

Professional Employee

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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Table of Contents

Professional Employee	3
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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 identifies 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).

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