

Working Foremen

A frequently encountered issue in the classification and reporting of employees involves the “working foreman.” Generally, a foreman is not covered by the Davis-Bacon and Copeland Acts because they do not perform the duties of a laborer or mechanic. However, there are instances where a foreman will join in with the employees under his or her direction and operate equipment or perform other duties of a manual or physical nature. The guidance from the US Department of Labor states:

Non-exempt working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 CFR 541, are laborers and mechanics for the time so spent. The working foreman is due the rate listed in the contract wage determination for the hours spent as a laborer or mechanic.

If the employee does not qualify as “exempt” and spends more than 20% of their time performing the duties of a laborer or mechanic, then they must be reported on the certified payroll and they must meet the wage and payment criteria of Davis-Bacon and Copeland (payment of specified prevailing wage, overtime pay, weekly payroll, deductions only as allowed/authorized).

“Non-exempt” in this guidance means that the employee does not meet the exemption criteria of 29 CFR 541. These are the stated exemption criteria for the Fair Labor Standards Act and the categories of exemptions include executive, administrative, professional, computer and outside sales employees. If the employee qualifies as exempt, they may work part or all of their time as a laborer or mechanic and are not required to be reported (though they should be shown on the payroll as “Section 541 Exempt” to avoid the inevitable question of who is operating a piece of equipment or performing some other duty). Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive. However, for a non-owner to establish an exemption as an executive requires that the employee meet all of the following criteria:

- *The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;*
- *The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;*
- *The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and*
- *The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.*

While a working foreman might easily qualify under three of these four criteria, the second one presents a more difficult hurdle. The US Department of Labor has issued guidance in the form of a “Fact Sheet” regarding the executive exemption ([link here](#)).



Fact Sheet
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For the employee to qualify as an executive, their primary duty must be the managing of the enterprise (the company) or a customarily recognized department or subdivision thereof. The Fact Sheet describes the terms, “primary duty”, “management”, and “department or subdivision.” The sticking point in a working foreman qualifying as an executive would be the requirement that they manage a customarily recognized department or subdivision of the enterprise. The Fact Sheet describes this as follows:

The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

In most instances, the working foreman is in charge of a crew (a collection of employees) rather than being in charge of a unit with permanent status and function. Based on the collective guidance from the US Department of Labor, we will carefully review any assertions of the executive exemption for employees at the level of project superintendent and below.