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Who is Covered or Not Covered by FLSA

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

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Who is Covered or Not Covered by FLSA

Reference Number: MTAS-910

The FLSA covers a wide range of employees in the public sector. The act does not, however, apply to all employees. Some individuals simply are not covered (non-covered employees). Others, while covered by the act, are exempted from certain provisions (exempt employees).

Non-covered employees are not bound by any provisions of the FLSA. Exempt employees, while covered by the FLSA, are exempt from its minimum wage and overtime provisions. Employers must keep records for non-exempt and exempt employees, however, there are no FLSA record keeping requirement for non-covered employees.

The central overtime provision of the FLSA states that **"no employer shall employ any of his employees ... for a work week longer than forty hours unless such employee receives compensation ... at a rate not less than one and one-half times the regular rate at which he is employed."** 29 U.S.C. § 207(a). Section 29 U.S.C. § 203(d) of the act defines an employer to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," including a public agency.

Non-Covered Employees

Reference Number: MTAS-1518

The act defines an "employee entitled to the protection of the act" 29 U.S.C. § 203(e)(2)(C) to include:

(C) any individual employed by a state, political subdivision, or an interstate governmental agency, other than such an individual —

(i) Who is not subject to the civil service laws of the state, political subdivision, or agency;

(ii) Who:

I. Holds a public elective office of that state, political subdivision, or agency;
II. Is selected by the holder of such an office to be a member of his personal staff;
III. Is appointed by such an office holder to serve on a policy making level;
IV. Is an immediate advisor to such an office holder with respect to the constitutional or legal powers of his office; or
V. Is an employee in the legislative branch of that state, political subdivision, or agency.

Elected officials, their personal staffs, policy making appointees, and legal advisors are not covered (non-covered employees) as long as they are not subject to the civil service laws of their state or local government. Therefore, any non-elected individual employed by a municipal government who is subject to a civil service system is covered. According to the DOL regulations 29 C.F.R. § 553.11(c), the term "civil service" refers to:

"... a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement. Continued tenure of employment under civil service, except for cause, is provided."

In 1985, a new non-covered employee category was added to 29 U.S.C. § 203(e)(2)(C)(i-v) of the act. The amendment "excluded employees not subject to civil service law who work in the legislative branch of a state or one of its political subdivisions." Thus, almost all non-civil service employees in the state legislature or county, city council or board are excluded by this provision. Additionally the Department of Labor has determined that "no matter what activity an elected official performs, he/she is not considered an employee for FLSA purposes." (DOL Wage and Hour opinion letter, December 3, 1986.)

Also not covered by the act are personal staff members who are selected or appointed by elected public officials. According to 29 C.F.R. § 553.11(b), "the term 'personal staff member' includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such officials." "Personal staff member does not include individuals supervised by someone other than the official, even if initially selected for the position by the elected official." 29 C.F.R. § 553.11(b). Furthermore, to qualify for the exemption, a personal staff member must not be subject to the civil service laws of the employing agency. It would not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

To determine whether an employee is a member of an elected official's personal staff, the Department of Labor (DOL) issued a Wage and Hour Opinion dated December 19, 1974, that provides a test of exclusion based on personal staff membership. Among the tests to be considered are the following:

1. Is the person's employment entirely at the discretion of the elected official;
2. Is the position not subject to approval or clearance by the personnel department or division of any part of the government;

3. Is the work performed outside of any position or occupation established by a table of organization as part of the legislative branch or committee formed by an act of the legislature; and
4. Is the person's compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the officeholder?

DOL further elaborated on this issue by stating in an opinion letter dated April 30, 1975, that, "individuals such as pages, stenographers, telephone operators, clerks, typists and others may be considered employees under the act."

Policy Making Appointees and Legal Advisors

Reference Number: MTAS-913

Also classified as non-covered under the act are policy-making appointees. When a publicly elected official appoints an individual to serve on a policymaking level, such an appointed individual is not covered by the act. To fall within the policy-making appointee exception, the staff member must be appointed by and serve solely at the pleasure or discretion of the elected official and must formulate policy rather than simply implement or apply the policy to others. In *Elrod v. Burns*, 427 U.S. 347, 1976, the courts ruled that "in determining whether an employee occupies a policymaking position, consideration must be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals."

Immediate legal advisors to elected officials also are not covered by the act. "Immediate advisors are defined as 'staff who serve as advisors on constitutional matters or legal matters and who are not subject to the civil service rules of the employing agency'." 29 C.F.R. § 553.11(d). City attorneys are clearly outside the coverage of the act because they advise on legal matters and generally are not subject to the civil service rules of the organization.

Volunteers, Independent Contractors, Prisoners, Trainees

Reference Number: MTAS-1520

Another group of individuals not covered by the act include bona fide volunteers, independent contractors, prisoners and trainees.

Volunteers:

29 U.S.C. § 203(e)(4)(A) provides that "employee does not include any individual who volunteers to perform service for a public agency that is a state, a political subdivision, or an interstate governmental agency, if:

- The individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- Such services are not the same type of service which the individual is employed to perform for such public agency.

There are several issues to be evaluated when determining the volunteer status of an individual in the public sector. The first has to do with whether two agencies of the same state or local government constitute the same or separate public agencies. The second issue arises when considering whether the employee is volunteering for the "same type of services" that the individual is employed to perform for the same agency.

The bottom line is that individuals may not volunteer to do what they are otherwise paid to provide. DOL will consider:

- The duties and other factors contained in the Dictionary of Occupational Titles
- The facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee. 29 C.F.R. § 553.103(a)

Examples of when an employee **would not** be considered a volunteer are:

> A nurse employed by a state hospital who volunteers nursing services at a state-operated clinic (which is not a separate agency); or a firefighter [who] volunteers as a firefighter at the same public agency. (Note: A January 7, 1988, DOL opinion letter stated that a firefighter may volunteer to perform the same services for a different public agency in another jurisdiction without incurring any entitlement to overtime compensation.)

The following employees, however, **would be** considered bona fide volunteers because they are not engaged in volunteering the "same type of services":

> A city police officer who volunteers as a part-time referee in a city basketball league; or an employee of the city parks department who serves as a volunteer firefighter; or an office employee of a city hospital who volunteers to spend time with a disabled or elderly person in the same institution during off-duty hours.

In several opinion letters, the DOL emphasized that public employees can volunteer for the same agency that employs them if the volunteer position is substantially different from their paid work. An employee cannot be both a "paid" employee and a "non-paid" volunteer while performing the same type of work for the same employer.

Independent Contractors:

Another class of non-covered individuals are independent contractors. As a general rule, independent contractors bid to perform government work and are evaluated based on results rather than their day-to-day operations. Independent contractors control their own workers and must ensure that those workers are compensated in accordance with the FLSA. The legal test that establishes a true independent contractor is called the “economic reality test,” which looks at the degree of control exerted, the worker’s opportunity for profit or loss, the worker’s investment in the business, the permanence of the working relationship and the degree of skill required to perform the work. *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984). Failure to meet the economic reality test means the individual is not an independent contractor and must be treated as an employee for FLSA purposes. Other courts have developed similar standards (*Donovan v. Dial Am. Marketing Inc.*, 757 F.2d 1376 (3rd Cir. 1985) and *Brock v. Superior Care Inc*., 840 F.2d 1054 (2nd Cir. 1988).

The U.S. Supreme Court has on a number of occassions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Courts have held that it is the total activity or situation which controls. Among the factors which the Court considered significant are:

1. The extent to which the services rendered are an integral part of the principal's business;
2. The permanency of the relationship;
3. The amount of the alleged contractor's investment in facilities and equipment;
4. The nature and degree of control by the principal;
5. The alleged contractor's opportunity for profit and loss;
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;
7. The degree of independent business organization and operation. (Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA))

There are certain factors that are immaterial in determining if there is an employment relationship. Such facts are the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by the State/ or local government, are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

The best strategy when hiring an independent contractor is to negotiate a contract that gives the contractor the greatest possible freedom as to the manner and schedule for performing the work. Also, the employing agency should avoid, if possible, long-term or exclusive contracts and other onerous requirements that may be deemed to make the contractor dependent on the business. The contractor should bear all or at least a portion of the risk of loss under the contract and should supply his or her own tools and materials needed to perform the work. Once the work is done, the employing agency should avoid, if possible, any ongoing supervision or direction of the work

Prisoners:

Prisoners who are required to work by or for the government also are not considered employees under the FLSA and need not be paid minimum wage or overtime. Thus prisoners can be worked long hours by a governmental entity without an FLSA violation. Moreover, it is not a violation of the Constitution, since they have no right to any pay. *Woodall v. Partilla*, 581 F. Supp. 1066, 1074 (N.D. Ill. 1984).

Trainees:

Finally, the last groups of non-covered individuals are trainees. The DOL issued an opinion letter dated January 6, 1969, which established guidelines for determining whether trainees are employees covered by the act.

*Whether trainees are employees depend upon **all** of the circumstances surrounding their activities on the premises of the employer. If **all** six apply, the trainees are not employees:*

- *The training, even though it includes actual operation of the facilities ..., is similar to that which would be given in a vocational school*
- *The training is for the benefit of the trainee*
- *The trainees do not displace regular employees, but work under close observation*
- *The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded*
- *The trainees are not necessarily entitled to a job at the completion of the training period*
- *The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training*

Exempt White-Collar Employees

Reference Number:

MTAS-920

The Executive, Administrative, Professional and Computer Employees Exemptions

In addition to certain elected, appointed, and volunteer employees not being covered by the FLSA, other employees are exempt from the minimum wage and overtime provisions of the act. Like non-covered workers, exempt employees are covered by the Equal Pay Act provisions, but unlike non-covered employees they are still covered by FLSA record keeping requirements.

The exemptions we are concerned with relate to executive, administrative, professional and computer employees, and are otherwise known as the “white collar or Executive, Administrative and Professional (EAP) exemptions.” The exemptions are based on the specific job description and duties of the employee involved.

29 C.F.R. § 541.0 of the Fair Labor Standards Act provides “an exemption from the act’s minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity.” 29 C.F.R. § 541.400 provides “a possible exemption from the minimum wage and overtime requirements for computer system analysts, computer programmers, software engineers, and other similarly skilled computer employees.”

The rules provide three standards to be met for the exemption to apply:

- The employee must be paid a pre-determined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the “salary basis test” as defined in 29 C.F.R. § 541.602)
- The amount of salary paid must meet minimum specified amounts (the “salary level test” as determined in 29 C.F.R. § 541.600)
- The employee’s job duties must primarily involve executive, administrative or professional duties (the “duties tests”) as determined in 29 C.F.R. § 541.700

Salary Level Test

Reference Number: MTAS-963

To qualify as an exempt executive, administrative or professional employee, an employee must be compensated on a salary basis at a rate of not less than $684 per week, exclusive of board, lodging or other facilities. The requirement will be met if the employee is compensated biweekly on a salary basis of $1,368, semimonthly on a salary basis of $1,482, monthly on a salary basis of $2,964 or annually on a salary basis of $35,568. The shortest period of payment that will meet this compensation requirement is one week. In the case of computer employees the compensation requirement also may be met by providing compensation on an hourly basis at a rate not less than $27.63 an hour or annually on a salary basis or $57,470.40. (29 C.F.R. § 541.400)

In the case of professional employees, an exception to the salary basis requirement is in effect. It applies to certain professionals. “Among those excluded are teachers (29 C.F.R. § 541.303(d)); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice; or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program.

An employee with total annual compensation of at least $107,432 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. A high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s duties. This exemption applies only to employees whose primary duty includes performing office or non-manual work. (29 C.F.R. § 541.601)

Salary Basis Test

Reference Number: MTAS-921

An employee is considered to be paid on a “salary basis” if the employee regularly receives each pay period, on a weekly or less frequent basis, a pre-determined amount constituting all or part of the employee’s compensation, which is not subject to reduction because of variations in the quality or quantity of work performed. An exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked unless subject to the exemptions provided by the law. (29 C.F.R. § 541.602)

The prohibition against deductions from pay is subject to the following exceptions:

1. Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. 29 C.F.R. § 541.602(b)(1). Thus, if an employee is absent for one or more full days to handle personal affairs, the employee’s salaried status will not be affected if deductions are made from the salary for the full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full day absence.

2. Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) 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. 29 C.F.R. § 541.602(b)(2). The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee qualifies under the plan, and after the employee has exhausted the leave allowance provided by the benefit. For example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the 12 weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits.
3. Deductions may not be made for absences of an exempt employee because the employee serves on jury duty; for attendance as a witness; or temporary military leave, the employer can offset any amount received by an employee as jury fee, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption. 29 C.F.R. § 541.602(b)(3).
4. Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance (those related to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines). 29 C.F.R. § 541.602(b)(4).
5. Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions on one or more full days imposed in good faith for infractions of workplace conduct rules. 29 C.F.R. § 541.602(b)(5). Such suspensions may be imposed pursuant to a written policy, applicable to all employees.

"An employer is not required to pay the full salary in the initial or terminal week of employment." 29 C.F.R. § 541.602(b)(6). An employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.

"An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act." 29 C.F.R. § 541.602(b)(7). Rather, when an exempt employee takes unpaid leave under the act, an employer may pay a proportionate part of the full salary for time actually worked. DOL's regulations under the FMLA provide that deductions may be made from the salaries of exempt executive, administrative and professional employees "for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee." 29 C.F.R. § 825.206(a). Thus, the deduction can be hour for hour.

FMLA regulations state that this special exemption to payment on a salary basis "applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as one of the four type of FMLA leave." 29 C.F.R. § 825.206(c). Deductions may not be made from the salary of an exempt employee (1) who works for an employer with fewer than 50 employees; (2) who works at a site with fewer than 50 employees within a 75-mile radius; or (3) where the employee has not worked the required 1,250 hours necessary to qualify for FMLA leave.

When calculating the amount of allowed deduction from pay, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules may be made in any amount. (29 C.F.R. § 541.602(c))

The regulations allow an employer to provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirements if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least the minimum weekly required amount paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus, straight-time hourly amount, time and one-half or any other basis), and may include paid time off. (29 C.F.R. § 541.604)

Employees of Public Agencies

Reference Number: MTAS-2120

The regulations (29 C.F.R. § 541.710) also provide that an employee of a public agency who otherwise meets the salary basis requirements of 29 C.F.R. § 541.602 shall not be disqualified from exemption under 29 C.F.R. §§ 541.100, 541.200, 541.300, or 541.400 on the basis that such employee is paid according to ***a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability***, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work day when accrued leave is not used by an employee because:

- Permission for its use has not been sought or has been sought and denied;

- Accrued leave has been exhausted; or
- The employee chooses to use leave without pay.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is reduced accordingly. As 29 C.F.R. § 541.710 states, "The special pay deduction rule for public sector employers is based on 'principles of public accountability'."
DOL explains that:

Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or "phantom" employees. 57 Fed. Reg. 37,676 (Aug. 19, 1992).

As a result of this rule, public sector employers may make certain types of deductions from the salary of otherwise exempt employees that a private sector employer would not be permitted. These include deductions for partial day absences when leave was not used or has been exhausted. The regulation also allows exempt employees to be furloughed for budget reasons without affecting their exempt status, except for the workweek in which the furlough occurs. 57 Fed. Reg. 37,674-75 (Aug. 19, 1992). The exceptions, however, apply only if the pay systems are established by statute, ordinance, regulation, policy or practice.
"If an employer discovers it has made deductions from the pay of an otherwise exempt employee that could potentially destroy the salary basis method or payment and, therefore, the exempt status of their employee, the employer that makes improper deductions from the salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay the employee on a salary basis." 29 C.F.R. § 541.603(a). The employer's intent is the "central inquiry" in determining whether the exemption should be forfeited. 69 Fed. Reg. 22,179.

Safe Harbor and Window of Correction

Reference Number: MTAS-2121

The salary basis regulations include a "window of correction" and a "safe harbor," both of which permit employers to retain the exempt status of their employees in certain situations involving improper pay docking. "Improper deductions from employee salaries that are either isolated or inadvertent will not result in the loss of the exemption if the employer reimburses the employee for such improper deduction." 29 C.F.R. § 541.603(c). This is called the "Window of Correction."

"If an employer has a clearly communicated policy that prohibits improper deductions and a complaint mechanism, reimburses employees for the improper deduction and makes a good faith commitment to comply with the FLSA's salary basis test in the future, the employer will not lose the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. DOL refers to this new rule as a "safe harbor" provision." 29 C.F.R. § 541.603(d).

The safe harbor provision applies regardless of the reasons for the improper pay deduction. The safe harbor is available for both improper deductions made because there is no work available and improper deductions made for reasons other than lack of work. DOL has provided a sample policy to help employers comply with the new salary basis test regulations. The written salary basis policy [1] may be included in the employer's employee handbook or given directly to exempt employees, but there is no indication in the rules that employees must sign that they have received such a policy.

Payment on a Fee Basis

Reference Number: MTAS-922

While uncommon in the public sector, bona fide administrative and professional employees may also be paid on a "fee basis", rather than a salary basis. "An employee will be considered to be paid on a fee basis if the employee is paid an agreed sum for a single job regardless of the time required for its completion. A fee is paid for the kind of job that is "unique" rather than for a "series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again." Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. "To determine whether the fee payment meets the minimum salary required for exemption, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $684 per week if the employee had worked 40 hours." 29 C.F.R. § 541.605.

The Department provides the example of an artist paid $500 for a picture that took 20 hours to complete. Accordingly, this would meet the minimum salary requirement for exemption since the earnings at this rate would yield the artist $1000 if 40

hours were worked and the salary level would be $913. 29 C.F.R. § 541.605(b).

Duties Test

Reference Number: MTAS-923

To qualify for exemption under the regulations, the employee also must meet the “duty test.” To qualify, an employee’s “primary duty” must be the performance of exempt work. The term “primary duty” means:

… the principle, 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. Factors to consider when determining the primary duty of an employee include, but are 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 non-exempt work performed by the employee. 29 C.F.R. § 541.700(a).

The amount of time spent performing exempt work can help determine whether exempt work is the primary duty of an employee. “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 requirements if the other factors support such a conclusion.” 29 C.F.R. § 700(b).

Work that is “directly and closely related” to the performance of exempt work also is considered exempt work. “The phrase ‘directly and closely related’ means tasks that are related to exempt duties and that contribute to or facilitate performance. ‘Direct and closely related’ work may include physical and/or menial tasks that arise out of exempt duties, and the routine work without which the exempt employee’s work cannot be performed properly (e.g., record keeping, monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine). Work is not 'directly and closely related' if the work is remotely related or completely unrelated to exempt duties.” 29 C.F.R. § 541.703(a).

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances. 29 C.F.R. § 541.704.

Executive Exempt Employee

Reference Number: MTAS-925

An employee in a bona fide executive capacity is an employee (1) who is compensated on a salary basis at a rate of not less than $684 per week, exclusive of board, lodging or other facilities, (2) whose primary duty is management of the organization in which the employee is employed or of a customarily recognized department or subdivision, (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(a).

“Management” as defined by the DOL regulation (29 C.F.R. § 541.102) “includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; … appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; providing for the safety and security of the employees or the property; planning and controlling the budget and monitoring or implementing legal compliance measures.” This is not an exhaustive list, and other activities also may be management duties.

29 C.F.R. § 541.103 provides that "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.” It provides that when an organization “has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.” For example, a large human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function. A recognized department or subdivision does not have “to be physically within the employer’s establishment and may move from place to place. Continuity of the same subordinate personnel is not essential to the existence of a recognized

unit with a continuing function." Use of a staffing pool, however, does not destroy the exempt employee's status. The phrase "customarily and regularly" means a frequency that is recurrent and performed every workweek. 29 C.F.R. § 541.701. DOL, in an August 20, 1992, opinion letter, further defined "customarily and regularly" to entail "over a significant time span," especially in smaller organizations.

The phrase "two or more other employees means two full-time employees or their equivalent." 29 C.F.R § 541.104(a). "The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or their full-time equivalent (FTE)." 29 C.F.R. § 541.104(b). "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. Hours worked by an employee cannot be credited more than once for different executives. Thus shared responsibility for supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor can be credited as a half-time employee for both supervisors" 29 C.F.R. § 541.104(d). In *Secretary of Labor v. Daylight Dairy Products Inc.*, 779 F.2d 784 (1st Cir. 1985), the court stated that a manager who meets the 80 hour rule only 76 percent of the time falls short of the requirement to customarily and regularly supervise 80 employee-hours of work.

The exempt executive employee must have the authority to hire or fire other employees. Alternately, 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. 29 C.F.R. § 541.105. "To determine whether an employee's suggestions and recommendations are given 'particular weight,' factors to be considered include, but are not limited to, 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." 29 C.F.R. § 541.105.

Concurrent Duties of Executive Employees

Reference Number: MTAS-1521

"Concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption if the requirements of the Act are met. 29 C.F.R. § 541.106(a). Generally, exempt executive employees make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work" while nonexempt employees who perform exempt work generally are directed by a supervisor to perform the work. "An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive." 29 C.F.R. § 541.106(a).

Highly Compensated Executive Employees

Reference Number: MTAS-1522

DOL regulations (29 C.F.R. § 541.601(b)(4) define a highly compensated employee as one having a "total annual compensation of at least $107,432." Accordingly, a high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties.

A managerial employee who is "highly compensated" may qualify as an exempt executive employee under what DOL calls a "short-cut test." 69 Fed. Reg. 22,174. The total may include several forms of compensation including commissions, non-discretionary bonuses and other non-discretionary compensation earned during a 52 week period, provided that at least $684 per week is paid on a salary or fee basis. (Note: Discretionary bonuses are not included in the definition of total annual compensation.) 69 Fed. Reg. 22,175.

The DOL exemption for the highly-compensated employee is applicable only to employees whose primary duties include performing executive, administrative or professional work. Therefore, "production line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skills and energy" cannot be exempt as "highly-compensated employees" no matter how highly paid they are. 29 C.F.R. § 541.601(d).

Executive Employee Exceptions

Reference Number: MTAS-2126

DOL's regulation 29 C.F.R. § 541.3(b)(1) emphasizes that the executive exemption does not apply to non-management law enforcement, fire and emergency personnel. Thus "police officers, detectives, investigators, … inspectors, correctional officers, parole or probation officers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work

such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work" do not qualify for exemption.

Also, 29 C.F.R. § 541.3(a) provides that the executive exemption does "not apply to manual laborers or other blue collar workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt blue-collar employees gain their skills and knowledge …through apprenticeships and on-the-job training." Thus non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations. Earlier provisions, however, make it clear that blue-collar workers in managerial roles can be exempt.

Administrative Employee

Reference Number: MTAS-926

An employee in a bona fide administrative capacity is an employee (1) who is compensated on a salary or fee basis at a rate of not less than $684 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. 29 C.F.R § 541.200(a).

An employee may qualify for the administrative exemption if the employee's primary duty is "the performance of work directly related to the management or general business operations of the employer's customers." (Employees acting as advisers or consultants to their employer's clients or customers may also be exempt.) "The phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee… an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a).

"Work directly related to management or general business 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." 29 C.F.R. § 541.201(b).

Exempt administrative workers include not only those who participate in forming management policies or in operating the business as a whole, but it also includes a wide variety of employees who either carry out major assignments in conducting the operations of the business or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business. 69 Fed. Reg. 22138. The requirement that the work performed by an exempt administrative employee be "office or nonmanual work." 29 C.F.R. § 541.200(a)(2) restricts the exemption to "white-collar" employees only. The regulations state specifically that they do not apply to "blue-collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Employees who use tools to perform their work normally are considered blue-collar workers.

The exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. According to 29 C.F.R. § 541.202(b), factors to consider in determining whether an administrative employee exercises discretion and independent judgment include:

1. Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices
2. Whether the employee carries out major assignments in conducting the operation of the business
3. Whether the employee performs work that affects business operations of the business
4. Whether the employee has the authority to commit the employer in matters that have significant financial impact
5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval
6. Whether the employee has the authority to negotiate and bind the company on significant matters
7. Whether the employee is involved in planning long- or short-term business objectives
8. Whether the employee investigates and resolves matters of significance on behalf of management
9. Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances

“The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision ... the term discretion and independent judgment does not require that the decision made by an employee have a finality that goes with unlimited authority and complete absence of review.” 29 C.F.R. § 541.202(c).

Closely related to whether the employee exercises “discretion and independent judgment” for purposes of applying the administrative exemption is whether the employee’s decision-making ability is limited by manuals or standard operating procedures. DOL’s revised exemption regulation 29 C.F.R. § 541.704 states:

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skill does not preclude exemption under section 13(a)(1) of the act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee’s exempt status. The section 13(a)(1) exemptions are not available, however, to employees who simply apply well-established techniques or procedures described in manuals or other sources within closely-prescribed limits to determine the correct response to an inquiry or set of circumstances.

An administrative employee who is “highly compensated” may qualify as an exempt administrative worker if the employee receives total compensation of at least the 90th percentile and performs only one of the exempt duties or responsibilities. 29 C.F.R. § 541.601(a). Accordingly, the highly-compensated employee likely would need to exercise discretion and independent judgment in order to be exempt.

DOL’s revised regulation (29 C.F.R. § 541.708) states that “employees who perform a combination of exempt duties, as set forth for executive, administrative, professional, and computer employees, may qualify for exemption.” Thus, for example, an employee whose primary duty involves a combination of exempt executive and exempt administrative work would still qualify for exemption.

Professional Employee

Reference Number: MTAS-927

The professional exemption of the FLSA actually covers three (3) exemptions: one for “learned professionals” one for “creative professionals, and one for the teaching professional.” An individual employed in a bona fide professional capacity is an employee:

- Who is compensated on a salary or fee basis at a rate of not less than $684 per week, and
- Whose primary duty is to perform work requiring 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. § 300(a)(2)(i) or, requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.300(a)(2)(ii).

To qualify as an exempt “learned professional,” an employee must have a primary duty that requires knowledge of an advanced type in a field of science or learning. DOL regulation 29 C.F.R. § 541.301(b) states “the phrase ‘work requiring advanced knowledge’ means work which is predominately intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment... Advanced knowledge cannot be attained at the high school level.” 29 C.F.R. § 541.301(b). Note that the employee cannot be exempt as a “learned professional” unless the employee’s work requires knowledge of an advanced type. Thus, an employee who has an advanced degree, but whose work does not require that level of education, will not qualify for the exemption.

Included within these requirements is a criterion that the employee’s primary duty must include the “consistent exercise of discretion and judgment.” 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. DOL notes that the “exercise of discretion and judgment” standard under the learned professional exemption is less stringent than the “exercise of discretion and independent judgment” standard under the administrative exemption. 69 Fed. Reg. 22,151, citing *De Jesus Rentas v. Baxter Pharmacy Services Corp.*, 286 F.Supp. 2d 235 (D.P.R. 2003).

“The phrase ‘field of science or learning’ includes the traditional professions of law, medicine, theology, accounting, actuarial computations, engineering, architecture, teaching, various types of physical, chemical and biological science, pharmacy and other similar occupations. The regulations specifically define “field of science or learning” as “occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.” 29 C.F.R. § 541.301(c).

"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.” 29 C.F.R. § 541.301(d). The best evidence that an employee meets this requirement is possession of the appropriate academic degree. “The word, ‘customarily’ means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degree employee, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.” 29 C.F.R. §

541.301(d). The exemption is not available for “occupations in which most employees have acquired their skill by experience, rather than by advanced specialized intellectual instruction.” This does not allow an employee to qualify as exempt based on equivalent training in the military, technical schools or community colleges.

“To qualify for the creative professional exemption, an employee’s primary duty 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.” 29 C.F.R. § 541.302(a). “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.” 29 C.F.R. § 541.302(b). The exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training. “This requirement is generally met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers.” 29 C.F.R. § 541,302(c).

To qualify for the exemption as a bona fide teacher under 29 C.F.R. 541.303, all the following must be met:

1. The employee's primary duty must be teaching, tutoring,instructing, or lecturing in the activity of imparting knowledge
2. The employee must be employed and engaged in a teaching activity as a teacher in an educational establishment by which the employee is employed.

There is no minimum salary or salary basis requirement applied to teaching professionals. In addition, there is no minimum educational or academic degree requirements for bona fide teaching professionals in educational establishments. Possession of an elementary or secondary teacher's certificate identities the individuals who are considered with the scope of the exemption for teaching professionals. Also included are employees whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.

A professional employee who is “highly compensated” may qualify as an exempt professional worker under the DOL revised regulations (29 C.F.R. § 601(a); however, the duty test for a highly-compensated professional employee is stricter than the duty test for the other exemptions. Additionally, the salary requirements of this part does not apply to the teaching profession or to the practice of law or medicine 29 C.F.R. § 541,303(d) and 29 C.F.R. § 541,304(d).

Recreational Employee Exemption

Reference Number: MTAS-928

The FLSA contains specific exemptions from the minimum wage and overtime provisions for amusement or recreational employees. 29 U.S.C. § 213(a)(3) and 29 C.F.R. § 553.32(e) exempt any employee who:

…is employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (a) it does not operate for more than seven (7) months in any calendar year, or (b) during the preceding calendar year, its average receipts for any six (6) months of such year were not more than 33 1/3 percent of its average receipts for the other six months of such year.

In order to meet the requirements, the establishment in the previous year must have received at least 75 percent of its income within 6 months. The 6 months, however, need not be 6 consecutive months. State and local governments operate parks and recreational areas to which this exemption may apply. 29 C.F.R. § 553.32.

The key point of this test is that the employee must be employed by a seasonal amusement or recreational establishment. Since some governments operate stadiums, convention centers, amusement parks and facilities, and recreational establishments like nature centers, ice skating rinks, state fairgrounds, tennis courts, golf courses, parks, gymnasiums, outdoor and indoor swimming pools, zoos and museums, this exemption from the act can be significant. Office personnel, warehouse workers and similar employees, not employed in the recreational or amusement establishment itself but in the local central administrative office, are not exempt. A 1970 Wage and Hour opinion letter dated July 21, 1970, seems to suggest that only amusement or recreational employees who work in a distinct, separate workplace for the recreation and amusement activities would be covered.

Exempt Computer Employee

Reference Number: MTAS-1523

Employees who work as “computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field” are eligible as an exempt professional employee. The exemption applies to “any computer employee compensated on a salary or fee basis at a rate of not less than $27.63 an hour.” 29 U.S.C. § 213(a)(17). The exemption, however, applies “only 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

modifications 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 above, the performance of which requires the same level of skills.“ 29 C.F.R. § 541.400(b)(1-4).

The computer exemption “does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, but who are not primarily engaged in computer system analysis and programming or other similarly skilled computer related occupations also are not exempt computer professionals.” 29 C.F.R. § 541.401.

Computer employees may also be exempt under the Executive and Professional duties exemption if their primary duties includes work such as planning, scheduling and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer of the employer's customers or manages two or more employees and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of other programmers are given particular weight. 29 C.F.R. § 541.402.

Non-Exempt Employee

Reference Number: MTAS-1524

The regulations make it clear that the “Executive, Administrative and Professional” exemptions do not apply to “blue collar workers who perform work involving repetitive operations with their hands, physical skill and energy. Such non-exempt blue collar employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on the job training, not through the prolonged course of specialized intellectual instruction. Non-management production line employees and non-management employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA and are not exempt under this part no matter how highly paid they might be.” 29 C.F.R. § 541.3(a).

The regulations also do not apply to “police officers, detectives, investigators, inspectors, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees regardless of rank or pay level who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime, or accident victims, preventing or detecting crimes; conducting investigations or inspections for violations of laws; performing surveillance; pursing, restraining and apprehending suspects; detaining or supervising suspects and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports or other similar work.” 29 C.F.R. § 541.3(b)(1).

Such non-exempt employees “do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed. 29 C.F.R. § 541.3(b)(2). Such employees are not exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer. 29 C.F.R. § 541.3(b)(3) Such employees are not exempt under the professional exemption because their primary duty does not involve the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” 29 C.F.R. § 541.3(b)(4).

Overview of FLSA Categories of Employees

Reference Number: MTAS-1525

The following chart provides an overview of the special categories of employees affected by the Fair Labor Standards Act. The first column lists those employees not covered by the act. The second column lists those employees who are exempt from the overtime provisions but not the record keeping provisions. The third column lists all non-exempt employees who are covered by the overtime and record keeping provisions of the act. Finally, the special category of employees is listed in column four.

FAIR LABOR STANDARDS ACT

Non-Covered Employees	Exempt Employees	Non-Exempt Employees	Special Categories
Elected Officials	Professionals	Hourly	Police
Staff of Elected Officials	Administrative	Piecework	Firefighters
Political Appointees	Executive	Blue Collar	School Personnel
Legal Advisors	Seasonal	Police	Hospital and Nursing Home Employees
Bona Fide Volunteers	Recreational	Fire	Other
Independent Contractors	Computer	EMT and Paramedics	
Prisoners	Others		
Certain Trainees			

Links:
[1] https://www.dol.gov/whd/regs/compliance/overtime/modelPolicy_PF.htm