

**“OH, NO! IT’S WAGE AND HOUR!”**  
**UNDERSTANDING WHO IS EXEMPT**  
**AND NON-EXEMPT**

*by*

**Scott Warrick, JD, MLHR, SPHR**

**I. EXECUTIVE EXEMPTION**

**A. Executive Exemption Short Test**

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

1. The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week (\$23,660 per year);
2. The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
4. The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

**B. Primary Duty**

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

**C. Management**

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work;

determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

**D. Department or Subdivision**

The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

**E. Customarily and Regularly**

The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

**F. Two or More**

The phrase “two or more other employees” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee 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 directs the work of two of those workers.

**G. Particular Weight**

Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon.

Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. 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.

#### **H. Exemption of Business Owners**

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

#### **I. Highly Compensated Employees**

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

### **II. ADMINISTRATIVE EXEMPTION**

#### **A. Administrative Exemption Short Test**

To qualify for the administrative employee exemption, 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 not less than \$455 per week (\$23,660 per year);
2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

**B. Primary Duty**

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

**C. Directly Related to Management or General Business Operations**

To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

**D. Employer’s Customers**

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

**E. Discretion and Independent Judgment**

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in 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; 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, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. 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.

**F. Matters of Significance**

The term "matters of significance" refers to the level of importance or consequence of the work performed. 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. 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.

**G. Educational Establishments and Administrative Functions**

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field.

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.

### III. LEARNED PROFESSIONAL EXEMPTION

#### A. Learned Professional Exemption Short Test

To qualify for the **learned professional** employee exemption, 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 not less than \$455 per week (\$23,660 per year);
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. Primary Duty

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

#### C. Work Requiring Advanced Knowledge

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

#### D. Field of Science or Learning

Fields 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 occupations that have a recognized professional status and are distinguishable 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.

**E. Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction**

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

**IV. CREATIVE PROFESSIONAL EXEMPTION**

**A. Creative Professional Exemption Short Test**

To qualify for the **creative professional** employee exemption, 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 not less than \$455 per week (\$23,660 per year); 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. Invention, Imagination, Originality or Talent**

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations.

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

**C. Recognized Field of Artistic or Creative Endeavor**

This includes such fields as, for example, music, writing, acting and the graphic arts.

**V. OUTSIDE SALES EXEMPTION**

**A. Outside Sales Test**

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

1. The employee's primary duty must be making sales (as defined in the FLSA), 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.

The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

**B. Primary Duty**

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

**C. Making Sales**

“Sales” includes any sale, exchange, contract to sell, consignment for sales, 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.

**D. Obtaining Orders or Contracts for Services or for the Use of Facilities**

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. The word “services” extends the 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.

**E. Customarily and Regularly**

The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

**F. Away from Employer’s Place of Business**

An outside sales employee makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

**G. Promotion Work**

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

## **H. Drivers Who Sell**

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

## **VI. COMPUTER EMPLOYEE EXEMPTION**

### **A. Computer Employee Exemption Test**

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

1. The employee must be compensated *either* on a salary or fee basis at a rate not less than \$455 per week *or*, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

The employee's primary duty must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (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 duties test described above, are also not exempt under the computer employee exemption.

**B. Primary Duty**

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

**VII. TEACHERS**

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

**VIII. PRACTICE OF LAW OR MEDICINE**

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

## **IX. HIGHLY-COMPENSATED WORKERS**

### **A. Highly Compensated Test**

The regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

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

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

### **B. Total Annual Compensation**

The required total annual compensation of \$100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

### **C. Make-up Payments and Prorating**

There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

### **D. Customarily and Regularly**

“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.

## **X. SALARY BASIS REQUIREMENT**

### **A. Salary Test In General**

To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$455 on a salary basis *or* on an hourly basis at a rate not less than \$27.63 an hour.

Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work. Subject to exceptions listed below, 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. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee’s predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.” If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

### **B. Circumstances in Which the Employer May Make Deductions from Pay**

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

### **C. Effect of Improper Deductions from Salary**

The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

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

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

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

#### **D. Safe Harbor**

If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

#### **E. Fee Basis**

Administrative, professional and computer employees may be paid on a “fee basis” rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.” A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made.

To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to 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 salary requirement since the rate would yield \$500 if 40 hours were worked.

## **XI. BLUE COLLAR WORKERS**

The exemptions provided by FLSA Section 13(a)(1) apply only to “white collar” employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

## **XII. POLICE, FIRE FIGHTERS, PARAMEDICS & OTHER FIRST RESPONDERS**

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

### **XIII. OTHER LAWS & COLLECTIVE BARGAINING AGREEMENTS**

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

### **XIV. WHERE TO OBTAIN ADDITIONAL INFORMATION**

The Department of Labor provides this information to enhance public access to information on its programs. This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For more information regarding the FLSA, visit the Wage and Hour Division's Web site at [www.wagehour.dol.gov](http://www.wagehour.dol.gov) or call our toll-free help line, available from 8 a.m. to 5 p.m. in your time zone, at 1-866-4US-WAGE (1-866-487-9243).

Copies of Wage and Hour publications also may be obtained from any office of the Wage and Hour Division. To locate the nearest Wage and Hour Division office, telephone the toll-free help line or visit our Web site for a complete listing of offices.

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at [www.dol.gov/esa/contacts/state\\_of.htm](http://www.dol.gov/esa/contacts/state_of.htm).

**These materials are not intended to act as legal advice but are instead for informational purposes only. The facts of each instance vary to the point that such a brief overview cannot be used in place of the advice of legal counsel. Therefore, whenever such issues arise, the advice of an attorney should be sought.**