

EXEMPTION OF EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, AND COMPUTER EMPLOYEES UNDER THE FLSA

The exempt or non-exempt status of any particular employee must be determined on the basis of whether duties, responsibilities and salary meet the requirements for exemption. The employee's title or classification is of no significance in determining whether the tests are met.

It is the responsibility of the Agency Head, or their designee, to determine whether any exemption is applicable to particular employees.

Following is an outline of the terms and conditions to be followed in determining those employees exempt from the overtime provisions of the Fair Labor Standards Act.

Executive Employees

An employee is exempt as an executive, if he meets all these conditions:

- primary duty is management of an agency, institution or school, or a customarily recognized department or subdivision (i.e. a unit of permanent status and function thereof)
- customarily and regularly directs the work of two or more full-time employees or their equivalent (80 hours total)
- has authority to hire or fire, or his suggestions on hiring, firing, promotions or changes of employees' status carry particular weight
- exercises discretion and independent judgment in significant matters in carrying out the position's responsibilities
- is paid on salary basis at a rate of at least \$455 a week (\$23,660 annually), exclusive of board, lodging or other facilities

Primary Duty and Management – The policy requires that the primary duty of an executive employee must be management.

“Primary duty” means the principal, main or most important duty or responsibility of the employee.

Managerial duties take into consideration the frequency of the employee's use of discretion and relative freedom from supervision.

These are some of the functions that come within the scope of management: Interviewing, selecting and training of employees; setting and adjusting rates of pay and hours of work; directing work; maintaining production records for use in supervision or control; appraising productivity and efficiency for recommending promotions or other changes in status; handling complaints; disciplining employees; planning work; determining work techniques, controlling the flow and distribution of materials and supplies; and providing for the safety of workers and property.

If the executive employee is in charge of a division, rather than of the entire department, the division must be formally established, not simply a group of employees signed to a job. Usually, the division has a title, like “Shipping Division,” or “Accounting Division.”

Supervision of Other Workers – An executive employee must direct the work of two or more employees, that is, he must direct at least two full-time workers or the equivalent. For example, the test would be met if the employee directs (a) one full-time and two part-time workers, if total is 80 hours, one of whom works mornings and the other afternoons, or (b) four part-time workers two of whom work mornings and the others afternoons.

The workers who are supervised must be employed in the department or sub-division that the executive employee is managing.

Moreover, an executive employee must be directly concerned either with the hiring or the firing and other change of status of the employees under this supervision, whether by direct action or by recommendation to those delegated to hire and fire.

Salary Requirement – Salaries paid monthly or semi-monthly that are equivalent to \$455 a week (\$23,660) are within the requirement. However, the shortest period of payment that will meet the requirement of pay on a salary basis is a week. Employees paid by the hour are not included in this exemption regardless of the fact that the amount paid them weekly far exceeds \$455; they are not paid on a salary basis. But a guarantee of \$455 a week in any week in which any work is performed may meet the salary requirement even though additional wages are paid on an hourly basis.

Salary Basis – Executive employees have to be paid on a salary basis to be exempt. The meaning of salary basis is most important. Salary basis means that the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation and the amount is not subject to reduction because of variations in the number of hours work in the workweek or in the quality or quantity of the work performed.

Work which tends to destroy the executive exemption is work which is not directly and closely related to his management duties. For example, although in a plant not large enough to employ a timekeeper or in which the timekeeping function has been decentralized, the supervisor of each department can keep basic time records of his own subordinates and count the work as management. The preparation of a payroll by a supervisor – even of the employees under his supervision would be non-management work because the preparation of a payroll does not aid the supervision of employees or the management of the department.

An executive employee may operate a machine for the purpose of instructing new employees without losing the exemption. Such work is considered a part of the supervisory duties and is exempt. But if he operates a machine to fill in time between supervisory duties or to assist other employees, such work is non-management work and could affect the issue of whether management is the employee's primary duty.

Administrative Employees

An employee is exempt as an administrative employee, if he meets all these conditions:

- primary duty consists of performing office or non-manual work directly related to management or general business operations of the employer or its customers
- the primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- is paid on salary or fee basis of at least \$455 a week(\$23,660 annually), exclusive of board, lodging, or other facilities

In general terms, administrative employees are sometimes referred to as staff (administration) rather than line (production) employees. "General business operations" refers to 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. Examples of administrative employees may include credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations directors.

Remember that a title alone is of little or no assistance in determining an employee's exempt or non-exempt status. The status of the employee should be determined on the basis of whether his duties, responsibilities and salary meet all the requirements of the regulations.

Primary Duty – To qualify for exemption as an administrative employee, an employee must have as his primary duty office or non-manual work directly related to management or general business operations of his employer or his employer's customers. This condition is met by employees who participate in the formulation of management policies or in the operation of the business as a whole. It applies to those employees whose work affects business operations to a substantial degree even though their assignments are only for a particular segment of the business.

Discretion and Independent Judgment – These terms are interpreted to mean the authority to make an independent choice, free from immediate supervision, in significant matters. They should not be confused with the use of skill in applying techniques, procedures, or specific standards.

Matters of significance – refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independence with respect to matters of significance simply because improper performance of the employee's duties may cause serious financial loss to the agency.

Example 1: Inspectors normally do specialized work along standardized lines involving well-established techniques and procedures that may have been catalogued and described in manuals or other services. These inspectors use skill rather than discretion and judgment.

Example 2: A shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders, and a bookkeeper may decide whether he will post first to one ledger rather than another. These decisions do not deal with significant matters.

Decisions by an employee need not have a finality that goes with unlimited authority and a complete absence of review. It is alright for the decisions to consist of recommendations for action or to be subject to review.

Salary Requirement – The \$455 weekly (\$23,660 annually) salary requirement for administrative exemption is met if the employee is compensated bi-weekly on a salary basis of \$910, semi-monthly on a salary basis of \$985.83 or monthly on a salary basis of \$1971.66.

Professional Employees

An employee is exempt as a professional employee, if he meets all these conditions:

- primary duty is work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.
- the advanced knowledge must be in a field of science or learning, customarily acquired by prolonged specialized instruction, as distinguished from general academic education (doctors, lawyers, engineers, chemists, nurses, etc.). As an alternative to the above, the primary duty may be (a) work that is creative and original (artists, writers, musicians, actors, certain radio and television announcers, etc.) or (b) work as a teacher in an educational establishment with a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge.
- is paid on salary or fee basis of not less than \$455 a week (\$23,660 annually). (This salary or fee requirement does not apply to an employee who is holder of valid license or certificate permitting practice of law or medicine, or in the case of interns or resident physicians, or employees employed and engaged as teachers in activities referred to in (b) above)

Learned Profession – The learned professions are described as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

These points should be noted:

1. 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. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.

2. However, 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 degreed employees, but who attained the advanced knowledge through a

combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.

3. The exemption does not apply to entire occupational groups regardless of the specific duties of the particular individual. For example, exemption of an accountant must be determined on the basis of the individual accountant's duties and other qualifications.

Artistic Professions – The requirements for the artistic type of professional work are that the work has to be original and creative in character in a recognized artistic field and the result of which must depend primarily on the invention, imagination, originality, or talent of the employee. This exemption includes such fields as music, writing, acting, and the graphic arts.

Computer Employee Exemption

An employee is exempt under the computer employee exemption if the employee:

- is employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field with one of the following as the employee's primary duty:
 - 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; or
 - 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.
- is compensated either on salary or fee basis at a rate not less than \$455 per week **or** is compensated on an hourly basis, at a rate not less than \$27.63 an hour.

Employees primarily involved in the manufacture or repair of computer hardware and related equipment do **not** qualify for the computer employee exemption. Employees whose work is highly dependent on computer software programs but not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations are also **not** eligible for the computer employee exemption.

Highly Compensated Employee Exemption

Highly Compensated Employees – Employees that perform office or non-manual duties and are paid a total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) and regularly perform at least one of the duties of an exempt executive, administrative or professional employee as identified in the exemption tests specified in this document.

EXECUTIVE EXEMPTION CHECKLIST

1. Does the employee receive a salary of at least \$23,660 annually (\$455 per week)?
 Yes – go to #2
 No – Not executive exempt (go to Administrative or Professional Checklist)

2. Is the employee's primary duty - the management of a customarily recognized sub-division of the department?
 Yes – go to #3
 No – Not executive exempt (go to Administrative or Professional Checklist)

3. Does the employee customarily and regularly supervise two or more full time employees?
 Yes – go to 4
 No – Not executive exempt (go to Administrative or Professional Checklist)

4. Does the employee have the authority to hire or fire other employees or are the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees given particular weight?
 Yes – Exempt - Executive
 No – Not executive exempt (go to Administrative or Professional Checklist)

PROFESSIONAL EXEMPTION CHECKLIST

1. Does the employee receive a salary (or fee basis pay) of at least \$23,660 annually (\$455 per week)?

 Yes – go to #2
 No – Not executive, professional or administrative exempt.

2. Is the employee's primary duty that of a professional either in (a) a learned profession or (b) an artistic profession? (see commentary for definitions)?

 Yes – go to #3
 No – Not professional exempt (go to Executive or Administrative Checklist)

3. Is the employee's work primarily intellectual and does it require the consistent exercise of discretion and judgment?

 Yes – Exempt – Professional
 No – Not professional exempt (go to Executive or Administrative Checklist)

ADMINISTRATIVE EXEMPTION CHECKLIST

1. Does the employee receive a salary (or fee basis pay) of at least \$23,660 annually (\$455 per week)?
 Yes – go to #2
 No – Not executive, professional, or administrative exempt

2. Is the employee's primary duty office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers?
 Yes – go to #3
 No – Not administrative exempt (go to Executive or Professional Checklist)

3. Does the employee exercise discretion and independent judgment in significant matters?
 Yes – Exempt – Administrative
 No – Not –administrative exempt (go to Executive or Professional Checklist)

COMPUTER EMPLOYEE CHECKLIST

1. Does the employee receive a salary of at least \$455 per week (\$23,660 annually) or an hourly rate of at least \$27.63 or more?

Yes – go to # 2
 No - Not Computer exempt

2. Does the employee work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing one of the following as the employee's primary duty:

- The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
- 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;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

Yes - Computer Employee Exemption
 No - Not Computer exempt

The computer employee 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 (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.