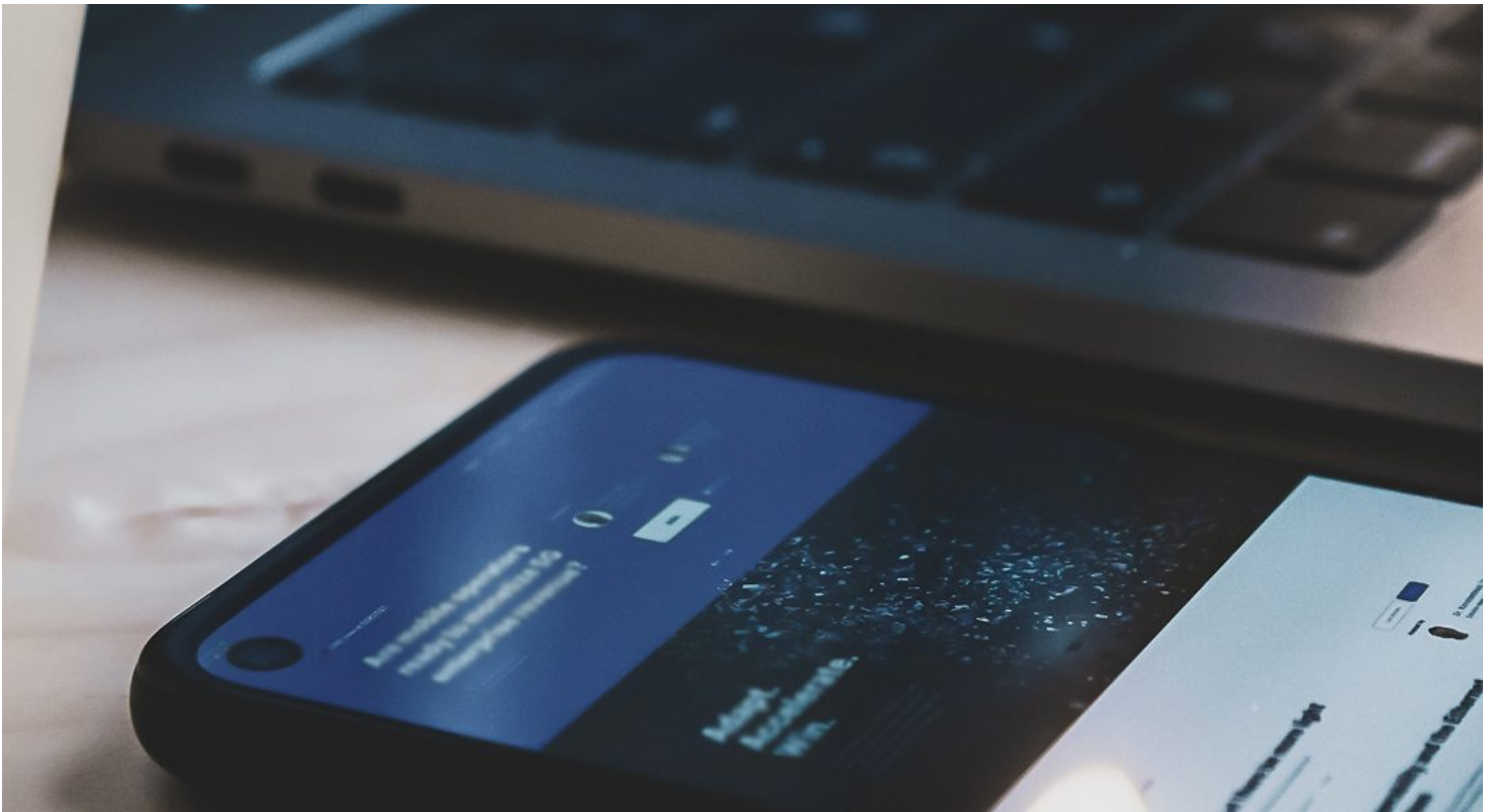


NEWS & INSIGHTS

Recent DOL Guidance: Construction Supervisors may be Exempt from FLSA Overtime Requirements

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To qualify for FLSA overtime exemptions, employees must meet the salary basis test and the duties test. The salary basis test requires they be paid more than \$455.00 per week. The duties test may be met by employees who perform executive, administrative, or professional duties. [29 U.S.C. § 213\(a\)\(1\)](#).

On January 5, 2018 WHD reissued two opinion letters, FLSA2018-4 and FLSA2018-10, opining that the described

construction supervisors met the duty test for administrative employees. Administrative employees are those whose “primary duty is the performance of office 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.” [29 C.F.R. § 541.200\(a\)](#).

In opinion letter FLSA20018-4, the WHD rendered an opinion that project superintendents did not qualify for executive or professional employee exemptions but were administrative employees. The project superintendents in this case required “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 . . . [responsibility] for securing and 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.”

The WHD decided that the superintendents were not employed in a bona fide executive capacity, in part, because the WHD was “unable to conclude that the [superintendents] customarily and regularly direct the work of two or more employees or have hiring and firing authority concerning employees” which was required by both the regulation and the previous WHD opinion letter precedent specific to construction project superintendents. Since the position did not require advanced specialized intellectual instruction (i.e. a Bachelor’s degree or some other specialized educational requirement), and most of the specialized training occurred on the job, superintendents were not deemed to qualify for the professional exemption either.

WHD stated that because the “primary duty” of the superintendents related “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.” In addition, the superintendents “exercise discretion and independent judgment with respect to matters of significance,” including hiring, firing, and overseeing subcontractors, and involvement in change orders. Therefore, the superintendents were bona fide administrative employees exempt from FLSA overtime pay requirements.

According to the employer seeking guidance in FLSA2018-10, the project supervisors served as the “company’s representative at the worksite in dealings with subcontractors, suppliers, customers, and government inspectors” as well as “directing, scheduling, managing, and paying subcontractors and suppliers.” WHD stated that based on the description given by the employer, the “overwhelming majority” of a supervisor’s duties were “non-manual work directly related to the management or general business operations of the employer.” The project supervisors spent more than half of their time supervising work which was largely outsourced to subcontractors and suppliers. Project supervisors also reviewed and modified home plans, ensuring that they complied with “safety, quality, and legal requirements.” Moreover, the “project supervisor serves as each homebuyer’s primary contact in dealing with the construction of the home and meeting with prospective customers to explain the construction process.”

This WHD opinion letter went on to cite FLSA2018-4: like the superintendents in that decision, project supervisors “oversee commercial projects from start to finish” and exercised similar discretion and independent judgment. The WHD focused heavily on the exercise of discretion “with respect to matters of significance,” which qualified the supervisors as administratively exempt pursuant to [29 C.F.R. § 540.200\(a\)\(3\)](#).

These opinions provide useful guidance to construction companies: they indicate that construction employees engaged in supervisory roles may meet FLSA exemptions. This is due to the WHD issues opinion letters only on the specific facts presented, owners are advised to seek counsel before making wage and hour decisions regarding

employees.

For questions regarding FLSA's applications to your employees, contact [Saxton & Stump's Employment Law Group](#).

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