

Chapter 22

EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER, AND OUTSIDE SALES EXEMPTIONS – FLSA § 13(a)(1) (29 U.S.C. § 213(a)(1))

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Chapter 22

EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER, AND OUTSIDE SALES EXEMPTIONS – FLSA § 13(a)(1) (29 USC § 213(a)(1))

22a GENERAL CONSIDERATIONS

22a00 Regulations: part 541 (29 CFR part 541).

29 CFR part 541 defines the terms “executive” (541.100), “administrative” (541.200), “professional” (541.300), “computer” (541.400), and “outside sales” (541.500) employees for purposes of the 29 U.S.C. § 213(a)(1) exemption from minimum wage and overtime. 29 U.S.C. § 213(a)(17) exempts computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field from minimum wage and overtime if they meet the prescribed duties tests, as discussed in 29 CFR §§ 541.400 through 541.402, and they receive the proper level of pay.

29 CFR part 541

22a01 Effective date of revised exemption tests.

The effective date of the revised exemption tests under 29 CFR part 541 is 08/23/2004. The revised regulations were published in the Federal Register on 04/23/2004 (69 FR 22122).

69 FR 22122

22a02 Scope of 541 exemptions.

29 U.S.C. § 213(a)(1) exemptions apply only to certain types of “white collar” employees who meet the salary and duties tests and who are employed as *bona fide* executive, administrative, professional, computer, and outside sales employees, as 29 CFR part 541 defines each of these terms. Manual laborers or other “blue collar” workers do not qualify for exemption under 29 CFR part 541.

29 CFR § 541.3(b)

22a03 Exemption period.

The exemptions provided by 29 U.S.C. § 213(a)(1) are applied on the basis that each workweek constitutes a separate period of exemption. However, certain of the tests are so worded that a determination of exemption must be made by considering the conditions of employment over a more extended period of time. For example, the “primary duty” test does not expressly apply on a workweek basis and must be applied using a holistic approach that is sufficient to capture the character of the employee’s job as a whole (29 CFR § 541.700; 69 FR 22186), rather than a day-by-day scrutiny of the tasks performed. Similarly, an employee may be paid the salary required during certain workweeks, but an analysis of the compensation paid over a longer period may reveal that the employee is not actually paid “on a salary basis.” Likewise, investigation may reveal that a supervisor does not “customarily and regularly” direct the work of two or more employees in his or her department, despite the fact that in particular weeks the supervisor may supervise more than one employee. It must

always be kept in mind, however, that a change in an employee's duties, responsibilities, or salary (even though temporary) may bring a change in exemption status.

22a04 **Job titles and job descriptions insufficient.**

Job titles and job descriptions do not determine an employee's exempt status.

29 CFR § 541.2

22a05 **Trainees.**

- (a) 29 U.S.C. § 213(a)(1) exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties required for exemption as a *bona fide* executive, administrative, professional, outside sales or computer employee.

29 CFR § 541.705

- (b) However, time spent by an exempt store manager attending a several week management training program which will qualify the manager for placement in a higher level management position will not result in loss of exemption for the manager for the time spent in the training program. The manager's primary duty is not changed by the mere fact that the manager attends such a training program.

WHD Opinion Letter FLSA 2008-19

22a06 **Other laws and collective bargaining agreements.**

The FLSA provides minimum standards that may be exceeded but cannot be waived or reduced. Employers must also comply with any federal, state, or municipal law, ordinance, or regulation establishing higher standards than those in the FLSA.

29 CFR § 541.4

22a07 **Recordkeeping, work schedule and leave usage policies.**

Employers may require exempt employees to record and track their hours and to work a specified schedule, and may make deductions from accrued leave accounts for leave taken (whether for a full or partial day) without affecting the employees' exempt status.

WHD Opinion Letter FLSA 2005-05

22a08 Employee working in both exempt and nonexempt positions.

When an employee performs work in more than one capacity for an employer, for example, an office assistant, -a position that is typically nonexempt, and as a manager - a position that is typically exempt, the standard for determining whether the combined duties are exempt is the primary duty test, which considers the character of the employee's job viewed as a whole. If the exempt managerial duties are the primary duty, the employee will be exempt. If the nonexempt office assistant duties are the primary duty, the employee will be nonexempt. If the employee is determined to be nonexempt, normal regular rate principles apply in calculating overtime due to the employee.

**WHD Letter FLSA 2005-14NA
29 CFR § 541.700**

22a09 All aspects of the applicable exemption test must be met.

If an employee's exempt status is subject to the salary basis test, and the employee is paid on a salary basis, but is paid less than \$455 per week, the employee is not exempt. If an amount is paid for a period longer than one week, it is necessary to compute the weekly equivalent of the amount paid to determine if the amount equals or exceeds \$455 per week.

If, under the executive exemption, an employee customarily and regularly supervises or directs the work of only one individual, the employee will fail the supervision test, and will not meet the executive exemption.

If an employee's primary duty is the performance of preventative maintenance work on electrical and mechanical systems, the employee's primary duty is manual labor, and the employee will fail the duties test of the administrative exemption.

**WHD Letter FLSA 2005-37NA
WHD Letter FLSA 2005-4NA**

22b EXECUTIVE EXEMPTION – 29 CFR § 541.100**22b00 Criteria for exemption of “executive” employees.**

- (a) To be exempt as a *bona fide* “executive” under 29 CFR § 541.100, all of the following tests must be met:
- (1) The employee must be compensated on a “salary basis” at a rate not less than \$455/wk (\$380/wk if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities,
 - (2) The employee’s primary duty must be management of the enterprise in which employed (or a customarily recognized department or subdivision thereof),
 - (3) The employee must customarily and regularly direct the work of two or more other employees, 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.
- (b) “Salary basis” is defined at 29 CFR § 541.602. (*See* FOH 22g02.)

29 CFR §§ 541.100 - 541.106, 541.600, 541.602, 541.606, and 541.700 - 541.701**22b01 Primary duty test for executive employees.**

- (a) An exempt executive employee’s primary duty must be management of the enterprise in which employed, or management of a customarily recognized department or subdivision of the enterprise. “Primary duty” is defined in 29 CFR § 541.700 as the principal, main, major or most important duty the employee performs, determined by examining all the facts in each case with the major emphasis on the character of the employee’s job as a whole. The amount of time spent performing exempt work can be a useful guide in answering this question, but time alone is not the sole test. The regulations do not require that employees spend more than 50 percent of their time performing exempt work to qualify for exemption. Thus, while employees who spend more than half their time performing exempt work will generally satisfy the primary duty requirement, employees who do not spend more than half their time performing exempt duties may still meet the primary duty requirement if other factors support that conclusion. Factors to consider include, but are not limited to, the relative importance of the exempt duties compared with other 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 to other employees for the kind of nonexempt work performed by the employee. For example, managers in retail establishments who perform exempt executive duties such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if they spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if a particular manager is closely supervised and earns little more than the nonexempt employees, such a manager generally would not satisfy the primary duty requirement. *See* also FOH 22b04 and 29 CFR § 541.106.

29 CFR § 541.700

- (b) “Management” includes (but is not limited to) activities such as interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for 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; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 CFR § 541.102**WHD Letter FLSA 2005-19NA****WHD Opinion Letter FLSA 2006-29****69 FR 22133**

- (c) “Customarily recognized department or subdivision” means a recognized subpart, within the larger business unit, which has a permanent status and continuing function. The term is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a recognized unit with permanent status and function. Each separate establishment of a multi-establishment enterprise qualifies as a recognized subdivision. However, a recognized subdivision need not be physically within the employer’s establishment, and may even move from place to place. An employee may work in more than one location without invalidating the exemption if factors show the employee is actually in charge of a recognized unit with a continuing function in the employer’s organization. Continuity of the same subordinate personnel is also not required; an otherwise exempt employee does not lose the exemption simply because the employee obtains and supervises workers from a pool or supervises a team of workers from other recognized units. Examples of “department or subdivision” include such groupings as a shift; a functional area, *i.e.* “back of the house, front of the house” in a store or restaurant; or a small group or team of employees who work on a related project within a larger group.

29 CFR § 541.103**69 FR 22134**

- (d) **Primary duty during a strike period.**

During a strike, otherwise exempt executive, administrative, and professional employees often perform the work of nonexempt “rank and file” employees, which raises a question as to their exemption status under 29 CFR part 541. The primary duty test does not expressly apply on a workweek basis. *See* 29 CFR § 541.700 and FOH 22a03. In Marshall v. Western Union Telegraph Co., 621 F.2d 1246 (3rd Cir. 1980), which involved a three-month strike period, the U.S. Court of Appeals for the Third Circuit held that the primary duty requirement then existing in the regulation’s “short test” for high-salaried managerial employees could not be applied on a workweek basis (or over any specific timeframe under the regulatory language). Based on this ruling, WHD will, on a nationwide basis, deem the primary duty test to be satisfied during a strike period, provided that the otherwise exempt employee who performs nonexempt work during that period (1) satisfied the primary duty

test prior to the strike and (2) is paid on a salary basis at a rate not less than the required weekly amount of \$455 during the strike.

Marshall v. Western Union Telegraph Co., 621 F.2d 1246 (3rd Cir. 1980)

22b02 Supervision of two or more other employees.

- (a) Whether an employee “customarily and regularly directs the work of two or more other employees” under 29 CFR § 541.100(a)(3) depends on all the facts. “Customarily and regularly” means greater than occasional but may be less than constant; it includes work normally and recurrently performed every workweek, but does not include isolated or one-time tasks. The fact that an occasional workweek passes when an otherwise exempt executive does not give direct instructions to subordinate employees will not defeat the exemption, provided the executive in fact customarily and regularly directs the subordinate employees’ work. In addition, in certain instances, a supervisor (such as a district sales manager) may not work at the same time or within the same establishment as the assigned subordinates being supervised; this will not defeat the exemption if the criteria of 29 CFR § 541.100(a)(3) in fact are met.

**29 CFR §§ 541.100, 541.701
WHD Opinion Letter FLSA 2006-35**

- (b) “Two or more other employees” means two full-time employees or the equivalent (29 CFR § 541.104). For example, one full-time and two half-time employees are equivalent to two full-time employees. Four half-time employees are also equivalent to two full-time employees. Full-time generally means someone who works 40 or more hours per week. If occasional, temporary or part-time employees are involved when determining if the two full-time employee equivalency is met, an exempt executive must supervise two or more employees for a combined total of 80 hours of work by such employees. In other words, the total number of hours worked by subordinate employees supervised must ordinarily total 80 within the workweek to qualify as the equivalent of two full-time employees. If a full-time employee works over 40 hours in the workweek, he or she counts as the equivalent of only one employee. For example, if a full-time employee works 60 hours per week and a part-time employee works 20 hours per week, although the two employees together work a total of 80 hours, an equivalent of only one full-time and one part-time employee is supervised, thereby not meeting the criteria. Only other employees of the employer may be considered when determining if the two full-time employee equivalency is met; supervision of volunteers, employees of independent contractors, or any other “non-employees” (trainees, interns) in relation to the employer are not considered for purposes of this test.

**29 CFR § 541.104
69 FR 22135
WHD Opinion Letter FLSA 2007-03
Fact Sheet #71**

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

executives. Thus, shared responsibility to supervise the same two employees in the same department does not meet the requirement that the executive direct the work of two or more employees or their equivalent. On the other hand, a full-time employee who works half of the time for one supervisor and the other half of the time for a different supervisor may be credited as a half-time employee for each of the supervisors. However, if a full-time employee usually works more than 40 hours per week and the employer wants to “split” this employee’s time evenly between two supervisors, then each supervisor is still supervising only one-half of this full-time employee’s time. Subdividing one full-time employee’s time between more than one supervisor for purposes of this test should never add up to more than one full-time employee.

Also, there is no requirement that the manager work at the same time or at the same location as the subordinates in order to qualify for the exemption, as long as the manager regularly directs the subordinate’s work.

WHD FLSA Opinion Letter August. 21, 1978

WHD FLSA Non-Administrator Letter November 8, 1979

WHD Opinion Letter FLSA 2006-35

- (d) WHD has occasionally accepted a lower full-time workweek standard but only when unusual circumstances justified it in an industry (and never because an individual employer’s rules defined full-time as something less than 40 hours per week for purposes of pension or benefit plan participation or other reasons). The exception was limited to firms in industries that had established workweeks of 37 ½ or 35 hours for full-time employees, such as banking and insurance in the 1970s. For example, banks historically operated fewer hours each week compared to their normal business operations today – *i.e.*, they were closed to the public by mid-afternoon on most weekdays and did not open for business on weekends (thus, the term “banker’s hours” became known as a reference to a reduced workweek schedule compared to the norm). Such qualifying circumstances no longer appear to be present in the banking and insurance industries today. In the 2004 revisions to the 541 regulations, WHD reinforced “its current interpretation that an exempt supervisor generally must direct a total of 80 employee-hours of work each week.” 69 FR 22135 (April 23, 2004) *See also* Perez v. Radioshack Corporation, 386 F. Supp. 2d 979, 990 (N.D. Ill. 2005) (to “customarily and regularly” direct work of two or more full-time employees, an exempt executive must supervise 80 or more hours of subordinates’ time at least 80 percent of the time to indicate frequency greater than occasional but less than constant).

29 CFR § 541.701

22b03 Authority to hire or fire, particular weight.

To qualify as an exempt executive, an employee must have the authority to hire or fire other employees, or have his or her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees be given “particular weight.” Factors considered when determining if an employee’s recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. For example, an employee who provides few recommendations that are never followed would not meet the requirement of 29 CFR § 541.100(a)(4). Generally, an executive’s recommendations must pertain to employees whom the executive

customarily and regularly directs or supervises. It does not include occasional suggestions regarding co-workers. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status, such as where a higher level manager or a personnel board makes the final hiring, promotion or termination decision. "Other change of status" refers to tangible employment actions and means a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. A supervisor who provides recommendations on any one of the specified changes in employment status may be considered to meet the requirement of 29 CFR § 541.100(a)(4).

29 CFR §§ 541.100, 541.105
69 FR 22131, 22135

22b04 **Concurrent performance of exempt and nonexempt duties.**

Concurrently (or simultaneously) performing both exempt and nonexempt duties does not automatically disqualify an otherwise exempt employee from the executive exemption if all the requirements for exemption are met. For example, if the primary duty of a manager of a retail food service establishment is management of that establishment, performing work such as serving customers or cooking food during peak customer periods would not preclude exempt status. 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 such nonexempt tasks, and can both supervise subordinate employees and serve customers at the same time without being disqualified from the exemption. 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. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks does not qualify for exemption as an executive even if the employee also has some supervisory responsibilities. A relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is not available. Nonexempt employees do not become exempt executives simply because they direct the work of other employees upon occasion or provide input on performance issues from time to time; such employees typically would not meet the other requirements of 29 CFR § 541.100 (such as having a primary duty of management). Whether an employee is exempt as an executive while performing concurrent duties must be determined on a case-by-case basis according to the factors set forth in 29 CFR § 541.700. *See* 29 CFR § 541.703 for a discussion of work that is "directly and closely related" to the performance of exempt work and is, therefore, also considered exempt work, and the examples discussed therein to illustrate types of work that are or are not considered "directly and closely related" to exempt work.

69 FR 22136 through 22137
WHD Letter FLSA 2005-19NA
WHD Opinion Letter FLSA 2006-29
29 CFR §§ 541.100, 541.106, 541.700

22b05 **Exemption of business owners with 20 percent equity interest.**

An employee who owns at least a *bona fide* 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (*e.g.*, corporation, partnership, or other), and who is actively engaged in its management, is considered a *bona fide* exempt executive. The salary and salary basis requirements do not apply to the exemption of business owners under 29 CFR § 541.101. An individual with a 20 percent or greater interest in a business who is required to work long hours, makes no management decisions, supervises no one and has no authority over personnel does not qualify for the executive exemption. To qualify for the exemption, a minority owner with at least a bona-fide 20 percent interest in the business must be actively engaged in its management.

69 FR 22132**29 CFR § 541.101**

22c ADMINISTRATIVE EXEMPTION –29 CFR § 541.200**22c00 Criteria for exemption of “administrative” employees.**

- (a) To be exempt as a *bona fide* “administrative” employee under 29 CFR § 541.200, all of the following tests must be met:
- (1) The employee must be compensated on a “salary” or “fee” basis (as defined in the regulations) at a rate of not less than \$455/wk (\$380/wk if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities,
 - (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 includes the exercise of discretion and independent judgment with respect to matters of significance.
- (b) “Salary basis” and “fee basis” are defined at 29 CFR §§ 541.602 and 541.605, respectively. *See* FOH 22g02.

22c01 Primary duty test for administrative employees.

- (a) An exempt administrative 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 of the employer’s customers. For further explanation of the term “primary duty” *see* the discussion under “executive” at FOH 22b01.

(b) **Office or non-manual work.**

The administrative exemption applies only to employees whose primary duty is the performance of office or non-manual work. Thus, for example, production line workers and employees in maintenance, construction and similar occupations who perform work involving repetitive operations with their hands, physical skill and energy are not exempt as administrative employees. For a discussion of manual laborers and other “blue collar” workers outside the scope of the “white collar” exemptions. *See* 29 CFR § 541.3 and FOH 22a02.

(c) **Directly related to management or general business operations.**

The phrase “directly related to management or general business operations” 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. Work “directly related to management or general business operations” includes, but

is not limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, Internet and database administration, legal and regulatory compliance, and similar activities. This list is intended only to be illustrative. It is not intended as a complete listing of exempt areas, nor is it intended as a listing of specific jobs; rather, it is a list of functional areas or departments that generally relate to management and general business operations of an employer or an employer's customers, although each case must be examined individually. Within such areas, it is still necessary to analyze the level or nature of the work performed (*i.e.*, does the employee exercise discretion and independent judgment as to matters of significance) in order to determine if the administrative exemption applies. Whether a particular employee primarily performs exempt work depends on the actual duties performed.

The production versus staff dichotomy is a useful analytical tool in evaluating whether an employee's primary duty is work directly related to management or general business operations. *See* 69 FR 22140 – 22142. Courts have noted that determining whether the administrative exemption applies is not as simple as a drawing the line between "white collar" and "blue collar" employees. Rather, non-manufacturing employees can be considered to be "production" employees if their job is to generate the product or service that their employer's business offers to the public. The distinction is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.

(d) **Employer's customers.**

An employee may qualify for the administrative exemption if the employee's primary duty is work directly related to the management or general business operations of the employer's customers, rather than those of the employer. Thus, employees acting as advisors or consultants to their employer's clients or customers – such as tax experts or financial consultants, for example - may be exempt. Nothing in 29 CFR part 541 precludes the administrative exemption because the customer is an individual, rather than a business, as long as the work performed relates to "management or general business operations." While the exemption would not apply when the client's or customer's "business" is purely personal, providing expert advice to a small business owner or a sole proprietor regarding management and general business operations would be an exempt administrative function. For example, many *bona fide* administrative employees perform important functions as advisors or consultants in analyzing and recommending changes in business operations but are employed by an entity engaged in furnishing such services to others for a fee (*e.g.*, management consultants). Such employees, if they meet the other requirements of the regulations, would qualify for exemption regardless of whether the management or general business operations to which their work is directly related are those of the employer's clients or customers, or those of their employer. This provision is meant to place administratively exempt work done for a client or customer on the same footing as such work done for the employer directly, regardless of whether the client is a sole proprietor or a "Fortune 500" company, as long as the work directly relates to "management or general business operations."

69 FR 22137 through 22147

29 CFR §§ 541.200 - .203, 541.700 →

WHD Opinion Letter FLSA 2002-5
WHD Letter FLSA 2005-21NA
Administrator's Interpretation 2010-1

22c02 **Discretion and independent judgment.**

- (a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. The exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in light of all the facts of the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree (even if the work relates to operation of only 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 has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the employer in handling complaints, arbitrating disputes or resolving grievances. Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required.

69 FR 22143 through 22144
29 CFR § 541.202(a), (b), and (c)

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

29 CFR § 541.202(e)

- (c) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. Exempt employees may use manuals, guidelines or other established procedures if they contain or 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. Employees who simply apply well-established techniques

or procedures within closely prescribed limits, however, are not exempt. The exercise of discretion and independent judgment also does not include clerical or secretarial work; recording or tabulating data; or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt even if labeled a “statistician.”

29 CFR §§ 541.202(e), 541.704

- (d) The term “matters of significance” refers to the level of importance or consequence of the work performed to the management or general business operations of the employer or of the employer’s customers. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. A messenger, for example, who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may result from the employee’s neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

29 CFR § 541.202(f)

69 FR 22143

WHD Opinion Letter FLSA 2006-27

22c03 **Administrative functions in educational establishments.**

The administrative exemption is also available for employees compensated on a salary or fee basis at a rate not less than \$455/wk (or \$380/wk if employed in American Samoa by employers other than the Federal government) exclusive of board, lodging or other facilities, or on a salary basis equal to at least the entrance salary for teachers in the educational establishment by which employed, and whose primary duty is performing administrative functions directly related to academic instruction or training in an “educational establishment” (as defined in 29 CFR § 541.204(b)). *See* FOH 22d06(e). Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field (such as building management, maintenance, or student health). Employees engaged in academic administrative functions include: 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 methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors; and other employees with similar responsibilities.

See FOH 22d08 through 22d12 regarding whether pre-schools, day care centers, Job Corps Training centers, beauty schools, and flight schools qualify as educational establishments for purposes of the 29 U.S.C. § 213(a)(1) exemption.

29 CFR § 541.204

22c04 **Clerical duties do not meet the administrative exemption test.**

An employee whose duties are to perform the following types of functions does not meet the administrative exemption:

- (a) Data entry for accounts payable and accounts receivable – (no signing authority),
- (b) Modifying account names/attributes in accounting software for improved job costing/profit accounting at year end,
- (c) Word processing for job contacts, lien waivers, letters, labels,
- (d) Sending notices to subcontractors regarding updating their workers' comp/liability insurance; maintain notebook of paper file for each subcontractor,
- (e) Receptionist duties – answering phones, taking messages, signing for package deliveries,
- (f) Ordering routine office supplies (paper, pens, notebooks, post-its, etc.).

Such duties are routine duties that involve clerical or secretarial work, recording or tabulating data, and performing other mechanical, repetitive, and routine work.

WHD Opinion Letter FLSA 2005-08

22d PROFESSIONAL EXEMPTION – 29 CFR § 541.300**22d00 Types of professional employees.**

The professional exemption includes three types: “learned,” “creative,” and “teaching.” Each type is defined separately in 29 CFR part 541 according to its own specific duties tests.

22d01 Criteria for exemption of “learned” professional employees.

- (a) To be exempt as a *bona fide* learned professional employee under 29 CFR §§ 541.300 and 541.301, all of the following tests must be met:
- (1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate of not less than \$455/wk (\$380/wk if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities,
 - (2) The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment,
 - (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.
- (b) “Salary basis” and “fee basis” are defined at 29 CFR §§ 541.602 and 541.605, respectively. See FOH 22g02 and 22g07.

22d02 Primary duty test for “learned” professional employees.

- (a) An exempt “learned” professional employee’s primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (29 CFR § 541.301(a)). For further explanation of the term “primary duty,” see the discussion under “executive” at FOH 22b01.

29 CFR § 541.301(a)

- (b) “Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Learned professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A learned professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

29 CFR § 541.301(b)

- (c) “Field(s) of science or learning” include 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 and can be distinguished from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

29 CFR § 541.301(c)

- (d) The phrase “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. The best evidence of meeting this requirement is having the appropriate academic degree for the particular profession. However, the word “customarily” means the exemption is available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who does not possess a degree in chemistry. However, the learned professional exemption is not available for occupations that require only a four-year degree in any field or a two-year degree as a prerequisite for entrance into the field. The learned professional exemption is not available for occupations that customarily may be performed with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

29 CFR § 541.301(d)

69 FR 22150

WHD Letter FLSA 2005-35NA

Accredited curriculums and certification programs are relevant to determining exempt learned professional status only to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the profession. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative if certification does not involve a prolonged course of specialized intellectual instruction. For example, certified physicians assistants meet the duties requirements for the learned professional exemption because certification requires four years of specialized post-secondary school instruction; employees with cosmetology licenses are not exempt as learned professionals because the licenses do not require a prolonged course of specialized intellectual instruction. In addition, the fact that an employee possesses a license to practice a certain profession must be considered along with all the other criteria in determining the exempt status of the employee. The possession of a license permitting an employee to perform duties which would meet the tests of an exempt employee under 29 CFR part 541 does not make that employee necessarily exempt. In order for an employee to meet the duties tests under 29 CFR part 541, the employee must actually perform exempt duties.

69 FR 22157

- (e) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for entrance into a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in 29 CFR § 541.301(e)(1), (e)(3), (e)(4), (e)(8) and (e)(9) also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

22d03 Special exceptions for the practice of law or medicine.

- (a) Special provisions in 29 CFR § 541.304 exempt, as *bona fide* learned professionals:
 - (1) Any employee who holds 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 holds 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.
- (b) This 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. “Physicians” includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).
- (c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt learned professionals if they enter such internship or resident programs after earning the appropriate degree required for the general practice of their profession.
- (d) The minimum salary and salary or fee basis requirements do not apply to the employees described in this section. NOTE: In the case of occupations in the medical field, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, physician assistants, nurse practitioners or other professions which service the medical profession.

29 CFR §§ 541.304(d), 541.600(e)

22d04 **Criteria for exemption of “creative” professional employees.**

- (a) To be exempt as a *bona fide* “creative” professional employee under 29 CFR §§ 541.300 and 541.302, all of the following tests must be met:
- (1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate of not less than \$455/wk (\$380/wk if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities, and
 - (2) The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- (b) “Salary basis” and “fee basis” are defined at 29 CFR §§ 541.602 and 541.605, respectively. See FOH 22g02 and 22g07

22d05 **Primary duty test for “creative” professional employees.**

- (a) An exempt “creative” professional employee’s primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, as opposed to routine mental, manual, mechanical or physical work. This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy.
- (b) Exemption as a creative professional depends upon how much invention, imagination, originality or talent the employee exercises. Whether the exemption applies, therefore, is determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, conductors, and soloists; painters who are given at most the subject matter of their painting; cartoonists who are told only the title or underlying concept for a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short story writers and screenplay writers who choose their own subjects and submit completed works to their employers; and persons in the more responsible writing positions in advertising agencies. Someone employed as a copyist, as an animator of motion picture cartoons, or as a re-toucher of photographs would not meet the requirements since such work is not properly described as creative in character. 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 that depends primarily on intelligence, diligence and accuracy. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Reporters who merely re-write press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters whose work products are subject to substantial control by their employer also do not qualify as exempt creative professionals. See also FOH 22i25.

29 CFR § 541.302(c) & (d)

- (c) To qualify for exemption as a creative professional, the work performed must be “in a recognized field of artistic or creative endeavor.” This includes such fields as music, writing, acting and the graphic arts.

29 CFR § 541.302

22d06 **Criteria for exemption of teachers.**

- (a) To be exempt as a *bona fide* teacher under 29 CFR § 541.303, all of the following tests must be met:
 - (1) The employee’s primary duty must be teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and
 - (2) The employee must be employed and engaged in the teaching activity as a teacher in an “educational establishment” (as defined in 29 CFR § 541.204(b)) by which the employee is employed.

29 CFR § 541.303

- (b) There is no minimum salary or “salary basis” requirement applied to teaching professionals. *See* 29 CFR § 541.303(d). In addition, there is no minimum educational or academic degree requirement for *bona fide* teaching professionals in educational establishments.

29 CFR § 541.303(d)

- (c) Exempt teachers include (but are not limited to): regular 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 economics teachers; and vocal or instrumental music instructors. Faculty members engaged as teachers who 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 extracurricular activities are a recognized part of the schools’ responsibility in contributing to the educational development of the student.

29 CFR § 541.303(b)

- (d) Possession of an elementary or secondary teacher's certificate identifies the individuals who are considered 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) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, 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 CFR § 541.303(c)

- (e) "The term 'educational establishment' means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12. Under many it includes also the introductory programs in kindergarten, and 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 qualify as educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit."

29 CFR § 541.204(b)

- (f) For employees whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. *See* FOH 22c03.

22d07 Non-exempt employee working part-time as a teacher.

An employee who holds a full-time nonexempt position with an educational institution, who is also employed to teach a course at night, has the full-time nonexempt position as the primary duty. In such cases, all hours suffered or permitted to work, including out of class preparation time, must be counted when determining the total hours worked. Overtime due may be computed using regular rate principles, or by applying the provisions of 29 U.S.C. § 207(g)(2) if the requirements for their use have been met.

WHD Letter FLSA 2005-29NA

22d08 **Preschool teachers.**

The revised final regulations effective August 23, 2004, made no changes in the Division's interpretation of the law regarding the exempt status of *bona fide* teachers in qualifying educational establishments. The activity of imparting knowledge through teaching, tutoring, instructing or lecturing implies a type of work which is predominantly intellectual and which includes the exercise of discretion and judgment in providing instruction to pupils. *See* WHD Fact Sheet 17D. Although preschools and day care centers (particularly at the earliest ages of preparing children to enter school) may engage in some educational activities, employees whose primary duty is to provide custodial care for the basic physical needs of the children attending (as opposed to being engaged in the intellectual activities of teaching, tutoring, instructing or lecturing in order to impart knowledge) do not ordinarily meet the primary duty test for exemption as teachers. Conversely, *bona fide* teachers in preschool and kindergarten settings may qualify for exemption under the same conditions as a teacher in an elementary or secondary school, *i.e.*, if they meet the primary duty test for a teacher and are employed and engaged in this activity as a teacher in a qualifying "educational establishment." Daycare centers providing custodial care and protection of preschool age children before they are old enough to enter the kindergarten or nursery school programs established for the particular State's elementary school curriculum do not qualify as "educational establishments" for purposes of the teacher exemption.

29 U.S.C. §§ 213(a)(1), 203(v)
29 CFR §§ 541.204(b), 541.303
WHD Opinion Letter FLSA 2008-13

22d09 **Substitute teachers.**

- (a) A substitute teacher may qualify for the professional exemption if the duties test is met.

Certain states do not require substitute teachers to have a college degree or teaching certificate.

Instead, a state, for example, may indicate that a person wishing to work as a substitute teacher need only meet certain other requirements, such as obtaining a substitute teaching permit, having completed a requisite number of college semester hours, or having obtained an associate's degree from a regionally or nationally accredited institution; or having obtained a high school diploma or G.E.D. certificate, and completing 24 hours of in-service training and ten hours of classroom observation.

Substitute teachers qualify for the professional exemption if their primary duty is teaching and imparting knowledge in an educational establishment. On the other hand, substitute teachers whose primary duties are not related to teaching—for example, performing general clerical or administrative tasks for the school unrelated to teaching their assigned students, or manual labor—do not qualify for the professional exemption. The term "educational establishment" includes "an elementary or secondary school system, an institution of higher education or other educational institution."

A substitute teacher with a teaching certificate clearly qualifies for the professional exemption. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or

other educational establishments. Therefore, 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. Further, there is no minimum educational or academic degree requirement for *bona fide* teaching professionals in educational institutions. Employees working as substitute teachers are within the teaching professional exemption whether or not they possess an advanced academic degree so long as teaching is their primary duty.

WHD Opinion Letter FLSA 2008-07

WHD Letter FLSA 2005-39NA

WHD Opinion Letter FLSA 2006-41

WHD Letter FLSA 2005-39NA

29 CFR § 541.204(b)

29 CFR § 541.303(c)

(b) **Substitute kindergarten teachers.**

Substitute teachers in a public school system may qualify for the teacher exemption in 29 CFR § 541.303 provided that their primary duty is teaching as defined therein. The fact that a substitute teacher may or may not possess a teaching certificate, and may or may not have completed a specified number of college course hours, does not affect the exempt status. The test is a two-part test:

- (1) The establishment in which the work is performed must be an educational establishment. (29 CFR §§ 541.303(a), 541.204(b))
- (2) The employee must have a primary duty of teaching. (29 CFR § 541.303(a))

Kindergarten teachers are specifically named in 29 CFR § 541.303(b) as being among the types of employees to whom the teacher exemption may apply.

WHD Letter FLSA 2005-39NA

22d10 Beauty school instructors, career school instructors.

To determine the exempt status of an instructor at a beauty school or other post-secondary career school, the first criteria that must be met is whether the instructor is employed in an educational establishment. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. If the educational establishment test is met, the duties of the instructor must be examined to determine if the primary duty is teaching, as defined in 29 CFR § 541.303.

WHD Letter FLSA 2005-38NA

WHD Opinion Letter FLSA 2006-41

WHD Opinion Letter FLSA 2008-09

22d11 Teachers and academic administrative personnel in Job Corps Centers.

A Job Corps center which provides basic educational instruction and vocational training, as well as training in personal care, to enable academically challenged enrollees to be self-supporting is considered an “other educational establishment or institution.” *See* 29 CFR § 541.204(b). Consequently, teachers or academic administrative personnel employed by such centers may qualify for the exemption for teachers and academic administrative personnel provided all the tests are met.

WHD FLSA Opinion Letter September 27, 1968**22d12 Flight instructors.**

- (a) A flight instructor may qualify for exemption as a teacher under 29 CFR § 541.303 if the instructor: (1) is certified in accordance with part 61 of the Federal Aviation Administration (FAA) Reg (14 CFR part 61) and (2) is engaged and employed as an instructor by a flight school approved by the FAA under FAA Reg 14 and CFR part 141. A flight school which is approved under FAA Reg part 141 would constitute an “educational establishment” for purposes of 29 CFR § 541.204(b).
- (b) Although there is no salary requirement for exemption as a teacher, a flight instructor must meet the primary duty test of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in order to be exempt. Exempt teaching activities would include, among other things, all student flight instruction including related ground training such as the maintenance of an airplane engine, instruction in FAA regulations, navigation, meteorology, radio procedure, maintenance of student progress and accomplishment records, scheduling of students and aircraft used for instruction, as well as maintaining liaison with the FAA for current teaching techniques and requirements. Performing minor repairs on aircraft the instructor uses in training would also be considered an exempt activity.

WHD FLSA Opinion Letter June 2, 2004**22d13 Partial day docking of salaried attorneys, physicians, and teachers.**

The salary basis provisions do not apply to attorneys, physicians and teachers. Thus reducing their pay for partial day absences does not result in the loss of exemption. A university professor is a teacher when the professor has a primary duty of “teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge” and “is employed and engaged in this activity in an educational establishment” by which the professor is employed.

WHD Letter FLSA 2005-34NA

22e COMPUTER EMPLOYEE EXEMPTION – 29 CFR § 541.400**22e00 Statutory basis for exemption of computer-related occupations.**

Public Law 101-583 (Nov. 15, 1990), directed DOL to issue regulations permitting computer systems analysts, computer programmers, software engineers, and other similarly-skilled professional workers to qualify as exempt executive, administrative, or professional employees under 29 U.S.C. § 213(a)(1); the law also exempted employees in the named occupations if they were paid on an hourly basis at a rate of at least 6 ½ times the minimum wage. These statutory provisions were incorporated into former 29 CFR §§ 541.3(a)(4) and 541.303, as part of the “professional” employee exemption, in 1992. When Congress increased the minimum wage in 1996, Congress adopted most – but not all – of the Department’s regulatory language constituting the computer employee “primary duty test” as a separate statutory exemption in a new 29 U.S.C. § 213(a)(17). 29 U.S.C. § 213(a)(17) exempts “any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty . . .” meets one of three specified sets of duties, or a combination of the specified duties requiring the same level of skills. The 1996 amendment also froze the hourly compensation test at \$27.63 (which equaled 6 ½ times the former \$4.25 minimum wage). The 1996 law included no delegation of rulemaking authority to DOL to further interpret or define the scope of the exemption; however, it also did not repeal the original 1990 statute. The 2004 part 541 final rule aligned the duties test in the regulatory text with the 1996 law. Thus the same duties test now applies for determining the exempt status of computer-related occupations under either 29 U.S.C. § 213(a)(1) or 29 U.S.C. § 213(a)(17), but an exempt computer employee may be paid either “on a salary basis” at a rate not less than \$455 per week, or on an hourly basis at a rate not less than \$27.63 per hour.

69 FR 22158 through 22160
FAB No. 2006-3

22e01 Criteria for exemption of “computer” employees.

- (a) To be exempt as a *bona fide* “computer” employee under 29 CFR § 541.400, all of the following tests must be met:
- (1) The employee must be compensated on a salary or fee basis at a rate of not less than \$455/wk (\$380/wk if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities, **or** if paid on an hourly basis, at a rate not less than \$27.63/hour;
 - (2) The employee must be employed as a computer system analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the duties described below; and
 - (3) The employee’s primary duty (defined in 29 CFR § 541.700) must consist of:
 - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.

- b. 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,
 - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems, or
 - d. A combination of the aforementioned duties, the performance of which requires the same level of skills.
- (b) “Salary basis” and “fee basis” are defined at 29 CFR §§ 541.602 and 541.605, respectively. See FOH 22g02 and 22g07.
- (c) The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Also, employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duty test above, are not exempt under the computer employee exemption.
- (d) 29 U.S.C. § 213(a)(17) exempts computer positions that are “similarly skilled” to a systems analyst, programmer, or software engineer, but only if the primary duty of the position in question includes the specified “systems analysis techniques and procedures, ... design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, ... or modification of computer programs related to machine operating systems;” or a combination of the duties just described, “the performance of which requires the same level of skills.” If the prescribed duties tests are met, the exemption may be applied regardless of the job title given to the particular position, since an employee’s job duties, not job title, determine whether the exemption applies. In each instance, the exempt status of any employee under the computer exemption must be determined by examining the actual job duties performed under the criteria in 29 U.S.C. § 213(a)(17), regardless of the job title.
- (e) Certain employees in the computer field may also have executive or administrative duties that qualify them for exemption. For example, systems analysts and computer programmers whose primary duty involves work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer’s customers may meet the duties requirements for the administrative exemption. Similarly, a senior or lead computer programmer whose primary duty is to manage the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, may meet the duties requirements for the executive exemption.

- (f) The specific computer-related occupations in 29 U.S.C. § 213(a)(17) are not included in the special exemption for highly compensated employees. *See* 29 CFR § 541.601. Because Congress included a specific, detailed primary duty test as a statutory prerequisite for exemption of computer employees, the abbreviated duties test under the highly compensated exemption cannot be applied to employees in computer-related occupations.

29 CFR §§ 541.400 - 541.402

69 FR 22158 through 22160

69 FR 22176

22f OUTSIDE SALES EXEMPTION – 29 CFR § 541.500**22f00 Criteria for exemption of “outside sales” employees.**

- (a) To be exempt as a *bona fide* “outside sales” employee under 29 CFR § 541.500, all of the following tests must be met:
- (1) The employee’s primary duty must be making sales (as defined in 29 U.S.C. § 203(k)), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and
 - (2) The employee must be customarily and regularly engaged away from the employer’s place or places of business in performing his or her primary duty.
- (b) “Primary duty” is defined in 29 CFR § 541.700 as the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in each case with the major emphasis on the character of the employee’s job as a whole. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, is considered exempt outside sales work. Other work that furthers the employee’s own sales efforts is also considered exempt work, *e.g.*, writing sales reports, updating or revising the employee’s sales or display catalogue, planning itineraries and attending sales conferences. (29 CFR § 541.500(b)) For further explanation of the term “primary duty” *see* the discussion under “executive” at FOH 22b01.
- (c) The salary requirements of 29 CFR part 541 do not apply to the outside sales employee exemption.

29 CFR § 541.500**22f01 Making sales or obtaining orders.**

- (a) “Sales” include any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

29 CFR § 541.501(b)

- (b) “Obtaining orders or contracts for services or for the use of facilities” extends the outside sales exemption to more than just sales of commodities. Obtaining orders “for the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

29 CFR § 541.501(c)

- (c) The word “services” extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

29 CFR § 541.501(d)

- (d) An employee whose primary duty is to repair or service products (*e.g.* refrigerator repair) does not qualify as an exempt outside sales employee.

69 FR 22161

- (e) Soliciting business through a dealer or merchant to offer a product or service to a customer is not a sale within the meaning of 29 U.S.C. § 203(k).

22f02 Customarily and regularly away from employer’s place of business.

- (a) An exempt outside sales employee must be customarily and regularly engaged away from the employer’s place or places of business. “Customarily and regularly” means greater than occasional but less than constant; it includes work normally and recurrently done every workweek, but does not include isolated or one-time tasks.

29 CFR § 541.701

- (b) “Away from the employer’s place of business” means the outside sales employee makes sales at the customer’s place of business or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal visits to the customer.

29 CFR § 541.502

- (c) 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. However, displaying samples in hotel sample rooms during trips from city to city are not considered as the employer’s places of business. Similarly, displaying the employer’s products at a trade show of short duration (*i.e.*, one or two weeks), if selling actually occurs (rather than just sales promotion), is not considered as the employer’s place of business.

29 CFR § 541.502

An employee who does not qualify for the outside sales exemption may, if employed by a qualifying retail or service establishment, be considered for exemption from overtime under 29 U.S.C. § 207(i) if the employee’s regular rate of pay is more than one-and-one-half times the minimum wage and more than half the employee’s compensation for a “representative period” represents commissions on goods or services. *See* 29 CFR §§ 779.410 – 779.420; FOH 21h.

69 FR 22162

- (d) Inside sales work does not qualify for the outside sales exemption.

69 FR 22161 through 22162

22f03 Promotion work.

- (a) Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. Promotional work that is not incidental to an employee's own outside sales, or that is incidental to sales made or to be made by someone else, is not exempt outside sales work.

29 CFR § 541.503

- (b) The arrangement of merchandise on shelves or the replenishing of stock is not exempt outside sales work unless it is incidental to and in conjunction with the employee's own outside sales.

29 CFR § 541.503(b)

22f04 Drivers who sell.

- (a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the primary duty is making 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 is considered exempt outside sales work. This includes loading, driving or delivering the products that the employee sells. A driver whose primary duty is to deliver products or goods, rather than selling products or goods, is not exempt.

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- (b) Several factors should be considered to determine if a driver has a primary duty of making sales, including (but not limited to):
- (1) Comparison of the driver's duties with those of other employees engaged as drivers and as salespersons,
 - (2) Presence or absence of customary or contractual arrangements concerning amounts of products to be delivered,
 - (3) Whether the driver possesses or has a selling or solicitor's license when required by law,
 - (4) The employer's specifications as to the qualifications for the position when hiring,
 - (5) Description of the employee's occupation in collective bargaining agreements,
 - (6) Sales training and attendance at sales conferences,
 - (7) Method of payment, and

- (8) Proportion of earnings directly attributable to sales.
- (c) See 29 CFR § 541.504(c) and (d) for examples of drivers who would, and who would not, qualify as exempt outside sales employees.

29 CFR § 541.504

22f05 Employees obtaining or soliciting mortgages for banks, finance companies or other lenders.

An employee of a finance company that is engaged primarily in servicing mortgages and takes mortgages in its own name may be exempt as an outside sales employee if the employee is customarily and regularly engaged away from the employer's place(s) of business in obtaining mortgages from individuals or brokers. Such soliciting is exempt work under 29 CFR § 541.500. Work incidental to the employee's obtaining the mortgage, such as obtaining credit information from the mortgagor before and after the sale, would qualify as exempt work if done with respect to the employee's own sales. Telephone solicitation, obtaining credit and other information with respect to sales made by others, and other work not incidental to the employee's own outside sales would not be exempt work.

Mortgage loan officers may qualify for the outside sales exemption even though they may perform some activities at their employer's place of business, so long as the inside sales activity is incidental to and in conjunction with qualifying outside sales activity. Activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the mortgage loan officer's own outside sales activities. See 29 CFR § 541.503.

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22f06 Real estate sales.

- (a) 29 CFR § 541.500 requires that an outside sales employee's primary duty must be making "sales" within the meaning of 29 U.S.C. § 203(k) or in obtaining certain orders or contracts for the use of facilities. Real estate sales employees will generally meet this test, since "sales" under 29 U.S.C. § 203(k) includes contracts to sell.
- (b) An exempt outside sales employee also must be customarily and regularly engaged "away from the employer's place or places of business" in making such sales. Real estate sales employees typically are required, as a customary and regular part of their employment, to spend time as necessary at the site of property to be sold and in visiting prospects at the latter's homes and offices as a part of their sales effort. Most of them must leave whatever place of business of the employer they use as headquarters in order to perform these tasks.
- (c) A real estate sales employee stationed in a model home on a tract from which parcels of real property are being sold with or without improvements, leaving the model home for such purposes, customarily and regularly, would meet the requirement of the definition, so far as making sales "away from" the employer's place of business is concerned. This is true even though all of the property shown to prospects by the sales employee is within the tract on which the model home is located. Further, not every home called a "model home" would be

a place of business of the employer. One which is in the nature of an “open house” to which a sales employee is assigned to meet prospects who may buy that house or another similar one on the tract may more properly be viewed as analogous to the hotel sample room of a traveling sales employee referred to in 29 CFR § 541.502 than to an actual place of business of the employer. Moreover, time spent on return to the model home or other headquarters to conclude a sales transaction or to continue the sales effort with the prospect would be deemed part of the sales employee’s outside sales activity.

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- (d) Certain activities performed by real estate sales employees in the employer’s place of business may be exempt work if the activities performed are in conjunction with and in furtherance of their outside sales work.

For example, the employees may perform duties at their employer’s place of business including:

- (1) Bringing a multiple listing book up to date,
- (2) Calling prospects with whom the sales employee has been dealing during outside sales activities,
- (3) Dictating or writing letters to such prospects,
- (4) Talking to such prospects in the office about their particular transactions,
- (5) Calling a list of prospective buyers or sellers of homes with whom the sales employee has had no prior contact,
- (6) Preparing a contract and other forms required for a sale negotiated during the sales employee’s outside sales activity, and
- (7) Talking to a “walk-in” prospect with whom the employee has had no prior contact and showing photographs and discussing terms on specific houses, if such activity results in subsequent outside sales activity with the prospect.

- (e) **Timeshare resort salespeople.**

Employees whose primary duty is to promote and to sell timeshare interests in resorts owned or operated by their employers do not qualify for the outside sales exemption when they sell timeshares on site at the resorts because they are not engaged in sales away from their employer’s place of business. Sales conducted at an office away from the resort that is a place of business of their employer would also not qualify as sales made away from the employer’s place of business. These employees may meet the tests of the outside sales exemption if they customarily and regularly make sales at a location that is not the employer’s place of business.

The question with timeshare salespeople is whether they are customarily and regularly engaged away from the employer's place of business in performing their primary duty of making sales. A resort is generally maintained on a permanent basis as a location of the employer and is staffed with the necessary personnel for maintaining the resort facilities. Although the employer sells timeshare interests in some of the properties on the resort, the employer also retains a continuing business interest in the remaining resort facilities, and in maintaining both the resort and the timeshare units that have been sold. Under these facts, the entire resort must be considered the employer's place of business.

Timeshare salespeople differ from real estate sales employees selling lots of land from a model home on a subdivision, who customarily and regularly leave the model home, because in the latter situation the employer does not maintain a continuing interest in the subdivision lots once they are sold or in the other facilities in the subdivision, and thus these areas are not part of the employer's place of business.

If timeshare resort salespeople never leave the employer's place of business, namely, the resort, they do not qualify for the outside sales exemption.

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22f07

Outside solicitors of charitable donations.

Persons employed in a capacity to solicit contributions on behalf of various charitable organizations are not performing work within the scope of the outside sales exemption. Soliciting promises of future charitable donations or "selling the concept" of donating to a charity does not constitute "sales" for purposes of the outside sales exemption. Such solicitors do not obtain orders or contracts for services or for use of the charity's facilities for which a consideration will be paid. Furthermore, the exchange of a token gift for the promise of a charitable donation does not constitute a "sale" or "selling" for purposes of the outside sales exemption.

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22g SALARY AND SALARY BASIS REQUIREMENTS – 29 CFR § 541.600**22g00 Amount of salary required for standard exemption tests.**

- (a) To qualify as a *bona fide* exempt executive, administrative or professional employee, the employee must be compensated on a salary basis at a rate of not less than \$455/wk (or \$380/wk, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Administrative, professional and computer employees may also be paid on a fee basis, as defined in 29 CFR § 541.605. The minimum weekly salary specified in each category of the 29 U.S.C. § 213(a)(1) exemptions is one of several tests applied to determine if the exemptions are applicable; it is not a minimum wage requirement. No employer is required to pay an employee the salary specified in 29 CFR part 541 unless the employer is claiming an exemption pursuant to 29 CFR part 541 and 29 U.S.C. § 213(a)(1).

29 CFR § 541.600(a)

- (b) The \$455 required weekly minimum salary may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. However, the shortest period of payment that will meet this compensation requirement is one week.

29 CFR § 541.600(b)

- (c) For academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as stated in 29 CFR § 541.204(a)(1).

29 CFR § 541.600(c)

- (d) For computer-related occupations exempt under 29 U.S.C. § 213(a)(17), the compensation requirement also may be met by payment on an hourly basis at not less than \$27.63/hour, as stated in 29 CFR § 541.400(b).

29 CFR § 541.600(d)

- (e) For professional employees, the compensation requirements do not apply to employees engaged as teachers, *see* 29 CFR § 541.303; employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof, *see* 29 CFR § 541.304; or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession. *See* 29 CFR § 541.304. The exception from the salary or fee requirement for medical occupations does not extend to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, physicians assistants, nurse practitioners or other professions which service the medical profession.

29 CFR § 541.600(e)

22g01 **Highly compensated employees test.**

- (a) Under 29 CFR § 541.601, an employee who receives total annual compensation of at least \$100,000 is considered exempt if the employee “customarily and regularly” performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in 29 CFR part 541 subparts B, C or D. “Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks.

29 CFR §§ 541.601, 541.707

- (b) (1) “Total annual compensation” must include at least \$455/wk paid on a salary or fee basis. *See* 29 CFR §§ 541.602, 541.605. Thus, highly compensated employees must receive at least the same base salary throughout the year as required for exempt employees under the standard exemption tests, while allowing highly compensated employees to receive additional income in the form of commissions and nondiscretionary bonuses. Total annual compensation may include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in 29 CFR § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

29 CFR § 541.601(b)(1)

- (2) Whether bonuses or other forms of compensation are discretionary or nondiscretionary is determined by applying the principles in the Act and regulations defining discretionary bonuses in 29 U.S.C. § 207(e)(3)(a) and 29 CFR § 778.211. (Under these principles, discretionary bonuses are excluded from an employee’s regular rate of pay; nondiscretionary bonuses must be included in the regular rate. Similarly, under the highly compensated employee test, all nondiscretionary bonuses and any other form of nondiscretionary compensation earned during the year are counted, together with the employee’s salary, towards the \$100,000 threshold.) If the employer retains the discretion as to both the fact that a payment will be made and the amount of the payment until at or near the point in time that the payment is to be made, the payment is discretionary; otherwise, it is nondiscretionary. If an employer promises in advance to pay a bonus, it is nondiscretionary. If, under the terms of an employment agreement, an employee has a contract right, express or implied, to receive a particular type of payment, it is nondiscretionary.

The following types of payments are considered nondiscretionary:

- a. Payments made pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly (*e.g.*, commissions or bonuses paid monthly or quarterly based on the amount of sales or profits),
- b. Bonuses that are promised to employees upon hiring,

- c. Bonuses that result from collective bargaining,
- d. Bonuses that are announced ahead of time to induce employees to complete assignments more quickly, more efficiently, or more cost-effectively; (such as attendance bonuses, individual or group production bonuses, or bonuses for quality and accuracy of work),
- e. Bonuses that are made contingent upon the employee remaining employed with the employer until the time the payment is to be made.

All forms of nondiscretionary compensation are included when determining if a highly compensated employee has received not less than \$100,000 in total annual compensation.

- (3) If an employee's total annual compensation does not total at least \$100,000 by the final pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the \$100,000 compensation level. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may be tested for exemption under the standard exemption tests in 29 CFR part 541 subparts B, C or D.

29 CFR § 541.601(b)(2)

- (4) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption as a highly compensated employee if the employee receives a pro rata portion of the minimum \$100,000 annual amount, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under 22g01(b)(3) within one month after the end of the employee's employment.

29 CFR § 541.601(b)(3)

- (5) The employer may utilize any 52-week period as the compensation year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will be applied.

29 CFR § 541.601(b)(4)

- (c) A high level of compensation is a strong indicator of a “white collar” employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s particular job duties. A highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in 29 CFR part 541 subparts B, C or D. For example, an employee may qualify as a highly compensated executive employee if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under 29 CFR § 541.100.

29 CFR § 541.601(c)
69 FR 22173 through 22174

- (d) The highly compensated employee exemption applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy cannot qualify for exemption under this test no matter how highly paid they might be.

29 CFR § 541.601(d)

22g02 **“Salary basis” rule.**

- (a) To qualify for exemption under 29 U.S.C. § 213(a)(1), employees generally must be paid not less than \$455/wk “on a salary basis.” However, these salary requirements do not apply to outside sales employees (29 CFR § 541.500(c)), teachers (29 CFR § 541.303(d)), or employees practicing law or medicine (29 CFR § 541.304). Exempt computer employees may be paid either on a salary or fee basis at not less than \$455/wk or on an hourly basis at not less than \$27.63/hour (29 CFR § 541.400(b)).
- (b) Being paid “on a salary basis” means that the employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis and the predetermined amount cannot be subject to reduction because of variations in either the quality or the quantity of work performed by the employee. Except for seven exceptions specifically cited in the regulations (29 CFR § 541.602(b)(1) through (7)), an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. If the employer makes deductions from the employee’s predetermined salary because of the operating requirements of the business or absences caused by the employer, the employee is not paid “on a salary basis.” If an exempt employee is ready, willing and able to work, deductions may not be made for time when work is not available. However, exempt employees need not be paid for any workweek in which they perform no work.

29 CFR § 541.602(a)
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- (c) The regulations contain seven exceptions to the salary basis “no pay-docking” rule (29 CFR § 541.602(b)(1) - (7)). Employers may make deductions from the salaries of exempt employees in the following circumstances:
- (1) When the employee is absent from work for one or more full days for personal reasons, other than sickness or disability – if an exempt employee is absent for one and a half days for personal reasons, the employer may deduct only for the one full-day absence;
29 CFR § 541.602(b)(1)
 - (2) When the employee is absent from work for one or more full days due to sickness or disability (including work-related accidents) if the deduction is made according to a *bona fide* plan, policy or practice of providing compensation for loss of salary for these types of absences, including under a State disability insurance law or State workers’ compensation law (the employer is not required to pay any portion of the employee’s salary for full-day absences for which the employee receives compensation under the plan, policy, or practice, or for full-day absences before the employee has qualified under the plan, policy or practice and after the employee has exhausted the leave allowance thereunder);
29 CFR § 541.602(b)(2)
 - (3) While an employer cannot make deductions from an exempt employee’s salary for absences caused by jury duty, attendance as a witness or temporary military leave, the employer may offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week;
29 CFR § 541.602(b)(3)
 - (4) For penalties imposed in good faith for infractions of safety rules of “major significance” including those related to preventing serious danger in the workplace or to employees, such as “no smoking” rules in explosive plants, oil refineries and coal mines;
29 CFR § 541.602(b)(4)
 - (5) For unpaid disciplinary suspensions of one or more full days imposed in good faith pursuant to a written policy applicable to all employees for infractions of workplace misconduct rules (*e.g.*, written policies prohibiting sexual harassment, violence in the workplace, drug or alcohol violations, or violations of state or federal laws - *i.e.* serious workplace misconduct issues, not performance or attendance issues);
29 CFR § 541.602(b)(5)
 - (6) An employer may pay a proportionate part of an exempt employee’s salary for the time actually worked in the initial and final weeks of employment (but employees are

not paid on a salary basis if they are employed occasionally for a few days at a time and the employer pays them a proportionate part of the weekly salary when so employed); and

29 CFR § 541.602(b)(6)

- (7) When an employee takes unpaid leave under the Family and Medical Leave Act, the employer may pay a proportionate part of the full salary for time actually worked.

29 CFR § 541.602(b)(7)

29 CFR § 825.206

- (d) **Full-day vs. partial-day deductions.**

Certain deductions permitted under the regulations may be taken only for “one or more full days” of absence. This language means a deduction may be taken from the salary only in full-day increments. Deductions for partial-day absences violate the salary basis rule generally, except those occurring in the first or final weeks of employment (29 CFR § 541.602(b)(6)) or for unpaid leave taken under the Family and Medical Leave Act (29 CFR § 541.602(b)(7)). Thus, for example, if an employee is absent for one and a half days to handle personal affairs, the employer may only deduct for the one full-day absence. The employee must receive a full day’s pay for the partial day worked to satisfy the “salary basis” rule. A deduction from pay as a penalty for violations of major safety rules under 29 CFR § 541.602(b)(4) may be made in any amount.

29 CFR § 541.602(b), 541.602(c)

- (e) (1) *Common practices that do not violate the salary basis rule*

Certain common payroll and recordkeeping practices do *not* bring into question whether someone is paid on a salary basis including, *e.g.*, taking deductions from an exempt employee’s accrued leave accounts (regardless of whether to cover partial-day or full-day absences); requiring exempt employees to keep track of and/or record their hours worked; requiring exempt employees to work a specified schedule of hours; and implementing *bona fide*, across-the-board changes in schedules.

69 FR 22178 through 22179

- (2) *Leave banks*

Where an employer has adopted a vacation leave and sick leave policy or plan, or a plan providing employees leave to attend children’s school activities, or to transport family members to routine medical appointments, it is permissible for the employer to substitute or reduce the accrued leave in the plan for the time that an exempt salaried employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such “leave bank” the employee continues to receive payment of an amount equal to the employee’s guaranteed salary. However, if an exempt employee is absent for less than a full day, the employee must still receive payment of the full guaranteed salary even if the employee has no accrued benefits in the “leave bank” or if the employee’s account

has a negative balance. According to § 541.602(b)(1), the employer may deduct from the salary of an exempt employee for being absent a full day for personal reasons. The employee's exempt status, however, would not be affected if the employer chooses to pay a portion of the daily equivalent salary when the employee has insufficient leave available to cover the full-day absence (*e.g.*, an employer applies the last remaining four hours of leave in an employee's "leave bank" which only partially covers the full-day, eight-hour absence).

WHD Opinion Letter FLSA 2005-07
WHD Opinion Letter FLSA 2007-06

22g03 **Effect of improper deductions from salary.**

- (a) An employer will lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An "actual practice" of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to, the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

29 CFR § 541.603(a)

- (b) If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their exempt status. For example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by that manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

29 CFR § 541.603(b)

- (c) Isolated or inadvertent improper deductions will not result in loss of the exemption for any employees if the employer reimburses the employees for the improper deductions. Whether deductions are "isolated" is determined according to an analysis of the factors in 29 CFR § 541.603(a). "Inadvertent" deductions are those taken unintentionally, for example, as a result of a clerical or time-keeping error.

29 CFR § 541.603(c)
69 FR 22181

(d) **Safe harbor.**

- (1) 29 CFR § 541.603(d) provides a safe harbor for employers that have a clearly communicated policy prohibiting improper deductions. If an employer has such a clearly communicated policy that prohibits the improper pay deductions specified in 29 CFR § 541.602(a), includes a mechanism for employees to file complaints, reimburses employees for any improper deductions and makes a good faith commitment to comply with the salary basis rule in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. Failure to reimburse employees for any improper deductions or continuing to make improper deductions after receiving employee complaints will cause the exemption to be lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.
- (2) Although a written policy is the best evidence of the employer's good faith efforts to comply with the salary basis rule under 29 CFR part 541, a written policy is not essential. However, the policy must have been "clearly communicated" to employees prior to the actual impermissible deduction. The "clearly communicated" standard can be met, for example, by providing a copy of the policy to employees when they are hired, publishing it in an employee handbook or distributing it to employees over the employer's Intranet.
- (3) The safe harbor provision is available regardless of the reason for the improper deduction, whether made for lack of work or for reasons other than lack of work. For example, where an employer has a clearly communicated policy prohibiting improper deductions but a manager engages in an actual practice (neither isolated nor inadvertent) of making improper deductions, regardless of the reasons for the deductions, the exemption would not be lost for any employees if, after receiving and investigating an employee complaint, the employer reimburses the employees for the improper deductions and makes a good faith commitment to comply in the future. There are several ways in which an employer could show its "good faith commitment" to comply in the future including (but not limited to) adopting or re-publishing to employees its policy prohibiting improper pay deductions; posting a notice including such a commitment on an employee bulletin board or the employer's Intranet; providing training to managers and supervisors on the employer's policy and commitment; reprimanding or training the manager who took the improper deduction(s); or establishing a telephone number for employees to file complaints concerning improper deductions.

69 FR 22181 through 22182

- (4) An employer should be allowed a reasonable amount of time to look into and correct a matter after receiving an employee complaint of improper deductions. While the amount of time it will take an employer to complete an investigation will depend upon the particular circumstances, an employer should begin such an investigation promptly. However, the mere fact that the employer receives other employee

complaints before timely completion of the investigation should not, by itself, defeat the safe harbor.

69 FR 22183

22g04 Employer employs both exempt and nonexempt employees in the same capacity.

Having some employees within the same job classification, who perform the same duties, but are paid on a different (hourly) basis, does not affect the status of any other exempt employees who are paid on a salary basis. An employer may, therefore, employ both hourly and salaried registered nurses, for example, and the salaried registered nurses will not lose their exempt status, assuming they otherwise qualify for the exemption.

WHD Opinion Letter FLSA 2005-20

22g05 Minimum guarantee plus extras.

- (a) An exempt employee may receive additional compensation beyond the minimum required amount that is paid as a guaranteed salary without violating the salary basis requirement. 29 CFR § 541.604(a). Thus, for example, an exempt employee guaranteed at least \$455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits if the employment arrangement also includes a guarantee of at least \$455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

WHD Letter FLSA 2005-20NA

WHD Opinion Letter FLSA 2006-43

- (b) The prohibition against improper deductions from the guaranteed salary under 29 CFR § 541.602(b) does not extend to any such additional compensation provided to exempt employees. Therefore, deductions for cash shortages, for example, may be made from a salaried exempt employee's commission payments without affecting the employee's exempt status under section 29 U.S.C. § 213(a)(1), so long as the commission payments are *bona fide* and are not paid to facilitate otherwise prohibited deductions from the guaranteed salary.

WHD Opinion Letter FLSA 2006-24

22g06 Computation of salary on an hourly, daily or shift basis.

An exempt employee's earnings may be computed on an hourly, daily, or shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked; and a reasonable relationship exists between the guaranteed amount and the amount actually earned. 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, as the case may be. Thus, for example, an exempt employee guaranteed compensation of at least \$500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid \$150 per shift without violating the salary basis requirement (such an employee must receive the full \$500 guarantee in any week in which he or she works three or fewer shifts). The reasonable relationship requirement applies only to situations where the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of \$650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary. The actual facts under the employment arrangement must be scrutinized in each instance to determine the predetermined amount that was actually guaranteed to be paid "on a salary basis."

29 CFR § 541.604(b)

22g07 **Computation of salary including bonuses and commissions.**

To qualify as a guaranteed salary, payment of a fixed, predetermined amount "free and clear" (at a rate not less than \$455 per week) is required for each workweek in which an exempt employee performs any work. Bonuses and commissions do not generally qualify as fixed, predetermined amounts that are paid "free and clear" because they are normally subject to variations based on the quality or quantity of the work performed.

29 CFR § 541.602

22g08 **Fee basis.**

- (a) Administrative, professional, and computer employees may be paid on a fee basis, rather than on a salary basis. An employee is considered paid on a "fee basis" under 29 CFR § 541.605 if the employee is paid an agreed sum for completing a single job, regardless of the time required to complete the work. These payments resemble piecework payments with the important distinction that generally a "fee" is paid for the kind of jobs that are unique rather than for a series of jobs repeated an indefinite number of times, and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a single task are not payments on a fee basis.

29 CFR § 541.605(a)

- (b) To test whether a fee payment meets the minimum level required for exemption, consider the time worked to complete the job and determine if the payment is at a rate that would yield at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum \$455 requirement for exemption since earnings at this rate would yield the artist \$500 if 40 hours were worked.

29 CFR § 541.605(b)

- (c) **Piece rate and percentages of hourly rates charged do not constitute a "fee basis."**

A "fee basis" is an agreed sum for a single job without regard to the time required for its completion. Payments based on an amount per transaction or per line are more properly

viewed as “piece rate” payments. A payment based upon a percentage of hourly amounts billed or charged to a client is, likewise, not a payment on a “fee basis.”

WHD Letter FLSA 2005-24NA

22g09 Board, lodging or other facilities.

- (a) To qualify for exemption under 29 CFR part 541, an employee must earn the minimum required salary amount “exclusive of board, lodging or other facilities.” This phrase means payment of the required salary amount must be “free and clear” or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment. *See* 29 CFR § 541.606.

WHD FLSA Opinion Letter March 7, 1969

- (b) 29 CFR part 531 defines what constitutes “board, lodging, or other facilities.” As described in 29 CFR § 531.32, the term “other facilities” refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work.

22g10 Annual salary earned in a shorter period.

The exemption is not lost in the situation where an annual salary covering a duty period of less than a year, when prorated over the full 12 months, computes to an amount less than the required minimum, provided that the amount of salary when prorated over the actual duty period meets the required minimum amount (*e.g.*, employment provided by schools for ten months of the year, under which the annual salary is paid in 12 equal monthly installments throughout the year).

22g11 Salary reduction as a result of reduced workweek.

A prospective reduction in the predetermined salary amount to not less than the applicable minimum salary due to a reduction in the employee's normal scheduled workweek is permissible and will not defeat the exemption, provided that the reduction in salary is a *bona fide* reduction that is not designed to circumvent the salary basis requirement (e.g., a 20 percent reduction in an exempt employee's salary while assigned to work a normally scheduled four-day reduced workweek due to the financial exigencies of the employer and/or to avoid layoffs would not violate the regulations as long as the reduced predetermined salary amount is at a rate that is not less than the applicable minimum salary of \$455 per week). But see also FOH 22g20. For employees of public agencies, see 29 CFR § 541.710 and FOH 22h05(b).

WHD FLSA Opinion Letter April 30, 1975
WHD Opinion Letter FLSA 2004-05
Fact Sheet #70

22g12 Extra compensation above required salary.

An employer may pay extra compensation to a *bona fide* exempt employee for working extended or overtime hours of work on any basis (e.g., flat sum, bonus payment, hourly rate, straight time, time and one-half, or any other basis, including paid time off at a later date) without invalidating the "salary basis" requirement.

29 CFR § 541.604(a)

22g13 Deductions from salary or from leave/paid time off (PTO) banks.

Employers are free to require use of leave, thus reducing time available in a leave bank, at any time. Since leave time is not required by the FLSA, there is no prohibition against an employer giving vacation time and later requiring that such vacation time be taken on a specific day.

WHD Letter FLSA 2005-41NA

- (b) Section 541.602(b)(1) states that "deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons." Salary deductions, therefore, may be made when exempt employees voluntarily take time off for personal reasons, other than sickness or disability, for one or more full days. For instance, an exempt employee paid \$500 per week on a salary basis may take voluntary time off for personal reasons for four days in a workweek and receive one fifth of the salary. The employee's decision to take voluntary time off, however, must be completely voluntary and not "occasioned by the employer or by the operating requirements of the business."

29 CFR § 541.602(a)

WHD Opinion Letter FLSA 2009-14

- (c) An employer may require use of leave for periods of inclement weather, either in whole or partial day increments. If the firm is open for operations, the employer may make deductions from salary for one or more whole days of absence if the employee chooses to not report to

work. A deduction for an employee's choice to not report to work during a period of adverse weather is a deduction for personal reasons, other than sickness or disability. If the firm is not open for operations, the employer must pay the full amount of the salary due for any week in which the employee performs any work. Neither an employee's status as a probationary employee, nor the fact that an employee may have a zero or negative accrued leave balance, provides an excuse for the employer to pay less than the full amount of salary required to maintain the employee's salary basis status if the firm is not open for operations.

WHD Letter FLSA 2005-41NA

WHD Letter FLSA 2005-46NA

- (d) An employer may require exempt employees to use accrued vacation time during a plant shutdown of less than a workweek without violating the salary basis test. Likewise, an employer may require employees to use paid time off to accommodate staffing levels needed during a period of reduced workload.

Since employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition against an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s). Therefore, an employer may direct exempt staff to take vacation or debit their leave bank account, whether for a full or partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary.

WHD Opinion Letter FLSA 2009-02

- (e) Mandatory unpaid time off, when required for increments of less than a full work week, in order to accommodate day-to-day or week-to-week fluctuations of business will violate the requirement to pay on a salary basis. This differs from a situation where a salary is reduced prospectively to reflect a *bona fide* reduction in normal scheduled hours. (See FOH 22g10.)

WHD Opinion Letter FLSA 2004-05

WHD Opinion Letter FLSA 2009-18

22g14 Deductions from salary when paid time off (PTO) bank is exhausted.

Deductions may be made from an exempt employee's paid time off (PTO) bank for both full and partial day absences, without affecting the employee's exempt status. In such instances, the full salary is paid to the employee. If the PTO bank may be used for absences related to sickness or disability, when an employee's PTO bank is exhausted, an employer may make deductions for one or more full days of absence without affecting the payment on a salary basis. Such deductions are made in "accordance with a *bona fide* plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability."

WHD Opinion Letter FLSA 2005-07

22g15 Deduction of extra compensation for reduction in extended workweek schedule.

An extended workweek schedule is a definite schedule of hours longer than the regular workweek for a temporary period (*e.g.*, a month or more). For example, an employee who is normally scheduled to work an eight-hour day, five-day workweek may be scheduled to work five days of nine hours or six eight-hour days. (A change in the workweek that is intended to be (or in fact is) permanent is not an extended workweek schedule as discussed herein.)

Because the payment of extra compensation to a *bona fide* exempt employee for working an extended schedule is an addition to, rather than a part of, the employee's predetermined salary, deductions of all or part of the extra compensation when the employee fails to work the full extended workweek schedule will not be regarded as a deduction from the employee's predetermined salary. This assumes that the extra compensation is *bona fide* and is not paid to facilitate otherwise prohibited deductions from the guaranteed salary.

22g16 Deductions for disability insurance benefit payments.

- (a) When an insurance plan is *bona fide*, compliance with its terms is compliance with the salary basis of payment required under 29 CFR part 541 even though a waiting period in excess of one or more days is required before the employee becomes eligible for inclusion in the insurance plan, or there is a waiting period for each illness before benefits are paid. *See* 29 CFR § 541.602(b)(2).
- (b) The fact that the employee receives no pay for some period during an illness, or that the employee's disability leave pay is less than the employee's predetermined salary will not defeat the salary basis requirement, so long as the plan is a *bona fide* insurance plan.

22g17 Reduced salary during periods of partial disability.

A disability pay plan which provides for a fixed reduced salary during the period of an employee's partial disability or rehabilitation will not cause loss of the salary basis status, so long as the salary paid at least meets the minimum required by 29 CFR part 541. An employer may choose to convert an employee to a nonexempt status during a period when the employee is unable to perform his regular exempt duties, without affecting the exempt status of other similarly situated employees.

A partial disability or rehabilitation payment plan that provides for compensation that fluctuates based on the number of hours worked by the employee will not qualify as a salary.

WHD Opinion Letter FLSA 2004-05

22g18 Deductions for cash register shortages, damages and loss of equipment.

Deductions from an otherwise exempt employee's salary may not be made for cash register shortages, damages or loss of company equipment. Deductions may be made only for the reasons stated in 29 CFR § 541.602(b).

WHD Opinion Letter FLSA 2006-07

22g19 Deductions for infraction of security regulations.

Deductions or penalties imposed on employees for infraction of security regulations required by a government agency will not defeat the exemption.

22g20 Deductions due to suspensions for infractions of workplace conduct rules.

"Workplace conduct rules" refers to conduct, and not to performance and attendance, issues. Moreover, it refers to serious workplace misconduct, like sexual harassment, violence, drug

or alcohol violations, or violations of state or federal laws. However, the fact that the misconduct occurred off the employer's premises does not preclude an employer from imposing such a disciplinary suspension, as long as the employer has *bona fide* workplace conduct rules that cover such off-site conduct. This disciplinary exception, however, does not allow deductions for fines, settlements or judgments which could arguably be blamed on an exempt employee.

69 FR 22177

69 FR 22178

22g21 **Deductions from the salary for working less than the full required hours per week.**

The salary basis test is not met if an employer makes deductions from an employee's predetermined salary when an employee fails to work the full standard hours per week as a result of a suspension (for reasons other than violating workplace conduct rules) or the employer's direction to work fewer hours due to a lack of work.

WHD Opinion Letter FLSA 2005-01

22g22 **Salaries paid by joint employers.**

When an otherwise exempt employee is jointly-employed by two or more employers, each of which pays the employee on a salary basis as defined in 29 CFR part 541, the salaries may be combined for purposes of determining if the minimum salary requirement has been met.

29 CFR § 791.2(a)

22g23 **Offsetting subsistence allowance paid military personnel.**

Military subsistence allowances may not be included in the amounts offset against the salary required by 29 CFR part 541 because such payments constitute payment for board, lodging, or other facilities. But *see* 29 CFR § 541.602(b)(3) regarding military pay.

22g24 **Salary basis of payment for State and local government employees.**

Special rules apply to the salary basis requirements for employees of public agencies. *See* 29 CFR § 541.710.

22g25 **Deductions from salaries of physicians, lawyers and teachers.**

Deductions from the salary of an employee who works in a position that is not subject to the salary basis requirement for the 29 U.S.C. § 213(a)(1) exemption will not defeat the exemption.

WHD Letter FLSA 2005-16NA

WHD Letter FLSA 2005-34NA

22g26 **Foreign national paid in foreign currency.**

Employers may pay foreign nationals temporarily residing in the U.S. all or a portion of their salary in foreign currency. To determine whether the minimum salary requirements of 29 CFR § 541.600(a) are met, the portion of the salary paid in foreign currency must be calculated using the exchange rate in effect at the time the wages are paid to the employee. The employer is not relieved from the obligation to meet all of the requirements under section 29 CFR § 541.600 for each pay period for which the exemption is claimed. The tests found in 29 CFR § 541.602 must also be met.

The total compensation package will meet the salary level requirements in those pay periods in which the \$455 per week equivalent threshold is met when the dollar compensation is combined with the foreign currency compensation that is converted using the exchange rate current at the time of payment (*i.e.*, the rate generally available to an individual person in the vicinity where the employee is working). In any pay period during which the total of the dollar compensation and dollar value of the foreign currency is less than \$455 per week, the exemption will not apply.

WHD Opinion Letter FLSA 2006-17**22g27** **Requiring exempt employees to make up missed time.**

The number of hours worked by an employee who is exempt under 29 U.S.C. § 213(a)(1) is a matter to be determined between the employer and the employee. An employer may require an exempt employee to make up work time lost due to personal absences of less than a day (but not dock the salary) without loss of the exemption under 29 U.S.C. § 213(a)(1). However, the failure to make up the time as required or to work the required number of hours does not constitute a violation of a “workplace conduct rule” for which an employer may impose a disciplinary suspension for one or more full days pursuant to 29 CFR § 541.602(b)(5). Such rules must be applicable to all employees and must relate to workplace conduct, not performance or attendance, issues.

WHD Letter FLSA 2006-06NA**22g28** **Waiting period for *bona fide* sick pay plan.**

There is no bright-line test for how many days and how short a waiting period are required for a sick leave plan to be *bona fide*. WHD has previously approved leave plans that allow for at least 6 days of sick leave per year. With respect to a qualifying period, the WHD previously deemed a leave plan that required one year of service prior to payment of sick pay benefits to be *bona fide*.

WHD FLSA Non-Administrator Letter August 15, 1972**WHD Opinion Letter FLSA 2006-32**

22h SPECIAL CONSIDERATIONS**22h00 Use of manuals.**

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 disqualify an employee from exemption under 29 CFR part 541. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The 29 CFR part 541 exemptions are not available, 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 CFR § 541.704

Use of a software program that enhances an exempt employee's ability to evaluate products, options and variables to serve the customer does not necessarily disqualify an employee from the exemption.

22h01 Emergencies.

- (a) An exempt employee does not lose exempt status by performing work of a normally nonexempt nature because of an emergency. When emergencies occur that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work. Emergencies arising out of an employer's business and affecting the public health or welfare may qualify under this provision, applying the same standard as emergencies that affect the safety of employees or customers.
- (b) "Emergency" does not include events that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.
- (c) The following examples from 29 CFR § 541.706(c) illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:
 - (1) A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a *bona fide* executive.
 - (2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.
 - (3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

- (4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of, or damage to, the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.
- (d) The foregoing list of situations where exempt employees could perform nonexempt work without losing their exempt status is not meant to be exhaustive. Other similar instances where exempt employees perform nonexempt work under unanticipated circumstances should be evaluated on a case-by-case basis. However, it continues to be DOL's position that nonexempt work may not routinely be assigned to an exempt employee solely for the convenience of the employer without calling into question the applicability of the exemption to that employee.

69 FR 22189
WHD Opinion Letter FLSA 2006-29

22h02 **Occasional tasks.**

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice for the exempt employee to perform the task.

29 CFR § 541.707

22h03 **Combination exemptions.**

29 CFR § 541.708 allows for "tacking" or combining exempt work under one category of the exemptions to exempt work under another category when determining if an employee's primary duty is to perform exempt work. Thus, employees who perform a combination of exempt duties for the executive, administrative, professional, outside sales or computer exemptions may still qualify for exemption. For example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of 29 CFR part 541 will not defeat the applicability of the exemption under any other section. Employees who meet the primary duty test as a result of "tacking" or combining exempt work must also meet the other requirements of the exemption.

69 FR 22190

22h04 **Motion picture producing industry.**

- (a) The "salary basis" requirement (29 CFR § 541.602) does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$695 a week (exclusive of board, lodging, or other facilities). An employee in this industry who is

otherwise exempt under 29 CFR part 541 subparts B, C or D, and who is employed at a base rate of at least \$695 a week, is exempt if paid a proportionate amount (based on a week of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

- (1) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least \$695 if 6 days were worked; or
 - (2) The employee is in a job category having a weekly base rate of at least \$695 and the daily base rate is at least one-sixth of such weekly base rate. *See* 29 CFR § 541.709.
- (b) This special exception also extends to similarly-employed employees of producers of television films and videotapes.

69 FR 22190

22h05 Employees of public agencies.

- (a) Under 29 CFR § 541.710, an employee of a public agency who otherwise meets the salary basis requirements of 29 CFR § 541.602 will not be disqualified from exemption under 29 CFR §§ 541.100, 541.200, 541.300 or 541.400 on the basis that the 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 its 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.
- (c) This special exception to the salary basis requirement for employees of public agencies formerly appeared as 29 CFR § 541.5d. The reasons for its promulgation were explained in the Federal Register of August 19, 1992, at 57 FR 37677.

22h06 Effect of 29 CFR part 541 changes on the California Wage Orders.

WH Opinion Letter FLSA 2005-19, dated August 2, 2005 provides guidance on whether certain changes to 29 CFR part 541 are "substantive changes" or "clarifications" of existing law. This guidance was provided because the California Wage Orders interpret FLSA

exemptions as they applied as of October 1, 2000. Questions regarding the application of FLSA exemptions under the California Wage Orders shall be referred to the California Department of Industrial Relations.

WHD Letter FLSA 2005-19NA

22i SPECIFIC OCCUPATIONS**22i00 General.**

29 CFR part 541 provides examples of particular occupations to demonstrate how to apply the regulatory concepts defining the exemptions in those situations. Some of the examples were also presented in the prior regulations. Note that while the examples may be useful in understanding how to apply the regulations to specific occupations, in order for an exemption to apply in a particular case, it is still necessary to confirm that an employee actually performs exempt duties and meets all other tests for the particular exemption claimed under 29 CFR part 541. Likewise, the examples cited below, when taken from opinion letters issued by the Wage and Hour Administrator, respond to a fact-specific inquiry. Certain examples below include only summaries taken from opinion letters. The opinion letter cited should be reviewed for a fuller discussion. A slight difference in the facts may result in a different outcome. Also, while the examples may provide useful guidance regarding the application of 29 CFR part 541 for a particular occupation, it must be remembered that a job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations.

29 CFR § 541.2**22i01 Academic advisors and intervention specialists.**

- (a) Academic advisors employed in an educational establishment performing the following duties are performing exempt administrative work, pursuant to 29 CFR § 541.204:
- (1) Assisting students in their academic pursuits by aiding them in class selection, educational goals, and graduation requirements,
 - (2) Orienting students regarding admissions, placement testing registration processes, policies, procedures, resources and programs,
 - (3) Reviewing academic records, placement tests and other standardized test results with students in order to develop course selections consistent with their career choices and degree requirements,
 - (4) Developing a term-by-term schedule and an outline of program study,
 - (5) Reviewing degree audits and transcripts to verify fulfillment of graduation requirements,
 - (6) Exercising override authority to allow student with poor academic performance to register after considering the students' needs, and
 - (7) Assisting students with overcoming academic difficulties, as well as learning, psychological or physical disabilities. *See* FOH 22i00.

WHD Letter FLSA 2005-42NA

(b) **Admissions counselors.**

Enrollment or admissions counselors whose primary duty is to engage in general outreach and recruitment efforts to encourage students to apply to an educational institution do not meet the academic administrative test, as their duties are not sufficiently related to the educational institution's academic operations. *See* FOH 22i00.

WH FLSA Non-Administrator Letter April 20, 1999

22i02 Accountants.

Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

29 CFR § 541.301(e)(5)

22i03 Acquisition agents, relocation agents, and property management agents for a land-acquisition service.

WHD has found acquisition agents, relocation agents, and property management agents to be exempt as follows (*see* FOH 22i00):

(a) **Acquisition Agents.**

Acquisition Agents (AAs) are employed to perform various tasks relating to the acquisition of property for the employer's clients. The AAs are responsible for purchasing the property by negotiating with the property owners, analyzing property appraisals, and making recommendations to the client using real estate practices, legal concepts, governmental standards, and regulations. The AAs represent the client in negotiations with the property owners and attorneys. They regularly recommend to the client whether a reasonable compromise is likely and further negotiations should be pursued, or whether to pursue condemnation litigation. If the property owner has a legitimate basis for seeking a substantially higher amount, the employees can recommend such increases to the client. If the negotiation process fails, the AAs prepare the lawsuit packages for condemnation proceedings, assist the client's attorney, and serve as an expert witness in mediation or trial. The AAs are also responsible for preparing for the real estate closing, including preparing closing documents.

When the duties performed are those described above, the Acquisition Agents qualify for the administrative exemption. The type of work performed by the AAs is directly related to the general business operations of the employer's clients. As noted in 29 CFR § 541.201(b), work in the functional areas of purchasing, procurement, and legal and regulatory compliance qualifies as work that is directly related to management or general business operations. Additionally, the many responsibilities of the AAs meet the discretion and independent judgment standard. The AAs interpret management policies, negotiate, consult with and provide expert advice to management, and bind the client financially on significant matters, as discussed in several of the factors found in 29 CFR § 541.202(b). Furthermore, the AAs are similar to the insurance claims adjusters listed as exempt in 29 CFR § 541.203, because

they are responsible for inspecting and determining the value of property including unique real property, negotiating settlements, and making recommendations regarding litigation when necessary.

(b) **Relocation Agents.**

Relocation Agents (RAs) assist in property appraisal and provide relocation assistance to the owners and tenants of the property purchased by the client. The RAs evaluate possible replacement properties and make recommendations as to the amount of the “replacement housing payment” to be paid to the displaced property owner. The RAs conduct research and analyze the best options for the property owners. They also analyze possible alternative properties under federal law. The RAs provide advice to the property owner on the moving process and any relocation assistance that might be available to them. The RAs can also make recommendations to the client to offer additional payments to the property owner or to extend the occupancy period given to the displaced property owner. They represent the client in appeals of the relocation payment amount, serving as expert witnesses in administrative appeals and/or in litigation. Where the tenant of the property is a business, the proceedings can be especially complicated because there often is tenant-installed equipment or machinery and/or significant build-outs by the tenant. In such cases, the relocation benefits can be as much as a million dollars, and RAs have saved clients hundreds of thousands of dollars at a time in appeals of business relocation payments. The RAs also assist the property owner in preparations for the property closing.

When the duties performed are those described above, the Relocation Agents qualify for the administrative exemption. The type of work performed by the RAs is directly related to the general business operations of the employer’s clients. Like the AAs, the RAs work in the functional areas of procurement, government relations, and legal and regulatory compliance, which are management and general business operations functions. *See* 29 CFR § 541.201(a). The RAs exercise discretion and independent judgment as to significant matters by analyzing housing alternatives, recommending “replacement housing payments,” and advising the client on significant financial matters. *See* 29 CFR § 541.202(b). The RAs are also similar to the insurance claims adjusters listed as exempt in 29 CFR § 541.203 because they are responsible for inspecting property, evaluating and making recommendations regarding the “replacement housing payment,” negotiating settlements with property owners, and representing management in any appeals.

(c) **Property Management Agents.**

The Property Management Agents (PMAs) serve as spokespersons and representatives of the client. They are responsible for dealing with governmental authorities, utility companies, contractors and other consultants during the conversion of the property for public use. They are responsible for contacting and developing rapport with various local officials and explaining the project in order to develop good relationships and ensure compliance with the law. Additionally, they must protect the client’s investment by working with the officials to keep the property safe from possible vandals and by making police reports in the event of vandalism. The PMAs work with environmental consultants to address environmental issues such as the presence of asbestos and to ensure compliance with environmental protection laws. The PMAs coordinate all of their work and develop an Operations and Maintenance Plan to ensure that the consultants and contractors follow proper procedures. The PMAs also coordinate and direct the demolition of the property, including preparing detailed specifications prior to the bidding, advertising for bids, and conducting pre-bid meetings to

explain the project prior to accepting bids for the demolition work. They have authority to use their knowledge and experience with contractors to select preferred contractors from an approved list or to shop for the best price for the work. After selection, the PMAs oversee and evaluate the work of all contractors.

When the duties performed are those described above, the Property Management Agents are exempt administrative employees. A PMA's primary duty of serving as a liaison between the client and various government agencies qualifies as management and general business operations because it involves government relations and legal and regulatory compliance. In addition, their work during the bid process and in the selection of contractors relates to purchasing and procurement, and their oversight activities involve quality control. The PMAs implement management policies, carry out major assignments, and negotiate on behalf of the company on significant matters, thereby fulfilling the exercise of discretion and independent judgment requirement. *See* 29 CFR § 541.202(b).

WHD Opinion Letter FLSA 2006-23

22i04 Advertising graphic art-installers.

Persons employed to install adhesive graphic "wraps" on vehicles or other surfaces are not performing duties which qualify for the creative professional exemption. They are skilled employees who install an artistic product created by someone else. The skill exercised in correctly applying the graphic, and insuring that the logo or advertising message presented in the graphic is not obscured, is not the performance of work that is "original and creative in character in a recognized field of artistic endeavor." Rather, such work depends primarily on diligence and accuracy. *See* FOH 22i00.

WHD Letter FLSA 2005-26NA

22i05 Advocates for individuals with disabilities.

An Advocate for individuals with disabilities, whose duties included the following, was not performing work which meets the administrative test:

- (a) Advocates services for people with disabilities,
- (b) Represents wishes and desires of a client in accordance with national protection and advocacy standards,
- (c) Keeps informed of changes in federal/state laws, regulations, policies and court orders affecting persons with disabilities,
- (d) Maintains full and accurate documentation of all clients assigned,
- (e) Prepares monthly reports of assigned cases for review by others,
- (f) Investigates and acts upon complaints of abuse and neglect,
- (g) Directly advises the Lead Advocate on matters relating to client concerns,
- (h) Participates in client case reviews, and

- (i) Represents the employer in outside forums, committees and work groups, as assigned.

These duties are more related to providing ongoing, day-to-day case management services, rather than performing functions directly related to the management of the employer's or employer's customer's business. *See* FOH 22i00.

WHD Letter FLSA 2005-30NA

22i06 Airplane and rotorcraft pilots and copilots, flight engineers.

- (a) Pilots do not qualify for the 541.300 learned professional exemption. WHD takes a position of non-enforcement with regard to pilots and copilots of airplanes and rotorcraft who hold an FAA Airline Transport Certificate or Commercial Certificate, and who receive compensation on a salary or fee basis at a rate of at least \$455 per week and who are engaged in the following activities:
 - (1) Flying of aircraft as business or company pilots,
 - (2) Aerial mineral exploration,
 - (3) Aerial mapping and photography,
 - (4) Aerial forest fire protection,
 - (5) Aerial meteorological research,
 - (6) Test flights of aircraft in connection with engineering, production, or sale,
 - (7) Aerial logging, fire suppression, forest fertilizing, forest seeding, forest spraying, and related activities involving precision flying over mountainous forest areas,
 - (8) Flying activities in connection with transmission tower construction, transmission line construction, transportation of completed structures with precision setting of footings, concrete pouring, or
 - (9) Aerial construction of sections of oil drilling rigs and pipe-lines, and ski-lift and fire lookout construction. This non-enforcement position does not apply to airplane and helicopter pilots engaged in agricultural crop-dusting operations. This policy does not relieve an employer from compliance with the minimum wage and overtime pay standards for support and maintenance personnel covered by the FLSA. In addition, this non-enforcement position does not apply to employees, including pilots and copilots, subject to the provisions of the McNamara-O'Hara Service Contract Act, the Davis-Bacon Act, and the Contract Work Hours Safety Standards Act, nor relieve any employer from any obligation incurred under a collective bargaining agreement or any liability incurred in a private suit under section 16(b) of the FLSA.

A pilot may qualify for the 541.100 executive exemption, if the primary duty is management and all other tests of the exemption are met. *See* FOH 22i00.

WHD Opinion Letter FLSA 2009-06

- (b) WHD also takes a position of non-enforcement with respect to flight engineers engaged primarily in flight testing airplanes or rotorcraft who have formal training equivalent to at least two years of college engineering education, 500 hours flight time as a flight engineer or pilot, and who are paid on a salary or fee basis at a rate of at least \$455 per week. *See* FOH 22i00.

WHD FLSA Opinion Letter September 2, 1975

22i07 Analysts -product technology and marketing.

A Product Technology and Marketing Analyst (PTA) who worked for a firm that provides products and services to prevent soil erosion and strengthen retaining walls and foundations of parking lots, bridges, levees, and buildings was found to be an exempt administrative employee.

The PTA's primary responsibility was to work independently with the company's Engineering and Design Group (EDG) to develop tests that measure the performance of new products and assess the feasibility of novel uses of current products. For example, if an existing product has the potential to stabilize and reinforce the lining of coal mine tunnels in a remote region, the PTA reviews all relevant information regarding the environmental conditions and the features of the mine. The PTA then works with the EDG to develop a test to measure the product's performance under varying conditions. The PTA evaluates numerous factors, including the type of equipment needed to create the precise environmental conditions and accurately capture the test results. Approximately 40 percent of the PTA's working time is spent with the EDG on tests for new and existing products. Additionally, approximately 30 percent of the PTA's time is spent as a liaison to the company's sales professionals, who visit potential and current customers. During these visits, the sales professionals are confronted with questions from customers regarding specific features/uses of the company's products and how they compare to competing products. The sales professionals rely on the PTA to provide them guidance on the appropriate responses to these customer inquiries. The PTA independently reaches conclusions regarding testing methodology, testing results, and product performance that allow the company to secure product sales by demonstrating that the company's products meet customer specifications or are superior to competing products.

The remainder of the PTA's time is spent performing standardized tests on the company's products and preparing reports reflecting the test results and how they compare to competitors. The PTA reports directly to the company's Vice President of Process and Product Development. The PTA receives at least \$455 per week on a salary basis.

The PTA's duty of working with the EDG to develop tests that measure the performance of new products and assess the feasibility of novel uses of current products directly relates to the functional areas of quality control and research. The PTA's duty of performing standardized tests on company products and preparing reports on how those products compare to competitors' products also directly relates to the functional area of research. Other duties, including assisting sales representatives in responding to customer questions regarding specific features/uses of the company's products, and evaluating product features for potential customers, directly relate to the functional area of marketing. Therefore, the PTA's primary duties involve 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."

Section 541.202(b) sets out several factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance. Examples of duties indicating the PTA “carries out major assignments in conducting the operations of the business” include working independently with the EDG to develop tests that measure performance of the company’s new products and assess the feasibility of novel uses of the company’s current products. Also, in determining how specific features/uses of the company’s products compare to competing products, evaluating features within the context of scenarios posed by sales professionals working in the field with customers, and making important conclusions that allow the company to secure product sales, the PTA “performs work that affects business operations to a substantial degree.” Accordingly, the PTA’s primary duties “include the exercise of discretion and independent judgment with respect to matters of significance.” *See* FOH 22i00.

WHD Opinion Letter FLSA 2008-03

29 CFR § 541.200(a)(2)

29 CFR § 541.202(b)

69 FR 22122

69 FR 22144

29 CFR § 541.200(a)(3)

22i08

Athletic trainers.

Athletic trainers who 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 Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

29 CFR § 541.301(e)(8)

22i09

Case managers employed by a firm providing services to individuals with disabilities.

Case managers employed by a company which is a service provider for individuals with disabilities were found to not be exempt under the administrative test. The company worked with physicians and other third parties to help consumers with disabilities increase their self-sufficiency at home and in the community. The primary duty of case managers was to meet and to work with consumers to gather information, to assess each consumer’s needs, to assess the costs of care, to prepare a plan of care, and to identify and to implement services to meet the consumer’s needs. Case managers did not personally deliver or administer services to the consumers, but were responsible for planning and helping to obtain those services from third-party service providers.

Case managers did not operate pursuant to written protocols or formulas. Rather, case managers drew upon their education and experience to identify and to procure whatever group of services may be appropriate for each consumer, maximizing that consumer’s ability to live outside an institution (such as a group home, assisted living center, nursing home, or state hospital). Case managers may have sought information and input from colleagues and other resources, but were independently responsible for developing a plan of care for each consumer. Each plan of care was, by necessity, driven by the individual needs and abilities of the consumer. A plan of care may have included services such as advocacy/case

management, independent living skills training, peer support, physical therapy, cognitive therapy, speech therapy, occupational therapy, or vocational rehabilitation.

Case managers also monitored the delivery of services in coordination with the consumer and third-party service providers. In addition, case managers assisted consumers with related matters, including consumers' eligibility for benefits through Medicaid, Medicare, Social Security, and private insurance.

Case managers performed their work free from direct supervision. Case managers developed and implemented plans of care without the requirement of approval by a superior, but their work was regularly reviewed by a company vice president for quality and timeliness.

The activities performed by these case managers were more related to providing the company's ongoing, day-to-day case management services for its consumers, which involved duties such as assessing costs of care, preparing a plan of care, and identifying and implementing services to meet the consumers' needs, rather than performing administrative functions directly related to managing either the company's business or any business of the company's customers. A case manager was not primarily tasked with performing duties in any of the management or general business functional areas described in 29 CFR § 541.201(b); nor was the case manager primarily tasked with providing administrative services to the employer's customers as contemplated in 29 CFR § 541.201(c). Therefore, case managers did not qualify for the administrative exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2007-07

22i10

Chefs.

Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to ordinary cooks who perform predominantly routine mental, manual, mechanical or physical work. *See* 29 CFR § 541.301(e)(6). A chef whose primary duty is work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, may be considered for exemption as a creative professional depending upon the facts. However, there is a wide variation in duties among chefs, and the creative professional exemption must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the specific chef in question. The Department intends that the creative professional exemption extend only to truly "original" chefs, such as those who work at five-star or gourmet establishments, whose primary duty is the performance of work "requiring invention, imagination, originality or talent."

69 FR 22154

22i11

Community events supervisors employed by a city.

Community Events Supervisors employed by a municipality who have as a primary duty planning and coordinating special events held at various times during the year, soliciting donations for events, determining what benefits will be provided for various levels of donation, contracting for services, designing, advertising, marketing, and coordinating summer camp activities, planning the camp activities, hiring and training staff, and planning camp budgets are performing work in the area of budgeting, personnel management,

advertising, marketing and public relations. This work would meet the requirement that the work be office or non-manual work directly related to the management or general business operations of the employer. The primary duty includes the exercise of discretion and independent judgment in matters of significance when the Community Events Supervisors carry out major assignments in operations and have the authority to bind the municipality in significant matters such as contracts with vendors. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-34

22i12

Construction project superintendents.

A construction project superintendent employed by an environmental engineering and consulting company that performs construction projects on miscellaneous government sites was found to be an exempt executive. The project superintendent's primary function was to supervise the day-to-day activities of the construction project. The superintendent oversaw the work of subcontractors employed on the project and supervised the labor force employed for the project, consisting of regular company personnel, project-specific temporary personnel, and/or union personnel. The superintendent usually supervised at least two employees, if not more, throughout the duration of the project. The superintendent met with the client's representatives, made decisions regarding the scope of work of subcontractors, made purchasing decisions as needed for the project, and reported and made recommendations to the project manager regarding employee advancement, firing, and change of status. The superintendent was paid far in excess of \$455.00 per week.

The project superintendent's duties are included in the type of activities constituting "management" within the meaning of the regulations.

Under 29 CFR § 541.100(a)(3), an exempt executive employee must "customarily and regularly direct the work of two or more other employees." "Two or more other employees" means two full-time employees or their equivalent. 29 CFR § 541.104(a). Only other employees employed by the same employer may be considered when making this determination under the executive exemption; the supervision of employees of independent contractors, subcontractors, or any other "non-employees" in relation to the employer are not considered for purposes of meeting this test. Assuming that the project superintendent customarily and regularly supervises two employees who are employed by the superintendent's employer, this requirement is satisfied. The failure to meet this aspect of this test, however, would result in denial of the executive exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2007-03

22i13

Copy editors.

Book club copy editors, employed by a direct marketing firm, whose duties included the following, did not meet the administrative exemption test because they performed "production" duties:

- (a) Reading club marketing promotional materials prepared by copywriters and making any necessary corrections for structure, grammar, comprehension, spelling, clarity, and accuracy,

- (b) Correcting the keying of test versions, checking for adherence to legal requirements for trademarks and copyrights, and ensuring compliance with postal rules and scanning standards,
- (c) Reviewing the accuracy of publication titles, authors' names, code numbers, and prices, and ensuring that the company's requirements for style and procedures are met,
- (d) Organizing work priority to meet deadlines according to promotion schedules,
- (e) Making decisions on workflow and communicating these decisions to club copywriters.

The "production versus staff" dichotomy is instructive when evaluating whether duties are directly related to management or general business operations, but not dispositive of exempt status. But, when work falls "squarely on the production side of the line," the administration/production dichotomy is determinative.

The primary duty of the copy editors described above falls squarely on the production side of the line for their employer, a direct marketing firm, and, thus, the employees are nonexempt. Their primary duty also involves the use of skill rather than the exercise of discretion and independent judgment. *See* FOH 22i00.

69 FR 22141
WHD Opinion Letter FLSA 2006-45

22i14 **Dental hygienists.**

Dental hygienists who 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 Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

29 CFR § 541.301(e)(3)

22i15 **Examiners or graders.**

Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

29 CFR § 541.203(h)

22i16 **Executive or administrative assistants.**

An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance. This example should not be read to expand the administrative exemption to include secretaries or other clerical employees.

29 CFR § 541.203(d)
69 FR 22146

22i17 **Financial services industry.**

Employees in the financial services industry generally meet the duties requirements for the administrative exemption 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. Courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be within the administrative exemption, even though the employees also engaged in some inside sales activities. However, the administrative exemption is not available for employees whose primary duty is to sell the employer's financial products on a day-to-day basis directly to consumers or who fail to exercise discretion and independent judgment with respect to matters of significance to the management or general business operations of the employer or of the employer's customers. See FOH 22i00 and FOH 22i34.

29 CFR § 541.203(b)
69 FR 22146
Administrator's Interpretation 2010-1

22i18 **Funeral directors and embalmers.**

Some licensed funeral directors and embalmers may meet the duties requirements for the learned professional exemption. In order to meet the duties requirements of the exemption, licensed funeral directors and embalmers must be 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. Some employees with the job title of "funeral director" or "embalmer" have not completed the four years of post-secondary education required by 29 CFR § 541.301(e)(9) and are not, therefore, exempt as learned professionals.

29 CFR § 541.301(e)(9)
69 FR 22155 through 22156

22i19 Information Technology (IT) support specialists (help desk support specialist).

An IT Support Specialist (renamed from Help Desk Support Specialist) who is responsible for the diagnosis of computer-related problems, conducts problem analysis and research, troubleshoots, resolves complex problems either in person or by using remote control software, and ensures timely closeout of trouble tickets is not exempt as an administrative or professional employee.

The IT Support Specialist position required a high school diploma or GED, although an associate degree was preferred.

WHD has found that an IT Support Specialist who spent time on such duties as described below was not exempt under either the administrative or computer professional categories:

Analyzes, troubleshoots, and resolves complex problems with business applications, networking, and hardware. Accurately documents all work in appropriate problem tracking software. Prioritizes tasks based on service level agreement criteria with limited supervision (55%).

Installs, configures, and tests upgraded and new business computers and applications based upon user-defined requirements. Assists users in identifying hardware/software needs and provides advice regarding current options, policies, and procedures. Creates and troubleshoots network accounts and other business application user accounts as documented in the employee lifecycle process (20%).

Participates in the design, testing, and deployment of client configurations throughout the organization. This process requires detailed knowledge of Microsoft operating systems and compatible business applications. Leverages application packaging software technology for deployment of business applications to client systems (10%).

Participates in the analysis and selection of new technology required for expanding computing needs throughout the organization. Works with competing vendors to determine the best selection based on price, technical functionality, durability, manufacturer support, manufacturer vision, and position in the healthcare industry (5%).

Documents technical processes and troubleshooting guidelines. Documents end-user frequently asked questions about computer systems or programs and publishes on Intranet as guidelines for the entire organization (5%).

Monitors automated alerts generated by systems management tools and makes decisions on the most effective resolution (5%).

Although the upkeep of a computer system may be viewed as essential to an employer's business operations, the nature of the individual employee's particular work, and not the possible results or consequences of its performance, is the focus of the analysis for determining if a particular employee is exempt. To qualify as an exempt administrative employee, therefore, the work performed must itself relate to significant matters in the management or general business operations of the employer. In addition, performing highly

skilled technical work in troubleshooting computer problems does not, by itself, demonstrate the exercise of discretion and independent judgment with respect to matters of significance. As stated in 29 CFR § 541.202(e), “[t]he exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.”

The primary duty of the IT Support Specialist as described above consists of installing, configuring, testing, and troubleshooting computer applications, networks, and hardware. Maintaining a computer system and testing by various systematic routines to see that a particular piece of computer equipment or computer application is working properly according to the specifications designed by others are examples of work that lacks the requisite exercise of discretion and independent judgment within the meaning of the administrative exemption. Employees performing such activities are using skills and procedures or techniques acquired by special training or experience. Their duties do not involve, with respect to matters of significance, the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered as required by 29 CFR § 541.202(a). Such work does not involve formulating management policies or operating practices, committing the employer in matters that have significant financial impact, negotiating and binding the company on significant matters, planning business objectives, or other indicators of exercising discretion and independent judgment with respect to matters of significance discussed in 29 CFR § 541.202(b). Although minor aspects of the work (described as five to ten percent) include participating in the design of client configurations and analyzing and selecting new technology, the description of the tasks performed and the decisions made by an IT Support Specialist does not demonstrate that their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance to the management or general business operations of the employer. Therefore, the IT Support Specialist position does not qualify for the administrative exemption under section 13(a)(1) of the FLSA.

With respect to the Computer Employee Exemption, the following analysis applies: The primary duty of the IT Support Specialist consists of installing, configuring, testing, and troubleshooting computer applications, networks, and hardware. The primary duty of this employee does not involve the “application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.” 29 CFR § 541.400(b)(1). Nor is the primary duty of the IT Support Specialist “[t]he 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,” *see* 29 CFR § 541.400(b)(2), “[t]he design, documentation, testing, creation or modification of computer programs related to machine operating systems,” 29 CFR § 541.400(b)(3), or “[a] combination of these duties, the performance of which requires the same level of skills,” 29 CFR § 541.400(b)(4). Because the primary duty of the IT Support Specialist as described does not consist of duties similar to those discussed in 29 CFR § 541.400(b)(1)-(4), the IT Support Specialist position does not qualify for the computer professional employee exemption under FLSA sections 13(a)(1) and 13(a)(17). *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-42

22i20 **Inspectors.**

- (a) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

29 CFR § 541.203(g)

- (b) However, inspectors whose primary duty is management of an area, including the supervision of two or more subordinates, may qualify for the executive exemption, provided that the other tests of the exemption are met. *See* FOH 22i00

WHD Opinion Letter FLSA 2007-11**22i21** **Inspectors or investigators-public sector.**

Public sector inspectors or investigators of various types, such as police officers, criminal investigators, liquor law investigators, probation officers, parole agents, fire prevention or safety inspectors, building or construction inspectors, health or sanitation inspectors, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their primary duty typically does not involve work “directly related to the management or general business operations of the employer.” Rather, their primary duty involves producing the services that their agency exists to produce. For example, in law enforcement organizations, investigation activities are among the primary functions of the “business.” Therefore, investigations are more related to the day-to-day operations than to the management or general business operations.

Such employees also do not typically qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met. Thus, the primary duty does not typically include the exercise of discretion or independent judgment with respect to matters of significance to the management or general business operations of the employer.

Public sector investigators whose primary duty is management may qualify for the executive exemption, provided that the other tests of the exemption are met. *See* FOH 22i00 and FOH 22i40.

29 CFR § 541.203(j)**WHD Letter FLSA 2005-21NA****WHD FLSA Opinion Letter September 12, 1997****WHD FLSA Opinion Letter February 1, 1998****WHD FLSA Non-Administrator Letter April 17, 1998****WHD FLSA Non-Administrator Letter January 23, 1998****WHD FLSA Non-Administrator Letter December 21, 1994****WHD FLSA Opinion Letter July 26, 1988**

22i22 Instructors-assistant athletic.

Assistant Athletic Instructors (AAIs) at colleges may qualify for exemption as teachers under section 13(a)(1) of the FLSA and 29 CFR § 541.303.

AAIs teach proper skills and skill development to student-athletes and are required to have a bachelor's degree with a master's degree (or additional experience) preferred. Their teaching responsibilities include instruction of physical health, team concepts, and safety. The AAIs, who work under the supervision of a head coach, are responsible for designing instructions for individual student-athletes and for specific team needs, and thus have a great deal of independent discretion and judgment as to the manner and method of teaching. Students receive academic credit for their participation in collegiate team sports.

Under Reg. 541 a teacher is "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed." An AAI whose teaching responsibilities encompass at least 50% or more of their time and include instruction of physical health, team concepts, and safety is meeting the primary duty test needed for the Reg. 541 teacher exemption.

There is no minimum education or academic degree required under the regulations for the teacher exemption. Athletic instructors whose primary duty is teaching in an educational establishment would qualify for the exemption whether or not they have a particular academic degree. By contrast, athletic instructors whose primary duty is not related to teaching would not qualify for the teacher exemption. Also, the regulations do not require that exempt teachers be paid on a salary basis. Having a primary duty of teaching generally involves, "by its very nature, exercising discretion and judgment."

The following duties are not related to teaching: developing effective recruitment strategies; recruiting and following up on prospective students; researching and targeting high schools and athletic camps as sources for potential student-athletes; and visiting high schools and athletic camps to conduct student interviews. The amount of time spent on such duties must be considered when determining whether the AAI meets the primary duty test for exemption as a teacher. Colleges generally would qualify as educational establishments for purposes of the teacher exemption. An "educational establishment" is defined as "an elementary or secondary school system, an institution of higher learning or other educational institution."

Where AAIs spend more than 50% of their time teaching in an educational establishment, they qualify for exemption from the FLSA's minimum wage and overtime pay requirements. *See* FOH 22i00.

WHD Opinion Letter FLSA 2008-11

WHD Opinion Letter FLSA 2006-41

WHD Letter FLSA 2005-39NA

29 CFR § 541.204(b)

29 CFR § 541.303(a)

29 CFR § 541.303(d)

WHD Fact Sheet #17D

22i23 Insurance claims adjusters.

- (a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; 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 CFR § 541.203(a)

- (b) **Varying levels of authority.**

In the insurance industry, there are insurance claims adjusters with varying levels of authority. The claims adjusting duties performed by these individuals when it is in the functional area of insurance is work directly related to management or general business operations of the employer or the employer's customers and thus meets the second criteria of the administrative exemption test.

In order to qualify for the administrative exemption, the employee must also meet the third criteria of the exemption test, "...primary duty must include the exercise of discretion and independent judgment with respect to matters of significance." Generally, the exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and then acting or making a decision after considering the various possibilities. The term "matters of significance" refers to the level of consequence or importance of the work performed. The exercise of discretion and independent judgment includes the employee's authority to make independent choices free of immediate supervision but does not preclude higher level review. An indicator of the claims examiner's exercise of discretion and independent judgment is the level of supervision. For example, does the claims adjuster's supervisor only spot-check work or must the adjuster seek approval from a supervisor for settlements?

The exercise of discretion and independent judgment must be more than applying specific standards or procedures found in manuals. The following are examples of duties performed by claims adjusters that are more than applying specific standards: evaluating independent medical examinations, evaluating investigations of accident scenes, hiring and interacting with nursing services to assist claimants to return to work, approving litigation strategy, participating in hiring experts, serving as lead negotiator in settlement discussions and using their own judgment about what the facts show, who is liable, what a claim is worth, and how to handle negotiations with the claimant in order to achieve a successful resolution.

Claims adjusters who perform their duties under close supervision or in consultation with supervisors and who have no, or limited authority, to make independent choices do not meet the third criteria of the administrative exemption. *See* FOH 22i00.

WHD Letter FLSA 2005-02NA

WHD Letter FLSA 2005-25NA

22i24 Investigators-background.

The range of duties performed in the process of making investigations, including gathering evidence; interviewing witnesses; reviewing medical, financial, employment and other data; preparing reports for review by a client or superior; and other similar work, is not work “which is directly related to the management or general business operations” of the employer where the employer provides such services to clients for a fee. The activities performed by investigators are more related to providing ongoing day-to-day investigative services - the production work of the employer-than they are to exempt administrative duties. The fact that investigators plan their own workload, make decisions on whether to further pursue a given lead, and make other similar decisions does not elevate the work to the level of exercising “discretion and independent judgment with respect to matters of significance” to the managing of their employer’s or their employer’s client’s business. *See* FOH 22i00.

WHD Letter FLSA 2005-21NA**22i25 Journalists.**

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. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their 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 CFR § 541.302(d)**22i26 Location managers in the motion picture industry.**

Location Managers, who typically choose a location for filming with approval from the director and production management, negotiate the site’s rental, contract for all necessary utilities, apply for all necessary governmental services and permits, create and enforce rules specific to the filming locations based on that site’s specific circumstances and designed to comply with state and local law, act as a liaison between the production company and local property owners and residents, and secure final rental payment for the property owner including negotiating any claim of property damage, have been found exempt.

Before the 2004 revisions to the part 541 regulations, Location Managers of motion picture companies were specifically cited as a type of qualifying administrative employee who performed special assignments away from the employer’s place of business. Based upon their duties—such as selecting locations, entering into rental agreements, and developing and implementing rules for employees to follow on location—it appears that the Location Managers are primarily engaged in the budgeting, procurement, and personnel management

functions described in 29 CFR § 541.201 as types of work directly related to assisting with the running or servicing of the employer's business.

The Location Managers' primary duties include the exercise of discretion and independent judgment. For example, the Location Manager formulates management policies when creating and enforcing regulations for the production crew based upon the site's requirements. Also, the Location Manager commits the employer in financial matters and negotiates and binds the company regarding significant matters when the Location Manager chooses the location, negotiates the site's rental, obtains contracts with local private resources, obtains necessary permits from local government, and represents the company's position to the property owner. Finally, the Location Manager represents the company when acting as a liaison between the company and the property owner and any disgruntled local residents, and when resolving the final balance of account between the company and property owner, including whether the company owes for any damages done to the rental property. Such activities involve the requisite exercise of discretion and independent judgment.

Accordingly, the position of Location Manager, as described above, satisfies the requirements for the administrative exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-46

22i27

Managers-convention and visitors service sales, employed by a city.

When the primary duty of a convention and visitors service sales manager employed by a city is performing office or non-manual duties that are directly related to management or general business operations of the employer, the second test of the administrative exemption is met. Examples of such duties include the following: marketing and promotional work to enhance the city as a destination for conventions and visitors; working closely with the local hospitality industry and other city departments to coordinate conventions and ensure efficient meeting arrangements for the attendees; conducting research to identify potential clients; preparing and presenting bids for meetings and conferences; designing promotional brochures and flyers; attending conferences of professional meeting planners and exhibit show associations to generate leads; handling computerized database bookings; and preparing bills for payment. The employee might also perform some clerical and support services for the convention and visitors services director as needed. This employee is engaged in marketing activities that are intended to enhance the city's image as a potential meeting place and thus promote economic growth.

When the employee operates under only minimal supervision, researches and selects potential clients, designs and creates promotional materials, and prepares and presents bids for meetings and conferences to potential clients, determines what amenities the city will offer to a group and the level of staffing the city will provide to assist a group, these duties include the exercise of discretion and independent judgment in matters of significant economic impact on the city.

Although the employee is required to perform clerical and support duties for the convention and visitors services director as needed, this nonexempt work does not appear to be the employee's primary duty. Thus, the employee performing duties described above qualifies for the administrative exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-34

WHD Opinion Letter FLSA 2009-04

22i28

Managers-gasoline service station.

When the station manager is in sole charge of a location and customarily and regularly directs the work of two or more other full-time employees, and management policy dictates that the following duties are to be performed only by the manager:

- (a) printing the daily sales report,
- (b) checking inventory status,
- (c) auditing cash receipts,
- (d) delivering cash receipts to the bank -

such duties do not defeat the exemption. They are management functions for purposes of meeting the primary duty test for executives, as these functions relate to the maintenance of production and sales records, and to providing security of the employer's property.

Training of employees, including a new manager, is also exempt management work under 29 CFR § 541.102.

Working as a station attendant is nonexempt work. Substantial nonexempt work cannot be routinely assigned to an employee without calling into question the application of the exemption to that employee. However, so long as an otherwise exempt station manager only performs attendant duties occasionally, for up to a full day, a few times per year, at infrequent intervals, the primary duty test will still be met. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-29

22i29

Managers-human resources or personnel.

Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, 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. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or

makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions as discussed in 29 CFR § 541.703.

29 CFR § 541.203(e)

22i30 Managers-loss prevention.

A Loss Prevention Manager (LPM), employed by a retailer, who has the primary duty of effectively implementing a loss prevention and shortage control program by, among other duties:

- (a) Analyzing inventory results,
- (b) Allocating store Loss Prevention resources to successfully reduce inventory shortage,
- (c) Focusing prevention activities on high shortage departments,
- (d) Identifying paperwork control weaknesses and implementing procedures to correct them,
- (e) Conducting audits for compliance and ensuring store follow-up on price accuracy initiatives,
- (f) Reviewing cash discrepancies to keep the store within allowable guidelines, and identifying cash registers with unacceptable shortages, and
- (g) Regularly reviewing loss prevention exception reports for signs of dishonesty, is performing work which directly relates to the functional areas of accounting, auditing, and quality control discussed in 29 CFR § 541.201(b), and thus may qualify as an exempt administrative employee.

Duties performed by the LPM such as interviewing all loss prevention candidates, conducting and supervising training for subordinates on a continual basis, and providing direction for subordinates also directly relate to the functional areas of personnel management and human resources. Ensuring training standards for associates regarding emergency procedures, robbery, fire, etc., is work directly related to the functional area of safety and health. An LPM's typical work day consists of performing office or non-manual work. Therefore, the LPM's primary duty involves the "performance of office or non-manual work directly related to the management or general business operations of the employer."

A typical LPM's primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." An LPM who is working independently has certain decision-making authority that is "free from immediate direction or supervision." When selecting appropriate steps to address the problem of inventory shortage and pursuing the selected course of action, an LPM compares and evaluates possible courses of conduct, and acts or makes a decision after the various possibilities have been considered as discussed in 29 CFR § 541.202(a). The LPM's primary duty of implementing the loss prevention and shortage control program for a store, and supervisory work where an LPM is in charge of subordinates, demonstrates that the employee "implement[s] management policies or operating practices." When implementing the loss prevention and shortage control program

for the store, the LPM “performs work that affects business operations to a substantial degree” because the effective performance of such duty is essential for the profitability of the store and, in fact, frequently determines the store’s success or failure. When developing store-specific programs to meet or exceed the store’s shortage goals, the LPM “carries out major assignments in conducting the operations of the business.” In determining what internal investigations to pursue and when to conduct interviews, in ascertaining prosecutable cases, and in investigating harassment allegations, the LPM “investigates and resolves matters of significance on behalf of management.” In addition, in consulting with and providing expert advice to store management with respect to the loss prevention and shortage control program, the LPM “provides consultation or expert advice to management.” Therefore, the LPM’s duties meet several of the factors in 29 CFR § 541.202(b) indicating the sufficient “exercise of discretion and independent judgment with respect to matters of significance” and, as such, may qualify for the administrative exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-30

22i31 Managers-staffing, employed by a temporary staffing company.

A staffing manager who has a primary duty of recruiting, hiring and managing the temporary labor pool of the employer’s clients is performing work in the area of personnel management, human resources and labor relations. This work would meet the requirement that the work be office or non-manual work directly related to the management or general business operations of the employer’s clients.

The staffing manager’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance in order to meet the third test of the exemption. The following are examples of situations in which the staffing manager may exercise the requisite discretion and independent judgment with respect to matters of significance.

- (a) Recruiting, hiring and recommending placement of employees into particular assignments,
- (b) Managing the client’s temporary labor pool,
- (c) Providing advice on personnel issues,
- (d) Handling complaints,
- (e) Resolving grievances, and
- (f) Terminating employees on behalf of the client’s management. *See* FOH 22i00.

WHD Letter FLSA 2005-45NA

22i32 Medical coders.

Medical coders who translate medical diagnoses and procedures into codes used for reimbursement from insurance companies were found not to be exempt learned professionals. The coders perform the following duties:

- (a) Analyze the patient's entire record to determine the appropriate code,
- (b) Assign and report codes in accordance with national organizational standards,
- (c) Maintain knowledge of current medical and pharmaceutical terminology, and
- (d) Attend ongoing continuing education courses in order to maintain the credentials and state board certifications.

Coders may have some, none, or all of the following qualifications:

- (1) State board certification,
- (2) B.S. degree in Health Information Management, or
- (3) A two-year degree.

Medical coding is not a recognized profession. The primary duty of medical coding does not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual study. Jobs that require only a four-year degree in any field or a two-year degree as a standard prerequisite for entry into that field do not qualify for the learned professional exemption. *See* FOH 22i00.

WHD Letter FLSA 2005-35NA**22i33 Medical technologists-registered or certified.**

- (a) Registered or certified medical technologists who 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 of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

29 CFR § 541.301(e)(1)

- (b) **Radiology technologists.**

Radiology technologists (RTs) have been found not to be exempt from the minimum wage and overtime requirements of the FLSA. The RT's primary duty does not require "advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." Their work has been found not to be "work 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."

The RT position requires successful completion of a two-to-three-year radiology technology program accredited by the Joint Review Committee on Education in Radiologic Technology or some other manner of accreditation acceptable to the American Registry of Radiologic Technologists (ARRT). The RTs must pass an ARRT examination for registration. To renew the ARRT registration, an RT must meet certain continuing education requirements every two years.

The requirement that an RT complete a two- to three-year radiology technology program accredited by the Joint Review Committee on Education in Radiologic Technology (or some other manner of accreditation acceptable to the ARRT), along with an ARRT examination for registration, does not meet the “advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction” standard.

Duties of RT’s have been found to be: reviewing physicians’ orders for patient examinations; ensuring that the examining room is properly prepared for the procedure; visiting patients to determine their tolerance to the examination and positioning; preparing patient information cards that are included on the film for identification; positioning the patients to assure that the radiologist can see and access the proper area for the imaging procedure; administering contrast and other chemicals orally or intravenously; setting technical factors on equipment, such as penetration and length of the imaging power; checking radiation and imaging power factors for safety to the patient, technologist, and equipment; and operating the equipment for radiation and other imaging power exposure. RTs take the film to the darkroom for automatic processing and evaluate the adequacy of the film for reading by the radiologist. As needed, the RTs take additional images. They may also assist the radiologist in understanding particular cases and images taken.

Following the procedures, the RTs return patients to their proper area; clean tables and change linens; clean cassettes, aprons, gloves, and wheelchairs; check cassettes for contact and leakage, and aprons and gloves for leakage; and clean the film processor as required. They ensure that proper notations are made in the patients’ records, and participate in maintaining departmental files, coordinating and scheduling of patients, and maintaining department inventories. The RTs maintain records of use according to state and federal regulations. They perform daily instrument calibration procedures on all instruments, make minor repairs to equipment, and report any major equipment problems to the department head. RTs carry out all of their duties without the need for constant supervision.

Although the RTs’ work involves the use of advanced skills and procedures that are vitally important to the professional work of the radiologist who analyzes and interprets the images, the RTs’ work does not appear to be “work 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.” 29 CFR § 541.301(b). The procedural work performed by the RTs is highly skilled and requires significant training, but seems to be more in the character of routine mental, manual, mechanical and physical processes than intellectual work requiring the consistent exercise of discretion and judgment. The “learned professional” activity in this area is the practice of medicine involved in the analysis and interpretation of the images developed, which is performed by the radiologist. *See* FOH 22i00

WHD Opinion Letter FLSA 2007-05

22i34 **Mortgage loan officers.**

In the financial service industry, there are persons classified as “mortgage loan officers,” “mortgage loan consultants,” “mortgage loan representatives,” “mortgage loan originators,” “mortgage bankers,” and similar titles. The following are typical duties of these individuals, referred to here as mortgage loan officers:

- (a) Contact potential customers after receiving internal leads, leads generated by direct mail or other marketing activity,
- (b) Collect required financial information from customers, including information about income,
- (c) Run credit reports,
- (d) Enter collected financial information into computer program that identifies which loan products may be offered to customers based on the financial information provided by the customer,
- (e) Assess the identified loan products and discuss with customers the terms and conditions of particular loans,
- (f) Match customer needs with one of the company’s loan products,
- (g) Compile customer documents to forward to underwriter or loan processor, and
- (h) May finalize documents for closing.

The primary duty of mortgage loan officers performing the typical duties shown above is making sales. These duties are the production work of the employer rather than duties which are directly related to the management or business operations of the employer. Mortgage loan officers typically perform their duties for homeowners, who are not involved in management or general business operations contemplated by these regulations; therefore, a typical mortgage loan officer’s primary duty is not related either to the employer’s management or general business operations or to those of the employer’s customers.

A mortgage loan officer who performs the typical duties described above has a primary duty of making sales for the employer and, therefore, does not qualify as a bona fide administrative employee exempt under section 13(a)(1) of the FLSA. *See* FOH 22i00.

Administrator’s Interpretation No. 2010-1**22i35** **Museum curators.**

When the primary duty of a museum curator is performing non-manual duties that are directly related to management or general business operations of the employer, the second test of the administrative exemption is met. Examples of such duties include the following: maintaining the quality of the museum collection in accordance with museum management principles and practices (quality control); soliciting and evaluating additions to the museum’s collection (similar to purchasing); developing educational components to present information regarding the exhibits (research); assisting in fundraising and writing grant proposals (finance

and budgeting); managing special projects such as collecting oral histories (research); and establishing and implementing a volunteer tour guide program (marketing).

The museum curator's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance to the management or general business operations of the employer in order to meet the third test of the administrative exemption. Examples of duties that curators perform that indicate the exercise of discretion and independent judgment with respect to matters of significance are the following: establishing and implementing volunteer tour guide programs (formulating operating practices); developing education materials to be presented by volunteer guides (formulating operating practices); developing the changing exhibits (implementing operating practices); and writing grant proposals (involvement in the long-term or short-term business objectives). *See* FOH 22i00.

WHD Letter FLSA 2005-43NA

22i36

Nurses.

Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. (Note, however, that many registered nurses are paid on an hourly basis rather than on a salary or fee basis, and for that reason are entitled to overtime pay.) Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

29 CFR § 541.301(e)(2)

22i37

Occupational therapists-certified, assistants.

WHD has found Certified Occupational Therapist Assistants (COTAs) employed by a school district to be nonexempt as learned professionals.

The primary duty of a COTA is assisting occupational therapists in providing therapeutic educational programs for students. According to the school district's COTA job description, the only educational requirement is that which is sufficient to obtain certification by the state Board of Occupational Therapy Examiners. One of the prerequisites for certification by the state is the completion of "at least 60 academic semester credits or the equivalent from an accredited institution of higher education."

The primary duty test under the learned professional exemption requires that:

- (a) The employee must perform work requiring advanced knowledge,
- (b) The advanced knowledge must be in a field of science or learning, and
- (c) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

COTAs did not meet the primary duty test. The COTAs' primary duty does not require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." Occupations that "require only a four-year degree in any field or a two-year degree as a standard prerequisite for

entrance into the field . . . do not qualify for the learned professional exemption.” 69 FR 22121, 22150 (Apr. 23, 2004). Completion of 60 semester hours does not qualify as a “prolonged course of specialized intellectual instruction. COTAs also did not meet the definition of a registered or certified medical technologist. The regulations contain specific academic requirements for exemption:

Registered or certified medical technologists who 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 of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

29 CFR § 541.301(e)(1). Becoming a COTA only requires 60 semester hours of study, rather than the more rigorous course of study required for registered or certified medical technologists.

The existence of a mandatory, accredited certification program for COTAs, standing alone, does not satisfy the regulatory requirement for a prolonged course of specialized intellectual instruction for entry into the field.

Accredited curriculums and certification programs are relevant to determining exempt learned professional status to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the occupation as required under section 541.301. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative, if certification does not involve a prolonged course of specialized intellectual instruction.

69 FR at 22157

Consequently, because the occupational therapist assistant occupation does not require “knowledge of an advanced type . . . customarily acquired by a prolonged course of specialized intellectual instruction,” these employees do not qualify for the “learned professional” exemption.

Additionally, the COTAs do not qualify for the exemption for administrative employees in educational establishments. *See* 29 CFR § 541.204. Section 541.204 provides an exemption for employees “whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.” 29 CFR § 541.204(a)(2). Section 541.204(c)(2), however, states that “jobs relating to the health of the students . . . do not perform academic administrative functions” and do not fulfill the requirements for the educational establishments exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2008-17

WHD Opinion Letter FLSA 2005-09

69 FR. 22121 and 22150

WHD FLSA Non-Administrator Letter May 2, 2001

29 CFR § 541.301(d)

22i38 **Paralegals.**

- (a) Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. 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. *See* FOH 22i00.

29 CFR § 541.301(e)(7)

WHD Letter FLSA 2005-09NA

WHD Letter FLSA 2005-54NA

- (b) **Paralegals with a specialized 4-year degree.**

The learned professional exemption may be available for paralegals who possess advanced specialized degrees in other fields and apply advanced knowledge in that professional field in the performance of their paralegal duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for the learned professional exemption. *See* FOH 22i00.

WHD Letter FLSA 2005-09NA

- (c) **Paralegals – Administrative exemption.**

The work of paralegals and legal assistants will not generally meet the discretion and independent judgment test of the administrative exemption and thus an analysis of whether their work is related to management or general business operations is not necessary. Paralegals perform duties using particular skills and knowledge rather than exercising the level of discretion and independent judgment required by section 29 CFR § 541.202(a)(3). When paralegals research and prepare reports, it is generally the attorneys who exercise discretion and independent judgment because they receive and decide whether or how to act on the information in the reports.

Although paralegals may work independently and use their own judgment as to how to prioritize their work assignments, including how the projects will be executed and how much time to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters or that an employee makes limited decisions, within clearly “prescribed parameters.” *See Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287-88 (4th Cir. 1986) and *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff’d*, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer’s customers.

A typical paralegal does not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives as required to be exempt under 29 CFR § 541.202(b). In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. Under the American Bar Association’s Code of Professional Responsibility, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete

professional responsibility for the work produced. The implication of such strictures is that paralegal employees would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-27

WHD Letter FLSA 2005-54NA

(d) **Senior Legal Analysts.**

A Senior Legal Analyst who conducts research at the request of an attorney and prepares a report for an attorney's review is performing work involving the use of skills and procedures rather than exercising discretion and judgment. The attorney who receives the reports exercises discretion and judgment in determining how to use the report. *See* FOH 22i00.

WHD Opinion Letter FLSA 2006-27

22i39 Physician assistants.

Physician assistants who 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 generally meet the duties requirements for the learned professional exemption.

29 CFR § 541.301(e)(4)

22i40 Police lieutenants and captains, fire battalion chiefs.

29 CFR § 541.3(b) states that police officers, fire fighters or other first responder employees who perform work such as extinguishing fires, rescuing crime or accident victims, performing surveillance, pursuing or restraining suspects, interviewing witnesses, and other similar work are not exempt executive or administrative employees. However, the executive exemption may apply to police lieutenants, police captains and fire battalion chiefs so long as the duties they perform meet all of the requirements set out in 29 CFR § 541.100. *See* FOH 22i00.

WHD Letter FLSA 2005-40NA

WHD FLSA Opinion Letter May 19, 1988

22i41 Purchasing agents.

Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs. *See* FOH 22i00.

29 CFR § 541.203(f)

WHD Opinion Letter FLSA 2008-01

22i42 **Sales engineer position.**

An employee with a four-year degree in mechanical or electrical engineering, whose duties require a combination of sales and applications engineering activities, can qualify for the professional exemption. In making such a determination, the primary duty test must be applied in order to determine whether the exempt engineering duties or the nonexempt sales duties are the primary duty. The relative importance of the engineer duties must be weighed with that of the sales duties. When the employee's engineering background and abilities are used to determine the engineering specifications, resolve engineering related problems, and provide technical support, which result in making the sale or securing the order, the importance of the engineering duties will outweigh that of the sales duties. *See* FOH 22i00.

WHD Letter FLSA 2005-28NA**22i43** **Sales work.**

An employee whose primary duty is inside sales work is not exempt as an administrative employee. *See* 29 CFR § 541.203(b).

69 FR 22146**22i44** **School resource officers.**

School Resource Officers (SROs) employed at an independent school district qualified for the administrative exemption.

The SROs' primary duty was to provide for the safety and security of the students, staff, and property within the school system by planning to prevent safety and security problems and by responding immediately to deal with any disruption or criminal activity. Among their qualifications, SROs were licensed pursuant to the state's Peace Officer's Standards and Training Certification. The SROs' duties included providing consulting advice to school administrators on plans for safety, emergency preparedness, traffic flow, evacuation, lighting, and video surveillance, as well as other safety/security issues; providing training to students, faculty, administrators, and parent groups regarding safety issues, such as personal safety, gun safety, bus safety, and drug and gang awareness; coordinating security for extracurricular events; serving as liaison/facilitator between the school system and local law enforcement agencies to coordinate the law enforcement efforts of the local jurisdiction with regard to the schools, and to develop a communication network between administration, staff, students and parents within the "cluster" schools; creating and maintaining written case files of criminal acts by students and reports of deprived, abused, or neglected children and sharing this information with the school administrator, school social worker, agencies in the law enforcement and judiciary systems, and the local family and children's services department, when appropriate; advising regarding what law enforcement measures are appropriate when the school administrator or SRO believes an incident is a violation of the law; investigating suspected criminal activity on school property; and making arrests on school property.

In performing the duties above, the SRO decided whether a situation requires immediate action, whether to charge a violation, whether to make an arrest, and whether to refer a case to the district attorney for prosecution. The SRO independently determined and planned his or her daily work schedules (*e.g.*, whether to visit a particular school at a particular time and what to do at that location). In addition, the SRO's recommendations to faculty and staff

were usually implemented (*e.g.*, advice on fire drills, lighting, landscaping, traffic flow, safety, and emergency preparedness plans). The SRO also provided training to faculty, staff, and students and made purchases on behalf of the school (*e.g.*, buying safety equipment).

Each SRO had an office at a high school and served as the Resource Officer for a cluster of schools, typically a high school and five to seven feeder middle and elementary schools. An SRO's typical work day consisted of working in an office at a high school writing reports or performing similar desk work, performing training, providing advice to faculty and staff, working in the field patrolling, and doing investigative work. The field work was incidental to the SRO's primary duty, which is office work, and did not require physical stamina or repetitive movements. The SRO was minimally supervised by the Manager of Safety and Security. Moreover, in certain cases, some of the cluster schools may employ security guards, but the SRO has no direct supervisory responsibility over the security guards in such cases. The SRO has an annual discretionary budget of \$15,000 to \$20,000 for purchasing safety/security related items, such as cameras and traffic safety cones. Purchase orders above the discretionary budget require supervisory approval. The SROs are paid at least \$455 per week on a salary basis.

The SROs performed office or non-manual work because an SRO's typical work day consisted of working in an office writing reports or performing similar deskwork, performing training, and providing recommendations and advice to faculty and staff. In addition, any field work performed by the SRO is incidental to the SRO's primary duty, which was office work, and did not require physical stamina or repetitive movements. The SROs' primary duty of providing for the safety and security of the students, staff, and property within the school system by planning to prevent safety and security problems and by responding immediately to deal with any disruption or criminal activity, which may include, for example, providing consulting advice to school administrators on plans for safety, emergency preparedness, traffic flow, evacuation, lighting, and video surveillance and providing training to students, faculty, administrators, and parent groups regarding safety-related issues, directly related to the functional areas of safety and health discussed in 29 CFR § 541.201(b).

The SROs' employers were public educational entities rather than police departments or security companies whose primary operations were law enforcement and security, and as a result, the SROs' activities could not be categorized as production operations for their employers. Therefore, the SROs' primary duty involved the "performance of office or non-manual work directly related to the management or general business operations of the employer." 29 CFR § 541.200(a)(2).

The primary duty of the SRO's described above "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 CFR § 541.200(a)(3). The SRO is minimally supervised. The SRO has an annual discretionary budget of \$15,000 to \$20,000 for purchasing safety/security related items. Such duties as providing the extensive recommendations and advice noted above to faculty and staff that are usually implemented satisfy one of the regulatory factors in 29 CFR § 541.202(b) for determining whether an employee exercises discretion and independent judgment with respect to matters of significance, specifically, that the "employee provide consultation or expert advice to management." In addition, by serving as a liaison/facilitator between the school system and local law enforcement agencies to coordinate the law enforcement efforts of the local jurisdiction relative to the schools, and to develop a communication network between administration, staff, students, and parents within the cluster schools, the SRO formulates and

implements management policies or operating practices. *See* 29 CFR § 541.202(b). *See* FOH 22i00.

WHD Opinion Letter FLSA 2007-08

22i45 Service and repair work.

An employee whose primary duty is to repair or service products (*e.g.* refrigerator repair) does not qualify as an exempt outside sales employee.

69 FR 22161

22i46 Shoppers-comparison.

Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

29 CFR § 541.203(i)

22i47 Social workers and case workers employed by a social service agency.

Social Workers who have acquired at least a bachelor's degree in social work, drug and alcohol education, counseling, psychology, or criminal justice and who work in the field of their degree will meet the learned professional test provided that the degree is a customary requirement for entry into the particular field of social work in which the work is being performed.

A Case Worker or Case Manager who is only required to have attained a bachelor's degree in any field, or a broad field, *i.e.* "social sciences," does not have "specialized academic training" necessary to qualify for the learned professional exemption. *See* 29 CFR § 541.301(d). *See* FOH 22i00.

WHD Letter FLSA 2005-50NA

WHD FLSA Non-Administrator Letter January 24, 2001

22i48 Team leaders who complete major projects.

An employee who leads a team of other employees assigned to complete major projects for the employer (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 CFR § 541.203(e)

22i49 **Therapists-respiratory.**

The standard prerequisite for entry into the respiratory therapist occupation does not require four years of specialized post-secondary school instruction. In the U.S., 12% of the accredited respiratory therapist programs are at the baccalaureate level. Accredited programs also are available at the two-year associate's degree level. Since possession of a specialized advance academic degree is not a standard prerequisite for entry into the occupation, the professional exemption does not apply. *See* FOH 22i00.

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22j OCCUPATIONAL INDEX TO 29 CFR part 541

The following index lists sections of 29 CFR part 541 which refer to particular concepts used in the regulations, including types of work, occupations and job titles. Note that just because a job title appears in an illustration in the text of the regulations should not be interpreted to mean that employees holding such a job title are either exempt or nonexempt, or that they meet any one of the specific requirements for exemption. In determining the exempt status of any particular employee, a job title alone is insufficient to establish exempt status. *See* 29 CFR § 541.2. The exempt or nonexempt status of each employee can only be determined by analyzing whether the employee's salary and duties meet all of the requirements for exemption as stated in the regulations.

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