



# County Technical Assistance Service

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## Application of the FLSA

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Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

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# Table of Contents

Application of the FLSA .....	3
Non-Covered Workers .....	3
Independent Contractors .....	3
Elected Officials and Their Personal Staff .....	4
Volunteers .....	4
Prisoners .....	5
Exempt Employees .....	6
Executive, Administrative and Professional Exemptions.....	6
The Salary Basis Requirement .....	6
The Primary Duty Requirement .....	8
Executive Employee Exemption .....	9
Administrative Employee Exemption .....	9
Professional Employee Exemption .....	10
Computer Employee Exemption .....	11
Highly Compensated Worker Exemption .....	12
Seasonal Recreational Employees .....	12
Public Safety Employees.....	12

## Application of the FLSA

**Reference Number:** CTAS-130

The FLSA is applicable to all employees of counties, including full and part-time employees, unless they are specifically exempted. Under the FLSA, some workers are considered *not covered*, and thus are not subject to any of the provisions of the FLSA, and others are *covered* employees who are *exempt* from some of the provisions of the FLSA. The payment of a salary in lieu of an hourly wage does not, by itself, remove an employee from the provisions of the FLSA.

The FLSA does not apply to persons who are not “employees.” The determination of whether an employer-employee relationship exists is therefore an important one. The employment relationship requires an “employer” and an “employee,” and the act or condition of employment. Courts have interpreted the term “employ” as defined in the FLSA broadly as “to suffer or permit to work” and have indicated that mere knowledge by an employer of work done for him or her by another is sufficient to create an employment relationship under the FLSA.

## Non-Covered Workers

**Reference Number:** CTAS-131

The following workers are not included within the definition of “employee” for purposes of the FLSA, and thus are *not covered* by the Act:

1. Independent contractors;
2. Elected officials and their personal staff, policy-making political appointees, and legal advisors;
3. Bona fide volunteers; and
4. Prisoners.

## Independent Contractors

**Reference Number:** CTAS-132

Independent contractors are not covered by the FLSA. There is no simple method for determining whether a worker is an employee or an independent contractor. A determination of the relationship cannot be based on isolated factors or upon a single characteristic or on technical concepts. It depends on all of the circumstances of the whole activity. All the facts relevant to the relationship between the worker and the employer must be considered. In general, workers who are economically dependent on the business of the employer, regardless of their skill level, are employees. Independent contractors are workers with economic independence who are in business for themselves. Among the factors that are considered significant, although no single one is regarded as controlling, are:

1. The extent to which the services in question are an integral part of the employer’s business.
2. Whether the worker’s managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer.
4. The worker’s skill and initiative.
5. The permanency of the worker’s relationship with the employer.
6. The nature and degree of control by the employer.

Each of the above-listed factors should be carefully analyzed, as well as any other relevant factors, to determine whether a person is an independent contractor based on the totality of the circumstances.

There are some factors that the Department of Labor deems immaterial to the determination of whether an employment relationship exists. The fact that the worker signs an agreement stating that he or she is an independent contractor is not controlling. The fact that the worker has incorporated a business or is licensed by a governmental agency is also not determinative. These include the place where the work is performed, the absence of a formal employment agreement, and whether the alleged contractor is licensed by state/local government. Finally, the time or method of payment does not control the determination. For more information, see [FLSA Fact Sheet #13, Am I an Employee? Employment Relationship under the Fair Labor Standards Act](#).

## Elected Officials and Their Personal Staff

**Reference Number:** CTAS-133

Elected county officials are not covered by the FLSA. Also not covered are political appointees to policymaking positions, legal advisors, and the personal staff of elected officials, as long as these persons are not under civil service protection. The exclusions for an elected official's personal staff and political appointees are very narrowly applied, and great care should be exercised in relying on those exclusions.

To determine whether someone meets one of these exclusions, the definition of "employee" under the FLSA must be examined, together with the administrative interpretations of that definition. The definition of "employee" does not include an individual who:

1. Holds a public elective office of that state, political subdivision, or agency;
2. Is selected by the holder of such an office to be a member of the official's personal staff;
3. Is appointed by the office holder to serve on a policymaking level;
4. Is an immediate adviser to such an office holder with respect to the constitutional or legal powers of the office; or
5. Is an employee of the legislative branch of that state, political subdivision, or agency;

as long as such individuals are not subject to civil service laws of the state, political subdivision, or interstate governmental agency which employs them.<sup>[1]</sup>

The exclusion for personal staff of an elected official is construed very narrowly by the DOL. As explained by the DOL in a Wage and Hour Opinion Letter dated November 27, 1998 (1998 WL 1147737), the exception applies only to individuals who are in a "highly intimate and sensitive position of responsibility" on the staff of the elected official. It generally includes only persons who are hired by and under the direct supervision of the elected official and who have regular direct contact with the official. See Wage and Hour Opinion Letter, September 12, 1997 (1997 WL 971910).

When a publicly elected official appoints an individual to serve on a policymaking board or commission, such an appointed individual is not covered by the FLSA. The most obvious examples of these policymaking appointees are appointed members of planning and zoning commissions, recreation boards, or other boards and commissions that have specific policy-making or advisory responsibilities.

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<sup>[1]</sup> 29 U.S.C. § 203(e)(2)(C).

## Volunteers

**Reference Number:** CTAS-134

Individuals performing volunteer services for units of state and local governments are not considered "employees" under the FLSA, and are therefore not covered by the act. The regulations governing volunteers are found in 29 C.F.R. §§ 553.100 - 553.106. A volunteer is an individual who performs a service for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation. These services must be offered freely and without pressure or coercion, direct or implied, from the employer. Individuals performing volunteer services for counties will not be regarded as employees for purposes of the FLSA. However, an employee cannot volunteer to perform services for his or her own employer that are similar to the services the employee is paid to do. For example, a full-time paid firefighter could not agree to identify a portion of the workweek as "volunteer time." An employee cannot be both a paid employee and a non-paid volunteer while performing the same type of work for the same employer.

For county employees who want to volunteer their time, two determinations must be made: (1) whether the services are performed for the same employer, and (2) whether the services are the same or similar to those the employee is paid by the county to do. Whether two units of a county are considered the same employer (same public agency) depends on the facts and circumstances, determined on a case-by-case basis. One factor the DOL considers is whether the agencies or departments are treated separately for statistical purposes in the Census of Governments, issued by the Bureau of the Census, U. S. Department of Commerce. The DOL normally takes an expansive view of the county as an employer, and if the agency for which a county employee wishes to volunteer is even remotely related to the county government, it might be wise to seek an opinion from the Wage and Hour Division on the issue.<sup>[1]</sup>

If the volunteer services are being performed for the same public employer, the services cannot be the same or similar services that the employee is paid to perform. The *same or similar services* means similar or identical services, based on all of the facts and circumstances. The DOL will consider such things as the three-digit categories of occupations in the *Dictionary of Occupational Titles*, as well as whether the volunteer duties are closely related to either the actual duties performed or the responsibilities assigned to the employee.

The DOL has issued several opinion letters on these issues. In an opinion dated October 5, 1987, the DOL stated that fire truck drivers in the same district could not work additional time for the same district without the hours worked being counted and compensated in accordance with the FLSA. In a ruling dated January 2, 1988, the DOL stated that a firefighter could volunteer the same services for a different public agency in another jurisdiction.

The DOL also has issued opinions confirming that public employees can perform volunteer work for the same employer, as long as the volunteer work is substantially different from their paid position. For example, in a letter dated May 7, 1986, the Wage and Hour Division stated that a full-time paid high school custodian could volunteer services to the high school as an assistant basketball coach. See also *Purdham v. Fairfax County School Board*, 637 F.3d 421 (4th Cir. 2011) (the court held that where a public employee engages in services different from those he or she is normally employed to perform, and receives no compensation or only a nominal fee, such work is exempt from the FLSA and the public employee is deemed a volunteer). Because all of these issues are decided on the facts and circumstances of the particular case, any county wishing to rely on such opinions would be well advised to request an opinion letter based on its own facts and circumstances.

Volunteers can be reimbursed for *expenses, reasonable benefits, and nominal fees* without losing their volunteer status. The DOL's regulations do not include any dollar limitation on the amount of money that can be paid to volunteers. The regulations state that a fee will not be considered nominal if it is tied to "productivity." The regulations make clear, however, that fees may be paid on a per-call or similar basis (e.g., a point system). The determination of whether an individual should lose volunteer status and be considered an employee for purposes of the FLSA will be made by DOL on the basis of an examination of the total amount of payments made, including fees, benefits, and expenses, "in the context of the economic realities of the total situation." Examples of allowable payments include uniform allowances, reasonable cleaning expense reimbursement, and compensation for wear and tear on personal clothing. These must be limited to actual reimbursement amounts and cannot be artificially high. Reasonable payments are permitted for tuition, books, supplies, transportation, and meal costs involved in training a volunteer to teach them to perform efficiently the services they will provide as a volunteer.

Some reasonable benefits also may be provided, such as liability, health, life, disability, worker's compensation, a nominal monthly or annual stipend or a "per call" stipend so long as these are nominal in the context of the economic realities of the particular situation. The regulations define allowable "reasonable benefits" to include a wide range of benefits such as pensions and length of service awards, and eliminate the requirements that benefits be "service-related" and be provided to county employees who perform the same type of services as the volunteers in order to qualify as allowable reasonable benefits.

In an opinion letter dated November 9, 1986, the DOL addressed the "reasonable benefits" issue in the context of volunteer firefighters. In this particular instance, the locality proposed to reward its firefighters with the following benefits:

1. Minimum water and sewer allotments—valued at \$9.00 and \$5.50 per month, respectively;
2. Membership in the government's swimming pool—valued at \$20 per month for a single person and \$30 per month for a family, for the pool season of three months; and
3. A contribution to a retirement investment fund—valued at \$250 per year, with an increase of \$25 per year up to \$500.

In this case, the DOL ruled that the benefits offered were nominal in value and therefore would not affect the volunteer status of the firefighters.

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[1] One issue that has been fairly controversial is whether a county employee such as an EMT or paramedic can volunteer the same services to a volunteer rescue squad or volunteer fire department within the county. The DOL appears to have relaxed its views somewhat in this area in light of a case in another jurisdiction, *Benshoff v. Virginia Beach*, 180 F.3d 136 (4<sup>th</sup> Cir. 1999). If the employee volunteers freely and without coercion, and if the volunteer organization is independently chartered with separate by-laws and policies and it is sufficiently separate from the county, the employee may volunteer even though the county provides some funding to the volunteer organization. See Wage and Hour Opinion Letters dated May 22, 2002 (2002 WL 32487830), June 5, 2002, and November 27, 2001.

## Prisoners

**Reference Number:** CTAS-135

Prisoners who are required to work by or for the government are not considered employees under the FLSA and need not be paid minimum wages or overtime. Use of inmate labor does not violate the FLSA if the prisoner works for or is required to work by the government having custody of the prisoner. However, if the inmates are contracted out to a private contractor, this can create an employment relationship requiring the payment of wages in accordance with the FLSA if the

private contractor exercises sufficient control over the prisoner to give rise to an employer-employee relationship. Even where minimum wage is required, deductions for restitution or other matters set by law or court order may reduce the wages below minimum wage so long as the employer does not gain from the deduction.

## Exempt Employees

**Reference Number:** CTAS-136

In addition to the workers who are not covered by the FLSA, there are some employees who are exempt from the minimum wage and overtime provisions of the Act. These employees are not required to be paid overtime when they work in excess of 40 hours in a workweek. These employees are, however, subject to some of the recordkeeping provisions of the FLSA. Although payment of a salary is an essential element of many exemptions, *the fact that an employee is paid a salary does not by itself make an employee exempt.*

## Executive, Administrative and Professional Exemptions

**Reference Number:** CTAS-137

These exemptions are sometimes called the “white collar” or “Section 541” exemptions, and are governed by the federal regulations found at 29 C.F.R. part 541. These regulations contain detailed requirements for the application of the exemptions. On April 23, 2004, the DOL filed its final regulations amending the regulations to revise the requirements for these exemptions. These regulations, known as the “Fair Pay” rules, became effective on August 23, 2004. The [DOL has a Web site](#) that is dedicated to explaining the regulations. Employers should thoroughly review all of their wage and hour practices and make adjustments to ensure compliance with the rules.

The employer has the burden of proving that a particular exemption applies to a particular employee and, therefore, the employer takes the exemption at his or her peril. Also, even though executive, administrative, and professional employees are specifically excluded from the provisions of the FLSA with regard to minimum wage and overtime, these employees are not exempt from the equal pay provisions and some of the recordkeeping provisions.

In order to qualify for one of these exemptions, an employee must meet certain tests regarding minimum compensation, job duties and responsibilities, and the employee must be paid on a “salary basis.” Under the old regulations, each of the white collar exemptions had a “Short Test” and a “Long Test” but these tests have been combined into a single test for each exemption. All of the white-collar exemptions require employees to be paid on a “salary basis” and their “primary duty” must be the performance of exempt work that varies by exemption. An employee who satisfies the test for a white-collar exemption is exempt from the minimum wage and overtime requirements of the FLSA.

## The Salary Basis Requirement

**Reference Number:** CTAS-138

*NOTE: On May 18, 2016, the United States Department of Labor’s Wage & Hour Division issued final regulations setting the minimum salary for the executive, administrative, and professional (“white collar”) exemptions under the Fair Labor Standards Act. These new regulations were scheduled to take effect on December 1, 2016, but the regulations are currently on hold. If these regulations were to become effective, the minimum salary to qualify for any of the “white collar” exemptions would be raised to \$913 per week (\$47,476 per year). This change would more than double the current minimum salary of \$455 per week (\$23,660 per year), which is discussed below. For additional information about these regulations, please see the CTAS InfoByte entitled “[Fair Labor Standards Act - Overtime Update 2016](#).” The information below sets out current law which will remain effect unless the new regulations are implemented at some point in the future.*

The “salary basis” test is a threshold requirement for the executive, administrative, and professional exemptions.<sup>[1]</sup> To meet this requirement, an employee must receive each pay period on a weekly or less frequent basis a pre-determined amount that is not subject to reduction for the quality or quantity of work performed. The minimum salary required for the exemptions was last revised in 2004. Under current regulations, the amount of the guaranteed salary cannot be less than \$455 per week (which translates into \$23,660 per year). The employee must receive the full salary for any week in which any work is performed, without regard to the number of days or hours worked, but exempt employees are not required to be paid for any week in which no work was performed.<sup>[2]</sup>

The \$455 minimum weekly salary may be translated into an equivalent amount for periods longer than one week (for example, the employee may be compensated bi-weekly on a salary basis of not less than \$910, semi-monthly on a salary basis of not less than \$985.83, or monthly on a salary basis of not less than \$1,971.66). The shortest payment period that will meet the exemption is one week.<sup>[3]</sup>

Also, the \$455 minimum weekly salary is not dependent on the number of hours worked in the workweek. Part-time employees are subject to the \$455 minimum weekly salary in the same way full-time employees are. It cannot be pro-rated to account for the reduced number of hours worked by part-time employees. See Wage-Hour Opinion Letter FLSA2008-1NA (2008 WL 1847289), Feb. 14, 2008.

The regulations contain exceptions that allow deductions from an exempt employee's pay for the following limited reasons: (1) deductions for absences of one or more full days for personal reasons other than sickness or disability (for example, if an employee is absent for one and one-half days for personal reasons, an employer could only deduct one day; however, the regulations contain a special provision that allows public employers to make deductions for absences of less than one day); (2) deductions for absences of one or more full days for sickness or disability if the employer has a paid sick/disability leave plan in place and the employee has used up his or her paid sick or disability leave (a special provision allows public employers to make deductions for absences of less than one day); (3) deductions to offset any amounts the employee may receive as jury fees, witness fees, or military pay while an employee is on leave for one of these reasons (the employer cannot make deductions for the actual absences for jury duty, witness duty, or temporary military leave; only the pay may be offset); (4) deductions made in good faith for violations of safety rules of major significance (such as rules prohibiting smoking in explosive plants, oil refineries or coal mines); (5) employers may make deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules that are part of written policies applicable to all employees (for example, suspension for violating a written policy prohibiting sexual harassment or workplace violence); (6) the employer is not required to pay full compensation for the first or last week of employment but instead may pay a proportionate part of the employee's salary for the time actually worked during those weeks; and (7) an employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA), but instead may pay a proportionate share of the salary for the time actually worked. When calculating the amount of the deductions, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed. A deduction for major safety violations may be made in any amount.<sup>[4]</sup>

Because the strict salary basis test presented problems for employers in the public sector with regard to deductions for less than one day's absence due to the generally accepted principle that public sector employees should not be paid for time not worked or covered by leave, the DOL issued regulations addressing this issue. The regulations<sup>[5]</sup> state:

- a. An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under § 541.100, 541.200, 541.300, or 541.400 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:
  1. permission for use has not been sought or has been sought and denied;
  2. accrued leave has been exhausted; or
  3. the employee chooses to use leave without pay.
- b. Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Under these regulations, a public employee who otherwise meets the requirements for an executive, administrative, or professional exemption does not lose the exemption if the employee is paid according to a pay system under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave, the pay system requires the employee's pay to be reduced for absences for personal reasons or because of illness or injury of *less than one work day*.<sup>[6]</sup> These regulations also allow a public employer to place an exempt employee on furlough for budget-required reasons without disqualifying the employee from being paid on a salary basis, except in the workweek in which the furlough occurred and the employee's pay was reduced.

With regard to disciplinary deductions, DOL recognizes the increasing liability of employers for their employees' conduct, particularly with respect to sexual harassment, workplace violence, drug and alcohol violations, and violations of state or federal laws, and the corresponding need for employers to be able to impose disciplinary suspensions of less than one week without pay for violations of workplace conduct rules. The regulations allow these deductions as long as there is a written policy in place that applies to all employees. The employer can suspend an exempt employee for one or more full days for disciplinary reasons under the written policy without losing the exemption.<sup>[7]</sup>

Current regulations provide that employers will not lose the exemption if an employee's pay is merely "subject to" impermissible deductions; instead, the employer must have an "actual practice" of making improper deductions. There is a "safe harbor" rule that protects employers from violations of the salary basis test through impermissible pay deductions if the employer demonstrates a good faith effort to comply with the FLSA by:

1. Having a clearly communicated policy that prohibits improper pay deductions;
2. Having a complaint mechanism in place that allows employees to bring the mistake to the employer's attention;
3. Reimbursing the employee for improper deduction(s); and
4. Making a good faith commitment to comply in the future.<sup>[8]</sup>

Under old rules, it was possible to violate the salary basis test by seemingly inconsequential actions as having exempt employees punch a time clock, or by paying exempt employees overtime and compensatory time. The current regulations eliminate these problems by providing that an exempt employee can receive additional compensation above the guaranteed minimum salary, and it can be based on additional hours worked beyond the normal workweek. The additional compensation may be paid on any basis, including flat sum, bonuses, straight-time hourly amounts, time-and-one-half or any other hourly basis, and it may include compensatory time. 29 C.F.R. § 541.604.

The following groups of employees are *not subject to the salary basis test*: teachers, doctors, lawyers, and those software professionals who are paid on an hourly basis at least \$27.63 per hour. These occupations have special rules exempting them from the salary basis test.<sup>[9]</sup> Also, for academic administrative employees the salary basis requirement can be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed.<sup>[10]</sup>

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[1] The salary basis requirement does not apply to lawyers and licensed or certified doctors and teachers. For certain computer-related occupations under the professional exemption, they need not be paid a salary if they are paid on an hourly basis at a rate not less than \$27.63 an hour. See FLSA Fact Sheet No. 17A, Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (U.S. Department of Labor, Wage and Hour Division). Also, for academic administrative employees the salary basis requirement can be met if the employee is compensated on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed. 29 C.F.R. §§ 541.204(a)(1), 541.600.

[2] 29 C.F.R. §§ 541.600, 541.602.

[3] 29 C.F.R. § 541.600(b).

[4] 29 C.F.R. § 541.602.

[5] 29 C.F.R. § 541.710.

[6] These special provisions apply only when the absence is occasioned by the employee for illness or personal reasons. Deductions cannot be made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions cannot be made for time when work is not available. 29 C.F.R. § 541.602.

[7] 29 C.F.R. § 541.602(b)(5). In the preamble to the 2004 amendments the DOL stated that the rules regarding deductions for violations workplace conduct rules are to be narrowly construed to apply only to serious conduct issues and not to employee performance or attendance. Accordingly, disciplinary deductions for chronic tardiness or absenteeism would not be allowed.

[8] 29 C.F.R. § 541.603.

[9] 29 C.F.R. §§ 541.303, 541.304, 541.600.

[10] 29 C.F.R. §§ 541.204(a)(1), 541.600.

## The Primary Duty Requirement

**Reference Number:** CTAS-139

In addition to the salary basis test, each of the white-collar exemptions contains a primary duty requirement, which varies with the exemption. "Primary duty" is defined as "the principal, main, major or most important duty that the employee performs" and it "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."<sup>[1]</sup> The regulations set out the following factors that may be considered, among other things, as a guide to determining whether an employee satisfies the primary duty requirement:

- 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 other employees for the kind of non-exempt work performed by the employee.

The amount of time spent performing exempt work is considered a "useful guide" under the regulations, but it is not the determining factor. The regulations have eliminated any absolute requirement that an employee spend more than 50 percent of his or her time performing exempt work, stating instead that employees who spend more than 50 percent of their time performing exempt work generally will satisfy the primary duty requirement but time alone is not the sole test. Employees who spend less than 50 percent of their time performing exempt duties can still be exempt if the other factors warrant that conclusion.<sup>[2]</sup> Executive employees who perform both exempt and non-exempt work generally will not be disqualified from



exemption as long as the executive makes the decision regarding when to perform non-exempt duties and the executive remains responsible for the success or failure of the business operations under his or her management while performing non-exempt duties.<sup>[3]</sup>

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<sup>[1]</sup> 29 C.F.R. § 541.700(a).

<sup>[2]</sup> 29 C.F.R. § 541.700.

<sup>[3]</sup> 29 C.F.R. § 541.106.

## Executive Employee Exemption

**Reference Number:** CTAS-140

The executive exemption applies to managerial employees. To be classified as a bona fide executive employee under the FLSA regulations, all of the following requirements must be met:<sup>[1]</sup>

1. The employee must be compensated on a salary basis at a rate not less than \$455 per week;
2. The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. The employee must customarily and regularly direct the work of two (2) or more other full-time employees, or their equivalent; and
4. 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.

The regulations give the following examples of "management" functions: interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among employees; determining the type of materials, supplies, machinery or tools to be used; and providing for the safety of the workers and the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.<sup>[2]</sup>

The requirement that an executive employee direct the work of two or more employees is satisfied when the executive supervises at least two full-time employees or the equivalent. For example, the executive could supervise one full-time employee and two part-time employees, or four part-time employees.<sup>[3]</sup> The phrase "customarily and regularly" as used in the regulations signify a greater frequency than occasional, but may be less than constant.<sup>[4]</sup>

The regulations also contain factors that may be considered in determining whether the executive employee's suggestions and recommendations are given "particular weight." These factors include: whether it is part of the employee's job to make suggestions and recommendations; the frequency with which they are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. The employee's suggestions and recommendations may have "particular weight" even if a higher level manager's recommendation has more importance or even if the employee does not have the ultimate decision making authority.<sup>[5]</sup> Evidence that an employee's recommendations are given particular weight could include the employee's job description, testimony that the recommendations were made and considered, and performance reviews that show the employee's role in other Workers' promotions or other change in status.

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<sup>[1]</sup> 29 C.F.R. § 541.100.

<sup>[2]</sup> 29 C.F.R. § 541.102.

<sup>[3]</sup> 29 C.F.R. § 541.104.

<sup>[4]</sup> 29 C.F.R. § 541.701.

<sup>[5]</sup> 29 C.F.R. § 541.105.

## Administrative Employee Exemption

**Reference Number:** CTAS-141

To qualify for this exemption, an employee's primary duty must be the performance of work that is directly related to the management or general business operations of the employer. The exemption generally includes executive and administrative assistants, advisory specialists, and employees who are in charge of a functional department that may include only one person. To be classified as a bona fide administrative employee under the FLSA, all of the following requirements<sup>[1]</sup> must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week (\$23,660 per year);
2. 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
3. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

To meet the requirements of the exemption, the employee must perform work that is directly related to assisting with the running or servicing of the business. Work directly related to management policies or general business operations is defined under the regulations to include, but not be 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, government relations, computer network and Internet activities, legal and regulatory compliance and similar activities.<sup>[2]</sup>

The regulations set out ten factors for determining whether an employee meets the requirement that the employee exercise "discretion and independent judgment with regard to matters of significance." These factors are:

1. Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
2. Whether the employee carries out major assignments in conducting the operations of the business;
3. Whether the employee performs work that affects the business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business;
4. Whether the employee has authority to commit the employer in matters that have significant financial impact;
5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
6. Whether the employee has authority to negotiate and bind the company on significant matters;
7. Whether the employee provides consultation or expert advice to management;
8. Whether the employee is involved in planning long- or short-term business objectives;
9. Whether the employee investigates and resolves matters of significance on behalf of management; and
10. Whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances<sup>[3]</sup>

The regulations also state that the "discretion and independent judgment" requirement still can be met even if their decisions are subject to review at a higher level, and even if the employee's duties consist of recommending action rather than the actual taking of action, as long as the other relevant factors warrant the conclusion. However, it must be more than the use of skill in applying well-established procedures or standards described in manuals<sup>[4]</sup> or other sources, and it does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.<sup>[5]</sup>

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<sup>[1]</sup> These requirements are set out in 29 C.F.R. § 541.200.

<sup>[2]</sup> 29 C.F.R. § 541.201.

<sup>[3]</sup> 29 C.F.R. § 541.202.

<sup>[4]</sup> In 29 C.F.R. § 541.704, it is noted that the use of manuals does not automatically exclude an employee from an exemption. The use of manuals, guidelines or other procedures that relate 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 affect an employee's exempt status.

<sup>[5]</sup> 29 C.F.R. § 541.202.

## Professional Employee Exemption

**Reference Number:** CTAS-142

Generally included in this exemption are the so-called "learned professions" such as medicine, law and dentistry; artistic professions and architects; teachers and professors; engineers and scientists; registered nurses; computer programmers,

computer systems analysts, and software engineers; and some accountants, depending on training and job duties.<sup>[1]</sup> To qualify for the learned professional exemption under the FLSA, all of the following requirements<sup>[2]</sup> must be met:

1. The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week (\$23,660 per year);<sup>[3]</sup>
2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment;
3. The advanced knowledge must be in a field of science or learning; and
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The regulations state that the phrase "work requiring advanced knowledge" means that it must be predominately intellectual in character which requires the exercise of discretion and judgment. 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. The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts this exemption to professions where specialized academic training is a standard pre-requisite for entrance into the profession, or employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained their knowledge through a combination of work experience and intellectual instruction.<sup>[4]</sup>

Certified public accountants generally meet the requirements for the exemption, and many other accountants who are not CPAs but who perform similar job duties may qualify, but accounting clerks, bookkeepers and other employees who perform a great deal of routine work usually will not qualify as exempt professionals.<sup>[5]</sup>

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<sup>[1]</sup> There is also an exemption for creative professionals such as artists, musicians, actors and writers, but since counties generally do not employ these kinds of professionals the exemption is not discussed. For more information, see 29 C.F.R. § 541.302.

<sup>[2]</sup> The requirements are set out in 29 C.F.R. § 541.301.

<sup>[3]</sup> These salary requirements do not apply to teachers, doctors, or lawyers. 29 C.F.R. §§ 541.303 and 541.304

<sup>[4]</sup> 29 C.F.R. § 541.301.

<sup>[5]</sup> 29 C.F.R. § 541.301(e)(5).

## Computer Employee Exemption

**Reference Number:** CTAS-143

The regulations consolidated the requirements for certain highly-compensated computer professionals. Computer analysts, computer programmers, software engineers and other similarly skilled workers in the computer field are eligible for this exemption. To qualify for the computer professional exemption under the FLSA, the following requirements<sup>[1]</sup> must be met:

1. The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
2. 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 duties described below;
3. The employee's primary duty must consist of:
  - 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.

This exemption does not include employees who repair computer hardware and related equipment. Computer employees who do qualify for this exemption often have duties that would qualify them for the administrative or executive exemptions.

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<sup>[1]</sup> The requirements are set out in 29 C.F.R. § 541.401.

## Highly Compensated Worker Exemption

**Reference Number:** CTAS-144

The regulations create a special category of exemption for employees who earn \$100,000 or more per year, known as the “highly compensated worker” rule. An employee meets this exemption if he or she meets the following requirements:<sup>[1]</sup>

1. The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
2. The employee’s primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

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[1] The requirements are set out in 29 C.F.R. § 541.604.

## Seasonal Recreational Employees

**Reference Number:** CTAS-145

Section 13(a)(3) of the FLSA provides an exemption from the minimum wage and overtime provisions of the FLSA for “any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per cent of its average receipts for the other six months of such year.” Receipts for this purpose are fees received from admissions. Examples of recreational or amusement establishments that may qualify for this exemption are outdoor swimming pools, golf courses and recreational parks that operate on a seasonal basis. A publicly operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to meet the requirements of (B) above so its employees could not qualify for the exemption under that section, but the employees could qualify under (A) above if the establishment is not open more than seven months each year.

## Public Safety Employees

**Reference Number:** CTAS-146

There is an extremely limited exemption from the overtime provisions of the FLSA for law enforcement and fire department personnel in counties that employ fewer than five full or part-time firefighters or fewer than five full or part-time law enforcement officers. All employees on the payroll must be counted, regardless of whether they are currently working, including employees on worker’s compensation leave, parental leave, FMLA leave, administrative leave, etc. This exemption can apply during one week and be inapplicable during the next week.<sup>[1]</sup> See [Public Safety](#) for more details.

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[1] See 29 U.S.C. § 213(b)(20) and 29 C.F.R. § 553.200.

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