



FLSA2018-4

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division (“WHD”) reissue Opinion Letter FLSA2009-1NA. On January 15, 2009, the then-Team Leader of the Fair Labor Standards Team, Monty Navarro, signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter “for further consideration” and stated that it would “provide a further response in the near future.”

We have further analyzed Opinion Letter FLSA2009-1NA. From today forward, this letter, which is designated FLSA2018-4 and reproduces below the verbatim text of Opinion Letter FLSA2009-1NA, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

A handwritten signature in black ink, appearing to read "Bryan L. Jarrett".

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request for an opinion regarding whether project superintendents (PSs) employed by your client, a commercial construction company, qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) as persons employed in a bona fide executive, administrative, or learned professional capacity.¹ It is our opinion that your client’s PSs do not qualify as exempt executive or professional employees but do qualify as exempt administrative employees.

Your client provides general contracting, designing/building, and construction management services to its customers. You state that while your client’s PSs are not required to have

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.

bachelor's degrees "[n]onetheless ... the duties of a project superintendent require advanced, specialized knowledge because a project superintendent is responsible for overseeing a construction project from start to finish, which includes complete familiarity with the plans and specifications for a project, being responsible for securing or hiring subcontractors ... involvement in change orders, overseeing the work of subcontractors, compliance with safety regulations, inspection and permitting process and all aspects of commercial construction." In addition, you state that the PSs' various duties include reviewing plans, specifications, construction cost data, and other contract documents to identify errors, omissions, code violations, and design problems; ensuring proper grades are followed and the structure location is accurate; hiring and overseeing subcontractors; involvement in change orders; ensuring the company and subcontractors follow safety regulations; consulting and assisting architects, engineers, owners, and state and federal agencies in interpreting and enforcing fire safety rules and regulations as applicable in the building's design, construction, and operation; verifying that necessary inspections, approvals, and certifications by appropriate agencies are completed; maintaining quality control; ensuring the work is on schedule; reviewing and approving contractor pay requests; and researching and advising on changes in methods and materials for use in future construction projects. You also state that the PSs work independently.

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. You state that PSs receive annual salaries of \$60,000 to \$75,000. For purposes of this response, we will assume the PSs meet the salary basis test in 29 C.F.R. § 541.602.

Under the relevant duties test, an "employee employed in a bona fide executive capacity" means any employee whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; who customarily and regularly directs the work of two or more other employees; and 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. *See* 29 C.F.R. § 541.100(a). In an earlier opinion letter, we opined that a project superintendent who supervised two or more employees during a construction project and made recommendations to the project manager on employee advancement, firing and change of status qualified for the executive exemption. *See* [Wage and Hour Opinion Letter FLSA2007-3 \(Jan. 25, 2007\)](#). Based on the information provided, however, we are unable to conclude that the PSs employed by your client qualify for the executive exemption because it is unclear whether they customarily and regularly direct the work of two or more employees, or have hiring and firing authority concerning employees.

An employee qualifies as an "employee employed in a bona fide professional capacity" under the relevant duties test if his or her "primary duty is the performance of work ... [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." *See* 29 C.F.R. § 541.300(a)(2)(i). The professional exemption is restricted to those professions that require specialized academic training as a standard entrance prerequisite, and the best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. *See* 29 C.F.R. §

541.301(d). Notably, the learned professional exemption “does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.” *See id.* Your letter indicates that the PSs employed by your client do not need to have a bachelor degree; accordingly, we conclude that they do not qualify for the learned professional exemption.

Under 29 C.F.R. § 541.200(a) an employee qualifies as an “employee employed in a bona fide administrative capacity” under the duties test if his or her “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 “includes the exercise of discretion and independent judgment with respect to matters of significance.” The term ‘primary duty’ means the principal, main, major, or most important duty that the employee performs. *See* 29 C.F.R. § 541.700(a). To qualify for the administrative exemption, “an employee must perform work directly related to assisting with the running of 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.” 29 C.F.R. § 541.201(a). Work directly related to the management or general business operations includes “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.” 29 C.F.R. § 541.201(b). 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 ‘matter of significance’ refers to the level of importance or consequence of the work performed.” 29 C.F.R. § 541.202(a).

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); *Carpenter v. R.M. Shoemaker Co.*, No. 00-5644, 2002 WL 987990, at *5 (E.D. Pa. May 6, 2002) (issue of fact whether project superintendents’ work directly related to management policies or to general business operations where a PS managed the day-to-day construction aspects of a particular project and “could be construed as participating on the production side, as opposed to the administrative side of [the] business”). In *Gottlieb*, the PS 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 and 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 PS’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).

Based on the information provided, we conclude that the PSs that you describe qualify as exempt administrative employees because their primary duty appears to relate directly to the management or general business operation of your client, i.e., they are responsible for overseeing a commercial construction project from start to finish. *See* 29 C.F.R. § 541.201(a) – (c). These PSs have “functional rather than departmental authority” and help to administer your client’s “business operations.” *See* 69 Fed. Reg. 22,141 (April 23, 2004); *see also Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 372-74 (7th Cir. 2005) (power plant’s work planners, lead work planners, and supply analysts, among other employees, had primary duties that directly related to management policies or general business operations). Additionally, your client’s PSs appear to exercise discretion and independent judgment with respect to matters of significance, such as in their responsibility for securing or hiring subcontractors, their involvement in change orders, and their overseeing the work of subcontractors. The exercise of discretion and independent judgment implies that, in these areas or others, the PSs 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).

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,

Monty Navarro
Fair Labor Standards Team
Office of Enforcement Policy

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