whether an employee’s suggestions and recommendations are given ‘particular weight,’ factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon.” 29 C.F.R. § 541.105. Moreover, generally the suggestions and recommendations must relate to “employees whom the executive customarily and regularly directs.” *Id.* However, the regulations do not require the employee to have authority to make the ultimate decision, and a higher level manager’s recommendation may be given more importance. *Id.* You state that the superintendent makes recommendations to the Project Manager regarding employee advancement, firing, and change of status. Thus, subject to the same assumptions noted above, this element of the executive exemption duties test appears to be satisfied.

Accordingly, the duties described in your letter appear to qualify the project superintendent position as an executive exempt from the minimum wage and overtime provisions of the FLSA. Therefore, so long as the actual duties performed by these employees are consistent with those described, the referenced employee is exempt from these provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 request might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above discussion is responsive to your inquiry.

Sincerely,

Paul DeCamp
Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**