



You Need Not Be Present To Win: Store Managers May Meet Executive Exemption Without Constant Physical Presence

Insights

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The Wage and Hour Division of the U.S. Department of Labor has just released an opinion letter that clarifies the criteria that a store manager must meet in order to qualify for the executive exemption under the Fair Labor Standards Act (FLSA). The opinion letter provides important guidance (and perhaps a sigh of relief) for employers whose managers direct the work of several employees, but do not necessarily physically supervise all the employees under their control on a regular basis.

The Executive Exemption In A Nutshell

Section 13(a)(1) of the FLSA provides an exemption from both the minimum wage and overtime pay requirements for those employees who are employed in a bona fide executive capacity. In order to qualify for this exemption, an employee must: 1) be compensated on a salary basis of \$455 or more per week; 2) have the primary duty of managing an enterprise or a customarily recognized department or subdivision of the enterprise; 3) customarily and regularly direct the work of two or more full-time employees (or the equivalent); and 4) have the authority to hire or fire other employees, or make suggestions regarding hiring, firing, or promotion which are accorded significant weight.

There has been a tremendous amount of litigation in recent years concerning whether store managers “and managers of similar operations, such as chain restaurants” are truly exempt. The Wage and Hour Division’s opinion letter analyzes whether a store manager who supervises a staff of employees, but who does not physically or in-person supervise two or more full-time employees, qualifies for the executive exemption.

In order to meet the third element of the executive exemption, an employee must customarily and regularly supervise two full-time employees or the equivalent. In other words employees can meet the executive exemption if they direct the work of at least two employees who work 40-hour workweeks. Employees can also meet the executive exemption if they direct the work of the equivalent of two full-time employees, such as one employee who works a 40-hour workweek and two part-time employees who each work a 20-hour workweek.

The DOL's Clarification

The DOL’s opinion letter describes a situation where a store manager has supervisory duties over all of a store’s employees, but the manager is physically present at the store to supervise the work of

only one full-time employee during that employee's shifts at the store. Although he physically or in-person supervises only a single employee, the manager has the supervisory authority over all the store's employees to interview, hire, train, set and adjust rates of pay and hours of work, direct and plan daily work, maintain sales records, appraise productivity and efficiency for purposes of advancement, handle complaints and grievances, discipline, and provide safety and security. The manager also plans and controls the store's budget, reviews sales figures and goals, handles emergencies, and sometimes calls the store to monitor the status of the operation even when the manager is not on duty.

The Wage and Hour Division stated that a store manager who supervises a store in such a fashion, and whose employees in the aggregate work 80 hours or more in a week, (i.e. the equivalent of two full-time employees) qualifies for the executive exemption. The exemption applies even if the manager does not physically or in-person supervise the work of two or more full-time employees. The manager qualifies for the executive exemption because he "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 [emphasis added].

Summing It Up

This letter is beneficial to employers because it recognizes that, to some degree, supervision need not be in person for the purposes of the executive exemption. The opinion letter stops short of saying that an employee may qualify for the executive exemption even if he does not engage in any physical supervision of employees.

But this letter does give employers with multi-shift or multi-location enterprises the leeway to claim that their managers meet the executive exemption even if the managers' physical supervision of the employees under their direction is not constant.

This Labor Alert is intended to provide an explanation of the highlights of a particular DOL opinion letter. It is not intended to serve as, and should not be considered, legal advice for any particular situation. For more specific information, contact your regular F&P attorney.