

# Jeopardizing Exempt Status: *White-Collar Exemptions*

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## The “White-Collar” Exemptions

The most important, and often most troublesome, exemptions to the minimum wage and overtime requirements under federal and state law are the white-collar exemptions. The FLSA and most state laws provide exemptions for “any employee employed in a bona fide executive, administrative, or professional capacity.” *E.g.*, 29 U.S.C. § 213(a)(1). The statutes typically do not define these terms; however, USDOL and many state agencies have issued extensive interpretive materials on the subject. *E.g.*, 29 C.F.R. Part 541.

To qualify for the executive, administrative, or professional exemptions, employees must satisfy a minimum compensation requirement and both a duties test and a salary basis test. When evaluating whether these tests are satisfied, an employer should consider both its formal policies and job descriptions and its actual practices. If either policies or practices fail to meet the required tests, the exemption may be lost. In addition, the USDOL has identified certain categories of workers who are excluded from the white-collar exemptions. USDOL Fact Sheet #17A (rev. Sept. 2019) (manual laborers, other blue-collar workers, police, firefighters, paramedics, and other first responders are categorically excluded).

### A. The Duties Tests

Both federal and state regulations require an analysis of specific activities and duties to determine whether employees are properly classified as executive, administrative, or professional.

#### 1. Executive Exemption

- **Must have a primary duty of management.**
- **Must supervise two or more full-time employees (or their equivalent).**
- **Must have authority to hire or fire (or determine the status of) other employees.**

A determination of an employee’s primary duty requires a consideration of all assignments and duties for which the employee is responsible and the amount of time dedicated to each of those

responsibilities. Although an employee who spends over 50% of his or her time on exempt duties satisfies the primary duty requirement, time spent on exempt duties is not always a determinative factor. 29 C.F.R. § 541.700(b). Instead, under the regulations, primary duty means “the principal, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a). This requires a consideration of various factors other than time. An employer and the courts may also consider the relative importance of an employee’s duties, the frequency with which the employee exercises discretion, whether the employee is relatively free from supervision, and whether the employee performs management and non-management duties concurrently. See *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104 (9th Cir. 2001). For instance, a number of cases have found that managers in restaurants, small operations, and convenience stores are exempt even though they spend the majority of their time doing the same manual labor as other employees. E.g., *Thomas v. Speedway Superamerica, LLC*, 506 F.3d 496 (6th Cir. 2007); *Palazzolo-Robinson v. Sharis Management Corp.*, 68 F. Supp. 2d 1186 (W.D. Wash. 1999) (finding that managers were exempt under the FLSA despite substantial manual work done while in charge); *Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982); USDOL Opinion Letter FLSA2006-29 (Sept. 8, 2006) (gasoline service station managers are exempt). But see *Marzuq v. Cadete Enterprises, Inc.*, No. 14-1744 (1st Cir. Dec. 9, 2015) (conflicting evidence on the duties of store managers prevented summary judgment for either party); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008) (affirming jury verdict that store managers did not have management as their primary duty).

An employee’s primary duty must be management of the enterprise or a customarily recognized department or subdivision thereof. Management includes interviewing, selecting, and training employees; setting and adjusting rates of pay and hours of work; directing the work of employees; maintaining records for use in supervision or control; evaluating employees; handling employee complaints and grievances; disciplining employees; planning and assigning work; providing for the safety and security of employees; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102. Management is a relatively broad term, see *Langley v. Gymboree*



*Operations, Inc.*, 530 F. Supp. 2d 1297 (S.D. Fla. 2008) (finding that sales leadership is a managerial task), and employees may have a primary duty of management even though they are not the leaders of a department or subdivision, *Aguirre v. SBC Communications, Inc.*, 2007 WL 2900577 (S.D. Tex. Sept. 30, 2007) (finding that developmental and attendance coaches in a call center are exempt), 29 C.F.R. § 541.700(c) (assistant retail managers who spend more than 50% of time on nonexempt work may still have management as their primary duty).

Some courts have interpreted the requirement that an executive direct “two or more other employees” to require regular supervision of two full-time employees or the equivalent 80 hours of work. *Secretary of Labor v. Daylight Dairy Prods., Inc.*, 779 F.2d 784, 787-88 (1st Cir. 1985). However, both federal and state courts have concluded that this is not a rigid requirement, but should be applied flexibly. *Sattler v. Consolidated Food Management, Inc.*, 1999 WL 10664 (Wash. App. Jan. 11, 1999) (manager who stopped having two employees to supervise as operation shut down nevertheless met requirement); *Murray v. Stuckey’s, Inc.*, 50 F.3d 564, 568-69 (8th Cir. 1995), *cert. denied*, 516 U.S. 863 (1995).

Finally, exempt executive workers must have the authority to hire or fire other employees, or their suggestions on employee status must be given particular weight. 29 C.F.R. § 541.100. Employee status means hiring, firing, promotion, and demotion and not merely disciplinary decisions.

## **2. Administrative Exemption**

- **Must have a primary duty of performing office or non-manual work directly related to management or general business operations of the employer or the employer’s customers.**
- **Must exercise discretion and independent judgment on matters of significance.**
- **Does not apply to production workers.**

An administrative employee’s primary duty must involve office or non-manual work that is directly related to management or general business operations. This includes “work in functional areas such as tax; finance; accounting; 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.” 29 C.F.R. § 541.201(b); see *Andrade v. Aerotek, Inc.*, 2010 WL 1244308 (D. Md. Mar. 30, 2010) (recruiter for staffing company was exempt). 29 U.S.C. § 541.203 provides examples of certain positions that typically meet this duties requirement, such as insurance claims adjusters, financial service employees, team leads on major projects, executive or administrative assistants to owners or senior management, human resources managers, and purchasing agents with authority to bind the company. See *Hein v. PNC Financial Servs. Group*, 511 F. Supp. 2d 563 (E.D. Pa. 2007) (securities brokers are exempt); *Talbert v. American Risk Ins. Co.*, 2010 WL 5186768 (5th Cir. Dec. 20, 2010) (insurance agents are exempt); USDOL Opinion Letter FLSA2009-28 (Jan. 16, 2009) (same). But see *Wong v. HSBC Mortgage Corp.*, 2008 WL 753839 (N.D. Cal. Mar. 19, 2008) (loan officers are non-exempt); USDOL Administrator’s Interpretation No. 2010-1 (Mar. 24, 2010) (mortgage loan officers are not exempt because their primary duty is sales). In addition, marketing and promotions (as compared to sales) work is also typically administrative in nature. See *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010) (pharmaceutical sales representative is exempt); *Cash v. Cycle Craft Co.*, 508 F.3d 680 (1st Cir. 2007) (customer service employee was exempt because his efforts went beyond sales work); USDOL Opinion Letter FLSA2009-4 (Jan. 14, 2009). But see *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010) (pharmaceutical sales representatives are not exempt); *Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010) (advertising salesperson for free magazine is not exempt). In contrast, ordinary inspectors, examiners, graders, comparison shoppers, investigators, and employees engaged in production work usually do not qualify as administrative employees. 29 C.F.R. § 541.203; USDOL Administrator’s Interpretation No. 2010-1 (Mar. 24, 2010) (mortgage loan officers are engaged in production rather than administrative work).

The determination of whether administrative duties are an employee’s primary duties parallels that discussed for executive employees. 29 C.F.R. § 541.206. Some courts have emphasized, however, that an employee’s

primary duty is not determined on a workweek-by-workweek basis. *Counts v. South Carolina Elec. & Gas Co.*, 317 F.3d 453 (4th Cir. 2003). Thus, an administrative employee who happens to do non-exempt work for a few weeks does not lose his or her exempt status. *Id.*

An administrative employee must also exercise “discretion and independent judgment” with respect to “matters of significance.” The exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting on or making a decision after the various possibilities have been considered. 29 C.F.R. § 541.202; USDOL Opinion Letter FLSA2018-15 (Jan. 5, 2018) (coordinators who develop and implement strategies are exempt). There is a distinction between employees engaged in administrative activities and employees engaged in production activities. *E.g.*, *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009) (loan underwriters are not exempt); USDOL Opinion Letter FLSA2018-13 (Jan. 5, 2018) (analysts who merely gathered and reported information “fall on the production side of the production-versus-staff dichotomy” and are non-exempt). Despite this production/administration dichotomy, employees whose decisions are subject to review or who use manuals and guidelines may still be exempt. 29 C.F.R. § 541.202 & .704; *see Renfro v. Indiana Michigan Power Co.*, 497 F.3d 573 (6th Cir. 2007) (finding technical writers for power plant exercised sufficient discretion); *Renfro v. Indiana Michigan Power Co.*, 370 F.3d 512 (6th Cir. 2004) (finding that work planners are exempt because they exercise judgment within a highly regulated area).

Matters of significance refers to the level of importance or consequence of the work performed. Although somewhat amorphous, matters of significance may include the ability to select potential clients, the preparation and presentation of bids, the execution of contracts, and check-writing authority. *E.g.*, *Robinson-Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010) (automobile insurance damage adjusters exercise sufficient discretion and judgment to be exempt); USDOL Opinion Letter FLSA2009-4 (Jan. 14, 2009) (convention sales manager is exempt); USDOL Opinion Letter FLSA2006-34 (Sept. 21, 2006) (events coordinator is exempt). In some cases, an employee may merely recommend actions rather than actually taking the actions. USDOL Opinion Letter FLSA2009-28 (Jan. 16, 2009);



*Talbert*, 2010 WL 5186768 (finding that insurance claims agents exercised sufficient discretion because they made recommendations on coverage). Regardless, employees who do not exercise discretion and judgment on matters of significance are not exempt. *E.g.*, *McElmurry v. U.S. Bank Nat'l Ass'n*, 2007 WL 2363305 (D. Or. Aug. 14, 2007); USDOL Opinion Letter FLSA2005-8 (Jan. 7, 2005) (accounts receivable clerk did not make decisions of consequence and is, thus, not administrative exempt); USDOL Opinion Letter FLSA2005-2 (Jan. 7, 2005) (same for junior claims adjuster).

Although most administrative employees perform work related to the management or general business operations of their employer, employees who provide advice to their employer's clients may also satisfy the duties requirements for the administrative exemption. *Webster v. Public School Employees of Wash., Inc.*, 247 F.3d 910 (9th Cir. 2001); *see also* USDOL Opinion Letter FLSA2002-5 (Aug. 6, 2002) (administrative exemption applies even if employer is in the business of providing administrative assistance to its customers). However, it is unclear whether the exemption is available when clients are individuals. *Compare* USDOL Opinion Letter FLSA2018-8 (Jan. 5, 2018) (client service managers are exempt) *with* USDOL Administrator's Interpretation No. 2010-1 (Mar. 24, 2010) (loan officers are not).

### **3. Professional Exemption**

- **A learned professional must do work requiring advanced knowledge in a field customarily acquired through prolonged instruction.**
- **A creative professional must do work requiring invention, imagination, originality, or talent in a recognized artistic or creative field.**
- **An exempt teacher must be engaged in the imparting of knowledge and work within a school system or educational establishment.**
- **Must consistently exercise discretion and independent judgment.**

Learned professionals' primary duty must consist of work requiring knowledge of an advanced type in a field of science or learning customarily acquired through a prolonged course of specialized instruction and study,



and which requires the consistent exercise of discretion and judgment. 29 C.F.R. § 541.301; e.g., *Pippins v. KPMG LLP*, No. 13-889-cv (2d Cir. July 22, 2014) (entry level accountants fall within the professional exemption). This exemption does not turn on whether a particular individual actually engaged in a prolonged course of specialized instruction. Rather, the question is whether such prolonged study is traditionally necessary for the position held by the employee. See *Young v. Cooper Cameron Corp.*, 586 F.3d 201 (2d Cir. 2009) (design specialist was not professional exempt because position did not have any education requirement); USDOL Opinion Letter FLSA2009-6 (Jan. 14, 2009) (finding that licensed pilots do not fall within the learned professional exemption, but noting USDOL's non-enforcement policy in relation to pilots). Thus, a unique individual who advances into the professional ranks through hard work, self training, and experience may still be characterized as a learned professional. E.g., *Pinillia v. Northwings Accessories Corp.*, 2007 WL 3378532 (S.D. Fla. Nov. 13, 2007); *Leslie v. Ingalls Shipbuilding, Inc.*, 899 F. Supp 1578 (S.D. Miss. 1995). Likewise, an employee with impeccable educational credentials may not qualify as a learned professional if the employee is working in a job that does not require such credentials.

Creative professionals' primary duty must consist of work that is original and creative in nature in a recognized field of artistic endeavor. This includes fields such as music, writing, acting, and the graphic arts. 29 C.F.R. § 541.302(b). USDOL draws a clear distinction between artistic professionals, who rely on invention, imagination, and talent, and regular employees, who may obtain the same results through the application of intelligence, diligence, and accuracy. Only those employees who rely on talent and invention fall within this exemption. USDOL Opinion Letter FLSA2005-26 (Aug. 26, 2005) (employees who apply, but do not design, vinyl wraps using advanced graphic arts technology are not exempt).

To be exempt, teachers must be engaged in the imparting of knowledge and be within a school system or educational establishment. Instructors in other contexts do not qualify. *Astor v. United States*, 79 Fed. Cl. 303 (Fed. Cl. 2007). An educational establishment is defined to include "an elementary or secondary school system, an institution of higher education or other educational institution." 29 C.F.R. § 541.204(b). Other

educational institutions include schools that are licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. *Compare* USDOL Opinion Letter FLSA2008-9 (Oct. 1, 2008) (instructors in licensed cosmetology school are exempt teachers) *and* USDOL Opinion Letter FLSA2006-41 (Oct. 26, 2006) (instructors in certified automobile service and collision repair school are exempt teachers) *with* USDOL Opinion Letter FLSA2008-13NA (Sept. 29, 2008) (instructors in daycare center licensed by the Department of Public Welfare and not the Department of Education were not exempt teachers) *and* USDOL Opinion Letter FLSA2005-38 (Oct. 13, 2005) (same for instructors in unlicensed beauty school).

The determination of an employee's primary duty under the professional exemption is similar to the determination of primary duty for exempt executive employees.

In 2004, the new federal regulations seemingly eliminated the discretion and judgment requirement for learned professionals. 29 C.F.R. § 541.301. However, the regulations expressly state that work requiring advanced knowledge includes work requiring the consistent exercise of discretion and judgment. 29 C.F.R. § 541.301(b). Thus, USDOL states that the new regulations "clarify and make no substantive changes in the primary duty test requirements for the professional exemption." USDOL Opinion Letter FLSA2005-9 (Jan. 7, 2005) (reemphasizing that paralegals are not exempt).

#### **4. Combination Exemption**

The federal regulations specifically provide that work that qualifies for exemption under the executive, administrative, professional, computer, and outside sales exemptions may be tacked together for employees who have mixed job duties and responsibilities. Such combination exemptions are discussed in 29 C.F.R. § 541.708. *See Schmidt v. Eagle Waste & Recycling, Inc.*, 599 F.3d 626 (7th Cir. 2010) (waste disposal account representative fell within outside sales or combination exemption); *IntraComm. Inc. v. Bajaj*, 492 F.3d 285 (4th Cir. 2007) (finding that combination exemption does not apply if salary requirements are not satisfied).



## **B. Minimum Compensation Requirement**

- **Must be paid a minimum of \$684 per week on a salary basis.**

Federal regulations require a base salary for exempt executive, administrative, and professional workers of \$684 per week (\$35,568 per year). This rate is a minimum and cannot be prorated for part-time employees. USDOL Opinion Letter FLSA2008-1NA (Feb. 14, 2008); USDOL Opinion Letter FLSA2006-10NA (June 1, 2006). The salary requirement does not apply to a few exempt workers, such as attorneys and doctors.

In some cases, this requirement may be satisfied by fee payments for administrative and professional employees. 29 C.F.R. § 541.605(a); USDOL Opinion Letter FLSA2018-15 (Jan. 5, 2018). A fee, generally speaking, is an agreed-to sum for a single job regardless of the amount of time it takes to complete the job. It resembles a piecework rate, but a fee differs in that it is paid for a kind of job that is unique rather than for a series of jobs repeated indefinitely 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 considered fees. Determining what is and what is not a fee may be difficult. *Compare Elwell v. University Hosp. Home Health Care Servs.*, 76 F.Supp.2d 805 (N.D. Ohio, 1999) (finding payments for visits were not fees) *with Fazekas v. Cleveland Clinic Foundation Health Care Ventures, Inc.*, 204 F.3d 673 (6th Cir. 2000) (finding per visit payments were fees).

In addition, the regulations establish a highly compensated employee exemption. This exemption applies to any worker (1) whose primary duty includes performing office or non-manual work; (2) who is paid \$107,432 or more per year in total compensation; and (3) who performs any one or more exempt duties or responsibilities. 29 C.F.R. § 541.601; *Smith v. Ochsner Health Sys.*, 353 F.Supp.3d 483, 498 (E.D. La. 2018); USDOL Opinion Letter FLSA2019-8 (July 1, 2019) (finding paralegal for trade group is exempt).

## **C. The Salary Basis Test**

- **Must pay a predetermined salary that is not subject to reduction based on the quality or quantity of work performed.**

Employers that claim employees as exempt under the executive, administrative, and professional exemptions must, with minor exceptions, pay those employees on a salary basis. Payment on a salary basis involves more than simply payment of a salary. The salary basis test requires that a white-collar exempt employee be paid a predetermined amount, on a weekly or less frequent basis, that is not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.600 to .606; USDOL Opinion Letter FLSA2020-2 (Jan. 7, 2020).

The salary basis test rests on two basic premises. First, employees must receive their full salary for any week in which they perform any work without regard to the number of days or hours worked. Second, employees need not be paid for any work week in which they perform no work.

In the 1990s, class actions focused on violations of the salary basis test. This was true primarily because salary basis violations were often amenable to class determinations. Indeed, in its November 6, 1996 issue, *Forbes Magazine* estimated salary basis test class actions as a \$20 billion liability for private sector employers. Although the likelihood of class-wide litigation was reduced by a Supreme Court decision in *Auer v. Robbins*, 519 U.S. 452 (1997), class litigation is still likely if employers have explicit policies or established practices that violate the salary basis requirements. See *Block v. City of Los Angeles*, 253 F.3d 410 (9th Cir. 2001). If such violations exist, employers run the risk that certain groups or all of their white-collar employees will be treated as hourly employees and entitled to overtime compensation.



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