

FLSA-332

(January 2, 1981

This is in reply to your letter of November 18, 1980, enclosing correspondence from *** Executive Vice President and General Manager of ***. Mr. *** is specifically concerned with the way the Wage and Hour Division is interpreting 29 CFR Part 541, as it relates to employees employed as assistant managers, night managers, and executive chefs in restaurants.

The Fair Labor Standards Act is the Federal minimum wage and overtime pay law. An employee who is covered under this law must be paid in accordance with its minimum wage and overtime pay provisions, unless specifically exempt. Section 13(a)(1) of the Act provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as these terms are defined and delimited in 29 CFR Part 541. Employees such as the ones Mr. *** has in mind may qualify for exemption as bona fide executive employees, if all the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.1 of the regulations, are met. Job titles are insufficient in determining whether or not an employee qualifies for exemption, since it is the actual duties and responsibilities of the job, along with the salary, that must be considered in making such a determination. The Wage and Hour Division has not adopted any new interpretation of these regulations with regard to restaurant management employees.

(One test for exemption requires that a bona fide executive employee spend no more than 40 percent of his or her time in nonexempt work (see section 541.112 of the regulations). It has been our experience that restaurant employees variously described as assistant managers, co-managers, night managers, executive chefs, etc., generally spend considerable amounts of time performing nonexempt work. Time spent by such employees in the performance of work of the type performed by the employees being supervised, such as helping out on the line in preparing and serving food, operating the cash register, counting the daily cash receipts, and cleaning and maintaining the restaurant, would be considered nonexempt work. The performance of such nonexempt work is not converted to exempt work merely by the fact that the employee may have other duties which are exempt. The exemption does not apply where an employee in a restaurant, although paid a salary of at least \$155 a week, spends more than 40 percent of his or her time in the performance of nonexempt work.

However, an employee who is paid in excess of \$250 per week may qualify for exemption as a bona fide executive employee if he or she supervises at least two full-time employees and has management on his or her "primary duty." (This is set forth in section 541.119 of the Department's regulations). A determination of whether an employee has management as his or her primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. An employee can spend more than 50 percent of his or her time in production of sales work and still have management as his or her primary duty, if the employee is in charge of a department or subdivision of an establishment, and has broad responsibilities similar to those of the owner or manager of the establishment. In the case of employees such as assistant managers in restaurants, it is evident that the last requirement is not always met. See section 541.103 for a discussion of "primary duty."

(With regard to the sole-charge exception, section 541.113 of the regulations provides that the tolerance on nonexempt work shall not apply in the case of an employee who is in sole charge of an independent establishment or physically separated branch establishment. Such an employee is considered to be employed in a bona fide executive capacity even though he or she exceeds the applicable percentage limitation on nonexempt work. Since the employee must be in "sole charge," only one person in any

establishment can qualify as an executive under this exception, and then only if he or she is the top person in charge at that location. Assistant managers, night managers, co-managers, executive chefs and so forth are the kinds of employees who are almost never in sole charge of a restaurant, and are, therefore, excluded from the "sole-charge" exception. These employees would have to meet all the requirements for exemption as a bona fide executive, including the tolerance on nonexempt work discussed in the above paragraph.

As indicated in section 541.103, one of the relevant factors in determine whether an employee has management as his or her primary duty is the relationship between that employee's salary and the compensation paid to other employees for the kind of nonexempt work performed by the employee who is claimed to be exempt. Sometimes this relationship is close, and sometimes nonexempt employees (as a result of overtime pay) actually earn more than their "supervisor." In such circumstances, a serious question arises as to whether the supervisor's primary duty is management.

Of course, a determination on the exempt or non-exempt status of any employee must be made on an individual basis that takes into consideration all the pertinent facts relating to the actual work performed by the employee in question, and not the content of his or her position description or job title.

Sincerely,

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Wage and Hour Division

Henry T. White, Jr.
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Enclosure