

# Essential Guide to the FLSA's White Collar Overtime Exemption Rules

This guide reflects changes to the regulations governing the FLSA white collar exemption based on the Department of Labor's Final Rule released on September 24, 2019 and effective January 1, 2020.

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## Introduction

The Fair Labor Standards Act (FLSA) requires that most covered employees in the United States be paid at least the federal minimum wage for all hours worked, with overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, § 13(a)(1) of the FLSA and associated Department of Labor regulations provide an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a)(1), 13(a)(17), and associated regulations also exempt certain computer employees.

The designation "white collar employee" does not appear in the FLSA. However, the term is a recognized short-hand for this general class of exemptions.

The white collar category comprises the most broad exemptions to the FLSA and touches the whole spectrum of industry classifications. Virtually every employer covered by the FLSA faces the sometimes difficult task of deciding which, if any, workers will qualify for white collar exempt status.

To qualify for one of these exemptions, employees generally must meet certain tests regarding their job duties and compensation. Job titles alone do not determine exempt status, nor does the receipt of a particular salary. In order for an exemption to apply, an employee's specific job duties and earnings must meet all of the applicable requirements. It is important to note that simply paying an employee a salary does not relieve an employer of minimum wage and overtime obligations to that employee. Unless they meet the criteria of a specific exemption, employees covered by FLSA protections who are paid a salary are still due overtime if they work more than 40 hours in a week.

This guide provides an overview of each of the white collar exemptions and describes the basic tests and requirements to qualify for them. The salary levels listed in this article apply beginning on January 1, 2020.

# Three Tests

For an employer to claim an exemption for a particular employee, three tests generally need to be satisfied:

1. **The Salary Basis Test:** The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
2. **The Salary Level Test:** The amount of salary paid must meet a specified minimum amount.
3. **The Duties Test:** The employee's job duties must primarily involve those associated with exempt executive, administrative, professional, outside sales, or computer employees.

## Salary Basis Test

Generally, for an employer to claim one of the white collar exemptions for an employee, that employee must be paid on a salary basis. The salary basis requirement does not apply to outside sales employees, teachers, and employees practicing law or medicine.

Being paid on a **salary basis** means an employee regularly receives a predetermined amount of money each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Generally, an exempt employee must receive at least the required weekly salary amount (see [Salary Level Test](#)) for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work.

## Deductions from Pay

To meet the salary basis test, deductions from pay are permissible only under the following circumstances:

- When the employee is absent from work for one or more full days for personal reasons other than sickness or disability.
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of not providing compensation for salary lost due to illness.
- To offset amounts an employee receives as jury or witness fees, or for military pay.
- For penalties imposed in good faith for infractions of safety rules of major significance.
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

This limitation on deductions is generally referred to as the **no-docking rule**.

Note that an employer is not required to pay an employee's full salary in the initial or final week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

If an employer makes improper deductions from an employee's predetermined salary, that employee is not considered paid on a salary basis. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

## Effect of Improper Deductions from Salary

The employer will lose the exemption if it has an “actual practice” (meaning the employer may have a policy against such practice, but has a history of implementing such practice) of making improper deductions from salary.

Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting deductions.
- The time period during which the employer made improper deductions.
- The number and geographic location of both the employees whose salary was improperly reduced and the managers responsible.
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If an actual practice is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

## Safe Harbor

Unless an employer willfully violates the policy by continuing the improper deductions after receiving employee complaints, an employer will not lose the exemption for any employee if the employer:

- Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
- Reimburses employees for any improper deductions; and
- Makes a good faith commitment to comply in the future.

## Fee Basis

Administrative, professional, and computer employees may be paid on a “fee basis” rather than on a salary basis. An employee is 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 payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are **not** considered payments on a fee basis.

To test whether a fee payment meets the minimum required amount for exemption, consider the time worked to complete the job and determine if the payment is at a rate that would yield at least \$684 per week if the employee worked 40 hours. For example, an artist paid \$500 to paint a portrait that took 20 hours to complete meets the minimum required amount since the rate would yield \$1,000 if 40 hours were worked.

# Salary Level Test

To qualify as an exempt executive, administrative, or professional employee, an employee must be compensated on a salary basis at a rate of no less than \$684 per week (or \$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the federal government, or \$380 per week if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities).

The required \$684 per week may be translated into equivalent amounts for periods longer than one week. For example:

- \$1,368 per biweekly pay period.
- \$1,482 if paid semimonthly (twice each month).
- \$2,964 per month.

However, the shortest period of payment that will meet this compensation requirement is one week.

Note that exempt computer employees may be paid at least \$684 per week, **or** on an hourly basis of at least \$27.63 an hour.

The salary level test does not apply to outside sales employees, teachers, and employees practicing law or medicine. Academic administrative employees may qualify for exemption either by satisfying the standard salary level test or, alternatively, being paid on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed.

## Hourly, Day, and Shift Rates

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.

### Reasonable Relationship

A reasonable relationship must be established regarding hourly, day, and shift rates. 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. Thus, for example, an exempt employee guaranteed compensation of at least \$725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid \$210 per shift without violating the \$684-per-week salary basis requirement.

The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily, or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

## Exclusive of Board, Lodging, or Other Facilities

The phrase **exclusive of board, lodging, or other facilities** means “free and clear” or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging, or other facilities may not count towards the minimum salary amount required for exemption.

**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.
- Transportation furnished to employees for ordinary commuting between their homes and work.

## Duties Test

To qualify for any of the white-collar exemptions, employees must meet certain tests regarding their job duties. The regulations establish separate duties requirements for executive, administrative, professional, outside sales, and computer employees, respectively.

Most employees who are exempt under the white collar exemptions are subject to the duties test. Under the duties test, an employee’s primary duty must be that of an exempt executive, administrative, or professional employee.

**Primary duty** means the principal, main, major, or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

The amount of time spent performing the specific duty can be a useful guide in determining whether such work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing a specific duty will generally satisfy the primary duty requirement.

Time alone, however, is not the sole test, and nothing requires that exempt employees spend more than 50 percent of their time performing a specific duty. Employees who do not spend more than 50 percent of their time performing their major or most important duty may nonetheless meet the primary duty requirement based on other factors:

- The relative importance of the major or most important duty as compared with other types of duties.
- The amount of time spent performing the major or most important duty.
- The employee’s relative freedom from direct supervision.
- The relationship between the employee’s salary and the wages paid to other employees for performance of similar work.

For example, managers in retail establishments who perform exempt executive duties such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if they spend more than 50 percent of the time performing nonexempt work such as running the cash register.

However, if a particular manager is closely supervised and earns little more than the nonexempt employees, such a manager generally would not satisfy the primary duty requirement.

The duties requirements for each of the exemptions are described below in greater detail.

# Exemptions

## Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than \$684 per week.
- The employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
- 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.

## Executive Exemption Terms

### Managing

Regarding the employee's duty to manage the enterprise, or manage a customarily recognized department or subdivision, **managing** generally includes, but is not limited to, activities such as:

- Interviewing, selecting, and training of employees.
- Setting and adjusting employee's 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, or 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.
- Monitoring or implementing legal compliance measures.

**Customarily recognized department or subdivision** means a recognized subpart within an employer's larger operation that has a permanent status and a continuing function. For example, a large employer's human resources department might have subdivisions for employee relations, benefits administration, recruiting and hiring, and personnel management, each of which has a permanent status and function. The phrase 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.

When an enterprise has more than one establishment (or branch), each establishment (branch) may be a recognized subdivision of the enterprise. A recognized department or subdivision does not need to be physically located within the employer's establishment and may move from place to place and/or may consist of employees drawn from other recognized units or from a pool of available employees (for example, a construction crew which moves from job to job).

## Directing

Where an employee must customarily and regularly direct work of two or more full-time employees, or their equivalent, the phrase **customarily and regularly** means with a frequency that must be greater than occasional, but which may be less than constant. It includes work normally done every workweek, but does not include isolated or one-time tasks.

The phrase **two or more other employees** means two full-time employees or their equivalent; generally, a total of 80 employee hours of work. For example, one full-time (40 hours per week) and two half-time employees (20 hours per week) are equal to two full-time employees. Four half-time employees are also equal to two full-time employees.

In industries where the established standard defining full-time schedules is 37½ hours or 35 hours per week, two or more other employees may be defined as 75 or 70 hours, respectively.

If occasional, temporary, or part-time employees are involved when determining if the two full-time employee equivalency is met, an exempt executive must supervise two or more employees for a combined total of 80 hours of work by such employees. In other words, the total number of hours worked by subordinate employees supervised must ordinarily total 80 within the workweek to qualify as the equivalent of two full-time employees.

If a full-time employee works over 40 hours in the workweek, he or she counts as the equivalent of only one employee. For example, if a full-time employee works 60 hours per week and a part-time employee works 20 hours per week, although the two employees together work a total of 80 hours,

an equivalent of only one full-time and one part-time employee is supervised, thereby not meeting the criteria.

Only other employees of the employer may be considered when determining if the two full-time employee equivalency is met; supervision of volunteers, employees of independent contractors, or any other “non-employees” (trainees, interns) in relation to the employer are not considered for purposes of this test.

The supervisory function can be distributed among two or more exempt executives, but each executive must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor customarily and regularly directs the work of two full-time nonexempt workers. However, the hours worked by a subordinate employee may not be counted or credited more than once for different executives. Thus, shared responsibility to supervise the same two employees in the same department does not meet the requirement that the executive direct the work of two or more employees or their equivalent.

On the other hand, a full-time employee who works half of the time for one supervisor and the other half of the time for a different supervisor may be credited as a half-time employee for each of the supervisors. In addition, there is no requirement that the manager work at the same time or at the same location as the subordinates in order to qualify for the exemption, as long as the manager regularly directs the subordinate’s work.

## Authority to Hire or Fire

Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion, or any other change of status are given “particular weight” include, but are not limited to:

- Whether it is part of the employee’s job duties to make such recommendations.
- The frequency with which such recommendations are made, requested, and relied upon.

Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. An employee’s 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.

## Exemption of Business Owners

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (for example, corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

A business owner who is required to work long hours, makes no management decisions, supervises no one, and has no authority over personnel does not qualify for the executive exemption.

# Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$684 per week.
- The employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

## Administrative Exemption Terms

### Office or Nonmanual Work

The administrative exemption applies only to employees whose primary duty is the performance of "office or nonmanual work." The 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.

For example, employees in production line work, maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers are not exempt as administrative employees.

### Directly Related

To meet the directly related to management or general business operations requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

Work directly related to management or general business operations includes, but is 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.
- Similar activities.

This list shows types of functional areas or departments typically considered administrative in nature. It is not intended as a complete list of exempt areas, nor is it intended as a listing of specific jobs. Rather, the list shows functional areas or departments that generally relate to management and general business operations, although each case must be examined individually.

## Employer's Customers

An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

The customer may be an individual, rather than a business, as long as the work performed relates to "management or general business operations."

While the exemption would not apply when the client's or customer's "business" is purely personal, providing expert advice to a small business owner or a sole proprietor regarding management and general business operations would be an exempt administrative function.

## Discretion and Independent Judgment

In general, 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. The exercise of discretion and independent judgment implies that one has authority to make an independent choice, free from immediate direction or supervision. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

The term must be applied in light of all the facts involved in the employee's particular employment situation. Factors to consider include, but are not limited to:

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices.
- Whether the employee carries out major assignments in conducting the operations of the business.
- Whether the employee performs work that affects business operations to a substantial degree.
- Whether the employee has authority to commit the employer in matters that have significant financial impact.
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval.
- Whether the employee has authority to negotiate and bind the company on significant matters.
- Whether the employee provides consultation or expert advice to management.
- Whether the employee is involved in planning long- or short-term business objectives.
- Whether the employee investigates and resolves matters of significance on behalf of management.

- Whether the employee represents the employer in handling complaints, arbitrating disputes, or resolving grievances.

The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the credit policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. A management consultant who has studied the operations of a business and proposed changes in organization may have the plan reviewed or revised by superiors before it is submitted to the client. These factors do not detract from the fact that the work of these employees includes the exercise of discretion and independent judgment with respect to matters of significance directly related to management or general business operations.

## Matters of Significance

The term ***matters of significance*** refers to the level of importance or consequence of the work performed to the management or general business operations of the employer or of the employer's customers.

An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may result from the employee's neglect.

Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

## Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$684 a week, or on a salary basis at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.

The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. Employees engaged in academic administrative functions include:

- Superintendents or other heads of elementary or secondary school systems, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program.
- Principals and any vice-principals responsible for the operation of an elementary or secondary school.
- Department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, etc.

- Academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements.
- Other employees with similar responsibilities.

Jobs relating to building management and maintenance, jobs relating to the health of the students, and staff such as social workers, psychologists, lunchroom managers, or dietitians do not perform academic administrative functions.

**Educational establishment** means an elementary or secondary school system, an institution of higher education, or other educational institution. Elementary and secondary schools are defined as those day or residential schools that provide elementary or secondary education, as determined under state law. Under the laws of most states, such education includes the curriculums in grades 1 through 12; under many, it also includes the introductory programs in nursery school and kindergarten.

The term “other educational establishment” includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary, or higher.

Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state’s educational system or accredited by a nationally recognized accrediting organization for career schools.

No distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

## Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$684 per week.
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work that 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.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

## Learned Professional Terms

### Advanced Knowledge

**Work requiring advanced knowledge** means work that is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical, or physical work.

A professional employee 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.

## Field of Science or Learning

The phrase *field of science or learning* includes the traditional professions of:

- Law.
- Medicine.
- Theology.
- Accounting.
- Actuarial computation.
- Engineering.
- Architecture.
- Teaching.
- Physical, chemical, and biological sciences.
- Pharmacy.
- Other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades, which are not a field of science or learning.

The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning.

When an advanced specialized degree has become a standard requirement for entrance into a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

## Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word *customarily* means the exemption may be 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.

For example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who does not possess a degree in chemistry.

The learned professional exemption is not available for occupations that require only a four-year degree in any field or a two-year degree as a prerequisite for entrance into the field. The learned professional exemption also does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Accredited curriculums and certification programs are relevant to determining exempt learned professional status only to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the profession. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative if certification does not involve a prolonged course of specialized intellectual instruction.

For example, certified physician assistants meet the duties requirements for the learned professional exemption because certification requires four years of specialized post-secondary school instruction;

employees with cosmetology licenses are not exempt as learned professionals because the licenses do not require a prolonged course of specialized intellectual instruction.

In addition, the fact that an employee possesses a license to practice a certain profession must be considered along with all the other criteria in determining the exempt status of the employee. In order for a licensed employee to meet the duties test, the employee must actually perform exempt duties.

## Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week.
- 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.

## Creative Professional Terms

### Invention, Imagination, Originality, or Talent

The requirement that an employee's primary duty must be the performance of work requiring "invention, imagination, originality, or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis.

The requirements are generally met by:

- Actors.
- Musicians.
- Composers.
- Soloists.
- Certain painters, writers, cartoonists, essayists, novelists, and others.
- Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality, or talent. Journalists are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

### Recognized Field of Artistic or Creative Endeavor

Recognized field of artistic or creative endeavor includes such fields as:

- Music.
- Writing.
- Acting.
- Graphic arts.

### Teachers

Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to:

- Regular academic teachers.
- Kindergarten or nursery school teachers.
- Teachers of gifted or disabled children.
- Teachers of skilled and semi-skilled trades and occupations.
- Teachers engaged in automobile driving instruction.
- Aircraft flight instructors.
- Home economics teachers.
- Vocal or instrument music teachers.

The salary and salary basis requirements do not apply to bona fide teachers.

Having a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

## Practice of Law or Medicine

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession.

The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

# Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour.
- The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the following primary duties:
  - 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.
  - A combination of the aforementioned duties, the performance of which requires the same level of skills.

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 (for example, 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.

# Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

## Outside Sales Terms

### Sales

**Sales** includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

Promotion work 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. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

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.

Several factors should be considered in determining whether a driver has a primary duty of making sales, including but not limited to:

- A comparison of the driver's duties with those of other employees engaged as drivers and as salespersons.
- The presence or absence of customary or contractual arrangements concerning amounts of products to be delivered.
- Whether or not the driver has a selling or solicitor's license when required by law.
- The description of the employee's occupation in collective-bargaining agreements.
- Sales training and attendance at sales conferences.
- Method of payment.
- Proportion of earnings directly attributable to sales.

### Obtaining Orders or Contracts for Services or for the Use of Facilities

Obtaining orders or contracts for services or for the use of facilities includes the selling of time on radio or television, the solicitation of advertising for newspapers, other periodicals, and the internet, and the solicitation of freight for railroads and other transportation agencies.

The word "services" extends the exemption to employees who sell or take orders for a service. The actual performance of the services for the customer may be by someone other than the person taking the order.

### Away from Employer's Place(s) of Business

An outside sales employee must be customarily and regularly engaged in sales activities “away from the employer’s place(s) of business.” An outside sales employee 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.

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.

An outside sales employee who displays samples in hotel sample rooms during trips while traveling is considered to be away from the employer’s place(s) of business. Similarly, an outside sales employee who displays the employer’s products at a trade show is considered to be away from the employer’s place(s) of business. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) would not be considered as the employer’s place of business.

## Promotion Work

Promotion work 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. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

## 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.

Several factors should be considered in determining whether a driver has a primary duty of making sales, including:

- A comparison of the driver’s duties with those of other employees engaged as drivers and as salespersons.
- The presence or absence of customary or contractual arrangements concerning amounts of products to be delivered.
- Whether or not the driver has a selling or solicitor’s license when required by law.
- The description of the employee’s occupation in collective-bargaining agreements.
- Other factors set forth in the regulation.

## Highly Compensated Employee Exemption

An employee with total annual compensation of at least \$107,432 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. An employee who performs such exempt duties only on an isolated or occasional basis will not satisfy this duties requirement.

Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

**Total annual compensation** includes the payment of at least \$684 per week on a salary or a fee basis and any commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned during the 52-week period. Thus, a highly compensated employee must receive at least the same base salary throughout the year as required for an exempt employee under the standard tests and may receive additional income in the form of commissions and nondiscretionary bonuses to meet the \$107,432 annual earnings threshold.

Total annual compensation does not include:

- Board, lodging, or other facilities.
- Payments made by the employer for medical insurance or life insurance.
- Contributions to retirement plans.
- The employer's cost of other fringe benefits.

Costs associated with providing such items or benefits may not be considered when determining if the employee has received the full required minimum compensation.

An employer may use any consecutive 52-week period it chooses to determine annual earnings (for example, calendar year, fiscal year, anniversary of hire year). If the employer does not identify the year in advance, the calendar year will apply.

An employee who is not employed for a full year — either due to being hired after the beginning of the year or terminating employment prior to the end of the year — may still qualify as “highly compensated” if he or she earns a pro rata portion of the annual compensation amount required (\$107,432) based on the number of weeks the employee has been or will be employed.

During the last pay period or within one month after the end of the 52-week period, the employer may make one payment (make-up pay) to the employee to bring the employee's total annual compensation to at least \$107,432. For example, an employee may earn \$90,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn \$17,432 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns \$12,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least \$5,432 to the employee. 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. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee but may still qualify as exempt under one of the other white-collar exemptions.

Under the highly compensated employee provision, any payment made to the employee in the month after the end of the year as make-up pay is only attributed to the employee's previous year's total annual compensation. Such a make-up payment does not count toward the total annual compensation in the year in which it was paid.

Under the highly compensated employee test, all nondiscretionary bonuses and any other form of nondiscretionary compensation earned during the year are counted, together with the employee's salary, towards the \$107,432 threshold. If the employer retains the discretion as to both the fact that a payment will be made and the amount of the payment until at or near the point in time that the payment is to be made, the payment is discretionary; otherwise, it is nondiscretionary. If an employer promises in advance to pay a bonus, it is nondiscretionary.

If, under the terms of an employment agreement, an employee has a contract right, express or implied, to receive a particular type of payment, it is nondiscretionary.

The following types of payments are considered nondiscretionary:

- Payments made pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly (for example, commissions or bonuses paid monthly or quarterly based on the amount of sales or profits).
- Bonuses that are promised to employees upon hiring.
- Bonuses that result from collective bargaining.
- Bonuses that are announced ahead of time to induce employees to complete assignments more quickly, more efficiently, or more cost-effectively (such as attendance bonuses, individual or group production bonuses, or bonuses for quality and accuracy of work).
- Bonuses that are made contingent upon the employee remaining employed with the employer until the time the payment is to be made.