

# **SUMMARY OF FINAL RULE CONCERNING FLSA “WHITE COLLAR” EXEMPTIONS**

By: Gregory P. Kult<sup>1</sup>

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The federal Fair Labor Standards Act (FLSA) requires covered employers to pay employees at least the federal minimum wage for all hours worked and overtime pay at one and one-half times an employee's regular rate for all hours worked over 40 during the designated workweek. Notwithstanding this general rule, section 13(a)(1) of the FLSA provides an exemption from the minimum wage and overtime requirements for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a)(1) and section 13(a)(17) of the FLSA also provide an exemption for certain skilled computer employees.

This document is a summary of the final rule for “white collar” exemptions, which is scheduled to take effect August 23, 2004. To qualify for exemption, employees generally must satisfy both a salary basis test and a duties test. Payment of a salary alone is not sufficient. Certain exceptions to the salary basis test will be noted in this summary.

## **Salary Basis Test (§541.602)**

In most cases, an employee will not be exempt from the minimum wage and overtime requirements of the FLSA unless the employee meets certain tests relating to job duties and is paid on a salary basis at least \$455 per week. An employee will be considered to be paid on a **salary basis** if:

- The employee regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed; and
- Subject to the exceptions outlined below, the employee receives the full salary for any week in which the employee performs any work without regard to the number of days or hours worked (exempt employees need not be paid for any workweek in which they perform no work).

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

- 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.
- 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. 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 has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder.

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<sup>1</sup> Current contact information:

Wooden & McLaughlin, LLP  
One Indiana Square, Suite 1800  
Indianapolis, IN 26204  
(317) 639-6151 ext. 341  
gkult@woodmclaw.com

This article does not constitute legal advice, nor is it a substitute for familiarity with the most current statutes, regulations, ordinances and case law on this topic. Slight differences in factual context can result in significant differences in legal obligations. Consider seeking legal advice with respect to any particular situation.

- Although an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.
- Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees.
- Deductions from pay of exempt employees 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.
- 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.
- When an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked.

**Special rule for employees of public agencies.** An employee of a public agency shall not be disqualified from exemption solely 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: (i) permission for its use has not been sought or has been sought and denied; (ii) accrued leave has been exhausted; or (iii) the employee chooses to use leave without pay. **(§541.710)**

**Effect of improper deductions from salary.** An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. In such case, 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 managers responsible for the actual improper deductions, even if some such employees did not actually experience improper deductions from their salary. **(§541.603)**

**Safe harbor.** If an employer has a clearly communicated policy that prohibits improper pay deductions and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. **(§541.603)**

**Minimum guarantee plus extras.** An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off. **(§541.604)**

**Alternative computation of earnings.** An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. **(§541.604)**

**Board, lodging, and other facilities.** Regulations defining what constitutes **board, lodging, or other facilities** are contained in 29 CFR part 531. As described in 29 CFR 531.32, the term **other facilities** refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by

a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work. (§541.606)

## Duties Tests

### Exempt Work

Exempt work includes the following, as well as activities directly and closely related to such work:

- **Executive employee:** Managing the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof; directing the work of two or more other employees; and hiring or firing other employees or effectively recommending hiring, firing, advancement, promotion or any other change of status of other employees.
- **Business owner:** Managing the enterprise in which he or she is employed.
- **Administrative employee:** Performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers that includes the exercise of discretion and independent judgment with respect to matters of significance.
- **Learned professional:** Performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
- **Creative professional:** Performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- **Teacher:** Teaching, tutoring, instructing or lecturing in the activity of imparting knowledge as a teacher in an educational establishment by which the employee is employed.
- **Lawyer or physician (or physician resident or intern):** Practicing law or medicine, or engaging in an internship or resident program pursuant to the practice of the medical profession.
- **Computer employee:** Applying systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; designing, developing, documenting, analyzing, creating, testing or modifying computer systems or programs, including prototypes, based on and related to user or system design specifications; designing, documenting, testing, creating or modifying computer programs related to machine operating systems; or a combination of the aforementioned duties, the performance of which requires the same level of skills.
- **Outside sales employee:** Making sales or obtaining orders or contracts for services or for the use of facilities away from the employer's place or places of business. (§541.702)

**Duties directly and closely related.** Work that is *directly and closely related* to the performance of exempt work is also considered exempt work. The phrase *directly and closely related* means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. (§541.703)

**Use of manuals.** 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. The 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. (§541.704)

**Emergencies.** An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate. (§541.706)

**Occasional tasks.** Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. (§541.707)

**Combination exemptions.** Employees who perform a combination of exempt duties for executive, administrative, professional, outside sales and computer employees may qualify for exemption. For example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. **(§541.708)**

## **Primary Duty**

The term **primary duty** means the principal, main, major or most important duty that the employee performs. 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 nonexempt work performed by the employee **(§541.700, §541.106)**

## **General Rule for Executive Employee Exemption**

The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the FLSA means an employee:

- Who is compensated on a **salary basis** at a rate of not less than \$455 per week (\$23,660 annually),<sup>2</sup> exclusive of board, lodging or other facilities; and
- Whose **primary duty**<sup>3</sup> is **management**<sup>4</sup> of the enterprise in which the employee is employed or of a **customarily recognized department or subdivision**<sup>5</sup> thereof; and
- Who **customarily and regularly**<sup>6</sup> directs the work of **two or more other employees**;<sup>7</sup> and
- Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given **particular weight**.<sup>8</sup> **(§541.100)**

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<sup>2</sup> For many of the exemptions, the minimum salary required is \$380 per week if employed in American Samoa by employers other than the Federal Government.

<sup>3</sup> Concurrent performance of exempt and nonexempt work does not necessarily disqualify an employee from the executive exemption. Whether an employee meets the requirements for the exemption when the employee performs concurrent duties is determined on a case-by-case basis. Generally, exempt executives 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. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive. **(§541.106)**

<sup>4</sup> **Management** 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; maintaining production or sales records for use in supervision or control; 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; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. **(§541.102)**

<sup>5</sup> A **customarily recognized department or subdivision** must have a permanent status and a continuing function. When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise. A recognized department or subdivision need not 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. **(§541.103)**

<sup>6</sup> **Customarily and regularly** means a frequency that must be greater than occasional but which may be less than constant. It includes work normally and recurrently performed every workweek. It does not include isolated or one-time tasks. **(§541.701)**

<sup>7</sup> The phrase **two or more other employees** means two full-time employees or their equivalent. 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 the equivalent. 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. **(§541.104)**

## **Special Rule for Business Owners**

The term “employee employed in a bona fide executive capacity” also includes any employee:

- Who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed; and
- Who is actively engaged in its **management**.<sup>9</sup> (§541.101)

The **salary basis** test, described on pages 1-2 above, does not apply to business owners for purposes of this special rule.

## **General Rule for Administrative Employee Exemption**

The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the FLSA means an employee:

- Who is compensated on a **salary or fee basis** at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities; and
- Whose **primary duty** is the performance of office or non-manual work **directly related to the management or general business operations**<sup>10</sup> of the employer or the employer’s customers; and
- Whose **primary duty** includes the exercise of **discretion and independent judgment**<sup>11</sup> with respect to **matters of significance**.<sup>12</sup> (§541.200)

Administrative and professional employees may be paid on a **fee basis** rather than on 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. (§541.605)

Factors to consider when determining whether an employee exercises **discretion and independent judgment** with respect to **matters of significance** include, but are not limited to, whether the employee: (i) has authority to formulate, affect, interpret, or implement management policies or operating practices; (ii) carries out major assignments in conducting the operations of the business; (iii) performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; (iv) has authority to commit the employer in matters that have significant financial impact; (v) has authority to waive or deviate from established policies and

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<sup>8</sup> To determine whether an employee’s suggestions and recommendations are given **particular weight**, factors to consider 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. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. An employee’s suggestions and recommendations may still 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 employee’s change in status. (§541.105)

<sup>9</sup> See footnote no. 4 above.

<sup>10</sup> The phrase **directly related to the management or general business operations** means work directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment. Examples include but are 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. (§541.201)

<sup>11</sup> The exercise of **discretion and independent judgment** involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. It must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. Employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed (and occasionally revised or reversed) at a higher level. (§541.202)

<sup>12</sup> The term **matters of significance** refers to the level of importance or consequence of the work performed. (§541.202)

procedures without prior approval; (vi) has authority to negotiate and bind the company on significant matters; (vii) provides consultation or expert advice to management; (viii) is involved in planning long- or short-term business objectives; (ix) investigates and resolves matters of significance on behalf of management; and (x) represents the company in handling complaints, arbitrating disputes or resolving grievances. **(§541.202)**

### **Special Rule for Educational Establishments**

The term “employee employed in a bona fide administrative capacity” also includes an employee:

- Who is compensated for services on a **salary or fee basis** at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities, or on a **salary basis** which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
- Whose **primary duty** is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof. **(§541.204)**

### **General Rule for Professional Employee Exemption**

The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the FLSA means an employee:

- Compensated on a **salary or fee basis** at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities; and
- Whose **primary duty** is the performance of work:
  - (i) requiring **knowledge of an advanced type**<sup>13</sup> in a **field of science or learning**<sup>14</sup> **customarily acquired by a prolonged course of specialized intellectual instruction**;<sup>15</sup> or
  - (ii) **requiring invention, imagination, originality or talent**<sup>16</sup> in a **recognized field of artistic or creative endeavor**.<sup>17</sup> **(§541.300)**

Some of the examples of exempt learned professionals that appear in the regulations include:

- **Registered or certified medical technologists.** Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

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<sup>13</sup> The phrase **work requiring advanced knowledge** means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment [see footnote no. 11, above], as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level. **(§541.301)**

<sup>14</sup> The phrase **field of science or learning** includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar 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. **(§541.301)**

<sup>15</sup> 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, usually evidenced by the appropriate academic degree. The learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. **(§541.301)**

<sup>16</sup> The requirement of **invention, imagination, originality or talent** distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. **(§541.302)**

<sup>17</sup> Work performed **in a recognized field of artistic or creative endeavor** includes such fields as music, writing, acting and the graphic arts. **(§541.302)**

- **Nurses.** Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.
- **Dental hygienists.** Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.
- **Physician assistants.** Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.
- **Accountants.** Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.
- **Athletic trainers.** Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption. (**§541.301**)

## **Practice of Law or Medicine**

The term “employee employed in a bona fide professional capacity” also means:

- Any employee who holds a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and
- Any employee who holds the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

In the case of medicine, the exemption applies to **physicians** and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term **physicians** includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry). Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

The **salary basis test**, described on pages 1-2 above, does not apply to lawyers and physicians (and physician interns and residents) covered by this special rule. However, the salary basis test does apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession. (**§541.304, §541.600**)

## **Teachers**

The term “employee employed in a bona fide professional capacity” also means any employee with a **primary duty** of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. (**§541.303**). The **salary basis test**, described on pages 1-2 above, does not apply to the employees covered by this special rule. (**§541.303, §541.600**)

## **General Rule for Computer Employees**

Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field<sup>18</sup> are eligible for exemption if:

- The employee is compensated (i) on a **salary or fee basis** at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities, or (ii) on an hourly basis at a rate not less than \$27.63 an hour; and
- Whose **primary duty** consists of:
  - (i) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - (ii) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - (iii) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - (iv) a combination of the aforementioned duties, the performance of which requires the same level of skills. (**§541.400-§541.402**)

## **General Rule for Outside Sales Employees**

The term “employee employed in the capacity of outside salesman” in section 13(a)(1) of the FLSA shall mean an employee:

- Whose **primary duty** is (i) making sales or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- Who is customarily and regularly engaged **away from the employer’s place or places of business**<sup>19</sup> in performing such primary duty. (**§541.500, §541.501**)

The **salary basis test**, described on pages 1-2 above, does not apply to the employees covered by this special rule. (**§541.500**)

**Making sales.** Work performed incidental to and in conjunction with the employee’s own outside sales or solicitations and work that furthers the employee’s sales efforts shall be regarded as exempt work. (**§541.500**)

**Promotion work.** Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. Promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. (**§541.503**)

**Drivers who sell.** Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Factors to consider include but are not limited to: a comparison of the driver’s duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor’s license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee’s occupation in collective

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<sup>18</sup> The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. (**§541.401**)

<sup>19</sup> An outside sales employee must be customarily and regularly engaged **away from the employer’s place or places of business**. The outside sales employee is an employee who makes sales at the customer’s place of business or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property. (**§541.502**)

bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales. **(§541.504)**

## **Highly Compensated Employees**

An employee with **total annual compensation**<sup>20</sup> of at least \$100,000 is exempt if the employee **customarily and regularly**<sup>21</sup> performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.

## **Special Rule for Motion Picture Producing Industry**

The requirement that the employee be paid on a **salary basis** does not apply to an otherwise exempt executive, administrative or professional employee in the motion picture producing industry who is compensated at a base rate of at least \$695 a week, exclusive of board, lodging, or other facilities. **(§541.709)**

## **Miscellaneous**

**Job titles insufficient to establish exemption.** A job title alone is not sufficient to establish the exempt status of an employee. Exempt status is determined based on whether the employee's salary and duties meet the requirements of the regulations. **(§541.2)**

**Scope of the executive, administrative, professional and outside sales exemptions.** The executive, administrative, professional, and outside sales exemptions do 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 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 required for exempt learned professional employees. They are nonexempt no matter how highly paid the employee may be. **(§541.3)**

**Other laws and collective bargaining agreements.** The FLSA's minimum wage and overtime requirements may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, nothing in the FLSA relieves employers from any contractual obligations to exceed the requirements of the FLSA. **(§541.4)**

**Trainees.** The executive, administrative, professional, outside sales and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee. **(§541.705)**

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<sup>20</sup> **Total annual compensation** must include at least \$455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

If an employee's total annual compensation does not total at least \$100,000 by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid.

The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. **(§541.601)**

<sup>21</sup> See footnote no. 6 above

**APPENDIX A**

**COMPARISON OF CURRENT RULE AND FINAL RULE EFFECTIVE AUGUST 23, 2004**

<u>Earnings</u>	<u>Existing Regulations</u>	<u>Final Regulations</u>
Less than \$155/week	Guaranteed Overtime	Guaranteed Overtime
\$155 to \$249.99/week	Long Duties Test	Guaranteed Overtime
\$250 to \$454.99/week	Short Duties Test	Guaranteed Overtime
\$455/week to \$100,000/year	Short Duties Test	Standard Duties Test
\$100,000/year or more	Short Duties Test	Highly Compensated Test

**Executive**

<u>Salary Level</u>	<u>Current Short Test (\$250/wk)</u>	<u>Final Standard Test (\$455/wk)</u>
Duties	<p>Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and</p> <p>Who customarily and regularly directs the work of two or more other employees.</p>	<p>Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;</p> <p>Who customarily and regularly directs the work of two or more other employees; and</p> <p>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.</p>

**Administrative**

<u>Salary Level</u>	<u>Current Short Test (\$250/wk)</u>	<u>Final Standard Test (\$455/wk)</u>
Duties	<p>Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and</p> <p>Which includes work requiring the exercise of discretion and independent judgment.</p>	<p>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</p> <p>Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</p>

## Professional

<u>Salary Level</u>	<u>Current Short Test (\$250/wk)</u>	<u>Final Standard Test (\$455/wk)</u>
Duties	<p>Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and</p> <p>Which includes work requiring the consistent exercise of discretion and judgment; or</p> <p>Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.</p>	<p>Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or</p> <p>Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</p>

## Computer

<u>Salary</u>	<u>Current Short Test (\$250/wk)</u>	<u>Section 13(a)(17) (\$27.63/hr)</u>	<u>Final Rule (\$455/wk or \$27.63/hr)</u>
Duties	<p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field (as provided in 541.303).</p> <p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering; and</p> <p>Whose work requires the consistent exercise of discretion and judgment.</p>	<p>Employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is: (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.</p>	<p>The exemptions apply only to a computer employee whose primary duty consists of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.</p>