

## **MUST A RESIDENTIAL CONSTRUCTION CONTRACTOR PAY ITS PROJECT SUPERVISOR OVERTIME PAY?**

Maybe. It all depends on the project supervisor's duties. As a matter of background, the U.S. Department of Labor ("DOL") issued an opinion letter in 2009 on this very topic under the Fair Labor Standards Act ("FLSA"), but withdrew it shortly thereafter stating the DOL decided to give the issue further consideration. The withdrawal of the opinion letter created uncertainty for the residential construction industry. In January of this year, the DOL began issuing opinion letters again and it reissued FLSA 2009-36 and designated it as FLSA 2018-17.

While an opinion letter issued by the DOL may only be relied upon by the party that requested the opinion letter, opinion letters provide valuable insight as to how the DOL views exemptions from overtime under the FLSA.

FLSA 2018-17 affirms its Opinion Letter FLSA 2009-36 on the issue of whether a residential contractor has to pay its project supervisors overtime. Based upon the facts presented, the answer is no. The DOL found that the construction supervisor position described in the request for the opinion letter qualified for the administrative exemption under the FLSA.<sup>1</sup>

The administration exceptions under the FLSA include any employee<sup>2</sup>:

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

The key to the scenario presented in Opinion Letter FLSA 2009-36 was the fact the project superintendent was not primarily responsible for the performance of manual work. Rather, the project superintendent was primarily responsible for the management and duties of the project superintendent that included such tasks as, budgeting, auditing, quality control, purchasing, procurement, safety and health, personnel management on the site, including subcontractors, compliance with the building code and similar activities. Additionally, the DOL found that the project superintendent in that case exercised independent judgment to make decisions regarding the activities mentioned above.

What is the benefit of obtaining an opinion letter from the DOL when an employer has a question about whether a particular position qualifies for an exemption from the FLSA's overtime requirements? Put simply, it provides protection against any future monetary liability

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<sup>1</sup> 29 Section (13)(a)(1), FLSA.

<sup>2</sup> 29 C.F.R. 541.200.

should a court determine that position did not qualify for an exemption. Why? Because obtaining an opinion letter shows good faith and reliance on the opinion of the DOL, the very agency charged with enforcement responsibility under the FLSA.

*A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.*

Questions regarding this article or past articles may be e-mailed to Christina Harris Schwinn at [christinaschwinn@paveselaw.com](mailto:christinaschwinn@paveselaw.com). To view past articles written by Ms. Schwinn please visit the firm's website at [www.paveselaw.com](http://www.paveselaw.com). Ms. Schwinn is a partner and an experienced employment and real estate attorney with the Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901; Telephone: (239) 336-6228; Telecopier: (239) 332-2243.