



## **EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT**

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## **EXECUTIVE EXEMPTION**

### **Test**

The “general rule” for the executive exemption requires:

**a. that compensation be paid on a salary basis at the rate of not less than \$684/week (exclusive of board, lodging or other facilities); and**

**b. that the primary duty consists of the management of the enterprise or of a customarily recognized department or subdivision; and**

### **Notes/Definitions**

**Exclusive of Board, Lodging or Other Facilities:** The phrase 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 toward the minimum salary amount required for [the] exemption. 29 C.F.R. § 541.606

**Tip:** Such transactions are not prohibited, but the costs to the employer may not be considered when determining if an employee has received the required minimum salary. Also, the term “other facilities” refers to items “such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work.” 29 C.F.R. § 541.606(b)

**Example:** Management duties include “activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property;

## Test

## Notes/Definitions

planning and controlling the budget; and monitoring or implementing legal compliance measures.”  
29 C.F.R. § 541.102

**Tip:** Performing exempt and non-exempt work concurrently does not *automatically* disqualify an employee from the executive exemption. “Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods.” 29 C.F.R. § 541.106

**Example:** “An assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager’s primary duty is management.” However, “a relief supervisor or working supervisor whose primary duty is performing nonexempt work . . . does not become exempt merely because he occasionally has some responsibility for directing the work of other nonexempt production line employees.” Also, “an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.” 29 C.F.R. § 541.106

**Department or Subdivision:** “[D]istinguish 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. A customarily recognized department or subdivision must have a permanent status and a continuing function. . . . When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.” However, a recognized department or subdivision may move from place to place. Similarly, “continuity of the same subordinate personnel is not essential to the existence of a recognized unit provided it is a continuing function.” Thus, the exemption will not be lost “because the employee draws and supervises workers from a pool” or draws workers from other units. 29 C.F.R. § 541.103

## Test

c. that the employee customarily and regularly direct the work of at least two employees; and

d. that the employee have the authority to hire/fire other employees or at least have his recommendations concerning hiring, firing and promotions or other changes of statuses be given “particular weight.” 29 C.F.R. § 541.100(a)

## Notes/Definitions

**Two or More Employees:** “Two or more other employees’ means two full-time employees *or their equivalent.*” 29 C.F.R. § 541.104(a)

**Example:** One full-time and two half-time employees are equivalent to two full-time employees as are four half-time employees. 29 C.F.R. § 541.104(a)

While supervision may be distributed among two, three or more employees, each “must customarily and regularly direct the work of two or more other full-time employees” (or their equivalent). However, an employee who merely assists the regular manager or supervises only in the manager’s absence does not meet this requirement. 29 C.F.R. § 541.104(c)

**Tip:** A shared responsibility for the supervision of the same two employees in the same department satisfies this requirement. However, a full-time employee who works 20 hours/week for one supervisor and the remaining 20 hours/week for a different supervisor can be credited only as a *half-time* employee for *each* supervisor. 29 C.F.R. § 541.104(d)

**Particular Weight:** Consider “whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon.” 29 C.F.R. § 541.105

**Tip:** The suggestions and recommendations generally must pertain to employees supervised by the executive. Therefore, an “occasional suggestion with regard to the change in status of a co-worker” would be insufficient. Also, “an employee’s suggestions and recommendations may still be deemed to have ‘particular weight’ even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision.” 29 C.F.R. § 541.105

## Employee/Owner Executive:

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

**Test**

**An employee who owns at least 20% equity interest in the enterprise provided he is actively engaged in its management (“employer/owner”). 29 C.F.R. § 541.101**

**Notes/Definitions**

**Tip:** There are *no* salary requirements for the *employee/owner* under the executive exemption. 29 C.F.R. § 541.101

## ADMINISTRATIVE EXEMPTION

### Test

The “general rule” for the administrative exemption requires:

- a. that compensation be paid on a salary or fee basis at a rate of not less than \$684/week (exclusive of board, lodging or other facilities); and
- b. that the primary duty consist of office or non-manual work which is directly related to the management or general business operations of the employer or its customers, and whose primary duty includes the exercise of discretion and independent judgment with respect to significant matters. 29 C.F.R. § 541.200

### Notes/Definitions

**Directly Related to Management or General Business Operations:** This “refers to the type of work performed by the employee. To meet this 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.” 29 C.F.R. § 541.201(a)

**Example:** “Work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities qualify.” 29 C.F.R. § 541.201(b)

**Or its Customers:** Where the primary duty is work related to the management or general business operations of the employer’s customers, the employee may be exempt. 29 C.F.R. § 541.201(c)

**Example:** Employees acting as advisers or consultants to clients or customers such as tax experts or financial consultants. 29 C.F.R. § 541.201(c)

**Discretion and Independent Judgment:** “[I]nvolves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.” Factors to consider include: “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

## Test

### Notes/Definitions

operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; 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 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; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances." Also, exercising "discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision ... even if their decisions or recommendations are reviewed at a higher level." 29 C.F.R. § 541.202(b)(c)

**Tip:** "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 (i.e., a messenger who is entrusted with carrying large sums of money or who operates very expensive equipment does not exercise discretion and independent judgment ... merely because improper performance ... may cause serious financial loss to the employer)." 29 C.F.R. § 541.202(f)

"The decision made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." 29 C.F.R. § 541.202(c)

"The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills" does not preclude exempt status (i.e., manuals and procedures addressing difficult or novel circumstances and used as reference material). "However, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances." 29 C.F.R. § 541.704

**Tip:** Such discretion and judgment "must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources" and it "does

## Test

## Notes/Definitions

not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.” 29 C.F.R. § 541.202(c)(e)

**Example:** Ordinary inspectors, examiners or graders of products or commodities, comparison shoppers, or public sector inspectors (i.e., building inspectors, fire inspectors), do not qualify. 29 C.F.R. § 541.203(g)

**Example:** Insurance claims adjusters qualify “if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.” 29 C.F.R. § 541.203(a)

**Example:** Financial service employees qualify “if their duties include work such as collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer’s financial products.” 29 C.F.R. § 541.203(b)

**Tip:** An “employee whose primary duty is selling financial products does not qualify for the administrative exemption.” 29 C.F.R. § 541.203(b)

**Example:** A team leader assigned to major projects “(such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.” 29 C.F.R. § 541.203(c)

**Example:** Executive assistant/administrative assistant (to a business owner or senior executive of a large business) will qualify “if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.” 29 C.F.R. § 541.203(d)

## Test

## Notes/Definitions

**Example:** Human resources managers qualify if they “formulate, interpret or implement employment policies.” 29 C.F.R. § 541.203(e)

**Tip:** “Personnel clerks who ‘screen’ applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption.” 29 C.F.R. § 541.203(e)

**Example:** Management consultants may qualify “if they study the operations of a business and propose changes in organization.” 29 C.F.R. § 541.203(c)

## Academic Administrator:

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

**(1) that are compensated for services on a salary or fee basis at a rate of not less than \$684/week (exclusive of board, lodging or other facilities), or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and**

**(2) whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof (the “Academic Administrator”).** 29 C.F.R. § 541.204(a)

**Performing Administrative Functions Directly Related to Academic Instruction or Training:** “Refers to work that is “related to the academic operations and functions in a school rather than to administration along the lines of general business operations.” 29 C.F.R. § 541.204(c)

**Example:** “The superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and method 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; the

## Test

## Notes/Definitions

principal and any vice-principals responsible for the operation of any elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.” 29 C.F.R. § 541.201(c)

**Tip:** “Jobs related to building management and maintenance, jobs relating to the health of the students, academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered *academic* administration, such employees may qualify” under the regular test for administrative exemption or another exemption. 29 C.F.R. § 541.204(c)

**Educational Establishment:** Includes “an elementary or secondary school system, an institute of higher education or other educational institution ... . Under the laws of most states, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some states may also include nursery school programs in elementary education and junior college curriculums in secondary education. 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.” 29 C.F.R. § 541.204(b)

## **PROFESSIONAL EXEMPTION**

### **Test**

The “general rule” for the professional exemption requires:

**a. that compensation be paid on a salary or fee basis at a rate of not less than \$684/week (exclusive of board, lodging or other facilities); and**

**b. that the primary duty consists of:**

**1. work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (not general academic education, apprenticeship, or training to perform routine mental, manual or physical processes) (the “learned professional”), or**

**2. work requiring invention, imagination or originality or talent in a recognized field of artistic or creative endeavor (the “creative professional”). 29 C.F.R. § 541.300(a)**

*In turn, each subcategory of “professional” has its own specific test:*

### **Notes/Definitions**

## Test

### Learned Professionals:

Requires that:

**“(1) The employee must perform work requiring advanced knowledge; and**

**(2) the advanced knowledge must be in a field of science or learning; and**

## Notes/Definitions

**Work Requiring Advanced Knowledge:** “[W]ork which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. 29 C.F.R. § 541.301(b)

**Tip:** Distinguish traditionally recognized professional status “from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.” 29 C.F.R. § 541.301(c)

**Example:** Learned professionals include “medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, and pharmacy.” 29 C.F.R. § 541.301(c)

**Tip:** “The learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes, [or] to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.” 29 C.F.R. § 541.301(d)

**Tip:** “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 a particular occupation, that occupation may have acquired the characteristics of a learned profession.” 29 C.F.R. § 541.301(f)

## Test

(3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.” 29 C.F.R. § 541.301(a)

## Notes/Definitions

**“Customarily” Acquired By A Prolonged Course of Specialized Intellectual Instruction:** Restricts the “learned professional” exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession” and the best evidence that an employee meets this requirement “is possession of the appropriate academic degree. However, the word ‘customarily’ means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction” (i.e., a lawyer who did not go to law school, or chemist who doesn’t have a degree in chemistry). 29 C.F.R. § 541.301(d)

**Example:** Registered or certified medical technologists qualify if they “have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council for Medical Education of the American Medication Association.” 29 C.F.R. § 541.301(e)

**Example:** Nurses qualify if they are registered (“RN”) by the appropriate State examining board. 29 C.F.R. § 541.301(e)

**Tip:** Licensed practical nurses and other similar health care employees generally do not qualify. 29 C.F.R. § 541.301(e)

**Example:** Dental hygienists qualify if they have “successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Education Programs of the American Dental Association.” 29 C.F.R. § 541.301(e)

**Example:** Physician assistants qualify if they have “successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants.” 29 C.F.R. § 541.301(e)

**Example:** Accountants qualify if they are certified public accountants or perform similar job duties. 29 C.F.R. § 541.301(e)

## Test

### Notes/Definitions

**Tip:** “Accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.” 29 C.F.R. § 541.301(e)

**Example:** Chefs qualify if they are “executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program.” 29 C.F.R. § 541.301(e)

**Tip:** “Cooks who perform predominantly routine mental, manual, mechanical or physical work” do not qualify. 29 C.F.R. § 541.301(e)

**Example:** Paralegals qualify only if they possess advanced specialized degrees in *other* professional fields and apply their advanced knowledge in that field in the performance of their duties (i.e., an engineer hired as a paralegal to provide expert advice on product liability cases or patent matters). 29 C.F.R. § 541.301(e)

**Tip:** “Paralegals and legal assistants generally do not qualify. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution.” 29 C.F.R. § 541.301(e)

**Example:** Athletic trainers qualify if they “have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification.” 29 C.F.R. § 541.301(e)

**Example:** Funeral directors or embalmers qualify if they “are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education.” 29 C.F.R. § 541.301(e)

## Test

### Law and Medicine Professionals:

The professional exemption also applies to:

**“(1) any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and**

**(2) any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession (the “legal/medical professionals”).** 29 C.F.R. § 304(a)

[Note: legal and medical professionals are not subject to the salary level or salary basis tests. 29 C.F.R. § 541.304(d)]

## Notes/Definitions

**Tip:** “In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners.” (i.e., general practitioners and specialists, osteopathic physicians, podiatrists, dentists, doctors of optometry, or bachelors of science in optometry). 29 C.F.R. § 541.304(b)

**Tip:** “Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.” 29 C.F.R. § 541.304(c)

## Test

### Teaching Professionals:

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

**(a) “any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge; and**

**(b) who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed” (the “teaching professional”).** 29 C.F.R. § 541.303(a)

[Note: teaching professionals are not subject to the salary level or salary basis tests. 29 C.F.R. § 541.303(d)]

## Notes/Definitions

**Example:** Exempt teachers include “academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economic teachers; and vocal or instrumental music instructors. 29 C.F.R. § 541.303(b)

**Tip:** Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the school’s responsibility in contributing to the educational development of the student.” 29 C.F.R. § 541.303(b)

**Tip:** “The possession of an elementary or secondary teacher’s certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency or unlimited). . . . [Also], a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.” 29 C.F.R. § 541.303(c)

## Test

### Creative Professionals:

To qualify:

(a) the “primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work”; and

(b) “the work performed must be ‘in a recognized field of artistic or creative endeavor’ (i.e., music, writing, acting and the graphic arts).” 29 C.F.R. § 541.302(a)(b)

## Notes/Definitions

**Invention, Imagination, Originality or Talent:** This “distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee ... . This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies.” 29 C.F.R. § 541.302(c)

**Tip:** “This requirement generally is not met by a person who is employed as a copyist, as an ‘animator’ of motion-picture cartoons, or as a retoucher of photographs.” 29 C.F.R. § 541.302(c)

**Example:** “Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy.” However, “employees of newspapers, magazines, television and other media are not exempt 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” (i.e., compare reporters whose work is subject to substantial control by the employer, to journalists whose “primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.”). 29 C.F.R. § 541.302(c)

## THE HIGHLY COMPENSATED EMPLOYEE

### (“SHORT TEST” FOR THE EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EXEMPTIONS)

#### Test

The “short test” requires:

**(a) compensation at an annual rate of not less than \$107,432 (exclusive of board, lodging or other facilities, or payments for medical or life insurance, retirement contributions or the cost of other fringe benefits provided by the employer); and**

**(b) that the “employee customarily and regularly performs one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.” 29 C.F.R. § 541.601**

#### Notes/Definitions

**Annual Rate of Not Less Than \$107,432:** (a) must include compensation on a salary or fee basis of not less than \$684/week; and (b) the total compensation of \$107,432 may be a combination of salary, commissions and other nondiscretionary bonuses and compensation; and (c) must be paid in full within one month after the end of the calendar year, unless the employer identifies another 52-week period in advance (i.e., fiscal year, employee anniversary, etc.). 29 C.F.R. § 541.601(b) The “catch-up” payment only counts toward the compensation of the prior year, and not the year of the payment. 29 C.F.R. § 541.601(b).

**Tip:** An employee who does not work an entire year must receive the final payment on a *pro rata* basis within one month after employment terminates. 29 C.F.R. § 541.601(b)

**Tip:** If an employee’s annual compensation falls short of the \$107,432 required, and the employer fails to make up the shortage within one month of the end of the year utilized, the employee may still be exempt under another exemption. 29 C.F.R. § 541.601(b)

**Duties Test:** The employee need only perform one or more of the duties or responsibilities of an executive, administrative or professional employee to qualify. Thus, if the employee customarily and regularly directs the work of 2 or more employees, he will not need to meet any of the other requirements of the executive exemption. 29 C.F.R. § 541.601(c)

**Tip:** The “highly compensated” employee test *only* applies to employees performing office or non-manual work. 29 C.F.R. § 541.601(d)

## **COMPUTER EMPLOYEE EXEMPTION**

### **Notes/Definitions**

The computer employee exemption requires that:

**(a) compensation be paid on a salary or fee basis at a rate of not less than \$684/week (exclusive of board, lodging or other facilities), or on an hourly basis of not less than \$27.63/hour; and**

**(b) the primary duty consists of:**

**(1) “The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications”;**

**(2) “The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications”;**

**(3) “The design, documentation, testing, creation or modification of computer programs related to**

**Tip:** “Employees engaged in the manufacture or repair of computer hardware and related equipment [or] whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations” are not exempt. 29 C.F.R. § 541.401

machine operating systems”; or

(4) “A combination of the aforementioned duties, the performance of which requires the same level of skills.” 29 C.F.R. § 541.400

**Tip:** Computer employees (within or without the scope of this exemption) may also have executive and administrative duties which will qualify them under those other exemptions. 29 C.F.R. § 541.402

## OUTSIDE SALES EXEMPTION

### Test

An outside “salesman” exemption will apply to an employee

#### **(a) whose primary duty is**

##### **(1) making sales, or**

**(2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid for by a client or customer; and**

### Notes/Definitions

**Primary Duty:** Includes “work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee’s sales efforts also shall be regarded as exempt work” (i.e., “writing sales reports, updating or revising the employee’s sales or display catalogue, planning itineraries and attending sales conferences.”). 29 C.F.R. § 541.500(b)

**Example:** “[A] company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low,” but who is not there to obtain a commitment for additional purchases, is not exempt. 29 C.F.R. § 541.503(c)

**Tip:** “Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.” 29 C.F.R. § 541.503(a)

**Example:** Compare “promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant’s shelves or rearranging the merchandise” to “activities designed to stimulate sales that will be made by someone else”. 29 C.F.R. § 541.503(b)

**Example:** Drivers who sell may be exempt employees if their primary duty is sales. “In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.” 29 C.F.R. § 541.504(a)

**Tip:** Factors to consider include “a comparison of the driver’s duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor’s license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee’s

## Test

**(b) who is customarily and regularly engaged away from the employer's places of business in performing the primary duty.** 29 C.F.R. § 541.500(a)

[Note: outside sales employees are not subject to the salary level or salary basis tests.]

## Notes/Definitions

occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales." 29 C.F.R. § 541.504(b)

**Away From Employer's Place of Business:** "The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property." 29 C.F.R. § 541.502

**Example:** "Outside sales employee does not lose the exemption by displaying samples in hotel rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business." 29 C.F.R. § 541.502

**Example:** "Outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) should not be considered as the employer's place of business." 29 C.F.R. § 541.502

## **MISCELLANEOUS COMPENSATION ISSUES**

### **Minimum Salary Requirement - Equivalent Amounts for Periods Longer than a Week:**

- If paid bi-weekly on a salary basis of \$1,368
- If paid semimonthly on a salary basis of \$1,482
- If paid monthly on a salary basis of \$2,964

[Note: One week is the shortest period acceptable for payment on a “salary basis”, except as explained below.]

### **Nondiscretionary Bonuses, Incentives, and Commissions:**

- Up to 10% of the minimum salary level (or \$68.40 a week) for the executive, administrative and professional exemptions may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions provided they are paid annually or more frequently. However, if, at the end of the designated 52 week period, the sum of the weekly salary plus non-discretionary payments does not equal 52 times the minimum weekly salary requirement (\$684/week or \$35,568/year), the employer must make an additional payment sufficient to satisfy this amount no later than the next pay period after the end of the year. Failure to do so will obligate the employer to pay overtime.
- For the highly compensated employee, the employer must pay on a fee or salary basis a weekly amount of at least the minimum salary requirement (\$684/week). Additional amounts to satisfy the annual salary level (\$107,432/year) must be paid by the final pay period of the 52 week period or within one month after it ends. Thus, the highly compensated employee may be paid a base salary of \$35,568/year (or \$684/week) with

\$71,864 in additional nondiscretionary bonuses, incentives and commissions by the end of the 52 week period (plus one month grace period).

### **Minimum Guarantee Plus Extras:**

- Exempt employees may receive additional compensation without violating the “salary basis” requirement or affecting their exempt status, provided the arrangement guarantees the minimum salary requirement. Thus, the employer can pay the exempt employee \$684/week in salary and pay additional amounts such as-
  - Commissions on sales
  - Percentage of profits
  - Additional compensation for all hours worked beyond the “normal” workweek (paid at straight time, time and half, flat sum, bonus payment or any other amount)
- Exempt employees may be compensated on an *hourly, daily or shift basis* without violating the “salary basis” requirement or affecting their exempt status, provided the arrangement guarantees the minimum salary requirement regardless of the number of hours, days or shifts worked and the amount actually paid has a reasonable relationship to the amount guaranteed. “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”. The reasonable relationship requirement applies only if the employee’s pay is computed on an hourly, daily or shift basis.” 29 C.F.R. § 541.604(b). Examples:
  - If employee is guaranteed at least \$725/week for any week in which he performs any work, and he normally works four or five shifts a week, he may be paid \$210 per shift without violating the \$684/week salary basis requirement.

- If employee is guaranteed only \$725/week and he is also paid 5% of all profits which often total as much or more than the guaranteed salary, the employee could not be paid on an hourly, daily or shift rate without jeopardizing the exemption.

## Fee Basis

The test to determine whether the amount of the fee would satisfy the minimum salary requirement is based on the amount of time it took to accomplish the work and whether that fee rate would be adequate if the work took 40 hours.

Examples:

- Paying an artist \$350 for a picture that took 20 hours to complete would yield the artist \$700 if it had taken 40 hours and satisfies the current \$684 minimum salary requirement.
- Paying an artist \$300 for a picture that took 20 hours to complete would yield the artist \$600 if it had taken 40 hours and, therefore, does not satisfy the \$684 minimum salary requirement

## Special Rules:

There are new special rules applicable to the motion picture producing industry and to employees working in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the US Virgin Islands (requiring only \$455/week) or working in American Samoa (requiring only \$380/week), unless the employees work for the US government.

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## Claudia D. Orr

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Claudia Orr has nearly 30 years of experience representing employers ranging from Fortune 500 companies to small businesses and nonprofits. Claudia provides advice on all aspects of employment law and defends her clients when litigation and administrative issues arise. She also regularly serves as an arbitrator and as a mediator in employment law cases. Claudia is serving as a member of the board of directors of Detroit SHRM for the second time, this time as secretary. She also remains a member of the organization's legal affairs committee.

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