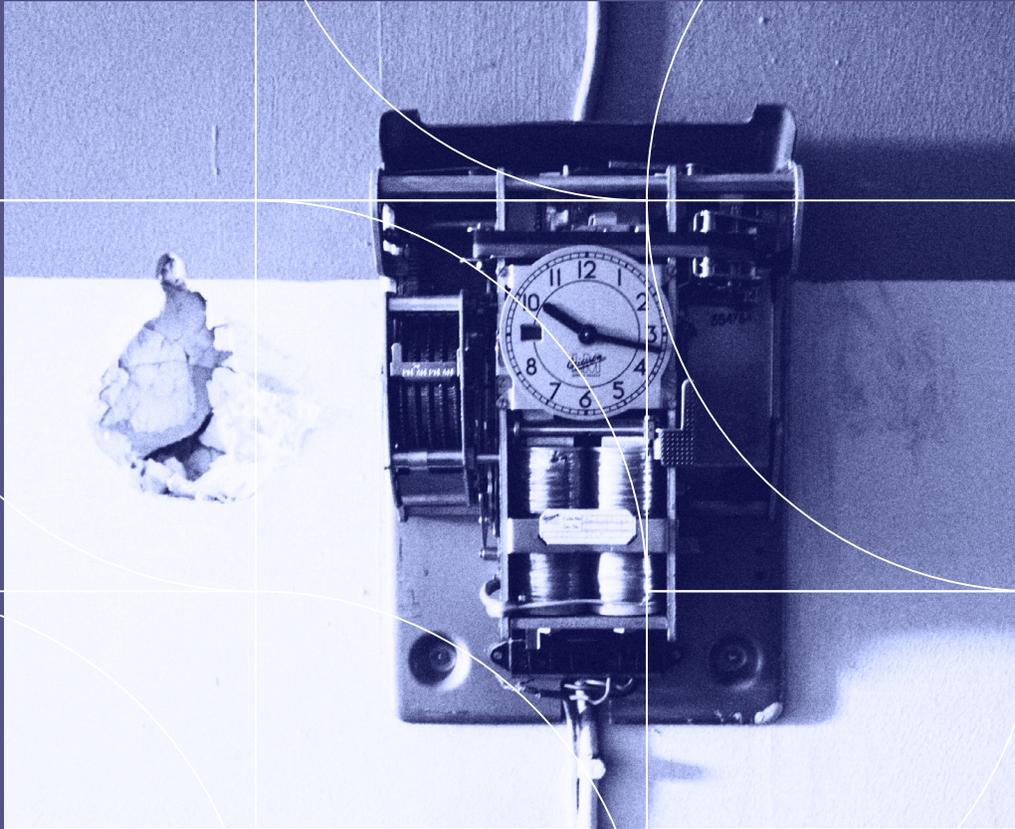




Exempt Employees



Because exempt misclassification issues are among those more prominently revealed during Wage-Hour Division investigations and are often the focus of costly litigation, this chapter of our FLSA Handbook explains the most common, “white collar” minimum wage and overtime pay exemptions.

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VII. EXEMPT EMPLOYEES

Certain employees may be exempt from the FLSA's overtime payment requirements pursuant to the DOL's so-called "white collar" exemptions. The white collar exemptions consist of six categories, each of which is discussed below: executive employees; administrative employees; learned professional employees; creative professional employees; skilled computer professional employees; outside sales employees; and highly compensated employees.¹¹⁹ These so-called "white collar" categories constitute the most broad-based exemptions to the FLSA's overtime requirements and cut across a spectrum of industries. The second type of exemption is the various lesser-known total and partial "non-white collar exemptions," also discussed below.

Virtually every employer covered by the FLSA faces the sometimes difficult task of deciding which, if any, workers will qualify for white-collar exempt status. Hazy regulations and sometimes conflicting court decisions relating to the tests for exemption mean that employers must use extreme caution — particularly in an era of aggressive regulatory investigations and enforcement actions — in making, documenting, and ultimately standing prepared to prove the appropriateness of their white-collar exemption decisions. Periodic self-auditing of worker classifications is essential to mitigate the risk of adverse WHD investigations and private litigation. As noted above, the United States Supreme Court's 2018 decision in *Encino Motorcars, LLC v. Navarro* swept away the frequently invoked notion that exemptions should be "narrowly construed," thus aiding employers in arguing that exemptions should be applied to particular positions, particularly where prior decisions analyzing and rejecting the at-issue exemption incorporated the now-discredited "narrow construction" reasoning.¹²⁰

A. White Collar Exemptions: Overview of the Three-Part Exemption Inquiry

As detailed in this section, the "white collar" exemptions require that most employees meet three tests in order to be exempt from the overtime requirement. Each of these tests is discussed in greater detail in Part VII.B. below.

1. The "Salary Level" Test

Employees must be paid at least a certain compensation level to qualify for exemption. Under the regulations currently in effect, the salary level test for exempt status requires payment of \$684 per week, or \$35,568 per year.

Once again, employers must be mindful of state salary level requirements for overtime exemptions that exceed those required under the FLSA. Under California law, for instance, to qualify for a white collar overtime exemption, an employee must be paid a weekly salary equaling at least twice the state's hourly minimum wage. In 2020, California's minimum wage for most employers is \$13.00 per hour, meaning that a salary of at least \$1,040 per week (\$13 x 2 x 40) or \$54,080 per year is required for exemption from California's overtime rules. In 2021, the threshold salary level amounts will increase to \$1,120 per week or \$58,240 per year based on a scheduled increase of the minimum wage to \$14 per hour for most employees. Thus, even if "exempt employees" satisfy the FLSA salary level requirement, failure to satisfy more stringent state law exemption requirements can leave employers on the hook for overtime pay under state law.

2. The “Salary Basis” Test

The employee must be paid the required weekly minimum amount of \$684 on a salary, rather than hourly, basis. While this test seems straight-forward, its application is not always simple, as discussed below.

3. The “Duties Test”

The employee must perform certain exempt primary duties. Paying an employee at least the minimum required amount on a salary basis does not, in and of itself, render the employee exempt from the FLSA’s overtime and minimum wage requirements.

- **Qualitative definition:** The FLSA’s implementing regulations define “primary duty” as “the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.”¹²¹ The regulations set forth factors to consider when determining an employee’s primary duty including, but not limited to: “the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.”¹²²
- **Specific percentage of time not required:** While some states’ laws (such as California) require that employees must work a certain percentage of their time performing defined exempt duties, the FLSA regulations do not set forth a specific time or percentage of time requirement for performing exempt duties in order to qualify for exemption.¹²³ Nonetheless, the regulations note that “[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. . . . Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.”¹²⁴
- **Performance, not title, is determinative:** Neither an employee’s job title nor job description will be determinative as to whether a given employee is an exempt employee. To be considered exempt, the employee must actually perform the duties required by the relevant exemption. Employers are well advised to review the duties of employees classified as exempt to determine whether they satisfy the duties test in all respects. Even though an employee might not satisfy all of the duties requirements of one exemption, however, he or she nonetheless might satisfy the requirements of another exemption. Some employees’ pay and duties may qualify them for exemption on more than one basis.¹²⁵

Application of the “duties test” varies depending upon whether the executive, administrative, professional, or outside sales exemption is at issue, as described in detail below.

B. The Salary Level Test

After several years of public discourse, political posturing, and litigation about earlier DOL regulations implementing the salary level test, regulations setting forth a new salary level requirement for the white collar overtime exemptions went into effect on January 1, 2020.¹²⁶ As noted above, the new overtime rule raised the threshold for exempt status from \$455 per week/\$23,660 per year to \$684 per week/\$35,568 per year.¹²⁷ Although the new overtime rule affected only the salary level requirement and not the duties tests for exemption (discussed below), DOL estimated that 1.3 million American workers classified as exempt before January 1, 2020 would become entitled to overtime pay based on their then-current pay rates. In the months leading up to January 1, 2020, therefore, employers in virtually every industry analyzed and changed pay levels and job duties to qualify or remove employees from exempt status, reviewed staffing and scheduling structures, revised payroll processes, and made other organizational adjustments to incorporate the new overtime pay requirement into their business and financial plans.

In recognition of evolving pay practices, the new salary level regulation allows employers to include annual nondiscretionary bonuses, incentives, and commissions to meet up to 10% of an employee's minimum salary level for exempt status. If an employee's nondiscretionary bonus or incentive payments in a particular 52-week period are too low, the new rule permits a "catch-up" payment within one pay period of the end of the 52-week period to maintain exempt status.¹²⁸

The minimum required salary is not pro-rated for part-time employees. If an employee makes less than \$684 per week he or she generally cannot be exempt even if he or she meets the duties test. Conversely, if the employee makes \$684 or more, the employee is eligible to be exempt, but *only if* he or she also satisfies the duties and salary basis tests detailed below.

C. The "Salary Basis" Test

With the exception of hourly paid computer professional employees who make at least \$27.63 per hour (an amount that is set by statute¹²⁹), doctors, lawyers, teachers, and outside sales employees, an exempt white-collar employee must be paid on a "salary basis." This means that the employee "regularly receives a predetermined amount constituting all or part of the employee's salary, which amount is not subject to reduction because of variations in the quality or quantity of work performed."¹³⁰ Thus, subject to certain exceptions, an exempt employee must receive his or her full salary for any week in which the employee performs *any* work without regard to the number of days worked or how well the job was performed.

1. General Rule Against Partial-Week Deductions

The salary basis test provides that an employer need not pay an employee his or her full salary in any week in which the employee performed *no* work.¹³¹ Thus, full-week deductions from salary do not violate the salary basis test.

But deductions in increments less than a week raise salary basis issues. If an employee is ready, willing, and able to work, deductions may not be made in anything other than full-week increments when work is not available because the employee's absence was not within the employee's control. Similarly, an employer cannot deduct pay for absences occasioned by jury duty, attendance in a litigation proceeding as a witness, or temporary military leave because, again, the absence was not within the employee's control.¹³²

2. Full-Day Deductions for Some Disciplinary Suspensions of Short Duration

Deductions “may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.”¹³³ While this exception could be read broadly, the DOL has cautioned that it should not. The DOL has noted that the term “workplace conduct” refers to conduct, not performance or attendance issues. The term, according to the DOL, refers to serious workplace misconduct like sexual harassment, violence, drug or alcohol infractions, or violations of the law.¹³⁴ Courts thus may interpret pay deductions in increments of less than a week for “insubordination” or other minor infractions to violate the salary basis test.

Furthermore, the disciplinary suspension must be imposed pursuant to a “written policy.” According to the DOL’s comments, “such policy need not include an exhaustive list of specific violations that could result in a suspension, or a definitive declaration of when a suspension will be imposed. The written policy should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension.”¹³⁵ According to DOL, the “written policy” requirement for this exception would be satisfied by a sexual harassment policy, distributed generally to employees, that warns employees that violations of the policy will result in disciplinary action up to and including suspension or termination. Employers’ anti-harassment and other disciplinary policies should be revised as necessary to avail themselves of this “written policy” exception. Many such policies provide that violations may result in discipline “up to and including termination of employment.” The safest approach is specifically including the words “unpaid suspension” as a possible penalty in any policy providing for discipline.

3. Full-Day Deductions for Personal Absences

Deductions for personal absences within the exempt employee’s control are treated differently under the salary basis test. Such absences may result in deductions from salary proportional to the time actually missed by the employee in *full-day increments* only.¹³⁶ Thus, an employer may make a full-day deduction for an exempt employee’s full-day absence taken for personal reasons (or require that the employee use available benefit time).

An employer also may make full-day deductions from an exempt employee’s pay for full-day absences occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability.¹³⁷ Deductions may be made for such absences before the employee has qualified under the plan, policy, or practice, and after the employee has exhausted his or her leave allowance.¹³⁸

4. Permissible Partial-Day Deductions for Exempt Employees

In only three limited circumstances may employers make partial-day deductions from an exempt employee’s salary:

- in the initial or terminal weeks of employment, the payment of an hourly or daily equivalent of the employee’s salary for the time actually worked is permissible;
- for violations of “safety rules of major significance” (for which employers usually would discharge an employee or suspend him or her for one or more full days);
or

- for intermittent leave taken under the Family and Medical Leave Act (“FMLA”). Deductions for intermittent leave are permissible only when the leave is taken under the FMLA. If the employee has not yet qualified for FMLA leave under the law, but the employer’s policies generously provide for leave for the employee anyway, deductions for intermittent leave taken under the employer’s policies do not qualify under this partial-day exception. Similarly, if the employee has taken his or her 12 weeks of leave, but the employer’s policies generously provide for additional leave, or the additional leave is granted as an accommodation under the Americans with Disabilities Act, partial-day deductions cannot be made.¹³⁹

Employers generally may provide additional compensation to exempt employees over and above a salary without jeopardizing the employee’s salaried status, even if paid on an hourly basis, and employers generally may deduct from an employee’s vacation, paid time off, or benefit time on an hour-for-hour basis (although some courts have expressed reluctance to accept hour-for-hour deductions).

5. Correcting Improper Salary Basis Deductions

The DOL salary basis regulations include a provision regarding the “effect of improper deductions from salary.” Under this regulation an employer who makes improper deductions from salary loses the exemption if it has an “actual practice” of making improper deductions.¹⁴⁰ Factors to consider when determining whether an employer has an actual practice of making improper deductions include but are not limited to:

- the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline;
- the time period during which the employer made improper deductions;
- the number and geographic location of managers responsible for taking the improper deductions; and
- whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.¹⁴¹

If an actual practice is found, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same manager(s) responsible for the actual improper deductions.¹⁴² Under this standard, if a first-line supervisor is responsible for the improper deductions, then the actual practice should be limited to a small group of otherwise exempt employees. If, however, the human resources department advised several managers to make deductions later deemed by the DOL or a court to be improper, then the salary basis violation could be found to have a much wider effect and potential overtime exposure could be much higher.

Isolated or inadvertent deductions will not result in the loss of the exemption for employees subject to them if the employer reimburses the employees for such improper deductions.¹⁴³

The regulations also provide employers with a defense akin to the affirmative defense to harassment complaints under the Supreme Court’s *Faragher* and *Ellerth* decisions and to

punitive damages under the Supreme Court's *Kolstad* decision.¹⁴⁴ Under it, an employer will not lose the exemption for an employee subject to improper deductions if the employer:

- has a clearly communicated policy that prohibits improper pay deductions and includes a complaint mechanism; and
- reimburses employees for any improper deductions; and
- makes a good-faith commitment to comply in the future.¹⁴⁵

Employers can evidence this “good-faith commitment” in various ways, including adopting or re-publishing to employees its policy prohibiting improper deductions, posting a notice including such a commitment on an employee bulletin board or intranet, training managers and supervisors, reprimanding or training the manager(s) who made the improper deductions, or establishing a telephone number for employee complaints. Employers thus have ample incentive to review and revise their employee handbooks and/or published pay policies, and to train managers and human resources representatives on salary basis compliance.

If, however, the employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, this safe harbor provision is inapplicable.

D. The Executive Exemption

To qualify for the executive exemption, the employee must satisfy three tests in addition to the salary basis and salary level requirements.

1. The Primary Duty Test

The employee's primary duty must be the *management of the enterprise or a recognized department or subdivision of the enterprise*.¹⁴⁶ The regulations make clear, however, that “concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption” if the employee otherwise meets the executive exemption.¹⁴⁷ This means, for example, that an assistant manager in a food service establishment who spends more than half of his or her working time performing duties such as serving customers, cooking food, stocking shelves, and cleaning the establishment may still be exempt from receiving overtime under the FLSA if (as detailed below) he or she has a “primary duty” of management, directs the work of at least two other employees, and has the requisite authority in which to change the status of other employees. “However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.”¹⁴⁸

Notwithstanding the concurrent performance rule, to qualify for exemption the employee's primary duty must be “management” in its nature. “Management” of the enterprise (or a unit of it) includes, but is not limited to, activities such as interviewing, selecting, and training employees; setting and adjusting rates of pay and hours of work; directing employees' work; maintaining production or sales records for use in supervision or control; appraising employee's productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work to be performed; determining techniques to be used; apportioning work among employees; determining the types of materials, supplies, machinery, equipment, or tools to be used or

merchandise to be purchased; providing for the safety and security of employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.¹⁴⁹

2. The Supervision Test

The employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent of two or more full-time employees.¹⁵⁰ “An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager’s absence does not meet this requirement.”¹⁵¹

3. The “Hiring/Firing” Test

To qualify for the executive exemption, the employee must have the authority to hire or fire employees or make recommendations as to employee status changes that are given “particular weight.”¹⁵² Significantly, this requirement generally will not be met by authority merely to reprimand, suspend, or even create a performance review. Authority over a “change in status” is required.

An employee’s suggestions and recommendations may be deemed to have “particular weight” even if a higher-level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the subordinate’s change in status. According to the DOL, whether an employee’s suggestions and recommendations are given particular weight depends on “whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; [and] the frequency with which the employee’s suggestions and recommendations are relied upon.”¹⁵³

E. The Administrative Exemption

The administrative exemption defies simple characterization as it can apply to many different types of jobs in a variety of different contexts. Stated in very general terms, this exemption covers those employees who are responsible, at a high level, for making decisions and performing activities directly related to the running or servicing of the business itself (e.g., the CFO, the credit manager, or a Human Resources manager). Exempt administrative employees are not usually involved with the direct production or provision of the services or products of the business (such as monitoring the production line where the product is made, or selling the product on the showroom floor). Courts sometimes discuss this concept in terms of a so-called “administrative-production dichotomy.”

The administrative exemption generally lacks the objective, bright-line tests found in some of the other exemptions (such as supervision of two or more employees required under the executive exemption). Further, the subjective nature of the discretion and independent judgment standard often has led to confusion in making administrative exemption determinations. Two tests must be met to qualify for the administrative exemption under the FLSA (in addition to the salary level and salary basis tests).

1. The Primary Duty Test

The employee must have the primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s

customers.¹⁵⁴ According to DOL regulations, “[w]ork directly related to management or general business operations includes, but is not limited to, work in functional areas such as 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 administration; legal and regulatory compliance; and similar activities.”¹⁵⁵

Among the examples identified in the regulations as potentially constituting exempt administrative work are insurance claims adjusters; certain financial services industry employees; some team leaders (for example, those with significant responsibility for designing and implementing major projects); executive assistants with substantial independent authority; human resources managers who implement, interpret, and formulate policy; and purchasing agents who have the authority to bind the company on significant purchases. Similarly, the regulations set forth examples of duties that are generally not exempt: inspectors, examiners, routine comparison shoppers, and public sector inspectors. These examples include a discussion of what factors are important in determining exempt status and are likely to provide helpful guidance to employers in evaluating their own work forces.¹⁵⁶

When the exemption regulations last were revised in 2004, the examples included in the regulation included appropriate examples for the modern, 21st-century workplace. Even since that time, however, the workplace context has evolved. In the modern service industry, large employers or a group of related entities sometimes maintain service centers whose own primary purpose is the support functions that the service center provides. In this context, applying the administrative exemption sometimes proves difficult, and advice of counsel experienced in assessing the administrative exemption classification should be sought.

2. The Discretion/Independent Judgment Test

The employee’s duties must include the *exercise of discretion and independent judgment with respect to matters of significance*.¹⁵⁷ Here, the employer must determine whether the employee’s primary duty includes “the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered” and whether the work is significant, substantial, important, or of consequence.¹⁵⁸ This does not require, in all cases, that the employee have the authority to make an independent decision which is not reviewable by others; rather, the employee may still exercise discretion and independent judgment, even if he or she makes recommendations for action, rather than actually taking action.¹⁵⁹

Among the specific inquiries that the regulations provide to assist employers in making this determination are whether the employee:

- has authority to commit the employer in matters that have significant financial impact;
- has authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- is involved in planning long- or short-term business objectives;

- investigates and resolves matters of significance on behalf of management; and
- represents the company in handling complaints, arbitrating disputes, or resolving grievances.¹⁶⁰

A recurring issue is the role that employer manuals, guidelines, and technical materials play in assessing the appropriateness of classifying an employee as exempt under the administrative exemption. Recognizing the prevalent and necessary use of technical and complex manuals in the 21st-century workplace, the DOL regulation states that an employee may still be exempt even when he or she consults such a manual.¹⁶¹ Employees who consult manuals to assist them in using their discretion and independent judgment to decide on an appropriate course of action in response to a novel or unique circumstance do not lose their exempt status simply because they consulted a manual. But when an employee consults manuals or established procedures and guidelines, and those manuals *limit* the employee's discretion by essentially telling him or her what to do or how to solve a problem within closely prescribed parameters, he or she is not performing exempt work.

Extensive and complex case law interprets and applies the FLSA's administrative exemption to various positions in banking/financial, insurance, and other service industries. Before concluding that a particular position qualifies for (or does not qualify for) the administrative exemption based on his or her job duties, employers should consult with counsel familiar with relevant case law in the applicable jurisdiction(s).

F. The Professional Exemptions

The FLSA regulations address three types of professional exemptions: (1) learned professionals, (2) creative professionals, and (3) computer professionals. Each is discussed below. Generally speaking, the professional exemption involves employees "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."¹⁶²

1. Learned Professionals

Generally, the learned professional exemption requires meeting the salary level and salary basis test, as well as three additional requirements:

- ***The primary duty test:*** The employee's primary duty must be the *performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.* Generally it involves using advanced knowledge to analyze, interpret, or make deductions from various facts. Conversely stated, "work requiring advanced knowledge" is generally *not* work that involves routine manual, mechanical, or physical work, or even routine mental work. It involves knowledge that cannot be attained at the high school level.¹⁶³
- ***The field of science or learning test:*** The employee's advanced knowledge must be in a *field of science or learning.* Examples of fields of science or learning are distinguished from the mechanical arts and skilled trades (where the

knowledge may be advanced, but is not in a field of science or learning) and include the traditional fields of science or learning such as law, medicine, theology, and teaching.¹⁶⁴

- ***The specialized intellectual instruction test:*** The employee's knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.¹⁶⁵ The best evidence of a learned profession is the attainment of the appropriate academic degree. The regulations recognize, however, that knowledge customarily acquired through a prolonged course of specialized intellectual instruction can also be acquired through alternative means involving a combination of intellectual instruction and work experience.

The regulations define key terms and provide specific examples of occupations which generally meet the duties test of a learned professional. They include: lawyers, chemists, doctors, physicists, scientists, registered nurses, teachers, engineers, accredited physician assistants, executive and sous chefs (with a four-year specialized academic degree), athletic trainers certified by the Board of Certification of the National Athletic Trainers Association, and licensed funeral directors and embalmers who are licensed by and work in a state with a four-year academic study requirement.¹⁶⁶

Conversely, the regulations provide that the learned professional exemption is not applicable to the following categories of jobs:

- Jobs in which most employees acquire their skill by experience rather than through advanced specialized intellectual instruction. For example, no amount of military training can turn a technical field into a learned professional field.
- Jobs which only require completion of an apprenticeship program (or other short course of specialized training).
- Jobs requiring a four-year college degree in *any field* or a two-year degree as a standard prerequisite for entrance into the field.

Examples of specific jobs that are *not* within the learned professional exemption include:

- Licensed practical nurses,
- Licensed vocational nurses,
- Skilled tradespersons,
- Technicians,
- Beauticians,
- Paralegals,
- Journalists, and

- Various engineering and repair technicians (such as journeyman electricians).¹⁶⁷

2. Creative Professionals

Qualifying for the creative professional exemption requires that employees meet the salary basis and salary level test, and two other requirements:

- ***The Primary Duty Test:*** The employee's primary duty must include *work requiring invention, imagination, originality, or talent.*
- ***The Artistic Field Test:*** The employee's work must be in a *recognized field of artistic or creative endeavor* as opposed to routine mental, manual, mechanical, or physical work.¹⁶⁸

General examples of fields of artistic or creative endeavor include music, writing, acting, and the graphic arts. Specific examples of job titles generally included within the creative professional exemption include actors, musicians, composers, conductors, soloists, painters, and cartoonists (who are only given broad outlines of their subject matter), essayists, novelists, short-story writers, and screenplay writers (who choose their subjects and submit finished work to their employers), as well as certain positions in advertising agencies.¹⁶⁹

Generally, the exemption is not available to workers whose duties are dependent on intelligence, diligence, and accuracy as opposed to invention, imagination, originality, or talent. Copyists, animators of motion-picture cartoons, or retouchers of photographs (whose work is not considered to be creative in nature) generally do not fit within the creative professional exemption.¹⁷⁰

Whether print and on-air journalists qualify for the creative professional exemption was disputed in the courts. The regulations in effect since 2004 were intended to reflect the divided federal case law by providing that exempt status determinations are to be made on a case-by-case basis. The regulations caution that “workers who simply collect and organize public information (and do not provide a unique or creative interpretation or analysis) are not likely to be exempt creative professionals.”¹⁷¹ Examples of non-exempt journalist work include collecting, organizing and recording information that is routine or already public, rewriting press releases (in the DOL's words, “gathering and regurgitating facts”), writing standard recountings of public information on routine community events, and doing work that is subject to substantial control by the employer.

Because of legal restrictions placed on news and other media organizations, the DOL's focus on the exercise of journalistic control over the work may present a barrier to reclassification if it is interpreted as controlling the final content that is published. But journalists may satisfy the duties requirements for the creative professional exemption. Examples of exempt journalist work may include on-air work in radio, television or other electronic media, conducting investigative interviews, analyzing or interpreting public events, writing editorials and opinion columns and other commentary, generating and developing story ideas with little editorial input, and acting as a narrator or commentator.¹⁷²

3. Computer Professionals

To qualify for the computer employee exemption, an employee must satisfy two tests:

- ***The Primary Duty Test:*** The employee's primary duty must consist of:
 - The application of systems-analyst techniques and procedures, including consulting with users, to determine hardware, software, or systems functional specifications; or
 - The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; or
 - The design, documentation, testing, creation or modification of computer programs related to machine-operating systems; or
 - A combination of these duties.¹⁷³
- ***The Salary/Hourly Pay Test:*** The employee must be paid on a salary basis of not less than \$684 per week or, alternatively, if paid on an hourly basis, not less than \$27.63 per hour.¹⁷⁴

The exemption is not available to an employee engaged in the manufacture or repair of computer hardware, or engineers or drafters who are not otherwise engaged in computer systems analysis and programming.¹⁷⁵

G. The Outside Sales Exemption

Qualifying for the outside sales exemption hinges on meeting the primary duty test. Unlike the other white collar exemptions (and in recognition of the fact that most outside salespersons are paid on a commission basis), to qualify for the outside sales exemption, the employee need not meet the \$684 salary level or be paid on a salary basis.

The employee's primary duty must be making sales or obtaining orders for contracts for services or for the use of facilities for which the client or customer will pay a consideration. The sales employee must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty."¹⁷⁶

- ***No numeric requirement on non-exempt duties:*** The primary duty test does not impose any percentage or numeric limits on non-exempt, non-sales work in which the employee engages. Further, work performed incidental to and in conjunction with the employee's own outside sales or solicitations – such as making deliveries and collections, writing sales reports, planning itineraries, attending sales conferences, etc. – is regarded as exempt outside sales work.¹⁷⁷
- ***Related promotional activities:*** In order to constitute exempt work, promotional activities must relate to the outside sales employee's own sales. Promotional activities related to the sales of others is not exempt outside sales work (though in some circumstances it may qualify as administrative exempt work). Thus, working at a trade show booth to promote one's own sales is exempt work. But

working there to promote the company's sales in general may not be exempt work.¹⁷⁸

- ***Away from the employer's place of business:*** The employee must be customarily and regularly engaged away from the employer's place or places of business. To be engaged "away from an employer's business or places of business," the outside sales employee must make the sales physically at the customer's place of business. Sales by phone, email, or the Internet can be activities adjunct to physically visiting the customer, but are not considered outside sales work if they are the principal vehicle for the sale.¹⁷⁹

H. The Highly Compensated Employees Exemption

The DOL has created a "bright line" test for workers who do not perform manual labor but do perform duties of an executive, administrative, or professional employee, and whose salary level is so high that they were not intended to be provided the protections of the overtime pay provisions of the FLSA. To this end, the DOL has formulated a streamlined exempt status test for highly compensated employees who earn more than \$107,432 per year (including salary and other payments), at least \$684 of which is paid as salary each week; and who perform at least one exempt duty of an executive, administrative, or professional employee.¹⁸⁰

No exceptions or allowances are made for part-time employees, or for employees of non-profits, colleges or universities, or public entities.

1. The Primary Duty Test

To qualify for the highly compensated employee exemption:

- the employee's primary duty must include performing *office or non-manual work*; and
- the employee must "customarily and regularly" *perform at least one of the exempt duties* or responsibilities of an exempt executive, administrative, or professional employee.¹⁸¹

Thus, an employee who customarily and regularly directs the work of two or more other employees (but does not have the authority to change another employee's status or provide recommendations that are given particular weight) may qualify as a highly compensated employee although the worker does not qualify as an executive employee.

The following employees performing manual work (including non-management production line workers) and non-management employees are *not* within the exemption no matter how highly they might be paid:

- Maintenance,
- Construction, and

- Similar occupations such as
 - Carpenters,
 - Electricians,
 - Mechanics,
 - Plumbers,
 - Ironworkers,
 - Craftsmen,
 - Operating engineers,
 - Longshoremen,
 - Construction workers,
 - Laborers, and
 - Other employees who perform work involving repetitive operations with their hands, physical skill and energy.

2. The Minimum Salary Test

An employer cannot count toward the minimum compensation of \$107,432 credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.¹⁸² Employers must prorate the \$107,432 in the case of an employee who works only part of the year. The prorating formula must be used for employees who terminate before a year ends, as well as for those who begin work during a 52-week year period that has already begun.¹⁸³

The employee's total annual compensation must include *at least \$684 per week paid on a salary basis*. Employers who fail to abide by this weekly minimum salary requirement risk losing the highly compensated employee exemption even though employees ultimately may be paid an annual amount well exceeding \$107,432. Under the current regulations, commissions, nondiscretionary bonuses, and other nondiscretionary compensation may be included in determining whether the employee meets the *annual* salary threshold, but such amounts may not be used to satisfy the weekly salary payment requirement.¹⁸⁴ Employers must closely follow special DOL rules which allow payment of a single lump-sum, make-up amount to "sure-up" the required \$107,432 amount at the end of the year (to be paid to the employee within one month after the end of the year).¹⁸⁵ Employers should review their practices to ensure that they provide adequate documentation of the purpose of the payment to the employee, and that employees are adequately apprised as to the purpose of the payment.

I. The “Non-White Collar” Exemptions

In addition to the white-collar overtime exemptions, the FLSA contains other exemptions to the Act’s overtime pay and minimum wage provisions. Some of these are statutory exemptions to both the overtime and minimum wage provisions. Some of these are exceptions to the overtime provisions only, meaning the employee still must be paid minimum wage even if exempt from the Act’s overtime requirements. Whether the employer or the employee bears the burden of proof on minimum wage or overtime entitlement may depend on which section of the FLSA is at issue, and whether it is considered to be an “exception” or “exemption” to the Act’s pay requirements.¹⁸⁶

Regardless of exempt status, a covered employer must continue to adhere to the record-keeping, child labor, and other applicable requirements of the FLSA with respect to its employees. Further, many of these lesser-known exemptions are not necessarily replicated under state overtime laws as the white-collar exemptions typically are. Accordingly, as with any exemption, management should consult with counsel before applying any of these exemptions.

1. Total Exemptions

The non-white collar total exemptions (i.e., exemptions from both the overtime and minimum wage requirements) include:

- Employees of an establishment which is a seasonal amusement or recreational establishment, organized camp, or religious or non-profit educational conference if:
 - It does not operate for more than seven months in a calendar year; or
 - Its average receipts any six months of the preceding calendar year were not more than 33 percent of its average receipts for the other six months of that year.
- Employees of local newspapers with a circulation of less than 4,000
- Switchboard operators of small telephone companies
- Seamen employed on foreign vessels
- Employees engaged in fishing operations
- Farm workers employed on small farms
- Casual babysitters
- Persons employed as domestic companions to the elderly or infirm in a private home.¹⁸⁷

2. Partial Exemptions

Some “non-white-collar” employees are exempt only from the FLSA’s overtime pay requirements, but are still subject to its minimum wage requirements. One of the most significant of such partial exemptions is known as the Motor Carrier Act (“MCA”) exemption. This exemption applies to employees over whom the Secretary of Transportation has the power to establish qualifications and maximum hours of service under the Motor Carrier Act. These employees include truck drivers, helpers, and mechanics working on those trucks if those trucks travel between states, or if they are engaged in the “continuous flow of commerce,” even if they travel only within one state.¹⁸⁸

Other examples of employees exempt only from the FLSA’s overtime requirements include:

- Auto, truck, trailer, farm implement, boat, or aircraft salespersons, or parts clerks and mechanics servicing these vehicles, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
- Employees engaged in newspaper delivery
- Certain railroad and air carrier employees
- Taxi drivers
- Seamen employed on domestic vessels
- Local delivery employees paid on approved trip rate plans
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations
- Domestic service workers who reside in their employers’ residences
- Employees of motion picture theaters
- Employees engaged in agriculture
- Employees who lack a high school diploma or who have not completed the eighth grade and who are required to spend up to 10 hours per workweek engaged in remedial reading or training in other basic skills without receiving time and one-half overtime pay for these hours. Nevertheless, the employees must receive their normal wages for hours spent in such training, and the training must not be job-specific.
- Employees subject to a collective bargaining agreement with special guarantee provisions with a union certified by the NLRB. These employees may work an average of 40 hours per week over a six-month period for a total of 1,040 hours, or over 12 months for a total of 2,080 hours, without earning one and one-half

times their regular rates of pay for the hours worked in excess of 40 per week, notwithstanding a limit of more than 12 hours per day or 56 hours per week.¹⁸⁹

- As noted above, the “Section 7(i) exception” from the FLSA’s overtime provisions exists for commissioned employees of “retail and service establishments” who receive at least one and one-half times the current minimum wage and at least 50 percent of whose earnings come from commissions.¹⁹⁰

J. State Exempt Status Laws and Regulations

A complicating factor for many employers in complying with the federal exempt status regulations is the presence of state overtime laws. Many states have their own overtime laws patterned after and, in many cases, essentially identical to the FLSA, including the white-collar exemptions. Many of those states’ exemption rules provide that employees who are exempt under the FLSA’s white-collar exemptions are also exempt from the overtime requirements under state law. But in other states, as highlighted in Part XI below, exemption laws may vary considerably from federal law. Careful planning, training, and employee supervision may be required to ensure compliance with both federal and state overtime exemptions.

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