



FLSA2006-35

September 21, 2006

Dear **Name***:

This is in response to your request for an opinion on behalf of your organization's members concerning whether a store manager must physically or in person supervise two full-time employees or their equivalent under the executive exemption of Fair Labor Standards Act (FLSA) section 13(a)(1). Based on a review of the information provided, it is our opinion that the store manager described below qualifies for the executive exemption.

You state that many retailers have stores that are staffed with the store manager and one other employee at any given time. The store manager, however, is responsible for, and has supervisory authority over, all of the store's employees (often five to eight individuals, depending on the time of the year). This responsibility includes interviewing, selecting, and training employees; setting and adjusting employee rates of pay and hours of work; directing work; maintaining sales records; appraising employees' productivity and efficiency for the purpose of recommending promotions or other change in status; handling employee complaints and grievances; disciplining employees; planning work; providing for the safety and security of the employees and the stores; and planning and controlling the budget.

Even when the store manager is not present in the store, he or she remains responsible for ensuring that company policies and his or her instructions are carried out by all subordinates. This is done by, for example, following up on any assigned tasks on a daily basis, monitoring employee productivity, and ensuring that sales goals are met by reviewing the previous shifts' sales analyses/reports. If a situation results in a store closing, the store manager would be notified and would take responsibility for all aspects of the emergency. When an employee is absent and the assistant manager is unable to locate a replacement, the store manager would be notified as well. Moreover, in most cases, when not on duty, the store manager routinely calls or stops by the store until he or she is confident that the assistant manager can effectively handle situations in the store manager's absence. The store manager is responsible for these types of supervisory activities with respect to all of the store's employees. The employees together work in excess of 80 hours per week. Due to the store's size and staffing levels, however, the store manager would physically or in person supervise less than 80 employee hours per week.

You ask whether the store manager who meets all other requirements for the exemption, including being responsible for the supervision of at least two full-time employees or their equivalent, but who does not physically or in person supervise 80 employee hours per week, may qualify for the executive exemption.

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 duty and salary, as discussed in the appropriate section of the regulations, are met.

As indicated in 29 C.F.R. § 541.100(a), the term “employee employed in a bona fide executive capacity” means “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.

As stated under 29 C.F.R. § 541.701, “[t]he phrase ‘customarily and regularly’ means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ‘customarily and regularly’ includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.”

Under 29 C.F.R. § 541.104(a),

[t]o qualify as an exempt executive under § 541.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase “two or more other employees” means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

As indicated in 29 C.F.R. § 541.104(b),

[t]he supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

You ask us to assume that all other requirements of the executive exemption are met in this case; our response, therefore, focuses on whether supervision must be in person to satisfy the requirement that an exempt executive employee “customarily and regularly direct[] the work of two or more other employees.” 29 C.F.R. § 541.100(a)(3).

It has been the longstanding position of the Wage and Hour Division that a store manager does not have to work at the same time or within the same establishment as his or her subordinate employees to satisfy the requirement that the store manager “customarily and regularly direct the work of two or more other employees.” *See* Wage and Hour Opinion

Letters April 2, 1986; July 11, 1985; November 8, 1979; and November 2, 1976 (copies enclosed). A store manager, even when not present in the store, may satisfy the requirements of 29 C.F.R. § 541.100(a)(3), provided he or she does in fact customarily and regularly direct the subordinate employees' work. Based on the information provided, we believe that the store manager customarily and regularly directs the work of subordinate employees even when he or she is not present in the store because the store manager continues to be responsible for ensuring that company policies and his or her instructions are carried out by all subordinates by following up on any assigned tasks on a daily basis, monitoring employee productivity, and ensuring that sales goals are met by reviewing the previous shifts' sales analyses/reports. Moreover, the store manager plans the work load for the employees, sets and adjusts employees' hours of work, appraises employees' productivity and efficiency, handles employee complaints and grievances, and disciplines employees.

We note that several courts have considered whether supervision must be in person and have held that supervisory employees may qualify for the executive exemption even where they do not physically supervise 80 employee hours per week. *See, e.g., Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th Cir. 2001) ("The [managers'] continuous simultaneous physical presence with the assistant managers is not an essential requirement of supervision as long the [managers] supervised the assistant managers' work in other ways."); *Smith v. Heartland Auto. Serv., Inc.*, 418 F. Supp. 2d 1129, 1141 (D. Minn. 2006) ("there is no requirement that, in order to supervise an employee, a manager must be constantly physically present at the store with that employee"); *Haines v. S. Retailers, Inc.*, 939 F. Supp. 441, 446 (E.D. Va. 1996) ("it is not required that the executive employee be actually present at the store at the time the other employees are working to be 'supervising' them").

Therefore, it is our opinion that the store manager qualifies for the executive exemption under FLSA section 13(a)(1).

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).**