



FLSA2018-3

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division (“WHD”) reissue Opinion Letter FLSA2009-9. On January 14, 2009, then-Acting WHD Administrator Alexander J. Passantino 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 FLSA2009-9. From today forward, this letter, which is designated FLSA2018-3 and reproduces below the verbatim text of Opinion Letter FLSA2009-9, 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 civilian helicopter pilots employed by the Division of State Police qualify for the executive, administrative, or professional exemptions under section 13(a)(1) of the Fair Labor Standards Act (FLSA).¹ It is our opinion that the civilian helicopter pilots are not exempt.

The helicopter pilots are civilian employees classified as “management/confidential,” who are prohibited under state law from bargaining collectively. The helicopter pilots do not receive overtime pay, although they perform the same duties as the state police helicopter pilots who

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.

receive overtime under a collective bargaining agreement. In a conversation with a member of the Wage and Hour Division (WHD) staff, you stated that the civilian helicopter pilots typically transport state executives and perform medevacs, evacuations, rescues, searches, and forest fire suppression. The civilian helicopter pilots possess Federal Aviation Administration (FAA) certification greater than required for the performance of such duties. You believe that the civilian helicopter pilots are not exempt under the FLSA as they do not satisfy the primary duty test.

Section 13(a)(1) provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as defined in 29 C.F.R. Part 541. An employee may qualify for exemption if the duties and salary tests are met.

The term “employee employed in a bona fide executive capacity” means “any employee”:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) 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.

29 C.F.R. § 541.100. The helicopter pilots you describe do not qualify as exempt executive employees because their primary duty is not managing the department or subdivision in which they are employed. *See* 29 C.F.R. § 541.100(a)(2). Rather, their primary duty is piloting helicopters. Furthermore, there is no indication that the pilots regularly supervise two or more full-time employees or have the authority to hire or fire other employees. *See* 29 C.F.R. § 541.100(a)(3), (4).

- (1) The term “employee employed in a bona fide administrative capacity” means “any employee”:
- (2) Compensated on a salary or fee basis at a rate of not less than \$455 per week;
- (3) 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

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

29 C.F.R. § 541.200. The helicopter pilots you describe are not exempt administrative employees because their primary duty is piloting a helicopter, which does not qualify as “office or non-manual” work. *See* 29 C.F.R. § 541.200(a)(2). Moreover, the helicopter pilots’ primary

duties are not directly related to the management or general business operations of their employer or their employer's customers. *See* 29 C.F.R. § 541.201(a).

The term "employee employed in a bona fide professional capacity" means "any employee":

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week;
- (2) Whose primary duty is the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300.

The primary duty test under the learned professional exemption requires that:

- (1) The employee must perform work requiring advanced knowledge;
- (2) The advanced knowledge must be in a field of science or learning; and
- (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

29 C.F.R. § 541.301(a). The phrase "work requiring advanced knowledge" means "work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work." 29 C.F.R. § 541.301(b). The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the learned professional exemption "to professions where specialized academic training is a standard prerequisite for entrance into the profession" rather than a general academic degree, an apprenticeship, or "training in the performance of routine mental, manual, mechanical or physical processes." 29 C.F.R. § 541.301(d). The Preamble to the 2004 revised Part 541 regulations maintains "that aviation is not a 'field of science or learning,' and that the knowledge required to be a pilot is not 'customarily acquired by a prolonged course of specialized intellectual instruction.'" 69 Fed. Reg. 22,122, 22,156 (Apr. 23, 2004).

WHD's longstanding position is that pilots do not qualify for the professional exemption under section 13(a)(1). *See* Wage and Hour Opinion Letter January 20, 1975 (copy enclosed). The primary duty of pilots does not "[r]equir[e] knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.300(a)(2)(i); *see also* 69 Fed. Reg. at 22,156. "While it is true that the duties of many helicopter pilots and copilots require considerable knowledge of navigation, meteorology, engineering and flight theory, and they must pass stringent examinations given by Federal Aviation Administration, it is still the experience in actual flight which is the most important element in qualifying as a pilot or copilot." Wage and Hour Opinion Letter January 20, 1975. Therefore, because the helicopter pilots do not satisfy the duties requirement under the regulations, they are not exempt professional employees under the Act.

WHD, however, takes a position of non-enforcement with regard to pilots and copilots of airplanes and rotorcraft who hold an FAA Airline Transport Certificate or Commercial Certificate, and who receive compensation on a salary or fee basis at a rate of at least \$455 per week, and who are engaged in the following activities:

- (1) Flying of aircraft as business or company pilots;
- (2) Aerial mineral exploration;
- (3) Aerial mapping and photography;
- (4) Aerial forest fire protection;
- (5) Aerial meteorological research;
- (6) Test flights of aircraft in connection with engineering, production, or sale;
- (7) Aerial logging, fire suppression, forest fertilizing, forest seeding, forest spraying, and related activities involving precision flying over mountainous forest areas;
- (8) Flying activities in connection with transmission tower construction, transmission line construction, transportation of completed structures with precision setting of footings, concrete pouring; or
- (9) Aerial construction of sections of oil drilling rigs and pipe-lines, and ski-lift and fire lookout constructions.

See Wage and Hour Division Field Operations Handbook § 52L01; Wage and Hour Opinion Letters February 7, 1992, September 2, 1975, January 20, 1975, and May 25, 1971 (copies enclosed).

This non-enforcement position does not apply to airplane and helicopter pilots engaged in agricultural crop-dusting operations. This policy also does not relieve an employer from compliance with the minimum wage and overtime pay standards for support and maintenance personnel covered by the FLSA. In addition, this non-enforcement position does not apply to employees, including pilots and copilots, subject to the provisions of the McNamara-O'Hara Service Contract Act, the Davis-Bacon Act, and the Contract Work Hours and Safety Standards Act, nor relieve any employer from any obligation incurred under a collective bargaining agreement or any liability incurred in a private suit under section 16(b) of the FLSA.

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 issue 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,

Alexander J. Passantino
Acting Administrator

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