SECTION 2: FEDERAL AND STATE WAGE-HOUR LAWS

2.4 Exempt and Nonexempt Employees

Not all employees of covered enterprises or who work in interstate commerce are entitled to the protections of the FLSA. When human resources and payroll staff members speak of an "exempt" or "nonexempt" employee, they are referring to the employee's status under the FLSA. Exempt employees are those who do not have to be paid the required minimum wage or overtime payments, and the employer does not have to keep certain records detailing their work. The most well-known of these exemptions is the "white collar exemption" for executive, administrative, professional, and outside sales employees, but there are also narrower exemptions that apply to retail and service establishment employees, hotel and restaurant employees, and others. Nonexempt employees must be paid at least the minimum wage for all hours worked, and an overtime premium for hours worked over 40 in a workweek.

2.4-1 White Collar Exemption

Bona fide administrative, executive, professional, and computer-related professional employees, as well as outside sales employees, are exempt "white collar" employees under the FLSA. This means they are not covered by the minimum wage, overtime, and certain recordkeeping requirements of the law.[11] The tests for determining exempt status measure the actual duties and responsibilities of the employee, not the job title. The determination also depends on:

- The employee's primary duty
- The employee's level of discretionary authority
- Whether a minimum salary requirement is met

Rules provide for salary and duties tests. In 2004 the DOL's Wage and Hour Division finalized sweeping changes to the regulations defining who is exempt as a "white collar" employee.[12] The regulations updated salary levels used in determining exempt status for the first time since 1975, while the duties tests received their first overhaul since 1949. In 2019, the DOL's Wage and Hour Division finalized regulations that updated the salary level but did not make changes to the duties tests.[13]

On April 23, 2024, the DOL issued a final rule effective July 1, 2024, to increase the minimum salary level for the FLSA executive, administrative, professional, outside sales, and computer employee exemptions.[14] The final rule increases the minimum salary level in two steps:

- On July 1, the minimum salary level increases from $684 to $844 per week (or from $35,568 per year to $43,888 per year).

- On January 1, 2025, the minimum salary level increases from $844 to $1,128 per week (or from $43,888 per year to $58,656 per year).

Prior to the 2024 final rule, the DOL last updated the white collar exemption regulations in 2019. That update set the standard salary level test at $684 per week (or $35,568 per year) and set the HCE total annual compensation threshold of $107,432 per year. These earnings thresholds had been in effect since January 1, 2020. *Note:* The regulations have been challenged in several court cases. On June 28, 2024, the U.S. District Court for the Eastern District of Texas granted a preliminary injunction to block enforcement of the new salary threshhold [*Texas v. U.S. DOL,* No. 4:24-cv-499 (E.D. Texas, 6-28-24)]. The court's ruling ***only*** applies to employees working for the state of Texas. However, additional court rulings may limit the rule's applicability further. Watch the PayrollOrg website and PAYROLL CURRENTLY for more information as it becomes available.

The 2024 final rule also requires the salary level to be updated every three years to match the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. This means that on July 1, 2027, the salary level will be updated. Updated thresholds will be published in the Federal Register at least 150 days before the update is scheduled. The 2024 final rule allows the DOL to temporarily delay a scheduled update where unforeseen economic or other conditions warrant.

Highly compensated employees (HCEs) with annual compensation above a certain amount have to meet only one prong of one of the white collar duties tests to qualify as exempt. The 2024 final rule increases the salary requirement for HCEs from $107,432 to $132,964 per year on July 1, then from $132,964 to $151,164 per year on January 1, 2025. The HCE level also will be adjusted every three years. As part of an exempt HCE's annual compensation, the employee must receive at least the standard salary amount of $884 per week on a salary or fee basis on July 1; that weekly salary threshold increases to $1,128 on January 1, 2025.

State laws and union contracts. [15] As noted elsewhere in this section, the FLSA does not preempt state laws and collective bargaining agreements that require higher minimum wages or overtime pay than the FLSA. Also, state laws that do not follow the federal regulations in defining exempt white collar employees take precedence over the DOL regulations where they are more favorable to the employee whose status is being determined (i.e., they require the employee to be paid overtime where the FLSA does not). [For more information on state overtime pay requirements and exemptions, see Tables 1.2 and 1.3 of *Guide to State Payroll Laws*]. The white collar regulations reinforce that principle and also make it clear that union contracts cannot waive or reduce the FLSA's protections for employees.

Following are detailed explanations of the white collar exemption requirements under the regulations for each category of exempt employee.

Job titles do not determine exempt status. [16] Just because an employee has a position with a title that sounds important, that is not enough to establish the employee's status as an exempt employee. The exempt/nonexempt status of an employee is determined by the employer only on the basis of whether the employee's status and duties meet the requirements established by the DOL's regulations.

Administrative employees—general rule. To qualify as an exempt administrative employee, each of the following tests must be met:[17]

1. The employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.

2. The employee's primary duty must include the exercise of discretion and independent judgment regarding matters of significance.

3. The employee must be paid at least $684 a week on a salary or fee basis, not including board, lodging, or other facilities.

Directly related to management or general business operations. In order to meet this requirement, the employee must perform work directly related to assisting with the running or servicing of the business, as distinguished from working on a production line in a manufacturing facility or selling products in a retail or service establishment.[18] The type of work that qualifies includes, among others, work in these functional areas:

tax	personnel management
finance	human resources
accounting	employee benefits
budgeting	labor relations
auditing	public relations
insurance	government relations
quality control	computer network, Internet, and data base administration
purchasing	legal and regulatory compliance
procurement	research
advertising	safety and health
marketing	

Exercising discretion and independent judgment. [19] The exercise of discretion and independent judgment involves evaluating and comparing different courses of conduct, and then making a decision after considering the various possibilities and outcomes. Whether an employee's work involves matters of significance is determined by the facts and circumstances in each case. Factors to be considered when determining whether an employee exercises discretion and independent judgment in matters of significance include:

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices
- Whether the employee carries out major assignments in conducting the operations of the business
- Whether the employee's work affects business operations to a substantial degree, even though the employee only works in one area of the business

- Whether the employee has authority to negotiate and commit the employer in matters that have a significant financial impact
- Whether the employee can waive or deviate from employer policies and procedures without prior approval
- Whether the employee provides consultation or expert advice to management
- Whether the employee is involved in planning long – or short-term business objectives
- Whether the employee investigates and resolves matters of significance on behalf of management
- Whether the employee represents the employer in handling complaints, arbitrating disputes, or resolving grievances

Exercising discretion and independent judgment implies that the employee operates free from immediate or direct supervision, but it does not mean that the employee's decisions are not subject to review or approval at a higher level or that they may not be reversed or modified. The decisions made by an exempt administrative employee may consist of recommendations for action rather than actually taking action. At larger employers, the fact that several employees perform the same work or work of the same significance to the employer does not mean that the work of each of them does not involve the exercise of discretion and independent judgment on matters of significance.

The exercise of discretion and independent judgment does not include clerical or secretarial work, recording or tabulating data (even if the employee is called a statistician), or other mechanical, repetitive, recurrent, or routine work.

Risk of financial loss not determinative. Even though the employee's failure to perform adequately will result in a significant financial loss for the employer, that does not mean the employee exercises discretion and independent judgment. Therefore, a messenger carrying a large sum of money for delivery does not exercise discretion and independent judgment just because his company stands to lose a great deal if the money is not delivered. The same holds true for an employee who operates very expensive equipment and whose negligence would be very costly for the employer.

Applying procedures in manuals not enough. [20] The exercise of discretion and independent judgment has to be more than the use of skill in applying well-established techniques, procedures, or specific standards found in manuals or other sources within narrowly defined limits to determine the correct response to a situation. However, the use of manuals or guidelines relating to highly scientific, financial, legal, or other highly complex matters that can be understood only by those with advanced or specialized knowledge does not affect an employee's exempt status.

Administrative employees—examples. [21] The following types of employees are included as examples in the regulations, mainly because of the troublesome issues involved in making the determination of the employee's exempt status.

Insurance claims adjusters. Insurance claims adjusters, whether they work for an insurance carrier or another company, generally meet the duties requirements for the administrative exemption if their duties include:

- Interviewing insureds, witnesses, and physicians

- Inspecting property damage
- Reviewing factual information to prepare damage estimates
- Evaluating and making recommendations regarding whether claims are covered
- Determining liability and the total value of a claim
- Negotiating settlements
- Making recommendations regarding litigation

Financial services employees. Employees in the financial services industry whose primary duty is selling financial products do not qualify for the administrative exemption. However, other employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include:

- Collecting and analyzing information regarding the customers' income, assets, investments, or debts
- Determining which financial products best meet customers' needs and financial circumstances
- Advising customers regarding the advantages and disadvantages of different financial products
- Marketing, servicing, or promoting the employer's financial products

Team leaders. An employee who leads a team of other employees assigned to complete one or more major projects for an employer generally meets the duties test for the administrative exemption, even if the employee does not have direct supervisory authority over the other team members. Examples of "major projects" include purchasing, selling, or closing all or part of a business, negotiating a real estate transaction or collective bargaining agreement, or designing and implementing productivity improvements.

Executive assistants. An executive assistant or administrative assistant to a business owner or senior executive of a large employer generally meets the duties requirements for the administrative exemption if the employee has been delegated authority regarding matters of significance and performs the work without specific instructions or prescribed procedures.

Human resource managers. Human resource managers who formulate, interpret, or implement employment policies generally meet the duties requirements for the administrative exemption, while personnel clerks who screen applicants to determine if they meet the minimum qualifications for employment do not, even though they may reject applicants who fail to meet the minimum standards. If a human resource manager handles the initial screening as well as final hiring decisions or recommendations, all the work is exempt work since the initial screening work is directly and closely related to the employee's exempt functions.

Purchasing agents. Purchasing agents with authority to bind the company on significant purchases generally meet the duties test for the administrative exemption even if they have to consult with top management in some instances.

Inspectors and graders. Work performed by inspectors, examiners, or graders generally does not meet the duties test for the administrative exemption because they normally perform specialized work involving well-established techniques and procedures that may be set forth in manuals or other sources. They have some leeway in performing their work, but only within narrowly prescribed limits.

For similar reasons, public sector inspectors or investigators (e.g., fire prevention, building construction, health or sanitation, environmental or soil specialists) also generally do not meet the duties tests for the administrative exemption. Also, their work is not directly related to the management or general business operations of their employer.

Retail store buyers. Buyers who evaluate reports on competitors' pricing to set their employer's prices generally meet the duties requirements for the administrative exemption. Employees who merely gather information regarding competitors' prices do not qualify for the exemption.

DOL and courts issue interpretations. Several months after the 2014 regulations were finalized, the Wage and Hour Division began issuing opinion letters interpreting the rules as they related to specific fact situations presented by specific employers, hopefully providing further guidance as to how the Division would act in applying the new rules. Soon after, the federal courts also began issuing decisions interpreting the new rules.

Paralegals. [22] The Division said that paralegals are not exempt administrative employees because their primary duty does not involve the exercise of discretion and independent judgment. Paralegals apply particular knowledge and skills in preparing assignments but do not exercise discretion and independent judgment despite having some leeway in reaching conclusions. They also are prohibited from practicing law, which shows they don't have the authority to exercise independent judgment in legal matters.

Nurse supervisors. [23] A nurse supervisor was an exempt administrative employee because she used discretion in finding nurses to meet emergency needs and had to match patient needs with nurses' skills, which was her main task.

Insurance claims adjusters. [24] Claims adjusters are exempt administrative employees where they use discretion to determine whether the loss is covered, set reserves, decide where to lay blame, and negotiate with the insured party or his or her lawyer. The use of estimating software by auto damage adjusters did not negate their exercise of discretion because it could not always be used and was not of much help in total loss situations. However, where adjusters were required to process claims within established guidelines and could not determine coverage or use their own judgment in determining the value of a claim, they did not exercise discretion and independent judgment in relation to the claims they processed and were not exempt administrative employees.[25]

Through September 30, 2016, licensed insurance adjusters are exempt from the FLSA's overtime requirements if they meet the following conditions:[26]

- They are employed to adjust or evaluate claims resulting from or related to a disaster or catastrophe declared by a state or federal agency, within 2 years after the disaster occurs.
- They receive average weekly pay of at least $591 for such work, or a higher amount determined by DOL.
- Their duties include any of the following:

  — Interviewing those who suffered injuries or other damages, witnesses, or physicians

  — Inspecting property damage or reviewing information in preparing damage estimates

— Evaluating and making determinations as to coverage or compensability of claims, liability for damages, and damage estimates

— Negotiating settlements

— Making recommendations regarding litigation

Project managers. [27] A construction company project manager's "substantial" manual labor was irrelevant and he was an exempt administrative employee where his primary responsibilities involved communicating with owners about projects, signing subcontracts on his employer's behalf, determining how many employees were needed on a job site and how many hours they needed to work, preparing monthly cost analyses, and purchasing and scheduling materials deliveries. The fact that his work was reviewed by supervisors didn't mean he wasn't exercising discretion and independent judgment.

Project supervisors. [28] The DOL concluded that project supervisors, who were employed by homebuilding companies to supervise and coordinate the construction of residential homes, were exempt from the FLSA's minimum wage and overtime requirements. The supervisors were not responsible for the manual work of constructing homes; they spent more than half of their time directing, managing, scheduling, and paying subcontractors and suppliers; they reviewed and modified new home plans; and they served as the primary point of contact for homebuyers in dealing with the construction of the home.

Mortgage loan officers. In 2010, the WHD reversed itself and concluded that mortgage loan officers' primary duty is sales rather than providing financial services, resulting in a finding that they were nonexempt employees.[29] The U.S. Supreme Court upheld the Division's change in its treatment of the exempt status of mortgage loan officers in 2015.[30]

Mortgage underwriters. There is a split among circuit courts as to whether mortgage underwriters are exempt or nonexempt employees. Rulings in second and ninth circuits determined that mortgage underwriters were nonexempt because their work was either in production or quality control rather than administrative in nature.[31] A different conclusion was reached in the sixth circuit where the court said that the mortgage underwriters are exempt employees because their work is administrative in nature because it is "ancillary to bank's financial principal production activity of selling loans."[32]

Technology support specialists. [33] "Information technology support specialists" (ITSS) are not exempt administrative employees. Their primary duty (75% of their time) consists of installing, configuring, testing, and troubleshooting computer applications, networks, and hardware. Maintaining a computer system and testing by systematic routines to determine whether a piece of computer equipment or a computer application is working properly according to specifications designed by others are examples of work that lacks the discretion and independent judgment needed for the administrative exemption. These duties do not involve, with respect to matters of significance, the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.

Pharmaceutical sales reps. [34] A federal appeals court ruled that pharmaceutical sales reps do not exercise the requisite discretion and independent judgment in their dealings with physicians to qualify as exempt administrative employees. They act under strict budgetary restrictions and exercise skills learned in company training within severe limits imposed by the company. In 2012, the U.S. Supreme Court ruled that these reps are exempt outside salespersons (see the subsection on the exemption for outside salespersons).

Retirement plan marketing director. [35] The primary duty of the special markets director of an employer's retirement plans unit was to work with salespeople to promote sales of 403(b) and 457 plans by explaining the plans to them and answering their questions, not to sell the products themselves, so his work was directly related to the company's general business operations. The court also said he used his experience to develop presentation materials, answer questions from consultants, and make presentations at seminars and conferences. While his materials had to be approved by the legal and marketing departments, his work involved the necessary discretion and independent judgment to qualify as an exempt administrative employee.

Academic administrative employees. [36] There is a separate administrative exemption for employees:

1. Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment

2. Who are paid a salary or fee of at least $684 a week, not including board, lodging, or other facilities, or a salary at least equal to the entrance salary for teachers in the educational establishment where they are employed

To qualify under this separate exemption, the employee's work must be related to the academic operations and functions of the school rather than its general business operations. Employees engaged in academic administrative functions include:

- Superintendent of an elementary or secondary school system
- Assistant superintendents responsible for curriculum, quality and methods of instruction, testing learning potential, establishing academic and grading standards, and other aspects of the teaching program
- Principal or vice-principal of an elementary or secondary school system
- Department heads in post-secondary educational institutions
- Academic counselors
- Other employees with similar responsibilities

Executive employees—general rule. [37] To qualify as an exempt executive employee, each of the following tests must be met:

1. The employee's primary duty must be management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision of the enterprise.

2. The employee must customarily and regularly direct the work of two or more other employees.

3. The employee must have the authority to hire or fire other employees, or particular weight must be given to the employee's recommendations as to the hiring, firing, advancement, promotion, or other change of employment status of other employees.

4. The employee must be paid a salary of at least $684 per week, not including board, lodging, or other facilities.

Business owner. [38] Also qualifying as an exempt executive employee is any employee who owns at least a bona fide 20% equity interest in the employer and is actively engaged in its management. The salary requirements do not apply to such employees.

Management. [39] Management includes activities such as:

- Interviewing, selecting, and training employees
- Setting and adjusting employees' pay rates and work hours
- Directing the work of employees
- Maintaining production or sales records for use in supervision of employees
- Appraising employee's performance for the purpose or recommending promotions or other changes in status
- Handling employee complaints and grievances
- Disciplining employees
- Planning employees' work
- Determining techniques to be used
- Dividing the work among employees
- Determining the types of materials, supplies, machinery, equipment, or tools to be used
- Determining the types of 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
- Monitoring or implementing legal compliance measures

Department or subdivision. [40] A customarily recognized department or subdivision must have a permanent status and a continuing function, rather than being a mere collection of employees assigned to a specific job or series of jobs. When a business has more than one facility, the employee in charge of each facility may be considered in charge of a recognized subdivision of the business.

A recognized department or subdivision does not have to be physically within the employer's establishment and may move from place to place. An exempt executive employee can work in more than one location as long as other factors show the employee is in charge of a recognized unit with a continuing function. The same is true if an employee draws and supervises workers from a pool or supervises a team of employees drawn from other recognized units.

Two or more other employees. [41] The phrase "two or more other employees" means two or more full-time employees or their equivalent. For example, one full-time and two half-time employees, or four half-time employees, are equivalent to two full-time employees. The number of work hours in a workweek that constitutes a full-time equivalent is determined by the employer's policy (e.g., 40, 37.5, or 35 hours a week). Hours worked by an employee cannot be credited more than once for different executive employees, but a full-time employee can be credited as a half-time employee for both executives.

CONTRACTORS DON'T COUNT The term "employee" does not include independent contractors for purposes of the executive employee exemption, so someone who manages two independent contractors but no employees would not qualify as an exempt executive. Such employees could, however, be classified as exempt administrative employees if the other requirements for that exemption are met.

The supervisory responsibilities can be spread among two or more employees, but each one must direct the work of two or more other full-time employees or the equivalent. Therefore, a department with five full-time employees could have up to two exempt managers. An employee who assists the manager of a department and supervises two or more employees when the manager is absent does not meet this requirement. This means that an employee who supervises only on a short-term basis, such as during a lunch break or while a manager is on vacation, does not meet the requirement of customarily and regularly managing two or more other employees. On the other hand, the manager does not have to be physically present with the employees being supervised.

Particular weight. [42] The factors to be considered in determining whether an employee's employment status recommendations are given particular weight include:

- Whether it is part of the employee's job duties to make such recommendations, as shown by job descriptions and/or performance reviews
- The frequency with which such recommendations are made or requested
- The frequency with which such recommendations are relied upon

An employee's suggestions and recommendations may still be found to have particular weight even if a higher level manager's recommendation has more importance and the employee does not have the authority to make the ultimate decision as to the employee's change in status.

Concurrent duties. [43] Performance of both exempt and nonexempt duties in the same workweek does not disqualify an employee from the executive exemption so long as the employee's primary duty meets the test for the executive exemption. Generally, executive employees decide when to perform nonexempt duties and still remain responsible for the success of operations under their management while performing the nonexempt work. On the other hand, nonexempt employees are generally directed by a supervisor to perform any exempt work or they perform the exempt work during defined time periods. An employee whose primary duty is production work or routine, recurrent, or repetitive tasks cannot qualify as an exempt executive even if they perform some exempt work, such as directing the work of other employees occasionally or providing input on performance issues from time to time.

> ***Example 1:*** An assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves, and cleaning without losing the executive exemption if the assistant manager's primary duty is management.

> ***Example 2:*** A working supervisor whose primary duty is performing nonexempt work on a production line in a manufacturing plant does not become exempt merely because the working supervisor occasionally has some responsibility for directing the work of other nonexempt employees when the exempt manager is unavailable.

DOL and courts issue interpretations. Several months after the 2004 regulations were finalized, the Wage and Hour Division began issuing opinion letters interpreting the rules as they related to specific fact situations presented by specific employers, hopefully providing further guidance as to how the Division would act in applying the new rules. Soon after, the federal courts also began issuing decisions interpreting the new rules.

Supervision of 2 full-time employees. [44] A federal district court ruled that an employee must direct the equivalent of 80 subordinate hours per workweek 80% of the time in order to satisfy the requirement that an executive employee must customarily and regularly direct the work of two or more other employees.

High-ranking police and fire officers. [45] The Wage and Hour Division said that police lieutenants, police captains, and fire battalion chiefs qualified as exempt executive employees because they perform traditional management functions, such as supervising employees, performing employee appraisals, and imposing discipline. Even though they did not have the final decision on hiring, firing, and promotions, their recommendations were given significant consideration. Police sergeants, on the other hand are not exempt executive employees because their primary duty is field law enforcement, not management, so they fit under the "first responder" language of the regulations.[46]

Nurse supervisors. [47] A nurse supervisor was an exempt executive employee because her "main function" was to oversee caseload management activity and see that health services were delivered according to her employer's standards. She also assisted with interviewing and selecting employees, maintained production records, handled employee complaints, and disciplined employees.

Retail chain store managers. [48] Managers at coffee shops operated by Starbucks were exempt executive employees, despite performing the job duties of nonexempt, hourly "baristas" for a sizable portion of their time. Their primary duty was the performance of significant managerial functions, such as ordering and controlling inventory, deciding whom to interview and hire, training and scheduling employees, and monitoring labor costs–all of which were critical to the successful operation of their stores. The fact that they, as managers for a multi-store chain, were required to conform to the company's desire for standardization and uniformity and were visited often by regional managers did not detract from the discretion they exercised as the highest-ranking store employees.

Even where the manager of a gas station/convenience store spent more than half her time performing nonexempt duties, a federal appeals court found that she was an exempt executive employee because her management duties were clearly more important to the employer and she exercised them with little supervision.[49]

But where managers of discount retail outlets spent 80%-90% of their time on nonexempt work, were closely supervised by district managers, and were paid little more than the highest paid nonexempt employee in each store, a federal appeals court ruled they were not exempt executives.[50] A federal appeals court disagreed in a case involving the same retail store chain, finding that a store manager who spent a significant majority of her time on nonexempt duties was an exempt executive because her management duties were more important to her employer and she was paid significantly more than nonexempt employees.[51]

Store managers who were sent to a 7-week training program to prepare them to be area sales managers did not lose their exemption during the training program, even though they performed exempt work less than 50% of the time for several weeks. DOL said the primary duty test did not have to be met every workweek in all cases, and the training program was not an employment position at the company that would otherwise be performed by nonexempt employees.[52]

Professional employees—general rule. [53] To qualify as an exempt professional employee, each of the following tests must be met:

1. The employee's primary duty must be the performance of work:

    a. requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (learned professional exemption); or

    b. requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (creative professional exemption).

2. The employee must be paid at least $684 a week, on a salary or fee basis, not including board, lodging, or other facilities.

Work requiring advanced knowledge. [54] Work requiring advanced knowledge is work that is predominantly intellectual and includes work requiring the consistent exercise of discretion and independent judgment. Such work does not include the performance of routine mental, manual, mechanical, or physical work. An employee performing work requiring advanced knowledge generally uses that knowledge to analyze, interpret, or make deductions from varying facts or circumstances.

Field of science or learning. A field of science or learning includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, pharmacy, and other similar occupations that have a recognized professional status. These occupations are distinguished from the mechanical arts or skilled trades where the knowledge can be of a fairly advanced type but is not in a field of science or learning.

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 that an employee meets this requirement is possession of the appropriate academic degree. But the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform the same work as degreed employees, but who attained the knowledge through a combination of work experience and intellectual instruction.

Therefore, the learned professional exemption is available to lawyers who did not go to law school but were eligible to take a state bar exam because of their work experience as a law clerk. However, the exemption is not available for occupations that customarily may be performed with the general knowledge obtained from a college degree in any field, with the knowledge gained from 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 have acquired their skill by experience rather than by advanced specialized intellectual instruction. A federal appeals court said that where most or all employees in a particular job lack advanced education and instruction, the exemption does not apply, regardless of the duties they perform.[55]

Learned professionals—examples. [56] DOL's regulations contain several examples of professions that may not be thought of as among the traditional professions, but whose employees may qualify as learned professional exempt employees depending on the level of specialized advanced instruction they need to acquire.

Nurses. Nurses who are registered by the appropriate state examining board generally meet the duties requirements for the learned professional exemption. However, licensed practical nurses and other similar health care employees generally do not qualify because having a specialized advanced academic degree is not a standard requirement for entry into such occupations.

Registered or certified medical technologists. Registered or certified medical technologists who have successfully completed three years of academic or 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.

Dental hygienists. Dental hygienists who have successfully completed four years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Central Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

Physician assistants. Physician assistants who have successfully completed four 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.

Accountants. Certified public accountants generally meet the duties requirements for the learned professional exemption, and other accountants who perform similar duties but who are not CPAs may meet the duties requirements. But accounting clerks, bookkeepers, and other similar employees who perform a great deal of routine work generally will not qualify as exempt professionals.

Chefs. Executive chefs and sous chefs who have attained a four-year specialized academic degree in a culinary arts program generally qualify as exempt learned professionals. However, the exemption is not available to cooks who perform mainly routine mental, manual, mechanical, or physical work.

Paralegals. Paralegals and legal assistants generally do not qualify as exempt learned professionals, since most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the exemption is available to paralegals who possess an advanced specialized degree in another professional field and apply the advanced knowledge in that field in performing their duties as a paralegal. One example would be an engineer who is hired by a law firm as a paralegal to provide expert advice on patent or product liability cases.

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.

Funeral directors or embalmers. Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

Creative professionals. [57] To qualify for the creative professional exemption, an employee's primary duty must involve work requiring invention, imagination, originality, or talent. Therefore, the exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training. The work must also be performed in a field of artistic or creative endeavor, including music, writing, acting, and the graphic arts.

The work performed by creative professionals is distinguished from work that depends primarily on intelligence, diligence, and accuracy. While the duties performed by such employees vary greatly, the exemption depends on the extent of the invention, imagination, originality, or talent exercised by the employee, which makes it necessary to determine the exemption on a case-by-case basis. This test is generally met by the following employees:

- Actors, musicians, composers, conductors, and soloists
- Painters who are given only the subject matter of the painting
- Cartoonists who are told only the title or underlying concept of a cartoon
- Essayists, novelists, short-story writers and screenplay writers who choose their own subjects and hand in a finished piece of work
- People holding more responsible positions in advertising agencies

This test generally is not met by copyists, animators of motion picture cartoons, or retouchers of photographs.

Journalists. Journalists may meet the duties requirements for the creative professionals exemption. 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. So, reporters who rewrite press releases or write standard recounts of public information by gathering facts on routine public events are not exempt creative professionals. They also don't qualify if their work product is subject to substantial control by their 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
- Acting as a narrator or commentator

Chefs. Chefs can be creative professionals if their primary duty is using their originality and talent to create or design unique dishes and menu items. The exemption is only for original chefs, such as those who work at gourmet establishments.

Higher education institutions. [58] In March 2018, the DOL released a fact sheet outlining the application of the FLSA to certain employees at higher education institutions.[59]

- **Teachers.** A teacher is exempt if his or her primary duty is teaching, tutoring, instructing, or lecturing to impart knowledge, and if he or she is performing that duty as an employee of an educational establishment. Professors, instructors, and adjunct professors typically qualify for this exemption. A faculty member who teaches online or remotely also may qualify for this exemption.
- **Athletic coaches.** Coaches employed by higher education institutions may qualify for the teacher exemption. A coach will not qualify for the exemption if his or her primary duties are recruiting students to play sports or visiting high schools and athletic camps to conduct student interviews. The amount of time the coach spends instructing student-athletes in a team sport is relevant, but not the exclusive factor, in determining the coach's exempt status.
- **Professional employees.** In higher education, examples of exempt non-teacher learned professionals generally include certified public accountants, psychologists, certified athletic trainers, and librarians. Postdoctoral fellows, who conduct research at a higher education institution after completing their doctoral studies, likewise generally meet the duties requirements of the learned professional exemption, and they may additionally qualify for the teacher exemption if teaching is their primary duty.
- **Administrative employees.** In higher education institutions, exempt academic administrative personnel generally include department heads, intervention specialists who are available to respond to student academic issues, and other employees with similar responsibilities. Exempt administrative personnel would likewise generally include academic counselors who administer school testing programs, assist students with academic problems, and advise students concerning degree requirements.
- **Executive employees.** Various positions in higher education institutions might qualify for the executive exemption, including deans, department heads, directors, and any other manager or supervisor whose job duties and compensation satisfy the general requirements for the executive employees.
- **Students.** Generally, most students who work for their college or university are hourly non-exempt workers and do not work more than 40 hours per week. However, some students receive salary and other non-hourly compensation.

  — *Graduate teaching assistants.* Graduate teaching assistants whose primary duty is teaching are exempt because they qualify for the teacher exemption.

  — *Research assistants.* Generally, an educational relationship exists when a graduate or undergraduate student performs research under a faculty member's supervision while obtaining a degree. Under these circumstances, the DOL would not assert that an employment relationship exists with either the school or any grantor funding the student's research. This is true even though the student may receive a stipend for performing the research.

— *Student residential assistants.* Students enrolled in bona fide educational programs who are residential assistants and receive reduced room or board charges or tuition credits are not generally considered employees under the FLSA. They therefore are not entitled to minimum wages and overtime under the FLSA.

Teachers. [60] Someone working for an educational institution whose primary duty is teaching, tutoring, instructing, or lecturing students at that institution is an exempt professional employee. The salary requirements for the exemption do not apply. Exempt teachers include:

- Regular academic teachers
- Kindergarten or nursery school teachers
- Teachers of gifted or disabled children
- Teachers of skilled and semi-skilled trades and occupations
- Teachers of driver education
- Aircraft flight instructors
- Home economics teachers
- Vocal or instrumental music instructors
- Teachers who also spend a considerable amount of time directing students in extracurricular activities, such as sports, drama, or journalism

While possession of a teaching certificate is clear evidence identifying an individual as being within the scope of the exemption for teaching professionals, a teacher who is not certified may qualify for the exemption if the individual is employed as a teacher by the employing school or school system.

Lawyers. [61] Any employee who holds a valid license to practice law and is engaged in the practice of law is an exempt professional. The salary requirements for the professional employee exemption do not apply.

Physicians. [62] Any employee who holds a valid license to practice medicine and is engaged in the practice of medicine is an exempt professional. The exemption applies to physicians and other practitioners practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The exemption also applies to 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. The employee does not have to be licensed when the program begins to qualify for the exemption.

The salary requirement does not apply to physicians engaged in the practice of medicine. This exception from the salary requirement does not apply to nurses, nurse practitioners, physician assistants, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or members of other professions that service the medical profession.

DOL and courts issue interpretations. Several months after the 2004 regulations were finalized, the Wage and Hour Division began issuing opinion letters interpreting the rules as they related to specific fact situations presented by specific employers, hopefully providing further guidance as to how the Division would act in applying the new rules. Soon after, the federal courts also began issuing decisions interpreting the new rules.

Respiratory therapists. [63] The Wage and Hour Division advised that a hospital's respiratory therapists did not qualify as exempt learned professional employees because their job does not customarily require an advanced specialized degree. Only 12% of accredited RT programs are at the baccalaureate level, and individuals can be licensed and certified as an RT after only two years of specialized instruction leading to an associate's degree.

Document review attorneys. Employees reviewing documents in connection with a lawsuit handled by a law firm were exempt professional employees because they were state-licensed attorneys engaged in the practice of law, despite their claim that the scope of review was quite limited.[64]

Nonexempt employees teaching part-time. [65] Full-time nonexempt employees of a community college who taught continuing education courses at night did not become exempt professional employees because their primary duty was not teaching, but performing their nonexempt duties, which were more important to the college.

Pre-school teachers. [66] Instructors in the Head Start program are exempt professional employees because they are teachers employed by an educational institution. They engage in a wide variety of behavioral and academic activities, giving lessons on typical school subjects, developing methods to assist struggling students, conducting parent conferences, and making home visits.

Athletic coaches. [67] Athletic coaches at a public school, who are not also employed by the school or school district in a different, nonexempt capacity, qualify for the teaching exemption. The DOL said that coaches qualify for the exemption because they spend most of their time instructing student athletes in the rules and fundamentals of their respective sports.

Social workers and caseworkers. [68] The Division said that social workers for a private nonprofit social services agency may qualify as exempt learned professionals, but that the agency's caseworkers do not. The social workers need a master's degree in an aspect of social work and two years' experience beyond that. They also make independent decisions about the course of a client's therapy and develop treatment plans using a variety of therapeutic approaches. Caseworkers, however, need only a bachelor's degree in the social sciences, not specialized academic training. Where social workers were required to have only a bachelor's degree in an "allied field" and to complete an additional training program, they were not exempt professionals because these requirements fell short of the "specialized course of intellectual instruction" required under the regulations.[69]

Mental health therapists. Mental health therapists were exempt learned professional employees because they were required to have a master's degree in social work, mental health counseling, marriage and family therapy, and/or creative arts therapy, as well as to secure and maintain a state license as a Licensed Mental Health Counselor. Each subject area was also designated by the state as a separate professional classification requiring its own highly particularized coursework tailored to the area of licensure.[70]

Substitute teachers. [71] A school district's substitute teachers were exempt teaching professionals even if they did not have a teaching certificate or a bachelor's degree, so long as their primary duty was teaching.

Funeral directors. [72] A licensed funeral director with a 2-year associate's degree was an exempt learned professional despite the regulations, which refer to "completion of 4 academic years of pre-professional and professional study." The court said there is nothing in the FLSA requiring a 4-year degree and the state requirements in this case, which included a 1-year residency program, amounted to a "prolonged course of specialized instruction."

Physician assistants and nurse practitioners. [73] A federal appeals court ruled that physician assistants and nurse practitioners paid on an hourly basis were not exempt professional employees. First, they were not exempt professionals because they were paid on an hourly basis rather than a salary basis. There is an exception to the salary basis requirement for employees who hold a license to practice medicine and who actually practice medicine, but the court deferred to the DOL, which has consistently ruled that PAs and RNs must be paid on a salary basis because they are not engaged in the practice of medicine.

Newspaper reporters. [74] A federal district court held that newspaper reporters were not exempt creative professional employees because their primary duty depended mainly on their intelligence, diligence, and accuracy, as opposed to invention, imagination, and talent. They covered only local news, and the majority of their articles were rewrites of press releases and community events announcements.

Part-time professors. [75] A university professor who qualifies as an exempt teacher is not subject to the general salary requirement for other professional employees, so the professor's compensation may be subject to deductions if the professor works less than a full day, without losing the exemption.

Helicopter pilots. [76] Where none of the certifications required of helicopter pilots were academic degrees and nearly all their instruction took place in the air rather than a classroom, they were not learned professional employees because their knowledge and skills were acquired through experience and supervised training rather than intellectual academic instruction. A 2018 DOL Opinion Letter explains that "while it is true that the duties of many helicopter pilots and copilots require considerable knowledge of navigation, meteorology, engineering and flight theory, and they must pass stringent examinations given by the Federal Aviation Administration, it is still the experience in actual flight which is the most important element in qualifying as a pilot or copilot."[77]

Blue collar workers and first responders are not exempt. [78] The white collar exemptions do not apply to manual laborers or other "blue collar" workers whose work involves performing repetitive operations with their hands, physical skill, and energy. Such employees gain the skills and knowledge they need through apprenticeships and on-the-job training, not through a course of specialized intellectual instruction that qualifies an employee as an exempt learned professional.

Therefore, non-management production line employees and non-management employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers must be paid at least the minimum wage and overtime pay under the FLSA. They are not exempt no matter how much they earn.

The white collar exemptions also do not apply to the following employees, no matter their rank or pay level:

police officers

detectives

deputy sheriffs

state troopers

highway patrol officers

investigators

inspectors

correctional officers

probation officers

park rangers

firefighters

paramedics

emergency medical technicians

ambulance personnel

rescue workers

hazardous material workers

similar employees

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
- Other similar work

These categories of employees are not exempt executive employees because their primary duty is not management. Therefore, a police officer or firefighter whose primary duty is to investigate crimes or fight fires is not an exempt executive merely because the employee directs the work of other employees in conducting an investigation or fighting a fire. These employees are not exempt administrative employees either because their primary duty is not the performance of work directly related to the management or general business operations of their employer. Finally, they are also not exempt professional employees because their work does not require advanced knowledge customarily acquired by a prolonged course of specialized instruction. While some of these employees may be required to have college degrees, a specialized academic degree is not a standard prerequisite.

Computer-related professional employees. [79] The definition of exempt professional employees includes highly skilled computer professionals working as systems analysts, programmers, software engineers, or in similar positions who meet the other requirements for professional employee status.

To satisfy the duties test for the computer professional exemption, the employee's primary duty must consist of one or more of the following:

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 creation, design, documentation, testing, or modification of computer programs related to machine operating systems

4. A combination of these duties, the performance of which requires the same level of skills

Highly skilled computer professionals who meet the primary duty test must be paid a salary or fee of at least $684 per week to qualify for the professional employee exemption. The professional employee exemption also applies to hourly paid computer professionals if they are paid at least $27.63 an hour.[80] Hourly paid computer professionals making less than this amount are not exempt from the FLSA, regardless of their professional duties.

The computer professional exemption is not available to employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent on the use of computers and computer software programs but who are not engaged in systems analysis and programming or similar computer-related occupations also do not qualify for the computer professional exemption.

On the other hand, some computer employees, whether they qualify or not for the computer professional exemption, may qualify as an exempt executive or administrative employee. A senior or lead computer programmer who supervises two or more other programmers in a recognized department of the employer may be an exempt executive employee. Systems analysts and programmers can meet the duties requirements for the administrative exemption if their primary duty consists of planning, scheduling, and coordinating activities required to develop systems to solve complex problems of the employer or the employer's customers.

Technology support specialists. [81] "Information technology support specialists" (ITSS) are not exempt computer professional employees because the primary duty of installing, configuring, testing and troubleshooting computer applications, networks, and hardware is not the equivalent of any of the three types of primary duties needed to satisfy the exemption. But where a network systems engineer was responsible for network analysis, testing, configuration, and modification, as well as for providing escalation support to helpdesk personnel, he was an exempt computer professional even though he spent a good deal of his time working on computer and server repair and functionality problems for other employees.[82]

Outside sales employees. [83] To qualify as an exempt outside sales employee, each of the following tests must be met:

1. The employee's primary duty must be:

    a. making sales of tangible or intangible items such as goods, insurance, stocks, bonds, or real estate; or

    b. obtaining orders or contracts for services or the use of facilities.

2. The employee must customarily and regularly work away from the employer's place or places of business in performing the employee's primary duty.

In determining an outside sales employee's primary duty, work that is performed incidental to and in conjunction with the employee's own outside sales or solicitations is regarded as exempt outside sales work. This includes incidental deliveries and collections, and it also includes promotional work so long as it is related to the employee's own sales and not sales made by someone else. Other work that furthers the employee's sales efforts also is exempt work, including writing sales reports, updating or revising catalogs, planning itineraries, and attending sales meetings or conferences.

NO SALARY TEST There is no salary requirement to qualify as an exempt outside sales employee.

Sales of facilities and services. Obtaining orders for the use of facilities includes selling time on radio, television, or other electronic media, soliciting advertising for newspapers and other publications, and soliciting freight for railroads and other transportation facilities. The outside sales exemption also applies to employees who sell or take orders for a service that may be performed for the customer by someone other than the employee taking the order.

Away from the employer's place of business. The outside sales exemption applies only to employees who work away from the employer's place of business, generally at the customer's place of business or the customer's home, if the employee is selling door-to-door. Sales made by telephone, mail, or the Internet do not qualify as outside sales unless such means are used merely to supplement personal calls. Any fixed site used by a sales employee as a headquarters or for telephone solicitations is considered one of the employer's places of business.

However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms while traveling from city to city. Such rooms are not considered the employer's places of business. The same holds true if the sales employee displays the employer's products at a trade show, even if selling actually occurs, rather than just sales promotion, so long as the trade show lasts only one or two weeks. In an opinion letter, the DOL also said that salespeople who used stylized trucks stocked with merchandise, marketing displays, and demonstration units to sell in highly populated areas qualified as the trucks were not considered a “fixed site” of the employer.[84]

Customarily and regularly. The term “customarily and regularly” means a frequency that must be greater than occasional but less than constant. Tasks performed customarily and regularly are performed each workweek rather than on an isolated or one-time basis.

Drivers who sell. Drivers who both deliver and sell products qualify as outside sales employees only if their primary duty is making sales. In making this determination, incidental work related to the employee’s own sales, including loading, driving, or delivering products, is exempt outside sales work. The factors to be considered in determining a driver’s primary duty include:

- A comparison of the driver’s duties with those of other truck drivers and sales employees
- Possession of a selling or solicitor’s license if one is required by local law
- Whether there are customary or contractual arrangements concerning amounts of products to be delivered
- The driver’s job description
- The employer’s qualifications for hiring for the driver’s position
- Sales training
- Attendance at sales conferences
- Method of payment
- The proportion of earnings directly attributable to sales

Drivers who may qualify as exempt outside sales employees include:

- A driver who is the only contact between the employer and the customer, calls on customers and takes orders, delivers products to the customer when the order is taken or at a later time, and is paid in relation to the amount of products sold
- A driver who obtains or solicits orders from someone who has the authority to commit the customer for purchases
- A driver who calls on prospects along the driver’s route to solicit sales of the employer’s products
- A driver who solicits additional sales from established customers even though the initial sale was made by someone else

Drivers who generally would not qualify as exempt outside sales employees include:

- A driver whose primary duty is to deliver products sold through vending machines and to keep the machines stocked, in good repair, and in good locations for sales;
- A driver who calls regularly on established customers and delivers some of the employer’s products at each call, the amount of which is determined by how much the customer sold since the last delivery and is not due to the driver’s solicitation effort

- A driver primarily engaged in delivering products to customers and performing promotional activities, such as placing advertising materials, putting prices on goods, arranging products on shelves, in coolers, or in cabinets, rotating stock, and otherwise servicing display cases, unless such work helps further the driver's own sales efforts

DOL and courts issue interpretations. Several months after the 2004 regulations were finalized, the Wage and Hour Division began issuing opinion letters interpreting the rules as they related to specific fact situations presented by specific employers, hopefully providing further guidance as to how the Division would act in applying the new rules. Soon after, the federal courts also began issuing decisions interpreting the new rules.

Mortgage loan officers. [85] Mortgage loan officers qualified as exempt outside sales employees because their primary duty was the sale of mortgage loan packages and they met clients at the clients' homes on a recurring basis. The activities they performed at the employer's office or in their own homes were incidental to their outside sales activities, so they also qualified as exempt outside sales work. In 2017, a U.S. District Court also determined that two mortgage loan officers fit under the outside sales exemption.[86]

Real estate salespersons. [87] A federal district court ruled that real estate salespersons who sold homes at a subdivision site to which they were assigned by their employer were exempt outside sales employees, relying on a DOL opinion letter in reversing an earlier decision made by the court.

The DOL had disagreed with the court's earlier reasoning, pointing out that it has long said that real estate salespersons working from a model home on a tract from which parcels of land are sold, whether or not they are improved, who leave the model home to show homes and engage in other sales activities are making sales "away from" the employer's place of business–even if all the property shown to prospects is within the tract on which the model home is located.[88]

However, the DOL concluded that the outside sales exemption does not apply to employees who sell timeshares on site at resorts because they are not engaged away from the employer's place or places of business. Resorts in which timeshares are sold are generally maintained on a permanent basis as a location of the employer and are staffed with the personnel necessary to maintain the resort facilities.[89]

Military recruiters. Military recruiters working for a company under contract with the U.S. Army were not exempt outside sales employees because they performed promotional work, not sales. While the recruiters solicited and screened potential recruits and helped them obtain documents they needed for enlistment, only the Army can enlist a recruit or "make the sale," the court ruled.[90]

Pharmaceutical sales reps. For several years, the federal courts were split on the issue of whether the outside salesperson exemption applies to sales representatives of pharmaceutical companies because the reps, while they visit physicians to promote their company's products and educate the physicians about those products, they do not make actual sales of the products and are prohibited by law from taking sales orders from physicians. But in 2012, the U.S. Supreme Court settled the issue by ruling that pharmaceutical sales representatives do qualify for the outside salesperson exemption.[91]

The Court relied on language in the FLSA defining "sales" as "any" of a list of transactions that also includes an "other disposition," which includes transactions that might not be sales in a technical sense, such as exchanges or consignments for sale, in order to accommodate the methods of selling in various industries. Under this definition, the Court said the pharmaceutical sales representatives made sales by getting nonbinding commitments from physicians to prescribe their employer's drugs, which was the most they could do to ensure the eventual disposition of the drugs.

Brand representatives. A federal appeals court found that brand representatives (brand reps) were exempt from the overtime requirements of the FLSA because they fell within the exemption for outside salesmen. The brand reps were employed by a marketing company that provides in-store demonstrations designed to increase sales for client businesses, such as grocery stores, department stores, and wholesale retailers. The company employed brand reps to perform in-store demonstrations and engage with customers. The company set the brand reps' schedules provided them with sales scripts, promotional materials, and training in specific sales techniques. The goal was for brand reps to "convert" a sale by getting customers to place products in their carts, but brand reps did not finalize sales at their display station as customers paid for all items at cash registers near the front of the store. Brand reps were paid a base hourly wage but could also earn commission-style bonuses. The court ruled that in the context of the relevant industry the activities of the brand reps constituted making a sale for purposes of the outside salesmen exemption.[92]

Work under different exemptions. [93] An employee whose primary duty involves a combination of work from two or more exemptions qualifies as an exempt employee. The work that is exempt under one category of exempt employees does not defeat the exemption under any other category.

A federal appeals court has affirmed that the "combination exemption" does not relieve an employer of the burden to establish the other requirements of the exemptions whose duties are combined. Accordingly, an employee whose primary duties combined elements of the administrative and outside sales exemptions, but who did not meet the other requirements for those exemptions, was a nonexempt employee.[94]

Determining an employee's primary duty. Under each of the white collar exemptions, an employee qualifies as exempt only if the employee's primary duty is the performance of exempt work as defined in that particular exemption. "Primary duty" means the principal, main, major, or most important duty that the employee performs. The determination of an employee's primary duty is based on all the facts underlying an employee's particular situation, but the major emphasis must be on the character of the employee's job as a whole.

Factors that are considered when making such a determination include:

- The relative importance of the exempt duties when compared to other duties performed by the employee
- The amount of time spent performing exempt work
- The employee's relative freedom from supervision
- The relationship between the salary paid the employee and the wages paid to other employees for the kind of nonexempt work performed by the employee

Percentage of time spent on exempt work. The amount of time spent on exempt work can be useful in determining an employee's primary duty, but it is not the sole factor. An employee who spends more than 50% of his or her time performing exempt work will generally satisfy the primary duty test. But time is not the only test, and nothing requires that exempt employees spend more than 50% of their time performing exempt work. Such employees may still meet the primary duty requirement if other factors support that result.

> ***Example 3:*** Assistant managers in a retail store who perform exempt work such as supervising other employees, ordering merchandise, managing the budget, and authorizing bill payment may have management as their primary duty even if they spend more than 50% of their time performing nonexempt work such as working at the cash register. But if they are closely supervised and earn only a little more than nonexempt employees working at the cash register, then they would not meet the primary duty requirement.

Work that is 'directly and closely related' to exempt work. [95] Work that would normally be considered nonexempt work is actually exempt work if it is "directly and closely related" to the performance of exempt work. "Directly and closely related" means tasks that are related to exempt work and that contribute to or facilitate the performance of exempt work. Such work includes:

- Routine work without which exempt employees cannot properly perform their jobs
- Recordkeeping
- Monitoring and adjusting machinery
- Taking notes
- Using a computer to create documents or presentations
- Opening the mail to read it and make decisions
- Using a photocopier or fax machine

Occasional tasks that cannot practicably be performed by nonexempt employees and that help an exempt employee carry out exempt functions and responsibilities are exempt work. Here are the factors to consider when determining whether such work is exempt work:

- Whether the same work is performed by the exempt employee's subordinates
- Can the work be delegated to a nonexempt employee
- Whether the exempt employee performs the task occasionally or frequently
- Whether there is an industry practice for the exempt employee to perform the nonexempt work

Trainees are not exempt. [96] The white collar exemptions do not apply to employees who are training for a job in one of these categories and are not performing the duties of an administrative, executive, professional, computer professional, or outside sales employee.

Emergency nonexempt work does not cause exemption to be lost. [97] An exempt employee does not lose the exemption because the employee performs nonexempt work because of an emergency that threatens employees' safety, may cause a disruption of the employer's operations, or may cause serious damage to the employer's property. Emergencies do not include things that are not beyond the employer's control or for which the employer can reasonably provide in the ordinary course of business, and they must occur rarely and be events that could not have been anticipated.

Following are some examples showing the distinction between emergency exempt work and routine nonexempt work.

- A mine superintendent who helps get workers out who are trapped after an explosion is still an exempt executive
- Assisting nonexempt employees during busy periods is not exempt work
- Replacing a nonexempt employee during the first day or a partial day of the nonexempt employee's illness may be exempt work depending on the size of the establishment and the department, the nature of the industry, the consequences of failing to replace the nonexempt employee, and whether the employee's place could be filled promptly with another nonexempt employee
- Regular cleaning and repair of equipment is not emergency work, even if it is needed to prevent fire or explosion, unless the need for the repair is caused by an accident that the employer could not anticipate

Salary requirement. [98] As noted in the discussions of the individual exemptions for administrative, executive, and professional employees, an employee must be paid on a salary basis at least $684 per week, exclusive of board, lodging, or other facilities. Administrative and professional employees can also be paid on a fee basis for a single job, which must equate to at least $684 per week if the employee worked 40 hours. The salary or fee basis requirement is set at $455 per week in Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. The salary or fee basis requirement is $380 if the employee works in American Samoa for an employer other than the U.S. government.

DOL PROPOSES INCREASE TO MINIMUM SALARY LEVEL FOR FLSA 'WHITE COLLAR' EXEMPTIONS [99] On September 8, 2023, the DOL published a Notice of Proposed Rulemaking that would increase the minimum salary level for FLSA "white collar" exemptions. If finalized, the regulations would increase the salary threshold so that any employee earning less than $1,059 a week ($55,068 a year) is a nonexempt employee entitled to overtime pay, whether he or she is paid on an hourly or salary basis. The regulations would also return the salary level in the four U.S. territories subject to the federal minimum wage – Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI) – to apply the same standard salary level as the rest of the United States. In addition, the special salary levels for American Samoa would increase to $890 per week (the equivalent of 84% of the standard salary level).

EQUIVALENT AMOUNTS The current salary requirement is met if the employee is paid a salary of at least $1,368 biweekly, $1,482 semimonthly, or $2,964 monthly.

'Catch-up payment.' [100] Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level. Employers must pay exempt employees 90% of the standard salary level ($615.60 per week), and if at the end of the 52-week period the salary paid plus the additional payments do not equal the standard salary level for 52 weeks ($35,568), the employer has one pay period to make up for the shortfall (up to 10% of the standard salary level, $3,556.80).

'Partial-year employment.' An employee who does not work a full year because the employee was hired after the year began or leaves employment before the year ends can still qualify for the highly compensated employee exemption. To qualify, the employee must receive a pro rata portion of the $35,568 minimum based on the number of weeks the employee was employed. A "catch-up" payment to qualify the employee may be made within one pay period of the employee's separation from employment.

'52-week period.' It is up to the employer to choose the 52-week period as the year for determining an employee's total annual compensation. It can be any 52-week period, such as a calendar year, fiscal year, or an anniversary of hire year. If the employer does not choose a year, the calendar year period will be used.

Highly compensated employees. [101] An employee with total annual compensation of at least $107,432 is an exempt "white collar" employee if the employee customarily and regularly performs one or more of the exempt duties of an exempt administrative, executive, or professional employee. The employee's compensation must include a salary of at least $684 per week. Total annual compensation may also 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, payments for medical insurance, payments for life insurance, contributions to retirement plans, and the cost of other fringe benefits, as well as amounts earned in a side business as an independent contractor.[102] But it does include pre-tax salary reduction contributions made by employees toward the cost of their benefits.[103]

DOL PROPOSES INCREASE TO MINIMUM SALARY LEVEL FOR FLSA 'WHITE COLLAR' EXEMPTIONS [104] On September 8, 2023, the DOL published a Notice of Proposed Rulemaking that would increase the minimum salary level for FLSA "white collar" exemptions. If finalized, the regulations would increase the salary threshold for highly compensated employees to $143,988 per year (the equivalent of the 85th percentile of weekly earnings of full-time salaried workers nationally).

'Catch-up payment.' If the employee's compensation has not reached $107,432 by the last pay period of the 52-week period, the employer can make one final payment to bring the total annual compensation up to $107,432. The payment must be made during the last pay period of the 52-week period or within one month after the end of the period. Any such "catch-up" payment can only count toward the prior year's total annual compensation for purposes of the highly compensated employee exemption. If such a payment is not made, then the employer must determine whether the employee qualifies as exempt under one of the tests for the specific exemptions.

'Partial-year employment.' An employee who does not work a full year because the employee was hired after the year began or leaves employment before the year ends can still qualify for the highly compensated employee exemption. To qualify, the employee must receive a pro rata portion of the $107,432 minimum based on the number of weeks the employee was employed. A "catch-up" payment to qualify the employee may be made within one month of the employee's separation from employment.

'52-week period.' It is up to the employer to choose the 52-week period as the year for determining an employee's total annual compensation. It can be any 52-week period, such as a calendar year,

fiscal year, or an anniversary of hire year. If the employer does not choose a year, the calendar year period will be used.

Not for production workers. The highly compensated employee exemption applies only to employees whose primary duty involves office or nonmanual work. Therefore, non-management production line workers and non-management workers in maintenance, construction, and similar occupations who perform work involving repetitive operations with their hands, physical skill, and energy are not exempt under this exemption no matter how much they are paid. This includes carpenters, electricians, plumbers, mechanics, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers.

Employee receiving premium pay plus salary fit the 'highly compensated employee' exemption. A pharmacist who received a base salary of $1,250 per week, added pay for hours worked over 44 in a workweek, plus "premium pay" of $6 an hour for those extra hours was an exempt highly compensated employee despite the extra pay for extra shifts he worked that was based on an hourly rate calculated by dividing his base salary by 44—the number of "base hours" he was expected to work in a week.[105] The employee argued that because his extra pay exceeded his guaranteed salary by almost double, there was no "reasonable relationship" between the two and the highly compensated employee exemption didn't apply to him, but the court disagreed.

White collar exempt employees must be paid on a salary or fee basis. [106] For those exempt employees who must be paid on a salary basis, the general rule is that they must be paid their guaranteed salary in any workweek in which they do any work regardless of the quality or quantity of the work performed. It generally does not matter how many days or hours they work, but they do not have to be paid for any workweeks in which they do no work at all. An exempt employee is not paid on a salary basis if deductions from the employee's full salary are made for absences caused by the employer or by the operating requirements of the business. So long as the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

PLANNED SALARY REDUCTIONS OK Even though exempt employees' salaries cannot be reduced because of variations in the quantity of work performed, a federal appeals court said it was lawful for an employer to prospectively reduce an exempt employee's salary to accommodate the employer's business needs. In this case, a retailer generally reduced the work hours and salaries of its pharmacists each year during periods when business is generally anticipated to be slow. The court said that was lawful because the employer wasn't changing salaries so often that the exempt employees were really being paid an hourly wage.[107] A similar finding of exempt status was made where a mortgage underwriter was guaranteed a base salary, but could receive differing amounts above that base in one quarter depending on her performance in the previous quarter.[108]

Employees performing same duties may not have same status. The DOL advised a hospital that it may pay one nurse practitioner as a nonexempt employee without jeopardizing the exempt status of the other nurse practitioners. Having some employees within the same job classification who perform the same exempt duties as others but who are paid on a different (hourly) basis does not affect the exempt status of other employees paid on a salary basis. The FLSA's white collar exemptions are not based upon a job title or job classification, but upon the salary and duties of each individual employee.[109]

There are several exceptions from the prohibition against deductions from an employee's salary. They include:

Absences for personal reasons. [110] Deductions from an exempt employee's pay may be made for absences of one or more full days for personal reasons, other than sickness or disability (e.g., inclement weather). But such deductions may not be made for partial day absences.

Absences for sickness or disability. [111] Deductions from an exempt employee's pay may be made for absences of one or more full days caused by sickness or disability (including work-related accidents) if the employee is receiving pay under the employer's sick or disability pay plan or under a state disability insurance law or workers' compensation law. Such deductions can also be made if the employee has not yet qualified for the employer's plan and after the employee has exhausted available leave under the plan.

In order for an employer to deduct from an exempt employee's salary for full days due to sickness or disability, the deduction must be made under a bona fide sickness or disability plan. In order to be a bona fide plan, the employer's plan must provide for a reasonable amount of paid sick leave. Where an employer's plan provided for one paid sick/personal day per year but also allowed employees to use their 1–3 weeks of vacation time as sick leave (an employee had to work one year to be eligible for one week of paid vacation), the Wage and Hour Division said the plan was bona fide and the employer could dock exempt employees who were out sick for one or more full days and were out of sick and vacation leave or had not yet become eligible for the leave without losing their exempt status.[112]

Salary deduction for full-day absences may be calculated based on hours worked. [113] An employer may calculate a deduction for a full-day absence based on the number of hours actually missed (e.g., if a nurse was scheduled to be on call Friday from 2:30 p.m. to midnight, but was unable to work any hours that day, the hospital could deduct 9.5 hours from her salary (i.e., the amount actually missed)).

Partial-day salary deductions permitted for full-day absences. [114] If an employee is absent from a shift scheduled to be shorter or longer than the employee's regular shift, the employer may take a deduction in proportion to the number of hours missed.

Jury duty, witnesses, military leave. [115] An employer cannot make deductions from an exempt employee's pay for absences caused by jury duty, attendance as a witness, or temporary military leave, but the employer can offset any amounts received as jury fees, witness fees, or military pay for a week against the employee's salary for that week without losing the exemption. Also, the employee does not have to be paid if he or she does not do any work during the week.

Safety rule infractions. [116] Deductions from an exempt employee's pay may be made for penalties imposed in good faith for violations of safety rules of major significance. Such rules include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

Workplace conduct rule violations. [117] Employers can impose unpaid disciplinary suspensions of one or more full days for violations of workplace conduct rules if the suspensions are imposed in good faith under a written policy applied to all employees. Therefore, an exempt employee can be suspended without pay for three days for violating a written policy prohibiting sexual harassment, or for six days for violating a written policy prohibiting workplace violence, but the same employee cannot be suspended for 4.5 days for violating a written policy prohibiting employee theft.

Initial and terminal weeks. [118] An employer is not required to pay an exempt employee's full salary in the first or last week of employment. Instead, the employer may pay a proportionate part of the employee's full salary for the time actually worked during those weeks. The employer can pay an hourly or daily equivalent of the employee's full salary for the time actually worked. This does not mean that the employer can pay a proportionate part of the weekly salary if the employee occasionally works a few days per week.

It was lawful for an employer to determine an exempt employee's daily rate for his first week's salary by using his regular semimonthly salary figure and the number of days in his first pay period rather than using a weekly salary figure in the calculation, which would have yielded a higher daily rate.[119]

Payment at a daily rate. The U.S. Supreme Court agreed to review a case to determine whether highly paid employees are entitled to overtime under the FLSA if they are paid at a daily rate.[120] The employee in question was a supervisor making more than $200,000 a year. An appeals court ruled the exemption did not apply because an employee paid a daily rate is not paid on a salary basis.[121] Although wages may be computed on a daily basis, the salary requirement requires a guarantee of the minimum weekly required compensation paid on a salary basis, as well as a reasonable relationship between the guaranteed amount and the amount actually earned; neither requirement was present in this case.

Deducting from leave banks for partial day absences is OK. [122] Without affecting an employee's exempt status, an employer may deduct from the employee's accrued leave account for partial day absences, so long as the employee's full guaranteed salary is paid for the workweek when the deductions are taken.

Motion picture production employees. [123] The salary basis requirement does not apply to an employee in the motion picture production industry who is paid at a base rate of at least $1,043 per week, exclusive of board, lodging, and other facilities. Such employees can be paid a proportionate amount of their base rate based on the number of days they work in any week in which they do not work a full week (based on a week of not more than six days). Exempt employees in motion picture production can also be paid a daily rate if the employee is in a job category that does not have a weekly base rate and the daily base rate would provide at least $1,043 if six days were worked or if the employee is in a job category with a weekly base rate of at least $1,043 and the daily base rate is at least one-sixth of the weekly base rate.

DOL PROPOSES INCREASE TO MINIMUM SALARY LEVEL FOR FLSA 'WHITE COLLAR' EXEMPTIONS [124] On September 8, 2023, the DOL published a Notice of Proposed Rulemaking that would increase the minimum salary level for FLSA "white collar" exemptions. If finalized, the regulations would increase the salary threshold for motion picture employees to o $1,617 per week (or a proportionate amount based on the number of days worked).

CONDITIONAL BONUSES CAN AFFECT EXEMPT STATUS In an opinion letter, the Wage and Hour Division said that pharmacists participating in an employer's incentive programs would not be exempt because the programs' incentive payments would be deducted from the pharmacists' final paycheck if they didn't work for the employer for a minimum length of time.[125]

EXTRA COMPENSATION MAY AFFECT EXEMPT STATUS In an opinion letter, the Wage and Hour Division said that the amount of extra compensation a salaried professional employee may receive before losing the exemption must be reasonably related to the salary amount.[126] The ruling involved engineers who were paid a salary of $2,100 per week ($70 x 30 hours) even if they worked less than 30 hours. However, when the engineers worked over 40 hours, the employer paid the employees for those hours at a rate of $70 per hour. The employer calculated that the engineers earned an average weekly compensation ranging from $1,793 to $3,761 in the previous year. The Division ruled that a 1.5 to 1 ratio of the normal salary is a "reasonable relationship" to the "usual earnings." Employees who earned up to an average of $3,150 satisfied the reasonable relationship test and those who earned above that amount were not "roughly equivalent" to the guaranteed weekly salary. The letter notes that the regulations do not provide an actual ratio and determinations will be based on facts and circumstances. In the case presented, a ratio of 1.8 to 1 was determined to exceed a permissible ratio.

Family and Medical Leave Act provides an exception. [127] Under the Family and Medical Leave Act of 1993 (see Section 4.2), employers must grant employees up to 12 weeks of unpaid leave for the birth or adoption of a child, to care for a seriously ill family member, or because the employee is seriously ill. This leave may be taken intermittently rather than all at once, and in blocks of less than one day. Under FMLA and FLSA regulations, an exempt employee does not lose his or her exemption merely because the employer provides unpaid FMLA leave of less than a day. For this exception to the salary basis test to apply, the employer and the employee must be covered by the FMLA and the leave must qualify as FMLA leave. If not, the FLSA's docking restrictions remain in effect.

The DOL said the FMLA exception for intermittent leave did not apply where a state law allowed employees to take up to 24 hours of unpaid leave to participate in a child's school activities or to accompany a child or elderly relative to routine medical or dental care. The employer could make deductions from an exempt employee's pay in such circumstances only for full-day absences because the leave was for personal reasons other than sickness or disability.[128]

For nonexempt employees paid by the fluctuating workweek method (see Section 2.6-4), the employer can pay such employees on an hourly basis and pay only for the hours the employee works during the period during which intermittent or reduced schedule FMLA leave is taken. During such periods (including weeks during which no leave is taken), the employee must be compensated at 1.5 times the employee's regular rate of pay for hours worked over 40 in a workweek. The regular rate is determined by dividing the employee's weekly salary by the employee's average schedule of hours worked during weeks in which FMLA leave is not taken. If the employer chooses to use this method of payment, it must do so for all employees being paid by the fluctuating workweek method. Without a conversion to hourly pay, no deduction for intermittent FMLA leave can be taken.

What about furloughs? Employers looking for ways to reduce costs often consider furloughs (i.e., requiring employees to take unpaid time off). Recognizing that employers needed guidance as to how furloughs might impact their exempt employees' status, the DOL issued answers to several frequently asked questions (FAQs) that arise.[129]

In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business? The employer must pay an exempt employee the full predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not permissible if the employee works less than a full day.

Physicians, lawyers, outside salespersons, or teachers in bona fide educational institutions are not subject to any salary requirements. Deductions from the salary or pay of such employees will not result in loss of the exemption.

Can a salaried exempt employee volunteer to take time off of work due to lack of work? If the employer seeks volunteers to take time off due to insufficient work, and an exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee's decision must be completely voluntary.

Can an employer make a prospective reduction in pay for a salaried exempt employee due to the economic downturn? An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to an exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least $684 per week.

On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect long-term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

Can an employee still be on call or performing work at home during a furlough day? Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties.

Public sector employers get a break. Recognizing that this definition of salary basis is particularly burdensome in the public sector, where tax revenues are used to pay employees' salaries and laws often prevent the payment of employees for hours not worked, DOL regulations ease the burden.[130] Under these rules, the exemption will not be lost where a public sector (government) employer is required by law, regulation, or principals of public accountability to reduce an employee's pay for absences for personal reasons or for absences of less than one workday due to sickness or injury and where accrued leave is not used by an employee because:

- Permission to use the leave was not asked for or was denied.
- The employee's accrued leave has been exhausted.

- The employee chooses to use leave without pay.

If the reduction is due to a budget-required furlough, the employee remains exempt except during the week of the furlough, and the employee's status as a critical employee is irrelevant. This exemption, however, does not apply to the ban on improper deductions.

Where city employees agreed in a bargaining agreement to a reduced salary, but received several days off that were characterized as "furlough time" and had to be taken in a certain time period or be forfeited, a federal district court said this was not a true furlough and, in any event, the new agreed upon salary was paid each month regardless of the number of days taken off or hours worked.[131]

DOL and courts issue interpretations. Several months after the 2004 regulations were finalized, the Wage and Hour Division began issuing opinion letters interpreting the rules as they related to specific fact situations presented by specific employers, hopefully providing further guidance as to how the Division would act in applying the new rules. Soon after, the federal courts also began issuing decisions interpreting the new rules.

Accountants paid a percentage of fees. [132] The Division said that accountants who were paid a percentage of the fees charged by their company for individual transactions were not compensated on a fee basis, so they were not exempt professional employees. The compensation scheme was more like a piecework arrangement than a fee arrangement because a fee is generally paid for a unique job, rather than for a series of jobs repeated over and over again for which payments on an identical basis are made over and over again.

Threats to dock pay. [133] When an employer installed card readers to track employees' coming and going from their manufacturing plant and told exempt employees that timesheet comparisons to the card reader reports could result in "pay adjustments," this did not change the status of the company's exempt employees. A federal appeals court said there was no "significant likelihood" of pay deductions since no exempt employee's pay had been docked and the reports were pulled about once a month, but only in response to a concern about a particular employee's absenteeism.

Requirement to take unpaid leave in full-day increments. A pharmacy did not violate the salary basis requirement by requiring its exempt pharmacists to take unpaid leave in full-day increments once their vacation and personal leave had run out. The decision whether to take the leave or not was not "occasioned by the employer" because it was optional and voluntary for the pharmacists, who could switch shifts with another pharmacist and avoid having to use leave at all. The court also noted that FLSA regulations expressly permit deductions for full-day absences for personal reasons when the employee's paid leave has run out.[134]

Breakage deductions. [135] The Division said that an employer's policy to deduct from exempt employees' salaries or seek reimbursement from them for breakage, loss, or destruction of property would violate the FLSA's requirement that exempt employees' salaries be paid "free and clear."

Deductions from bonuses. [136] Any compensation beyond an exempt employee's salary is a matter of agreement between the employer and employee, and the prohibition against improper deductions from an exempt employee's salary does not apply to such additional compensation. Accordingly, an employer can take deductions for bad checks and other cash shortages from bonus payments to exempt managers without affecting their exempt status.

Work hour requirements. [137] The Division said that an employer can require exempt employees to work a minimum number hours per week and to make up work time lost due to personal absences of less than a day if it does not dock the pay of employees who fail to comply with the policies. The employer also could not suspend exempt employees as a possible penalty for failing to comply, since the attendance rule is not a “workplace conduct rule.”

Using tip credit as salary. [138] An employer cannot count an exempt administrative employee’s tips as a credit toward the minimum salary requirement of $684 per week. A tip credit can only be taken against a portion of an hourly employee’s tips toward the minimum wage. Also, a tip is an employee’s property and is not compensation paid by the employer.

Salary paid in foreign currency. [139] The Division said that amounts paid to an employee in U.S. dollars and in foreign currency may be combined in order to satisfy the salary requirement for an exempt employee. The employer must use the generally available exchange rate in effect at the time of payment in the vicinity where the employee is working.

Part-time exempt employees. [140] The Division explained that an employee holding a part-time position must still be paid a salary of at least $684 per week a week to qualify as an exempt white collar employee, subject to limited exemptions for teachers, lawyers, and physicians who are not governed by the general salary requirement.

Requirement to report 40 hours. Where exempt employees were required to report at least 40 hours per week to receive their full salary and would receive less if they entered fewer than 40 hours, the employees did not lose their exempt status because the employer had a process to correct the underpayments once the employees corrected their time-entry errors.[141]

Effect of improper docking of pay. [142] In general, an employer that makes improper deductions from the pay of exempt employees does not intend to pay those employees on a salary basis and will lose the exemption for them. The factors the DOL will consider when determining whether an employer has an actual practice of making improper deductions include:

- The number of improper deductions, especially when compared to the whole number of employee infractions resulting in discipline
- The time period during which the improper deductions were made
- The number and geographic location of employees whose pay was improperly reduced
- The number and geographic location of managers who made the improper deductions
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions

If the facts show that the employer has an actual practice of making improper deductions, the employer will lose the exemption for the time period when the improper deductions were made, but only for employees in the same job classification and working for the same managers responsible for the improper deductions.

> ***Example 4:*** If a manager routinely docks the pay of exempt engineers at a company facility for partial-day personal absences, then all engineers working at that facility whose pay could have been docked by that manager would lose the exemption. Engineers working at other facilities or for other managers at the same facility would remain exempt.

Exemption not lost for isolated deductions. On the other hand, improper deductions that are isolated or inadvertent will not result in loss of the exemption for the employees whose pay was docked if the employer reimburses the employees for the improper deductions.

Safe harbor provision. If an employer:

- Has a clearly communicated policy prohibiting improper pay deductions
- Includes a complaint mechanism
- Reimburses employees for any improper deductions
- 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 to make improper deductions after getting employee complaints.

If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after employees have complained, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classifications and working for the same managers who made the improper deductions.[143] The employer can best protect itself with a written policy prohibiting improper deductions that was distributed to employees before any improper deductions were made, either at the time of hire, in an employee handbook, or on a company Intranet.

Payment on an hourly, daily, or shift basis. [144] An employer may compute an exempt employee's earnings on an hourly, daily, or shift basis without losing the exemption if the employment agreement also includes a guarantee of at least the minimum weekly required amount regardless of the number of hours, shifts, or days worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.

The reasonable relationship test is met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily, or shift rate for the employer's normal workweek.

> ***Example 5:*** An exempt employee who is guaranteed compensation of at least $700 a week for any week in which the employee works, and who normally works four or five shifts each week, may be paid $210 per shift without violating the salary basis requirement.

Where disabled exempt employees are able to work part-time while recuperating from an illness or injury, the Wage and Hour Division approved an employer's plan guaranteeing the employees their full hourly rate (calculated as a pro-rata share of their pre-disability salary) for all hours the employees anticipated working during a week, whether or not the employees actually worked that number of hours, and a reduced amount for hours the employees do not anticipate working during a week because of their disability. However, the Division did not approve a plan where the recuperating employees would be paid the discounted disability pay and were to be paid at their full hourly rate only for hours actually worked. In this situation, there was no reasonable relationship between the weekly guarantee of $250 ($684 per week as of January 1, 2020) and the employee's actual normal earnings.[145]

Extra compensation is OK. [146] An employer can provide an exempt employee with additional compensation without violating the salary basis requirement, so long as the employee is guaranteed the required amount on a salary basis. Such additional compensation can be calculated and paid on any basis, including:

- Commissions on sales
- Straight time or time-and-a-half pay for hours worked beyond the normal workweek
- Shift differential
- Flat sum
- Paid time off

Employers can track exempt employees' hours. [147] An employer can require exempt employees to track and record the hours they work without losing the exemption, even though such recordkeeping is not necessary under the FLSA. Employers can also require exempt employees to work a specified schedule.

SECTION 2: FEDERAL AND STATE WAGE-HOUR LAWS

2.4 Exempt and Nonexempt Employees

2.4-2 Retail and Service Industry Exemption

Employees in retail or service industries are exempt from the overtime pay requirements of the FLSA if both of the following requirements are met:

1. Their regular rate of pay on a weekly basis (hourly rate plus commissions) is at least 1.5 times the federal minimum wage in effect.

2. More than half of their pay for a representative period (at least one month) comes from commissions.[148]

   Example 1: Employee Erica sells beds and mattresses for The Big Sleep Co., a furniture retailer, and is compensated by both salary and commissions. Her compensation for a 6-week period, working a different number of hours each week, looked like this:

WEEK	SALARY	COMMISSION	TOTAL	HOURS	REGULAR RATE
1st	$300	$360	$660	45	$14.67
2nd	$300	$300	$600	50	$12.00
3rd	$300	$380	$680	55	$12.36
4th	$300	$350	$650	52	$12.50
5th	$300	$300	$600	48	$12.50
6th	$300	$410	$710	55	$12.91
Total	$1,800	$2,100	$3,900		

Erica is exempt from the overtime pay requirements of the law for each of the six weeks because her regular rate of pay was more than 1.5 times the minimum hourly rate in effect during each of those weeks ($7.25 x 1.5 = $10.88) and more than one-half her total compensation came from commissions ($3,900.00 x 0.5 = $1,950.00).

At least one month. In a 2019 opinion letter, the WHD defined the “not less than one month” requirement as meaning six, but not four, consecutive weekly pay periods.[149] Similarly, three, but not two, consecutive biweekly pay periods would also satisfy the requirement.

What about service charges in hotels and restaurants? The Wage and Hour Division has ruled that waiters and waitresses in hotels and restaurants may qualify for the overtime exemption granted to retail and service industry commission salespersons.[150] For the exemption to apply, the "commission" received by employees must consist of service charges added to customers' bills. Tips or gratuities that are optional for the customer do not qualify as commissions, and employees receiving such tips must be paid overtime according to the law.

If the employee does receive compensation from service charges, then the overtime exemption will apply if the employee's regular rate of pay each week is more than 1.5 times the applicable minimum hourly wage and the employee's compensation from service charges makes up more than one-half of the employee's total compensation for a representative period of at least a month.

Employees can sell products related to retail goods. At an automobile dealership, an employee who earned commissions on service contracts and insurance he sold to customers who bought vehicles was exempt under the retail industry exemption. A federal appeals court said the exemption applies to any employee of a retail establishment who meets the compensation requirements, not only those employees who sell the retail goods.[151]

At a company that sells and leases food service equipment, route sales managers (RSMs) who spent most of their time maintaining and repairing customers' equipment were nonetheless exempt under the retail industry exemption. The RSMs received commissions based on customer demands in their territory and were expected to encourage sales and lease renewals, even though they were not salespersons.[152]

Employees can be paid a flat rate per sale. Call center employees who were paid a flat rate for each sale they made by telephone were covered by the retail industry exemption because the court said their payments were commissions. The court relied on the fact that the payments were sufficiently proportional to the products sold and said they were not piecework payments because they depended on the preferences of customers and fluctuated from period to period.[153]

DOL withdraws two provisions in the regulations pertaining to retail or service establishments. In May 2020, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued a final rule to provide one consistent analysis for all employers when determining whether they qualify as "retail or service" establishments for purposes of an exemption from overtime pay for commission-based employees under the FLSA.[154] The final rule withdrew two provisions in 29 C.F.R. §779:

(1) Industries the WHD viewed as having "no retail concept," which made them ineligible to claim the exemption, and

(2) Industries that the WHD viewed as "may be recognized as retail" and were potentially eligible for the exemption.

SECTION 2: FEDERAL AND STATE WAGE-HOUR LAWS

2.4 Exempt and Nonexempt Employees

2.4-3 Public Sector Exempt Employees

While the FLSA generally applies to employees of the federal, state, and local governments and their agencies and political subdivisions, there are several exemptions in addition to those that apply generally. On the state and local government level, employees who are not subject to state or local civil service laws are exempt from the FLSA if they are:[155]

- Publicly elected officials
- Persons selected by an elected official to be members of the official's personal staff, if they are directly supervised by the official
- Persons appointed by an elected official to serve in a policymaking position
- Persons who are immediate advisors to an elected official on the constitutional or legal powers of the office
- Persons employed by a state or local legislative branch, other than a legislative library or a school board

SECTION 2: FEDERAL AND STATE WAGE-HOUR LAWS

2.4 Exempt and Nonexempt Employees

2.4-4 Other Exempt Employees

The following table shows employees who may be exempt from the minimum wage and/or overtime pay requirements of the FLSA if certain conditions are met (X = full, P = partial, N = narrow):[156]

Table 2.1

MISCELLANEOUS FLSA EXEMPTIONS

Employee Job Description	Minimum Wage Exemption	Overtime Exemption	Full Minimum Wage & Overtime Exemption
Employees covered by collective bargaining agreements (union contracts)—FLSA §7(b)		X	
Tobacco employees—FLSA §7(m)		P	
Local transit employees engaged in charter activities—FLSA §7(n)		N	
Employees of seasonal amusement or recreational establishments, organized camps, or religious or nonprofit educational conference centers—FLSA §13(a)(3)			X
Fishing employees (including first processing at sea)—FLSA §13(a)(5)			X
Farm workers (depends on duties and size of employer)—FLSA §13(a)(6), (b)(12)–(b)(16)		X	X
Small local newspaper employees—FLSA §13(a)(8)			X

Switchboard operators for small public telephone companies—FLSA §13(a)(10)		X
Seamen on foreign vessels—FLSA §13(a)(12)		X
Seamen on American vessels—FLSA §13(b)(6)	X	
Casual babysitters or home companions for individuals who cannot take care of themselves—FLSA §13(a)(15)		X
Criminal investigators paid availability pay—FLSA §13(a)(16)		X
Motor carrier employees—FLSA §13(b)(1)	X	
Employees of interstate railroads and airlines—FLSA §13(b)(2), (b)(3)	X	
Announcers, news editors, and chief engineers of small radio and television stations—FLSA §13(b)(9)	X	
Salespersons and mechanics in auto dealerships (also salespersons in trailer, boat, or aircraft dealerships)—FLSA §13(b)(10)*	X	
Local delivery drivers and driver's helpers—FLSA §13(b)(11)	X	
Taxicab drivers—FLSA §13(b)(17)	X	
Firefighters and police officers in very small towns—FLSA §13(b)(20)	X	
Live-in domestic workers—FLSA §13(b)(21)	X	
Motion picture theater employees—FLSA §13(b)(27)	X	
Couples employed by a nonprofit educational institution to work with orphaned children—FLSA §13(b)(24)	X	
Employees of small logging operations—FLSA §13(b)(28)	X	

News carriers who deliver newspapers directly to the consumer—FLSA §13(d)			X
Homeworkers making evergreen wreaths—FLSA §13(d)			X
Employees working in a foreign country—FLSA §13(f)			X
Cotton and sugar service and processing employees—FLSA §13(h)-(j)		P	
Learners, apprentices, students, disabled workers, and messengers —FLSA §13(a)(7); §14(a)	P	X	
Local bulk petroleum distributor employees—FLSA §7(b)(3)		P	
Outside buyers of poultry or dairy products in their natural state—FLSA §13(b)(5)		X	
Employees of amusement or recreational establishments in a national park or forest—FLSA §13(b)(29)		P	
Certain volunteers at private nonprofit food banks receiving groceries based on need—FLSA §3(e)(5)			X

* see footnote[157] below

Temporary suspension of FLSA enforcement for recreational establishments. In September 2020, the DOL's Wage and Hour Division (WHD) issued a Field Assistance Bulletin to announce it would temporarily suspend enforcement of FLSA minimum wage and overtime laws for existing amusement and recreational establishments, organized camps, or religious or nonprofit educational conference centers that modified, replaced, canceled, or reduced normal operations due to COVID-19.[158] The WHD will not bring minimum wage and overtime actions against these seasonal establishments that, prior to 2020, fulfilled FLSA §13(a)(3) requirements if these employers: canceled or limited regular season programming or operations for reasons related to COVID-19; adopted related alternative programming or operations solely for 2020; paid employees at least the same wage levels and rates they received when the establishment was operating as an amusement or recreational establishment; and took steps to abandon those alternatives and return to normal operations in 2021. When applying the receipts test in 2021, the WHD will use receipts from either 2019 or 2020.

Companionship services. In 2007, the U.S. Supreme Court upheld the DOL regulation as it existed at that time that extended the FLSA's companionship services exemption (FLSA §13(a)(15)) to individuals employed by a third party. The Court said the regulation (29 CFR §552.109(a)) was valid and enforceable.[159]

In 2013, the DOL amended its regulations to provide that third parties could not use the companionship services or live-in domestic services exemption from the minimum wage and overtime requirements, whether or not they are joint employers with the individual using the services.[160] The amended regulations also define companionship services as the provision of fellowship and protection for a person who requires assistance in caring for himself or herself, as well as the provision of care in assisting the person with the activities of daily living if such care does not exceed 20% of the total hours worked for that person each workweek. Companionship services also do not include the performance of medically-related services that are typically performed by trained personnel.[161] The DOL also issued guidance on how the new rules apply to home care services provided through shared living arrangements, including adult foster care and paid roommate situations.[162]

The amended regulations were scheduled to take effect January 1, 2015, but in October 2014 the DOL announced that it would not bring enforcement actions based on the regulations before July 1, 2015, instead using the time to provide technical assistance to the third-party provider community, particularly states. From July 1–December 31, 2015, the DOL planned to enforce the new rules, but intended to give strong consideration to the employer's efforts to comply, particularly a state's efforts to bring its publicly funded home care programs into compliance.[163] In August 2015, the D.C. federal appeals court upheld the final rules, finding that the DOL had reasonably exercised its rulemaking authority.[164] The DOL began full enforcement of the new rules in January 2016.