



FLSA2006-29

September 8, 2006

Dear **Name***:

This is in response to your letter requesting an opinion concerning the applicability of the executive exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) (copy enclosed) to gasoline service station managers employed by your firm. Based on a review of the information provided, it is our opinion that an otherwise exempt executive manager who performs the duties described below would remain exempt.

FLSA section 13(a)(1) 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. Please note that revisions to 29 C.F.R. Part 541 were published as a final rule in the Federal Register on April 23, 2004 (69 Fed. Reg. 22,122) and became effective on August 23, 2004 (copy enclosed).

You state that the manager is in “sole charge” of an independent branch location and customarily and regularly directs the work of two or more other full-time employees, or their equivalent. In a telephone discussion with a member of the Wage and Hour Division staff, you stated that the manager’s primary duty is management of the independent branch. The manager has the authority to hire or fire other employees and receives a salary of at least \$500 per week. For purposes of this reply, we assume that the manager at issue is compensated on a salary basis in accordance with 29 C.F.R. § 541.602.

You ask whether an otherwise exempt executive manager would fail to meet the primary duty test of management of the enterprise under the final rule if the manager is involved in the following four scenarios:

1. The manager is sent to another station to complete paperwork and banking duties because the manager usually in charge of that station is off due to illness. These duties include printing the daily report that shows, for example, the total number of certain items sold (packs of gum, cigarettes, etc.) and total daily sales. The manager uses this report to check inventory status and to verify the cash on hand against the daily sales figure report. The manager then delivers the cash receipts to the bank. Only a manager is allowed to perform these duties. It takes the manager one half to three hours to complete these duties; the manager then goes home or returns to his or her primary station.
2. The manager performs the same duties as in scenario #1, but may have to perform such duties for a week or longer due to extenuating circumstances, such as the manager at the other station being on vacation or because there is no manager assigned at the other station. Each day for a week or longer the manager spends one half to three hours at the other station. The manager may be assigned the responsibility of managing the other

station. The manager would remain in charge of the primary station. Normally a manager would return to the primary station to complete his or her duties, or the manager may go home if these duties have already been completed.

3. The manager is sent to another station to train a new manager. The manager is not in charge of that station, but remains in charge of the primary station. Typically, a manager first would attend to the primary station for two hours during the beginning of the workday and then go to the other station to train the new manager. The manager would train the new manager for three days to a week. This may involve showing the new manager how to “work the drive,” which consists of pumping gas and waiting on customers. This experience is part of the overall managerial training. The manager usually leaves an assistant manager in charge of the primary station, but continues to have ultimate responsibility for the primary station. Usually, a more experienced manager is asked to complete the training so that the new manager will gain a better insight into how the store operation works.
4. The manager is sent to another station to “work the drive” as an attendant because of a shortage of help. While “working the drive” at the second station, the manager would not be in charge of that station; the manager remains in charge of the primary station during this time. This scenario applies to only a few of the managers about once a year. Typically, a manager would spend a couple of hours at the primary station during the beginning of the workday and then be called to “work the drive” at another station. In rare instances, the manager would spend one day, for at most eight hours, “working the drive” in another station and then return to manage the primary station all other times of the week.

Under 29 C.F.R. § 541.100(a), the term “employee employed in a bona fide executive capacity” is defined as “any employee”:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week . . . ;
- (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.

Management, as discussed in 29 C.F.R. § 541.102, generally:

includes, but is not limited to, 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 property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

As discussed in 29 C.F.R. § 541.700(a), in order:

[t]o qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, 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.

Furthermore, as explained in 29 C.F.R. § 541.700(b),

[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

By way of example,

assistant managers in a retail establishment who perform exempt work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

29 C.F.R. § 541.700(c). *See also* 29 C.F.R. § 541.106 (discussion of "concurrent duties").

We believe that the duties described in scenarios #1 and #2, such as printing the daily sales report in order to check inventory status and audit cash receipts, including delivering cash receipts to the bank, which only the manager may perform, are management functions for purposes of the primary duty test as these functions relate to the maintenance of production or sales records in order to provide for the security of the employer's property. *See* 29 C.F.R. § 541.102; *see also Jones v. Va. Oil Co.*, 69 Fed. Appx. 633, 637-38, 2003 WL 21699882 (4th Cir. Jul. 23, 2003); *Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d Cir. 1982). With regard to scenario #3, the training of employees such as a new manager is also considered an exempt management type of work under 29 C.F.R. § 541.102. Therefore, it is our opinion that an otherwise exempt executive manager who performs the duties described in scenarios #1, #2, and #3 would remain exempt under the final rule.

We note that performing the duties described as "working the drive" by an attendant in scenario #4 is nonexempt work. It continues to be the Department's position that substantial nonexempt work cannot routinely be assigned to exempt employees without calling into question the application of the exemption to that employee. However, as you clarified, only a few of the managers "work the drive" as an attendant; this takes place about once a year. Typically, a manager would spend a couple of hours at the primary station during the beginning of the workday and then be called to "work the drive" in another station. In rare instances, the manager would spend one day, for at most eight hours, "working the drive" in another station and then return to manage the primary station at all other times of the week. Based on your representation, it is our opinion that an otherwise exempt manager who "works the drive" as an attendant in another station for a full day at very irregular infrequent intervals would not typically cause the manager to fail to meet the primary duty requirement of management of the enterprise under the final rule. Therefore, it is our opinion that the manager in scenario #4 would remain an exempt executive employee.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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 question presented. Existence of any other factual or historical background not contained in your letter 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 issues 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 this letter 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).**