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**FLSA Exemptions - Background**

The Fair Labor Standards Act (FLSA) was amended effective August 23, 2004, with changes to Part 541 defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees.<sup>1</sup> Although there are many other exemptions and exceptions from the minimum wage and overtime standards of the FLSA, the “white collar” exemptions applying to the five groups of employees listed above are the most common.

The FLSA requires that most employees in the United States be paid at least the Federal minimum wage of \$7.25 effective July 24, 2009 for all hours worked.<sup>2</sup> Work in excess of 40 hours in a workweek is paid at time and one-half the regular rate.<sup>3</sup> The Federal minimum wage and overtime provisions establish the minimum standard. Individual states may provide for a higher minimum wage and better overtime regulations.<sup>4</sup>

Exempt employees must satisfy certain tests with respect to their primary duties. *Job titles do not determine exempt status.*<sup>5</sup> If meeting the standards of the salary level, salary basis, and job duties tests, employees are exempt from the minimum wage and overtime provisions.<sup>6</sup> These tests have been complex and confusing in the past and have been revised under the 2004 amendments..

**Workers Not Eligible for Exemptions**

The FLSA regulations were designed to ensure that employees could better understand their rights and that employers understand their legal obligations under the law. To achieve this objective and to also eliminate any misunderstanding, certain types of employment were specifically identified as not being eligible for an exemption. For example, “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy, are not eligible for an exemption.<sup>7</sup> These jobs include non-management employees in occupations including carpenters, electricians, mechanics, plumbers, longshoremen, construction workers, and laborers. The 2004 amendments make it clear that these workers, when qualifying, will continue to earn overtime compensation no matter how high their annual compensation may be.<sup>8</sup>

Other workers identified as being eligible for overtime compensation, irrespective of their annual compensation, include police officers, fire fighters, paramedics, medical technicians, and similar occupations that perform public safety duties.<sup>9</sup> On the other hand, “highly compensated” workers who earn at least \$100,000 per year who “customarily and regularly” perform exempt duties are *not eligible* for overtime pay.<sup>10</sup> The “highly compensated” test applies only to employees who receive at least \$455 per week on a salary basis.

The United States Department of Labor (DOL) estimates that the minimum salary level of \$455 per week (\$23,660 annually) qualified an additional 6.7 million salaries workers for overtime protection beginning in August 2004.<sup>11</sup> These include white-collar workers who were misclassified as being exempt, and blue-collar workers whose overtime protections have been strengthened because of the specificity of the amended regulations.<sup>12</sup>

### **Overview of Executive, Administrative, and Professional Exemptions**

The FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, and professional employees. Other workers, including certain computer employees and outside sales employees, may also be exempt when satisfying the job related tests.<sup>13</sup>

Each of the following tests must be met to qualify for the executive, administrative, or professional exemption:

#### **Executive:**

- The employee must be compensated consistent with the salary basis provisions of the final regulations at a rate not less than \$455 per week.<sup>14</sup>
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.<sup>15</sup>
- The employee must customarily and regularly direct the work of at least two or more other full-time employees, or their equivalent; and<sup>16</sup>
- The employee must have the authority to hire or fire other employees, or 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.<sup>17</sup>

#### **Administrative:**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week.<sup>18</sup>

- The employee’s primary duty must be 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<sup>19</sup>
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.<sup>20</sup>

The FLSA regulations provide for a “learned” professional and a “creative” professional. The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. Occupations included in the learned professional category would include those involved in the fields of science or learning including law, medicine, accounting, engineering, teaching, chemical and biological sciences, and other employment requiring advanced education. The best evidence of meeting the learned professional exemption would be through possession of the appropriate academic degree. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

The creative professional exemption requires that the 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. This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The determination of the exemption depends on the extent of the invention, imagination, originality or talent exercised by the employee and is made on a case-by-case basis. Examples of occupations included in the creative professional category would include actors, musicians, composers, writers, and novelists.

**Learned Professional:**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week.<sup>21</sup>
- The employee’s primary duty must be the performance of 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.<sup>22</sup>
- The advanced knowledge must be in a field of science or learning.<sup>23</sup>
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.<sup>24</sup>

**Creative Professional:**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week.<sup>25</sup>
- The 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.<sup>26</sup>

## **Summary – FLSA Amendments**

The FLSA amendments effective August 23, 2004, were designed to eliminate the confusing and complex regulations that have been in effect for many years. The DOL has investigated thousands of claims annually from employees who feel that they have been denied overtime compensation because their employers have designated their jobs as exempt. As a result, more and more employees have had to resort to litigation to receive their overtime pay. Although all rules and policies are subject to different interpretations, the DOL has attempted to reduce the anxiety of employers in the determination of exemptions through the final regulations.

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<sup>1</sup> 29 C.F.R. Part 541 et seq.

<sup>2</sup> 5 C.F.R. Part 551.301 (a)(1); 29 U.S.C. 206 (a)(1).

<sup>3</sup> 29 C.F.R. Part 778.107.

<sup>4</sup> 29 C.F.R. Part 541.4.

<sup>5</sup> 29 C.F.R. Part 541.2.

<sup>6</sup> 29 C.F.R. Parts 541.100 et seq; 541.600; 541.602.

<sup>7</sup> 29 C.F.R. Part 541.3(a).

<sup>8</sup> Id

<sup>9</sup> 29 C.F.R. Part 541.3(b).

<sup>10</sup> 29 C.F.R. Part 541.600.

<sup>11</sup> Department of Labor Regulatory Impact Analysis.

<sup>12</sup> Id.

<sup>13</sup> 29 C.F.R. Part 541.400 et seq; Part 541.500 et seq.

<sup>14</sup> 29 C.F.R. Part 541.100 (a)(1).

<sup>15</sup> 29 C.F.R. Part 541.100 (a)(2).

<sup>16</sup> 29 C.F.R. Part 541.100 (a)(3).

<sup>17</sup> 29 C.F.R. Part 541.100 (a)(4).

<sup>18</sup> 29 C.F.R. Part 541.200 (a)(1).

<sup>19</sup> 29 C.F.R. Part 541.200 (a)(2).

<sup>20</sup> 29 C.F.R. Part 541.200 (a)(3).

<sup>21</sup> 29 C.F.R. Part 541.300 (a)(1).

<sup>22</sup> 29 C.F.R. Part 541.301 (b).

<sup>23</sup> 29 C.F.R. Part 541.301 (b)(2).

<sup>24</sup> 29 C.F.R. Part 541.301 (b)(3).

<sup>25</sup> 29 C.F.R. Part 541.300 (a)(1).

<sup>26</sup> 29 C.F.R. Part 541.302 (2).