



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* [29 C.F.R. §§ 790.17\(d\), 790.19](#); *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990). Our letter to you dated January 16, 2009 is withdrawn and may not be relied upon as a statement of agency policy. Please note that Wage and Hour Opinion Letter FLSA2009-29 (Jan. 16, 2009), a copy of which was attached to our letter to you, has also been withdrawn.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-36

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether employees of homebuilders who supervise construction of multiple new homes, townhomes, and/or condominiums each year qualify for an exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).^{*} We believe the attached opinion letter recently issued by the United States Department of Labor Wage and Hour Division adequately responds to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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

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



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-29

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether a project supervisor in the residential homebuilding industry qualifies for an exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).^{*} You ask specifically whether the project supervisor qualifies as an employee employed in a bona fide administrative capacity. It is our opinion that the position is exempt from the minimum wage and overtime requirements of the FLSA.

You indicate that project supervisors are employed by homebuilding companies to supervise and coordinate the construction of residential homes. Often the homebuilding company will outsource the actual construction of the home to various subcontractors, and the project supervisor will serve as the company's representative at the worksite in dealings with subcontractors, suppliers, customers, and government inspectors. A project supervisor spends more than half of his/her time directing, scheduling, managing, and paying subcontractors and suppliers. Additionally, the project supervisor reviews and modifies new home plans; interacts with building inspectors; ensures each home is ready for each required inspection; responds to customer concerns and complaints; reviews the initial home construction budget to ensure the estimates are reasonable; inspects the work of subcontractors and suppliers; tracks the home costs against original estimates as construction progresses; acts as the company safety inspector at the worksite; works with subcontractors to ensure compliance with all federal and state safety procedures and regulations; and takes appropriate and necessary action if an accident occurs.

Section 13(a)(1) of the FLSA exempts from its minimum wage and overtime pay provisions "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The exemption is determined not by occupational title or job classification, but rather by the duties and salary of the individual employee involved. See [29 C.F.R. § 541.2](#).

The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the FLSA includes "any employee:"

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . exclusive of board, lodging, or other facilities;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

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

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

[29 C.F.R. § 541.200.](#)

Regarding the first requirement that the project supervisor is compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities, you request that we assume the project supervisor meets this requirement and is paid accordingly. Therefore, we focus on whether the position also meets the primary duty test in determining whether the project supervisor qualifies for the administrative exemption. To satisfy the primary duty test, the project supervisor's primary duty must include both the performance of office or non-manual work directly related to the management or general business operations of the employer and the exercise of discretion and independent judgment with respect to matters of significance.

As stated in [29 C.F.R. § 541.201\(a\)](#):

To qualify for the administrative exemption, an employee's primary duty must be the performance of [office or non-manual] work directly related to the management or general business operations of the employer or the employer's customers . . . To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

Additionally, as stated in 29 C.F.R. § 541.201(b):

Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network; internet and database administration; legal and regulatory compliance; and similar activities.

We recently issued an opinion, Wage and Hour Opinion Letter January 16, 2009, in which we concluded that project superintendents employed by a commercial construction company qualify as exempt administrative employees because their primary duties appeared "to relate directly to the management or general business operation of [the employer], i.e., they are responsible for overseeing a commercial construction project from start to finish." (citing 29 C.F.R. § 541.201(a)-(c)). As we explained in Wage and Hour Opinion Letter January 16, 2009, recent decisions in the federal courts demonstrate that the application of these requirements is highly fact specific. *See Gottlieb v. Construction Servs. & Consultants, Inc.*, No. 05-14139, 2006 WL 5503644, at *6-7 (S.D. Fla. July 24, 2006) (project superintendents whose primary duty "involved producing the product their company existed to market" rather than servicing the company itself, and where "all 'matters of significance' were determined by [the project supervisor's] superiors" were not exempt administrators).

In *Gottlieb*, the project superintendent did not qualify for the administrative exemption because, in part, his duties were primarily to inspect the work of subcontractors to ensure compliance with the builder's plans to schedule the subcontractors and supplies to ensure they were both in place at the proper time. See 2006 WL 5503644, at *6; [29 C.F.R. § 541.203\(g\)](#) (“[o]rdinary inspection work generally does not meet the duties requirements for the administrative exemption”); [29 C.F.R. § 541.202\(e\)](#) (“the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources”). The fact that the project superintendent's work was important to the company, affecting its profitability and reputation, was not dispositive. See *Gottlieb*, 2006 WL 5503644, at *6 (citing *Sack v. Miami Helicopter Svc., Inc.*, 986 F. Supp. 1456, 1469 (S.D. Fla. 1997)); 29 C.F.R. § 541.202(f).

From your letter describing the project supervisor's duties, it appears that an overwhelming majority of his/her work is non-manual work directly related to the management or general business operations of the employer, a homebuilding company, and includes tasks such as budgeting, auditing, quality control, purchasing, procurement, safety and health, personnel management, human resources, labor relations, public relations, government relations, legal and regulatory compliance, and similar activities.

To begin, the actual manual work of constructing the home is outsourced to subcontractors and suppliers. As previously stated, the project supervisor supervises and coordinates the construction of the home and serves as the homebuilding company's representative at the work-site in dealings with subcontractors, suppliers, customers, and government inspectors.

In your letter, you indicate that the project supervisor spends more than half of his/her time directing, managing, scheduling, and paying subcontractors and suppliers. In discharging these duties, the project supervisor evaluates the quality and efficiency of the subcontractors' and suppliers' work, is authorized to stop their work to correct any observed deficiencies, and may require them to remove any of their employees from the worksite. If necessary, the project supervisor may recommend the dismissal of subcontractors and suppliers whose work is not satisfactory. When a particular subcontractor's contract is up for renewal, the project supervisor provides significant input as to who will be re-contracted for future services.

Additionally, the project supervisor reviews and modifies new home plans, making sure there are no conflicts between the plans and the actual construction of the home. The project supervisor ensures that each home meets all safety, quality, and legal requirements; ensures each home is ready for inspection; and negotiates the best solution for any issue that may arise with a building inspector, subcontractor, or supplier. Also, the project supervisor schedules the subcontractors and suppliers and commits the homebuilding company to pay when appropriate.

Furthermore, the project supervisor serves as each homebuyer's primary contact in dealing with the construction of the home and also meeting with prospective customers to explain the construction process. The project supervisor reviews the initial home construction budget to ensure the estimates are reasonable and tracks the construction costs against the original estimates once construction begins. Finally, the project

supervisor is not typically subject to any on-site supervisors by any other company employee. It appears that, like the project superintendents in Wage and Hour Opinion Letter January 16, 2009, the project supervisors oversee the commercial construction project from start to finish, using a similar amount of discretion and independent judgment when carrying out their duties. The exercise of discretion and independent judgment implies that the project supervisors make independent choices concerning matters of significance, such as whether to depart from prescribed standards or permitted tolerances. *See* 29 C.F.R. § 541.202(a)-(c). Unlike in *Gottlieb*, the primary duties of the project supervisors seem to be more involved than just inspecting work to ensure compliance with the builders' plans and scheduling subcontractors and supplies. Therefore, it appears the project supervisor's primary duties meet the requirement of being office or non-manual work directly related to the management or general business operations of the employer as stated in 29 C.F.R. § 541.200(a)(2) and further described in 29 C.F.R. § 541.201.

As stated in 29 C.F.R. §541.202(a):

To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

Additionally, as stated in 29 C.F.R. § 541.202(b):

Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

"The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision.

However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.” 29 C.F.R. § 541.202(c).

It appears the project supervisor’s primary duties involve the exercise of discretion and independent judgment with respect to matters of significance. For example, in your letter, you indicate that the project supervisor has significant authority to adjust the construction process as necessary when, in his/her opinion, such a change is needed to meet any safety, quality, or legal requirements, or to ensure a high quality home is provided within the estimated budget, and to commit the homebuilding company to any payments that are required to complete such an alteration; to negotiate solutions to issues raised by the building inspector, subcontractors, or suppliers; to schedule subcontractors or suppliers; to stop their work when it is unsatisfactory; to order the removal of their employees when necessary; to recommend the dismissal of a subcontractor or supplier if appropriate; to commit the homebuilding company to any payments to subcontractors or suppliers for any work or building materials provided; and to stop payment to any subcontractor or supplier when appropriate. Additionally, as previously stated the project supervisor serves as the homebuilding company’s sole representative at the worksite and must deal with any issues, concerns, unforeseen events, or problems that may arise during the entire homebuilding process. Thus, the project supervisor has the authority to formulate, affect, interpret, and implement management policies and operating practices; carry out major assignments in conducting the operations of the homebuilding company; perform work that affects business operations to a substantial degree; commit the employer in matters that have significant financial impact; waive or deviate from established policies and procedures without prior approval; negotiate and bind the company on significant matters; and investigate and resolve matters of significance on behalf of the company. Therefore, it appears the project supervisor’s primary duties meet the requirement of including the exercise of discretion and independent judgment with respect to matters of significance as stated in 29 C.F.R. § 541.200(a)(3) and further described in 29 C.F.R § 541.202.

It is our opinion that the project supervisor position is exempt from the FLSA’s minimum wage and overtime requirements as an employee employed in a bona fide administrative capacity, provided that the salary basis requirement is met.

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 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 this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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