

## Executive Exempt Employee

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Dear Reader:

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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,

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## Executive Exempt Employee

Reference Number: MTAS-925

**(NOTE: The U.S. District Court for the Eastern District of Texas issued a preliminary injunction preventing the implementation of the revised FLSA overtime regulations. The case was brought by 21 states. The Obama Administration appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. The 5th Circuit Court of Appeals granted a motion of the Trump Administration for an additional 60 days to determine its position on the appeal of the ruling by the District Court enjoining the FLSA overtime regulation. The Administration's decision was initially due by May 1st, 2017. The 5th Circuit granted another extension until June 30th. The Labor Department filed a brief with the Fifth Circuit Court of Appeals indicating that it will not defend the \$913 salary rate and asked the Court to clarify its ability to set a salary level. The department issued a request for public comments. Until we hear more, continue to comply with the old salary level testing regulations.)**

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 \$455 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.

“Management” as defined by the DOL regulation (Section 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.” 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 § 541.100 are met. 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

**(NOTE: The U.S. District Court for the Eastern District of Texas issued a preliminary injunction preventing the implementation of the revised FLSA overtime regulations. The case was brought by 21 states. The Obama Administration appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. The 5th Circuit Court of Appeals granted a motion of the Trump Administration for an additional 60 days to determine its position on the appeal of the ruling by the District Court enjoining the FLSA overtime regulation. The Administration's decision was initially due by May 1st, 2017. The 5th Circuit granted another extension until June 30th. The Labor Department filed a brief with the Fifth Circuit Court of Appeals indicating that it will not defend the \$913 salary rate and asked the Court to clarify its ability to set a salary level. The department issued a request for public comments. Until we hear more, continue to comply with the old salary level testing regulations.)**

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. 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. 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 \$100,000."

The total may include several forms of compensation including commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52 week period, provided that at least \$455 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." Earlier provisions, however, make it clear that blue-collar workers in managerial roles can be exempt.

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