



# FYI

## **WAGE AND HOUR** Exemptions – Duties Test

*Revised: November 2016*

### **Summary:**

The Fair Labor Standards Act (FLSA) provides for certain exemptions from the minimum wage and overtime requirements. Regulations of the Wage and Hour Division of the U.S. Department of Labor (DOL) set out detailed requirements for these exemptions.

The best known and most significant of these exemptions is for “any employee employed in a bona fide executive, administrative, or professional capacity ... or in the capacity of outside sales, which are commonly called “white collar exemptions.”

Positions are exempt only if they plainly and unmistakably fit one or more of the exemption tests. Employers bear the burden of proving the exemption applies and should be familiar with these regulations before making a decision not to pay overtime to certain employees.

This material has been updated based on the DOL regulations on overtime exemptions effective August 23, 2004.

**For additional resources, please see page 9.**

#### **Important Notice:**

*The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.*

## **I. Executive, Administrative or Professional Exemption**

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To be exempt from the overtime and minimum wage requirement of the Fair Labor Standards Act (FLSA), an employee must meet the criteria of one of the standard executive, administrative, or professional employee tests. The exemption depends on: 1) the employee's duties and responsibilities, and 2) the employee's salary level and method of compensation. The last prong requires that an employee be paid a minimum of \$455/week on a salary or fee basis. For a discussion of "salaried" status and if and when an employer may make a deduction from a weekly salary without losing the exempt status, see the Employers Council FYI Wage and Hour: Exemptions - Salary Basis Test.

All relevant factors must be considered when determining whether an employee is exempt. It cannot be assumed that merely because one employee with a particular job title is exempt, a second employee with a similar job title is exempt. The decision is based on a case-by-case basis depending on the work that is being performed by that particular incumbent.

Employers must keep in mind that exemptions from the FLSA overtime and minimum wage provisions are narrowly construed by the DOL and the courts, and employers bear the burden of proving that each employee claimed as exempt meets each and every requirement set out in the regulations.

### **Highly Compensated Employee Test**

The DOL adopted a new test in the 2004 Regulations for employees with annual compensation of \$100,000 or more including commissions and non-discretionary bonuses. These employees must perform office or non-manual work. Once the salary threshold is met, the employer need only show that the highly compensated employee regularly performs one or more of the exempt duties outlined in the standard tests for the executive, administrative or professional exemptions to be exempt.i

### **Executive Exemption Test**

1. DOL regulations state:

The term "employee employed in a bona fide executive capacity" shall mean any employee:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities;
- (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.<sup>ii</sup>

2. A determination of whether management is the “primary duty” is predicated on all facts and circumstances in a particular case. As a general rule, employees who spend more than 50 percent of their time performing managerial duties will satisfy the primary duty requirement.

- a. Management functions recognized by FLSA include:
  - Interviewing, selecting, and training employees.
  - Setting and adjusting their rates of pay and hours of work.
  - Planning, apportioning, and directing their work.
  - Monitoring their productivity and efficiency for the purpose of recommending promotions or other changes in their status.
  - Handling employee complaints and grievances and disciplining them when necessary.
  - Planning and controlling the budget.
  - Determining the type of materials, supplies, machinery or tools to be used, or merchandise to be bought, stocked, and sold.
  - Controlling the flow and distribution of materials or merchandise and supplies.
  - Providing for the safety of the employees and the property.<sup>iii</sup>
- b. Examples of non-exempt duties which are not managerial include:
  - Performing the same kind of work as the non-exempt employees supervised.
  - Performing any production work, even though not like that performed by subordinates, which is not part of supervisory functions.
  - Making sales, replenishing stocks, returning stock to shelves, except for supervisory training or demonstration purposes.
  - Performing routine clerical duties, such as bookkeeping, billing, filing, or operating business machines.
  - Checking and inspecting goods as a production operation, rather than as a supervisory function.
  - Keeping records on employees not under the executive’s supervision.
  - Preparing payrolls.
  - Performing maintenance work.

- Repairing machines, as distinguished from an occasional adjustment.
  - Cleaning around machinery, rearranging displays, taking an employee's place at the workbench, or on the sales floor.
- c. Under certain circumstances, routine tasks may be directly and closely related to management and exempt work if the tasks facilitate supervision or the smooth functioning of the business. Examples include: maintenance of timekeeping records, distribution of material or supplies, examination of work product, etc.
- d. The performance of non-exempt work in an emergency situation will not defeat the exempt status.
3. Working supervisors, foremen, leads, and group leaders who regularly perform production work or the same duties as their non-exempt subordinates may be non-exempt depending on the amount of time spent on duties unrelated to supervisory activities. For example, a supervisor in the shipping room who makes out bills of lading and other shipping records, a warehouse foreman who also acts as inventory clerk, or the head shipper who assists in placing goods on shelves and keeping perpetual inventory records lose their exemption if the time spent on these non-exempt activities exceed 50 percent of the workweek.
4. Two or more employees mean two or more full-time employees or their equivalent. For example, one full-time and two part-time employees would meet this criterion but the question is what is the supervisor doing when not managing these three employees? The supervisor of non-employee volunteers and independent contractors will not qualify for exemption under the executive test.
5. The executive exemption also allows an employee who owns at least a 20 percent interest in the business to be exempt, so long as the employee is actively engaged in the management of the company. The \$455/week salary level and the salary basis requirements do not apply to the 20 percent equity owner exemption.<sup>iv</sup>

## **Administrative Exemption**

DOL regulations state:

The term "employee employed in a bona fide administrative capacity" shall mean any employee:

- (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<sup>v</sup>.

2. For determining whether an employee performs exempt administrative duties there is a two-part inquiry. First, what type of work is performed by the employee? Is

the employee's primary duty the performance of work directly related to management or general business operations? Second, what is the level or nature of the work performed? Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matter of significance?

3. The exempt administrative employee's work must be directly related to assisting with the running of the business and does not include the production or operating side of the business. A non-exclusive list of functional areas that generally are related to management or general business operations include: tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administrations, and legal and regulatory compliance.

4. Within such areas or departments, it is still necessary to analyze the level or nature of the work in order to assess whether the administrative exemption applies. Hence, the second requirement for the administrative exception requires the employee to regularly exercise discretion and independent judgment with respect to matters of significance. In general, DOL's regulations say, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matter of significance" refers to the level of importance or consequence of the work performed.

5. In the 2004 Regulations, the DOL states that the term "discretion and independent judgment" must be applied in light of all the facts involved in the particular employment situation. Factors to consider include:

- whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- whether the employee carries out major assignments in conducting the operations of the business;
- whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business;
- whether the employee has authority to commit the employer in matters that have significant financial impact;
- whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- whether the employee has authority to negotiate and bind the company on significant matters;
- whether the employee provides consultation or expert advice to management;
- whether the employee is involved in planning long- or short-term business objectives;
- whether the employee investigates and resolves matters of significance on behalf of management, and

- whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.vi
6. The exercise of discretion and independent judgment does not include clerical or secretarial work, recording or tabulating data, or performing mechanical, recurrent or routine work. A secretary is not exempt even if referred to as an “administrative assistant.” An employee who tabulates data is not exempt, even if called a “statistician.”

## **Learned Professional Exemption**

DOL regulations state:

The term “employee employed in a bona fide professional capacity” shall mean any employee:

- (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 work:
  - (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instructionvii.

2. The primary duty requirement may be satisfied when the professional spends more than 50 percent of his or her time performing work requiring advanced knowledge. The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence that an employee meets this requirement is possession of the appropriate academic degree.

3. Specifically, the DOL identifies the following traditional professions as a field of science or learning: law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, and pharmacy. The DOL acknowledges that “the areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned professional.”

4. The primary duty must include the consistent exercise of discretion and judgment in making independent choices in significant matters. The regulations do not define “discretion and judgment” as applied to the professional exemption, except to say that an exempt learned professional generally uses his or her advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances.

5. The work must be predominately intellectual and varied in character, so that the output or result cannot be standardized. Technicians may possess a high degree of skill and intellectual capacity but the tasks themselves involve limited discretion or judgment and are almost always non-exempt.

6. The learned professional exemption is not available for jobs that customarily may be performed with only the general knowledge acquired by an academic degree in any field, or for occupations in which most employees have acquired their skill with on-the-job experience or with knowledge acquired through an apprenticeship, vocational/technical training, or military experience.

7. The professional exemption does not apply to employees training for employment in a professional capacity who are not actually performing the duties of an exempt employee. Hence, for new employees it is prudent to identify the period of time when their training is ongoing, and during that period of time the trainee will not be an exempt employee. Only when the training has progressed to such a level that the employee consistently exercises discretion and judgment and otherwise meets the professional duties test will the employee qualify for the exemption.

### **Creative Professional Exemption**

1. DOL regulations state:

The term “employee employed in a bona fide professional capacity” shall mean any employee:

- (1) Compensated on a salary 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 work:
  - (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor<sup>viii</sup>.

2. To qualify for the creative professional exemption, an employee’s primary job must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

3. The work performed must be “in a recognized field of artistic or creative endeavor.” This includes such fields as music, writing, acting, and the graphic arts.

### **Computer Professional Exemption**

1. The DOL regulations state:

The exemptions apply to computer employees whose primary duty consists of:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same high level of skill<sup>ix</sup>.

2. Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under this test. However, because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

3. In general, the exemption does not apply to employees engaged in technical support, the operations of computers or in the manufacture, repair or maintenance of computer hardware and related equipment.

4. Certain computer employees may be considered for the executive or administrative exemption.

5. There is an exception to the salaried basis requirement in that any employee who meets the computer exemption may be paid on an hourly basis instead of salaried if the hourly rate is \$27.63 or greater.

## **Outside Sales Exemption**

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1. The DOL regulations state:

The term “employee employed in the capacity of outside salesman: means

(1) Any employee whose primary duty is:

(i) making sales

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty<sup>x</sup>.

B. Work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee’s sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee’s sales or display catalogue, planning itineraries, and attending sales conferences.

C. Outside sales work does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus a fixed site whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business.<sup>xi</sup>

D. Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales.<sup>xii</sup>

E. Outside sales employees are not required to be paid on a salary or fee basis. They are not eligible for the highly compensated employee exemption available to administrative, executive and professional employees. Outside sales employees may be paid on a salary, fee, commission, piece rate, bonus, or any other combination or method of compensation. No minimum wage is required.

F. Under DOL regulation and case law, inside sales persons are not eligible for exemption from overtime.

G. Certain employers may meet the retail sales and service industry exemption that allows inside sales persons an exemption from overtime if particular tests are met. See the Employers Council FYI Wage and Hour: Salespersons - Pay Practices.

## **Other Exemptions from Minimum Wage and/or Overtime Provisions**

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A. The following employees are exempt from the federal minimum wage and overtime provisions.

1. Executive, administrative, or professional employees; highly-skilled computer-related workers, and outside salespeople.
2. Employees of certain retail and service establishments.
3. Employees of certain amusement or recreational facilities, camps, religious establishments, or nonprofit educational conference centers.
4. Employees in certain kinds of plants that process fish or sea life.
5. Agricultural employees.
6. Employees exempt by order of the Secretary of Labor.
7. Employees of certain types of newspapers.
8. Switchboard operators of certain types of telephone companies.
9. Sea employees.
10. Babysitters or companions.

B. The following employees may be exempt from overtime provisions but not minimum wage:

1. Certain drivers or drivers' helpers. See the Employers Council FYI Wage and Hour: Motor Carrier Exemption.
2. Certain employees covered by DOL regulations.
3. Railroad employees.
4. Airline employees.
5. Agricultural employees.

6. Employees of commuter rail lines.
7. Auto, truck, or farm equipment salespeople or repair people.
8. Trailer, boat, or aircraft salespeople.
9. Country elevator operators.
10. Processors of maple sap into sugar or syrup.
11. Employees engaged in transporting fruits and vegetables.
12. Taxicab drivers.
13. Live-in domestic employees.
14. Certain types of foster parents.
15. Employees of motion picture theaters.
16. Employees who tend trees or engage in lumbering.
17. Employees of amusement or recreational establishments located in a national park or other federal land.

## **Additional Resources on this Subject**

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### **A. SEMINARS**

Wage and Hour Workshop

### **B. REFERENCE MATERIAL**

FYI

Wage and Hour: Exemptions – Salary Basis Test

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<sup>i</sup> 29 C.F.R. § 541.601  
<sup>ii</sup> 29 C.F.R. § 541.100  
<sup>iii</sup> 29 C.F.R. § 541.102  
<sup>iv</sup> 29 C.F.R. § 541.101  
<sup>v</sup> 29 C.F.R. § 541.200  
<sup>vi</sup> 29 C.F.R. § 541.202(b)  
<sup>vii</sup> 29 C.F.R. § 541.300  
<sup>viii</sup> 29 C.F.R. § 541.302  
<sup>ix</sup> 29 C.F.R. § 541.400  
<sup>x</sup> 29 C.F.R. § 541.500  
<sup>xi</sup> 29 C.F.R. § 541.502  
<sup>xii</sup> 29 C.F.R. § 541.504