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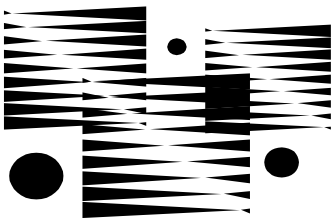


COLEMAN CONSULTING

A company that provides advice on the flexibilities available in federal compensation programs, and training in the areas of federal premium pay and related areas of U.S. Government position classification and compensation systems.

Mr. Coleman received his Bachelor of Arts in Sociology from the University of Colorado at Boulder in 1975. During his thirty-two year federal career he worked for a number of agencies including the Agricultural Research Service, the Federal Transit Administration, the U.S. Naval Academy, the Office of Thrift Supervision, the U.S. Customs Service, the Immigration & Naturalization Service, Immigration & Customs Enforcement, Customs & Border Protection, and the Department of Homeland Security.

At the Office of Thrift Supervision, Mr. Coleman was both a team member and the team leader on the staff that developed a new compensation system including a point factor job evaluation system, and a market based direct pay system with performance based increases. At the Department of Homeland Security he worked as member of the team designing a statutorily mandated pay for performance system.

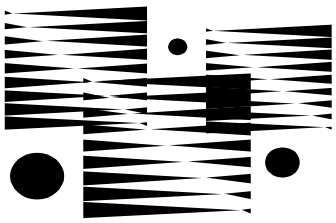
Mr. Coleman started out as a Position Classification Specialist, an art he practiced for more than twenty years. For more than fifteen years he has practiced in the arcane field of federal basic and premium pay.

Mr. Coleman is married, has no children, is a collector of transportation tokens, has been a streetcar driver and conductor, and enjoys traveling to far away places like Egypt and India. He is researching his family's history, and lives in Annapolis, Maryland.

WORKSHOP OBJECTIVES

Upon completing this material, you should be able to:

- Indicate when the provisions of the FLSA were extended to federal employees;
- Identify the criteria used to determine if a position is EXEMPT or NONEXEMPT;
- Decide when an employee is entitled to overtime under the provisions of the FLSA;
- Understand the formulas for computing FLSA overtime pay; and,
- Utilize experience applying this knowledge gained during practical exercises.



INTRODUCTION

Conditions for Passage

The Fair Labor Standards Act (FLSA) was established by Congress to address at least three concerns. First, it was written to protect ordinary workers. Congress perceived the high unemployment of the 1930's as an invitation to wage abuses especially by employers not covered by existing state or federal wage and hour laws. The FLSA was to provide relief from substandard wages and excessive hours by establishing certain minimum labor standards. The standards were designed to eliminate the low wages and long hours which endangered the material health and well being of employees. Congress believed that the FLSA also would promote economic stability through increased purchasing power.

Second, it was written to resolve the widespread unemployment and scarcity of jobs during the great economic depression of the 1930's. Some felt establishing requirements for paid overtime could reduce the high unemployment. The higher cost of the premium pay for overtime would discourage employers from paying current workers for extra hours and encourage employers to hire additional workers to keep labor costs down.

Third, the FLSA was written to address a series of ineffective laws passed between 1892 and 1913. These laws attempted to establish fair minimum and overtime wage standards. Known collectively as the Eight Hour Law, they provided for an 8 hour work day and for time beyond 8 hours to be paid at time and one half the employee's basic rate of pay. The Law was not effective because it applied only to federal workers or those in specific industries such as public works employees.

The Act was passed on June 25, 1938, as Public Law 75-718. Initially, it did not cover any federal employees. Almost 30 years passed before the first few federal employees were covered by amendments passed in 1966. Almost ten more years passed before most of the remaining federal employees were covered. Public Law 93-259 was passed April 8, 1974, and became effective less than one month later on May 1, 1974. Initially it covered executive branch and other federal employees who met the definition of Section 7(a) of the Act. Federal law enforcement and fire protection employees (those covered by Section 7(k) of the Act) were covered on January 1, 1975.

Why is it important for federal managers and those who advise them to study the FLSA? The answer is its potential impact on federal agency operations. This potential impact can be seen in four areas. The Act has an impact on fiscal resources, and on management responsibility. Another reason is the Act's interaction with other laws that apply to federal employees. A final reason is the complexity involved in administering the Act.

Impact on Fiscal Resources

The first area of potential impact is on the fiscal resources of a federal agency. Unlike Title 5, there are no limitations under the FLSA on how much the employee can earn. The longer the employee works under FLSA the more she or he is paid. This is particularly important because of the suffer and permit concept. Under this concept unique to the FLSA the employee is entitled to be paid for work performed even when the supervisor does not order or approve it.

Second, the FLSA criteria for determining when an employee's activities can be counted as compensable hours of work are very generous and include hours typically not counted under other laws covering federal employees.

Finally, the FLSA method for computing overtime pay includes a variety of types of remuneration not included in computing overtime under other federal laws. Thus, the lack of a limit on employee pay, the additional hours that can be counted toward overtime entitlements, and the more generous payment provisions can add up to large, unexpected premium pay costs. Such unexpected premium pay costs can dramatically impact an agency's fiscal resources and its ability to accomplish mission critical objectives.

Impact on Management Responsibility

The second area of potential impact the FLSA can have on a federal agency is in the area of management responsibility. Agency managers and supervisors have always been responsible for effectively managing fiscal, material, and human resources. The FLSA makes this responsibility more important because all work performed by an employee that is accepted by the manager and most time on the job that benefits a federal agency is compensable under the Act.

This makes it most important that federal managers ensure that employees perform work only when they need it and can pay for it. More importantly perhaps, the manager must assure that work is not performed when it is not needed or cannot be paid for.

One of the ways to assure that employees work only when wanted is to establish a work schedule for each employee. The FLSA does not require managers to establish work schedules. However, NONEXEMPT federal employees continue to be covered by Part 610 Title 5 of the Code of Federal Regulations. These regulations provide guidance on establishing employee schedules. The regulations cover both the 5 day 8 hours/day workweek as well as those working on compressed and flexible schedules. The use of such schedules should assist the manager both in planning work and in controlling compensation costs.

Thus, the FLSA does not diminish management's responsibility to plan and manage work. In fact the FLSA enhances the manager's responsibility to effectively and efficiently manage the assigned fiscal and human resources. An enhanced knowledge of the FLSA will allow managers to more carefully manage both their human and fiscal resources to accomplish organizational goals and objectives.

Interaction with Other Laws

A third area in which the FLSA can impact a federal agency is its interaction with other laws that apply to federal employees.

When FLSA coverage was first extended to federal employees they were entitled to overtime under both the FLSA and the Federal Employees Pay Act of 1945. This required a dual computation each pay period, to determine which set of rules provided the bigger benefit. This went on each pay period from 1974 to 1990. During 1990, the Federal Employees Pay Comparability Act was passed. It eliminated the need for a dual computation by stating that NONEXEMPT employees would be paid overtime under the FLSA provisions only. Thus, one of the interactions between the FLSA and the FEPA has been eradicated.

A second interaction between the FLSA and the FEPA continues. This is the interaction between Title 5 premium pay provisions and the FLSA. NONEXEMPT employees are entitled to Title 5 differentials for work performed at night, on Sundays and holidays, under hazardous conditions, and annual premium pay for standby and administratively uncontrollable duty. These premium hours of work and the resulting premium pay have a two-fold impact on pay administration for NONEXEMPT employees. One, Title 5 premium pay is included when FLSA overtime pay is calculated. Two, receiving certain kinds of Title 5 premium pay, e.g., annual premium pay for administratively uncontrollable overtime, helps to determine whether certain hours of work are included when determining an employee's FLSA overtime entitlement.

A third interaction the FLSA has with other laws is the one between the FLSA and other premium pay laws that cover certain groups of federal employees. The FLSA regulations that apply to federal employees require agencies to review a NONEXEMPT employee's entitlements under all the laws that apply to him or her. If the NONEXEMPT employee's entitlement for overtime under another law is greater, then the employee must be paid under the other law.

If the NONEXEMPT employee's entitlement for overtime is higher under the FLSA, then the employee must be paid under the FLSA provisions. The material in this text does not cover the provisions of these other laws, but they will be mentioned in this material at the points where they affect the application of the FLSA. Thus, a manager or management advisor should be aware of the FLSA to assure that employees receive the compensation to which they are entitled, whether it is FLSA overtime or premium pay under other laws.

Complexity of Administering the Law

A fourth area in which the FLSA can impact a federal agency is the complexity of administering the law. This complexity results from a number of factors.

The FLSA is a complex law to administer because it has specific and extensive rules regarding worktime and payment. The FLSA establishes detailed rules covering what time is considered hours of work, the minimum number of hours that must be worked before overtime begins, and the formula for computing overtime pay. These rules are different from other laws that apply to federal employees.

Also, the FLSA is a complex law to administer because of frequent changes in how it is applied. These changes come from several sources: changes to statutes; changes to regulations; and the

impact of claims filed by federal employees. Claims may be filed: in U.S. Courts; as grievances and heard by arbitrators; with the U.S. Office of Personnel Management or with the employing agency. The decisions resulting from the claims filed in U.S. Courts or as grievances may provide new insight on how the FLSA is to be applied.

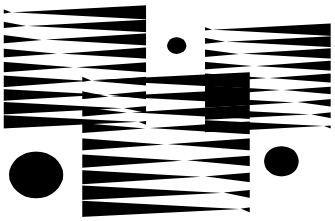
Thus, knowledge of the FLSA will help managers and management advisors cope with the complexity of administering the FLSA caused by frequent changes to the law and regulations, and the changing insight on applying the law resulting from decisions rendered in lawsuits, grievances and administrative claims.

Conclusion

In short, the study of the Fair Labor Standards Act is important for many reasons. These include the FLSA's potential impact on fiscal resources, and on management responsibilities. They also include the complexity of applying the FLSA, and the interaction between the FLSA and other laws.

The text has been completely rewritten and updated to reflect the revisions to the regulations released by the U.S. Office of Personnel Management on 17 September 2007. The revised regulations make major changes to the subpart that deals with exemption from the FLSA. The changes make this subpart dramatically different from the form it took after the revisions made in 1997, but make it much closer in form to the regulations released by the U.S. Department of Labor in 2004.[1]

The purpose of this study is to help the manager and management advisor to minimize the impact of the FLSA on an organization in the Executive Branch of the Federal Government of the United States while assuring the all legal and regulatory requirements are satisfied.



[1] The U.S. Department of Labor regulations cover employees in the private sector, state and local governments, and non-profit organizations.

COVERAGE BY THE FLSA

Geographic Coverage & the Foreign Exemption

Federal employees stationed in one of the following areas, defined in the statute as areas within which the Act applies, are covered by the provisions of the FLSA.

A State in the United States
District of Columbia
U.S. Virgin Islands
Puerto Rico
Outer Continental Shelf Lands [as defined at 67 Stat 462]
American Samoa
Guam
Commonwealth of the Northern Mariana Islands
Midway Atoll
Wake Island
Johnston Island
Palmyra

Foreign Exemption

This exemption prevents the application of the minimum wage, overtime and child labor provisions of the FLSA to any federal employee who spends all hours of work in a given workweek in an exempt area. Exempt areas are ones not listed above. Thus, the FLSA does not apply to federal employees permanently stationed in a foreign country such as Cuba, Germany, or Japan. The FLSA also does not apply to federal employees stationed in any territory under the jurisdiction of the U.S. if that location is not listed above.

The exemption applies as long as ALL hours of work in a work week are performed in one or more exempt areas. This means that if a federal employee is permanently stationed in an exempt area or is temporarily stationed in an exempt area she or he is not covered by the minimum wage, overtime and child labor provisions of the Act as long as NO hours in a work-week are performed in a covered area.

Employees permanently stationed in a foreign location who perform ANY hours in a workweek in one of the covered areas, above, lose the foreign exemption for that workweek. [29 USC 213(f), 5 CFR 551.212 (2007)]

The agency must make a determination whether or not the work being performed in a covered area by an employee who is normally stationed in an exempt area is exempt or non-exempt. This determination is made utilizing the exemption criteria discussed later in this chapter, and must be based on the duties actually being performed by the employee in the covered area. Whether the duties performed in the covered area are the same as or different from those in the employee's official position description, it is the work actually performed by the employee in the covered area that must be the basis for the decision to exempt or nonexempt the employee while in the covered area. If the employee's assigned duties change during the period of time he or she is working in a covered area, then the employee's coverage or exemption must be determined for each workweek.

The foreign exemption does not take effect after the employee returns to an exempt area until she or he fully meets the requirement to perform ALL hours in a workweek in an exempt area, as discussed earlier in this section.

Agency Coverage

The 1974 amendments extend FLSA coverage to any instrumentality of the United States Government or any part of such instrumentality that acts as an employer.

Specifically, this includes (1) an executive agency as defined in 5 U.S.C. § 105, i.e., an Executive Department, a Government Corporation (e.g., the National Trust for Historic Preservation, the Saint Lawrence Seaway Development Corporation), and an independent establishment (e.g., the Government Accountability Office, the Office of Federal Procurement Policy); (2) the military departments as defined in 5 U.S.C. § 102, i.e., the Departments of the Army, Navy and Air Force; and (3) a nonappropriated fund instrumentality of an executive agency or a military department; unless exempted by the Act or some other law. [29 USC 203(e)(2)(A)(i), (ii) & (iv), 203(x), 5 CFR 551.102(a) & 551.104]

The amendments also covered any unit of the Judicial Branch with positions in the competitive service, and the Government Printing Office. [29 USC 203(e)(2)(A)(iii), (v) & (vi)]

To be an employer typically means that the agency engages a person to perform one or more tasks that are for the benefit of that agency. The courts go on to say that being an employer includes such responsibilities as hiring and firing employees, supervising and controlling employees' work schedules or conditions of employment, determining rates and

methods of payment, and maintaining employment records. [Hale v. Arizona, 967 F.2d 1356 (1992)]

Employee Coverage

The Fair Labor Standards Act is designed to establish certain minimum labor standards for covered employees. Thus, it is written to cover all employees unless they meet one or more of the exemption criteria or they are specifically excluded by another statute.

Coverage includes an employee of an agency, listed in the preceding section. This includes any person who is defined as an employee in § 2105 of title 5, United States Code. It also includes a civilian employee appointed under appropriate authority; and an individual suffered or permitted to work by an agency whether or not formally appointed. [5 CFR 551.103(a)]

Included in this coverage are: employees appointed to the competitive and the excepted service; employees placed on permanent or temporary appointments; and employees working full time, part time or intermittent schedules.

After analyzing the coverage of the FLSA, OPM has determined that large groups of federal employees will NOT meet any of the exemption criteria and, therefore, are protected by the minimum wage, overtime and child labor provisions of the FLSA. OPM provides the following list of groups of employees who are expected not to meet any of the exemption criteria. [Attachment to FPM Letter 551-7 at B.2.c; 5 CFR 551.202(a)]

- **Nonsupervisory employees in the Federal Wage System** or in other comparable wages systems. [5 CFR 551.204(b)]
- **Nonsupervisory employees in equipment operating and protective occupations, and most clerical occupations**, such as office, computer, and communications equipment operators. [5 C.F.R. § 551.204(a)(1)]
- **Nonsupervisory employees in technician occupations** classified below GS-9 or the equivalent level in other white-collar pay systems, and many, but not all, of those classified at or above GS-9 or the equivalent in other white-collar pay systems, such as biological, engineering and other technicians. [5 C.F.R. § 551.204(a)(2)]
- **Nonsupervisory employees at any grade level in occupations requiring highly specialized technical skills and knowledge** that can be acquired only through prolonged job training and experience, such as Air Traffic Controllers, GS 2152, or those in the Aircraft Operation

Series, GS 2181, unless such employees are performing predominantly administrative functions rather than the technical work of the occupations. [see letter from Assistant Director for Agency Compliance & Evaluation, USOPM to Director of Personnel at the Department of Transportation, dated 8 November 1985] [5 C.F.R. § 551.204(a)(3)]

These positions are nonexempt unless affected by the provisions covering temporary duty, discussed below, or by the foreign exemption, discussed above.

A question may occasionally arise about whether or not an individual is an employee of a federal agency. The U.S. Court of Appeal for the Fourth Circuit stated that to be an employee the worker(s) must satisfy the "economic reality" test. This says "employees are those who as a matter of economic reality are dependent upon the business to which they render service." [Dubois v. Secretary of Defense 161 F.3d 2 (1998)] In recognizing the economic reality test as the determinant of whether or not an individual is an employee, the courts have said that the terms employee and employer are not to be constrained to the meanings of these terms established in common law. Rather the economic reality test is more appropriate in federal social welfare legislation such as the Fair Labor Standards Act. [Mednick v. Albert Enterprises, Inc., 508 F.2d 297 (1975)]

Five criteria make up the economic reality test: degree of control exercised by the employer, workers' opportunity for profit or loss, degree of skill and independent initiative required, permanence of the work relationship, and how integral the work is to the employer's business. The Court found that one group of individuals, baggers at the Fort Belvoir Commissary, did not meet these criteria and, therefore, were not employees and not covered by the FLSA. [Dubois v. Secretary of Defense 161 F.3d 2 (1998); cf., 1 Op.O.L.C. 102 (1977); Baker v. Flint Engineering, 137 F.3d 1426 (1998)]

Individuals Not Covered

Even though the protection of the FLSA is extended to those who are employees, there are many persons who are not covered by this term. The first of these is an individual appointed under appropriate authority without compensation. Another is one who is identified as a trainee. A trainee is a person assigned to a federal activity primarily for training. The training is similar to that given in a vocational school or other institution of training even if it includes actual operation of the facilities of a federal activity. The training primarily benefits the individual. The trainees do not displace regular employees but may be supervised by them. The federal

activity derives no immediate benefit but may actually be impeded by the presence of the trainees. In addition, there may be no entitlement to a job with the federal activity when the training is completed. The trainee and the federal agency both understand that the trainee is not entitled to wages paid by the agency for the time spent in training. An individual who meets all of these conditions is a trainee and is not covered by the FLSA's provisions.

Additionally, volunteers are not considered employees under the FLSA. Volunteers are people who donate their services and the primary benefit accrues to the volunteer or to someone other than the agency, e.g., visitors to a National Park. There is no compensation agreement, and the services, if left unperformed, would not require an employee to be assigned to perform them. Such volunteers are not covered by the FLSA's provisions. Finally, a member of the uniformed services, e.g., an officer or enlisted member of the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, etc. do not meet the definition of employee under the FLSA. [5 CFR 551.103(b) and 551.104]

Also there are several groups of employees who are not covered by the FLSA, typically because of the provisions of another law. Those receiving law enforcement availability pay (LEAP) under 5 USC 5545a are exempt, i.e., Criminal Investigators and pilots of the Bureau of Customs & Border Protection who are law enforcement officers as defined in 5 USC 5541(3) [P.L. 104-19, July 27, 1995]. [5 CFR 551.213] Customs and Border Protection Officers who receive overtime pay or premium pay under section 267 of title 19, United States Code, for time worked also are excluded from coverage. These employees cannot receive premium pay under any other provision of law including the FLSA when they are paid under the title 19 provisions. [5 CFR 551.214]

Salary Based Coverage

With the revisions to the FLSA regulations covering federal employees issued in 2007, a new provision was added. It is designed to protect employees who are paid below a certain level. This provision extends FLSA coverage to all employees, including supervisory employees, whose annual rate of basic pay is less than $23,600. [5 CFR 551.203(a) (2007)]

In applying this provision, OPM defines the term *rate of basic pay* as the rate of pay fixed by law or administrative action for the position to which the employee is assigned. The annual rate of basic pay for this purpose includes (1) any applicable locality payment under Subpart F, Part 531, Title 5,

Code of Federal Regulations; (2) any applicable special rate supplement under Subpart C, Part 530, Title 5, Code of Federal Regulations; or (3) any similar payment or supplement under other legal authority. The rate of basic pay used is the one established before any deductions are made, and does not include additional pay of any other kind, such as premium payments, differentials, and allowances. [5 CFR 551.203(b) (2007)]

There are some exceptions to the salary based coverage. First, if the employee is affected by the temporary work provisions at 5 CFR 551.211, then the salary based coverage does not apply. Second, if the employee is affected by the foreign exemption at 5 CFR 551.212, then the salary based coverage does not apply. Third, if the employee is a professional engaged in the practice of law or medicine as prescribed at 5 CFR 551.208 (c) and (d), then the salary based coverage does not apply.

If one of these exceptions does not apply and the employee's annual rate of basic pay is less than $23,600, then the salary based nonexemption extends FLSA coverage to him or her. [5 CFR 551.203(a) (2007)]

Exercise: FLSA Coverage

For each scenario determine if the employee is covered by the provisions of the FLSA. Explain your answer.

1. David is employed in a nonsupervisory position as a WG employee in a warehouse at Fort Polk, Louisiana. Is David covered by the FLSA?

   ____ Yes ___ No

   Explanation:

2. Due to an emergency, Aaron is temporarily stationed in Italy for three full weeks. Is Aaron covered by the FLSA for the three weeks in Italy during which he performs no work in the United States.

   ____ Yes ____ No

   Explanation:

3. Stephen is employed in a nonsupervisory position as a GS-7 telecommunications equipment operator in the U.S.

Consulate Office in Frankfurt, Germany. Is Stephen covered by the FLSA?

____ Yes ____ No

Explanation:

4. Stephen travels to Maryland for two days of training on a piece of new communication equipment. After the training, he finished the work week at his regular job in Germany. Is Stephen covered by the FLSA during the work week in which he attends training in Maryland?

   ____ Yes ____ No

   Explanation:

5. Mary is employed as a nonsupervisory GS-4 clerk at the United States Mint in Denver. Is Mary covered by the FLSA?

   _____ Yes _____ No

   Explanation:

6. Joaquin is employed as a practicing attorney at an annual salary of $23,450. Is Joaquin covered by the FLSA?

   _____ Yes _____ No

   Explanation:

Exemption From Coverage

General Principles

As noted, the FLSA is an employee protection act and presumes that employees are covered. To be exempt, the employing agency must correctly determine that the employee clearly meets the requirements of one or more of the exemption criteria described in the regulations, or is specifically excluded by another statute. [5 CFR 551.201 and 551.202(a)]

The most important exemptions for federal compensation practice are the ones established by the Act itself, those for bona fide executive, administrative, and professional employees.

Exemption as a bona fide executive, professional or administrative employee is based on the nature of the work performed, the level of responsibility, and independence of action. It is important to remember that it is the duties actually performed by the employee on which the exemption must rest. Established position descriptions and titles may assist in making an initial FLSA exemption determination, but it is critical to remember that the final decision must be based on the work actually being performed by the employee. [29 USC 213(a)(1); 5 CFR 551.202(e) (2007); Ale v. Tennessee Valley Authority 269 F.3d 680 (2001)]

All employees who clearly meet the criteria must be exempted. However, exemptions must be construed narrowly and applied only to employees who are clearly within the terms and the spirit of the exemptions. If there is a reasonable doubt regarding whether or not an employee meets the criteria for exemption, the employee should be NONEXEMPT. [5 CFR 551.202(b) & (d) (2007)]

Federal agencies are directed to review and make coverage and exemption determinations on each employee. Agencies are required to use the regulations and supplemental OPM guidance when making these determinations[2]. [5 CFR 551.201 & 551.202(a)] The agencies also are directed to consider all exempt work performed by the employee, regardless of the

[2] While OPM is authorized to issue regulations and guidance for agencies to use in making exemption determinations, the courts have emphasized that such guidance must be consistent with the Secretary of Labor's implementation of the FLSA [e.g., AFGE v OPM 821 F.2d 761 (1987)]. Also, the courts have said that DOL regulations, opinion letters, and other interpretative material may be used to supplement OPM's guidance because it provides more detailed definitions, and because it is of a much earlier vintage and more courts have had the opportunity to construe it [e.g., Adam v U.S. 26 Cl.Ct. 782 (1992)]. [5 CFR 551.101(c) (2007)]

category in which it may fit, when making coverage and exemption determinations. [5 CFR 551.202(f) (2007)]

When an employee challenges an employer's exemption determination, the burden of proof always lies with the employer, i.e., the agency. If the agency asserts an employee is exempt, then the agency must be able to demonstrate conclusively why the assertion is true. [5 CFR 551.202(c)]

The courts have repeatedly emphasized that the burden of proof lies with the agency. For example, in Roney v U.S. the court held that when "...the employer claims that an employee is exempt from overtime provisions under the FLSA, the burden falls on that employer to prove that the employee falls within the claimed exemption." [790 F.Supp. 23 (1992)] In addition, the courts have said that the employer must show, by clear and affirmative evidence, that the employee meets every requirement of the regulation before the employee will be deprived of the Act's protection. See, for example, Mitchell v Williams 420 F.2d 67 (1969) and Clark v J.M. Benson & Co. 789 F.2d 282 (1986).

The regulations make two additional points. First, the most obvious criteria is not necessarily the one under which a position can be exempted. For example, an engineering technician that does not meet the criteria for exemption as a professional employee may be performing work that qualifies for exemption as an administrative employee. Second, a position may be exempt even when it does not clearly fit within a single exemption category. For example, an employee may perform a variety of functions, no one of which constitutes the primary duty; or the employee's primary duty may involve two categories which are intermingled and difficult to segregate. If the agency can demonstrate that the work as a whole clearly meets the criteria in one or more of exemption categories, then the position can be designated exempt. [5 CFR 551.202 (g) & (h) (2007)]

Because the burden of proof lies with the agency, it is critical for an agency to keep good records. When the exemption determination is made at the time the position is classified, an explanation of how the determination was made should be included in the position evaluation report. Compensation, time and attendance reports, and related pay information should be maintained because of frequent changes in the provisions and the proliferation of employee claims. See the chapter below for record keeping requirements. [5 CFR 551.402(b)]

Exemption Terms Defined

A position must meet certain requirements to be exempt. These requirements are discussed in the following pages. Some of the terms used in the exemption requirements are defined here. The purpose of the definitions is to clarify the meanings of the terms because the meanings differ from customary federal usage and, normally, do not carry over into other federal human resources functions.

Directly and Closely Related Work

This concept is important when determining whether or not an employee meets one or more of the sets of exemption criteria. It reminds us to look at all of the work performed by the employee being reviewed, and to use both the work that is clearly exempt, and work that is *directly and closely related* to the performance of exempt work and that contribute to or facilitate performance of exempt work when making an exemption determination.

Work that is directly and closely related may include tasks that typically are considered nonexempt tasks as long as such tasks arise out of and are integral, essential or indispensable to performing the exempt duties. Tasks that are typically considered nonexempt can only be considered directly and closely related to the exempt work if such tasks must be performed by the exempt employee in order to perform his or her exempt work. For example, they may be physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. [Cf., 29 CFR 541.703]

Examples of work typically considered nonexempt but can be considered directly and closely related may include recordkeeping; maintaining various records pertaining to workload or employee performance; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work which both supervisors and workers are required to perform also meet the requirement to be directly and closely related to the primary duty of the position. An example of the latter is physical training during tours of duty for firefighting and law enforcement personnel. [See, for example, Adams v. U.S., 36 Fed.Cl. 91 (1996)]

Work is *not* directly and closely related if the work is only remotely related to or completely unrelated to performing the exempt duties. This means that work which is completely different from and unrelated to the exempt duties, and/or does not contribute to or facilitate performance of the exempt work

the employee performs cannot be considered directly and closely related. For example, analytical work on a project assigned to an employee because of his subject matter expertise, and is unrelated to the supervisory responsibilities of his position would not be considered to be directly and closely related to the exempt supervisory work.

Determining what work qualifies as directly and closely related is best decided on a case by case basis. To aid us in making these determinations, the regulations provide examples of typically nonexempt work some of which would meet the requirement to be directly and closely related, and some of which would not meet this requirement.

The first example is a supervisor who spot checks and examines the work of his or her subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory. Such spot checking is directly and closely related to the supervisory functions so long as the checking can be distinguished from or is different from the work ordinarily performed by a nonexempt inspector. If such work contributes to the effective supervision of the assigned staff or the smooth functioning of the organizational unit supervised, then it can be considered directly and closely related to the supervisory function and counted with the exempt work when making a decision on the coverage or exemption of the position. [5 CFR 551.104, definition for *directly and closely related* subparagraph 1 (2007)]

The second example is a supervisor who sets up a machine or adjusts a machine for a particular job. Especially in small plants, or where such work requires special skills not possessed by production employees in the occupation and the volume of such work does not justify hiring a specially trained employee to perform, such setup or machine adjustment tasks performed by an executive employee are considered directly and closely related to the exempt work. In contrast, when such setup or machine adjustment work typically is performed by the same employees who operate the machine, this work is part of the production operation and is not exempt.

The regulations go on to say that tasks that recur infrequently or are one-time tasks which are impractical to delegate because they would disrupt normal operations or take longer to explain than to perform, and are performed by an executive or supervisory employee are considered directly and closely related to the exempt work. [5 CFR 551.104, definition for *directly and closely related* subparagraph 2 (2007)]

The third example is that of a management analyst. This requires:

- Collecting and organizing information;
- Analyzing and evaluating information, and developing conclusions; AND
- Preparing a record of findings and conclusions or recommendations.

Such tasks as taking extensive notes recording the flow of work and materials through an organization that is part of collecting information, and personally using a computer to type a report and create a proposed table of organization that is part of report preparation, alone, can be NONEXEMPT tasks. Think of the work that Management Assistants perform. But when such tasks are performed in order to analyze the data and make recommendations (which is exempt work) then such duties can be counted as directly and closely related to the exempt work and can be used to support exemption. [5 CFR 551.104, definition for *directly and closely related* subparagraph 3 (2007)] See the other examples included in the 2007 revision to the regulations for additional assistance in making this determination about whether or not work is directly and closely related to the exempt work.

Discretion and Independent Judgement

Generally, for an employee to be exempt from coverage by the FLSA, she or he must exercise discretion and independent judgement in carrying out his or her executive, administrative or professional functions. In earlier versions of the regulations, this requirement was clearly identified as one of the tests to be passed in order to qualify for exemption. In the final regulations released in 2007, the use of discretion and independent judgement is extensively discussed in the requirements for being an exempt administrative employee, but only briefly touched on when discussing exempt executive and exempt professional work.[3] The basic characteristics of the exercise of discretion and independent judgement are described here to assure proper consideration of this element when making exemption determinations.

Typically this involves: comparing and evaluating possible courses of conduct; interpreting results or implications; and

[3] OPM noted that the requirement to exercise discretion and independent judgement is mentioned in the definition of the term *primary duty.* In addition, the definition for the term *management* illustrates how this judgement is applied by an exempt executive employee. [72 Fed.Reg. 52753, 17 September 2007, @ 52757]

independently acting or making a decision after the various possibilities have been considered.

Making a decision about whether or not an employee exercises discretion and independent judgement must consider all of the facts involved in the particular employment situation in which the question arises. To determine that an employee exercises discretion and independent judgement, the work should exhibit the following characteristics.

- Must be of sufficient complexity to require the discretion and independent judgement in determining the approaches and techniques to be used and in evaluating results.

  This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or using knowledge of established procedures, precedents, or other guidelines that specifically govern the employee's action.

  The use of manuals, guidelines or other established procedures do not, by themselves, prevent exempting a position. When such materials contain or relate to highly technical scientific, legal, financial or other similarly complex matters and can be understood or interpreted only by those with advanced or specialized knowledge or skills, then the work can qualify for exemption. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not prevent an employee from being exempt. [5 CFR 551.206(e) & (f) (2007)]

- Must have sufficient authority or power to make an independent choice free from immediate direction or supervision. This does not mean that the employee's decisions have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgement may consist of recommendations for action rather than actually taking action. The employee can be exercising discretion and independent judgement even if the decisions are occasionally revised or reversed after review. [5 CFR 551.206(c) (2007)]

  This precludes exempting trainees who are in a line of work that requires discretion but who have NOT been given authority to decide discretionary matters independently.

- Must involve matters of significance. This refers to the level of importance or consequence of the work

> performed. The phrase ``matters of significance'' refers to the level of importance or consequence of the work performed.
>
> The courts have stated that when determining whether or not an employee exercises discretion and independent judgement with regard to matters of significance, two points must be considered: (1) the types of activities, and (2) the importance of the work, e.g., Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1125-26 (2002). One court emphasized that the work must be significant, substantial, important, or of consequence [e.g., Piscione v. Ernst & Young, L.L.P., 171 F.3d 527, 535-43 (1999)] in order to support exemption. Another court went so far as to say that the types of activities or the nature of the work was the critical point in this inquiry [Clark v. J.M. Benson Co., Inc. 789 F2d 282, 288 (1986)].
>
> The regulations go on to remind us that the requirement to exercise discretion and independent judgement relating to matters of significance is not met merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money may cause the employer great financial loss through the employee's neglect; an employee who operates very expensive equipment may cause the employer great financial loss through improper performance of his work. Neither, however, exercise discretion or independent judgement on matters of significance merely because great financial loss may occur. [5 CFR 551.206(g) (2007)]

When the characteristics described in this definition are present in a position, then it is appropriate to indicate that the employee exercises discretion and independent judgement with regard to matters of significance. This will support exemption of the position. When these characteristics are not present, it will be more difficult to demonstrate that the employee exercises discretion and independent judgement with regard to matters of significance, which, in turn, will make it more difficult to support exemption.

GS Grade Level Equivalents

In the past, OPM and its predecessor provided guidance on how to find the equivalent GS grade for a job in another white collar system [see Attachment to FPM Letter 551-7, dated 1

July 1975, at B.4.].[4] In the final regulations released in September 2007, OPM declined to provide guidance on determining the GS equivalent to positions in pay banded systems. The final regulations permit each agency to determine which of its bands is equivalent to a particular GS grade level because agencies generally establish their own pay banding schemes. Thus, OPM provides no generic guidance for determining the GS equivalent in an agency's pay banded system. [72 Fed.Reg. 52753, 17 September 2007 @ 52757]

Primary Duty

Normally, this is a duty which constitutes the major part (over 50%) of the employee's work.

A duty that occupies less than 50% of the employee's time (alternative primary duty) can be credited as the primary duty for exemption purposes provided that the duty has all three of the following characteristics.

- Constitutes a substantial, regular part of the work assigned and performed. AND
- Is the reason for the existence of the position. AND
- Is clearly exempt in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgement, and the significance of the decisions made. [5 CFR 551.104 (2007)]

The regulations indicate that when all three of the preceding characteristics are present, the use of a duty that occupies less than fifty percent of the employee's time can be credited as the employee's primary duty.

80% Percent Test

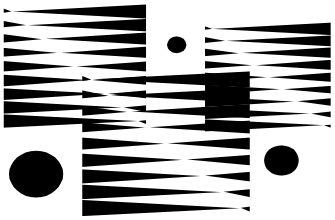
The regulations issued since 1974 clearly spelled out this requirement. It was applied primarily to employees in lower graded positions, and established a requirement for such employees to spend 80% or more of the work time in a representative workweek on exempt and closely related work.

OPM stated in its 2007 release that controlling "…case law made retention of the 80 percent requirement unsupportable. Federal courts have found many employees to be exempt who spent less than 50 percent of their time performing exempt

[4] Typically, this involved comparing the level of difficulty and responsibility of the employee's duties with the levels of difficulty described in the OPM classification standard for a comparable GS occupation.

work." The regulations list several cases in which courts found employees performing exempt work for as little as 20 percent of the time to meet the exemption requirements. [72 Fed.Reg. 52753, 17 September 2007]

However, at least two federal court decisions have spoken in favor of the 80 percent test especially in the situations involving the exemption of supervisory positions. [Amos v. U.S. 13 Cl.Ct. 442 (1987); Adams v. U.S. 36 Fed.Cl. 91 (1996)] While the 80 percent test has been swept aside, defense of positions identified as exempt probably will be stronger in proportion to the amount of time spent on exempt and closely related work.



Executive Exemption Criteria

An executive employee is one whose primary duty is management of a federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function), and who:

- Customarily and regularly directs the work of two or more other employees; AND
- Has authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

[29 USC 213(a)(1), 5 CFR 551.205(a)]

Application of Executive Exemption Criteria

When applying the Executive Exemption Criteria, a supervisory or managerial job must meet the regulatory requirements established above in order to be exempt. To assist in determining if the work meets these requirements, the following material examines many of the phrases that compose the criteria in the order they appear.

Primary Duty

A definition for the phrase *primary duty* is included in the preceding section of this chapter, "Exemption Terms Defined."

As noted, the supervisory work must constitute the primary purpose for which the position is established. A federal court looking at the pre-2007 regulations that included the same phrase responded to the question: when is management the primary duty or primary purpose of the position and, therefore, able to support exemption? The case involved lieutenants and sergeants of the Uniformed Division of the Secret Service. The court found that individuals who spend a substantial amount of time engaged in the same kind of work as lower graded employees were not exempt. The court stated that "...it strains reason to conclude that they are engaged in...general management...of the operations...." Because the primary purpose of these positions were not management of the organization's operations, the court decided the employees did not meet this primary duty requirement and, therefore, were not exempt from the FLSA. [Amshey v. U.S. 26 Cl.Ct. 582 (1992)]

Also note that OPM reminds us that the definition of the term *primary duty* includes the requirement to exercise discretion and independent judgement, which is also discussed in the "Exemption Terms Defined" section of this chapter.

Management Defined

The term "management," as used in the executive exemption criteria, covers a supervisor's or manager's responsibilities in three basic areas: human resources management, work management, and organizational management. Each one of these responsibilities is examined in the following material.

HUMAN RESOURCE FUNCTIONS – to meet one portion of the definition of the phrase "manage an organization," an employee must be authorized to take the following kinds of personnel actions or make recommendations and suggestions that are given particular weight regarding such actions as interviewing, selecting and training employees; setting and adjusting their rates of pay and hours of work; directing the work of assigned employees; maintaining production or financial records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; and disciplining employees. This is in addition to the requirements spelled out in the exemption criteria to hire, fire and advance employees.

WORK MANAGEMENT FUNCTIONS – to meet a second portion of the definition of the phrase "manage an organization," an employee must be authorized to take the following kinds of work management actions or make recommendations and suggestions that are given particular weight regarding such actions as planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; and providing for the safety and security of the employees or the property.

ORGANIZATION MANAGEMENT FUNCTIONS – to meet the third portion of the definition of the phrase "manage an organization," an employee must be authorized to take the following kinds of organization management actions or make recommendations and suggestions that are given particular weight regarding such actions as planning and controlling the budget; and monitoring or implementing legal compliance measures.

Recognized Organizational Unit

This phrase means an established and defined organizational

entity which has regularly assigned employees and for which a supervisor is responsible for planning and accomplishing a continuing workload. A recognized organizational unit must have a permanent status and a continuing function. As an example, the definition presents a large human resources department that might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and recruitment and placement with each subdivision having a permanent status and function.

This definition is intended to distinguish or differentiate between supervisors and leaders of temporary groups formed to perform assignments of limited duration. It also is intended to differentiate between a mere collection of employees assigned from time to time to a specific job or series of jobs, and a unit with a permanent status and a continuing function. [5 CFR 551.104 (2007)]

The U.S. Court of Appeals for the Federal Circuit when looking at the pre-2007 regulations that included the same phrase offers two questions to help in making a decision in this area. They are:

- Is there a unit recognized by the organization, established and defined by the organization with regularly assigned employees? and,
- Does the purported executive manage or supervise the recognized organizational unit?

In a case involving cook foremen, a court emphasized the importance of the supervisor being in charge of a recognized organizational unit with a continuing function. When the organization is a standard federal unit, such as division, branch, section or unit, it usually is quite easy to be sure the supervisor meets this requirement. If both the supervisor and the employees rotate, as in this case, then it may be more difficult to identify a recognized organizational unit. The court found the prison's Food Service Division was the established organization. However, the court also acknowledged that the cook foremen, who were responsible for directing the work of a group of inmates in one of four identified areas - baking, food preparation, food service, cleaning - within the Food Service Division qualified as supervisors of recognized organizational units. This was because each of these four areas had a continuing function and was recognized by the organization. [Amos v U.S. 13 Cl.Ct. 442 (1987)]

The definition in the regulations goes on to say that a recognized organizational unit may move from place to place. The mere fact that the employee works in more than one

location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized organizational unit with a continuing function in the organization.

A federal court provided us with an example of such a mobile group of employees. The case involved employees who supervise teams moving nuclear and other dangerous or sensitive cargoes across the country. In making its determination, the court favorably cited a DOL regulation that makes a similar statement.

"...the unit supervised need not be physically within the employer's [premises] and may move from place to place, and that continuity of the same subordinate personnel is not absolutely essential...." [29 CFR 541.103(c) (2006)]

A permanently assigned staff in a fixed location makes it easier to identify a recognized organizational unit. While this is the situation most federal practitioners will find, it is not absolutely required. If all of the indicators are present to show that a person is in charge of a unit recognized by the agency and that the unit has a continuing function then the employee will meet this requirement. [Baca v U.S. 29 Fed.Cl. 354 (1993); Adams v. U.S. 350 F.3d 1216 (2004)]

The definition goes on to say that continuity of the same subordinates is not essential to the existence of a recognized organizational unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized organizational units, if other factors are present that indicate the employee is in charge of recognized organizational unit with a continuing function.

In closing this discussion, perhaps the final word should go to the Federal Claims Court, which in 1999 emphasized that where a recognized organizational unit with an ongoing function cannot be identified exemption from FLSA coverage will be difficult to support. The Court was looking at a claim brought by Supervisory Border Patrol Agents who were assigned a group of Border Patrol Agents and a field duty area that varied from day to day. This constantly changing group of SBPA and BPAs was unnamed by the agency. As a result, the Court found the SBPAs did not meet the requirement to be in charge of a recognized organizational unit with a continuing function. [Adams v. U.S. 44 Fed.Cl. 772 (1999)]

Regularly and Customarily Directs the Work of Two or More Other Employees

The regulations provide some advice on applying this phrase to specific situations. The first advisory discusses one situation that will not meet this requirement. This is a deputy or assistant manager of a recognized organizational unit who actually supervises two or more employees only in the absence of the manager. Someone responsible for supervising two or more employees only in the absence of someone else does meet the requirement to regularly and customarily direct the work of other employees.

The second advisory discusses employees who are assigned to an organizational unit, but who work on a variety of assignments or teams. The regulation reminds us that in such situations, an employee cannot be credited more than once for different executives. This advice is focused on organizations that use matrix management where a leader or supervisor may oversee work in several product or service lines, but where the leader does not have full operating authority for all the employees she or he directs. Thus, the shared responsibility for supervising the same two or more employees in the same organizational unit does not meet the requirement to customarily and regularly direct the work of two or more other employees.

In contrast, where an employee works for one supervisor of a recognized organizational unit for four hours and four hours for the supervisor of another recognized organizational unit, she or he will be credited as a half-time employee for each supervisor.

In a case involving cook foremen at federal correctional institutions, a court spoke about another issue of importance: the need to supervise federal employees. The court found that to support exemption the workers being supervised must be employed in an executive agency, as a civilian in a military department, in a Nonappropriated Fund Instrumentality of an executive agency or military department, or in a unit of the legislative or judicial branch. The worker also must be engaged in an activity that benefits the agency. The court distinguished the inmates the cook foremen at federal correctional institutions supervised from true employees: the inmates were convicted criminals incarcerated in a penitentiary. If a supervisor does not manage a group of federal employees, as defined here, then they fail a critical test and cannot be exempt. [Amos v U.S. 13 Cl.Ct. 442 (1987)]

In closing the discussion on the phrase customarily and regularly directs the work of two or more other employees it is appropriate to ask, how often must one do something to meet the standard of customarily and regularly? Both the regulations and the courts indicate that this phrase means a frequency which may be greater than occasional but which may be less than constant. Tasks or work performed customarily and regularly includes work normally and recurrently performed every workweek. It does not include isolated or one time tasks. [5 CFR 551.104 (2007); Baca v. U.S. 29 Fed.Cl. 354 (1993); Amos v. U.S. 13 Cl.Ct. 442 (1987)]

Particular Weight

The criteria for exemption as a bona fide executive includes the requirement to hold authority to make personnel management decisions for assigned employees or to make suggestions and recommendations on personnel management actions that are *given particular weight*. Three criteria to be used in determining whether or not an employee's suggestions or recommendations are *given particular weight* and, therefore, would help to support exemption as an executive employee are discussed in the regulations.

- Is it part of the employee's job duties to make such suggestions and recommendations?
- How often does the employee make such suggestions or recommendations or how often are they requested? and,
- How often are the employee's suggestions or recommendations relied upon or acted on?

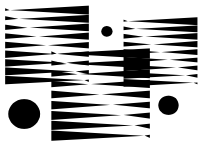
While the criteria are not exhaustive, considering them should aid in determining whether or not the weight given to the supervisor's recommendations should help in determining if they support exemption. Generally, the executive's suggestions or recommendations must pertain to employees whom the executive customarily and regularly supervises.

The employee may meet the requirement of having suggestions and recommendations given particular weight even if a higher level manager's recommendation carries more weight or is more important, and even if the employee does not have authority to make the final or ultimate decision as to the employee's status change. However, an employee does not meet the requirement for suggestions and recommendations being given particular weight if she or he makes only an occasional suggestion about a co-worker's status change. [5 CFR 551.205(b) (2007)]

Directly and Closely Related Work

Finally, when making a determination about whether or not an employee meets the Executive Exemption Criteria that all work performed by the employee being reviewed must be examined. In reaching a decision about exemption both the work that is clearly exempt, and work that is *directly and closely related* to the performance of exempt work and that contributes to or facilitates performance of exempt work are to be considered. The definition, provided earlier in this chapter, discusses what kind of work qualifies as directly and closely related to exempt work and what cannot be considered directly and closely related. It also provides some specific examples of tasks directly and closely related to exempt executive work.

See the examples included in the discussion about the term 'directly and closely related' given in the Exemption Terms Defined portion of this chapter, above.



COVERAGE EXERCISE I

GENERAL SUMMARY

The purpose of this position is to oversee and direct the work of a group of assigned Customs & Border Protection Officers (CBPOs), to perform a wide range of complex advisory and coordinating duties, and to carry out other specialized assignments involving highly sensitive inspection and control issues.

MAJOR DUTIES & RESPONSIBILITIES

1. Leads and trains an assigned group of journeyman CBPOs in both cargo and passenger processing operations. Assesses the on-going activities in the assigned station(s) to insure that the work is carried out in a timely, expeditious and appropriate manner. Plans and coordinates actions with other functional areas (e.g., classification and value, investigations) in applying intelligence information, resolving mutual problems, interpreting requirements, etc.

2. Provides daily assignments to members of the group, balances workload among them, identifies areas of special emphasis, and assures that work is done properly. Approves actions involving sensitive and unique conditions (e.g., VIPs or other people requiring special handling or determining the necessity for a pat-down search). Detains and makes arrests, if warranted. Provides input to performance appraisals, and may recommend disciplinary and performance improvement actions where needed. Performs a wide range of tasks, such as assuring coverage of emergency/unscheduled overtime, approving leave requests, completing forms for funds collected, etc., in the absence of the supervisor. Makes informal recommendations regarding promotions, reassignments, performance recognition, and similar personnel actions.

3. Provides advice and assistance to assigned CBPOs in applying a wide variety of procedures and methods to widely diversified inspection and control activities, such as interpretation of a point of law, proper procedure, limitation on a search, propriety of continuing a search. Arranges for formal training or provides both formal/informal training to assigned CBPOs on changes in procedures, new methods and techniques, etc.

4. Handles sensitive and troublesome situations, and resolves problems between a wide variety of people, such as passengers, shippers, terminal operators, and inspectional personnel. Defuses situations that could result in disputes between CBPOs and the shipping and traveling public by explaining customs laws, regulations and procedures, and reinforcing the right to and necessity of carrying out inspections. Facilitates the movement of cargo and passengers through the inspectional process.

5. Plans and carries out projects to explore and resolve major problems in operations and enforcement activities, or to develop and install new procedures. Studies may involve identifying impact on personnel, monetary and other resources. May study trends or patterns in problems, to determine if proper techniques and methods were used, and to develop guidance on proper techniques and methods to avoid such problems. May perform cost study/analysis to develop accurate estimates of cost per passenger, cost of overtime, affect on security, etc., of proposed changes in procedures or operations.

FLSA STATUS ____Exempt EXPLANATION

____Nonexempt

COVERAGE EXERCISE II

GENERAL SUMMARY

The purpose of this position is to directly supervise a team of senior, journeyman and trainee Customs & Border Protection Officers (CBPOs) assigned to the Inspection Section in the enforcement of customs and other federal laws regarding the importation and exportation of goods. The Section's work affects the efficiency and effectiveness with which the homeland is protected, revenue due the United States is collected and protected, contraband is intercepted, and the homeland is protected.

MAJOR DUTIES & RESPONSIBILITIES

1. Serves as a key link in the management chain and acts as the focal point in communicating, promoting and encouraging adherence to policies and achievement of management objectives to assigned CBPOs. Conveys suggestions, ideas, and opinions from employees to higher level management. Promotes efficient and economical operations, and recommends changes to accomplish this. Is responsible for the quality and quantity of work produced.

2. Actively directs a moderate sized workforce in the protection of the homeland, enforcement of laws and regulations, and the facilitation of the arrival and departure of passengers, cargo/merchandise, and vessels/vehicles. The work requires balancing the potential effects on the program of a positive enforcement action against the negative effects of over-zealousness. Makes on the spot decisions to mitigate or remit fines, penalties and forfeitures of seized items within delegated authority.

3. Plans the work of the organization to be accomplished in the near and intermediate term by assigned CBPOs, sets priorities, and prepares schedules. Anticipates and solves problems involving day to day operations of the unit. Assigns work to subordinates based on priorities, selective consideration of the requirements and difficulty of the work, and the capabilities of the employees. Reviews work products and accepts, amends or rejects the work.

4. Communicates to each employee the performance standards and critical elements of the position, evaluates performance, and recommends recognition, reward or removal of employees, as performance warrants. Identifies developmental and training needs, and provides or schedules appropriate training. Gives advice, counsel and instruction to subordinates on both technical and administrative matters.

5. May interview candidates for vacant positions in the organization. Recommends appointment, promotion or reassignment of assigned employees. Hears and resolves complaints, and refers formal grievances to the supervisor. Effects disciplinary measures such as oral admonishments, reprimands, and suspensions up to 14 days. Is responsible for carrying out EEO policies and communicating support of these policies to subordinates.

FLSA STATUS ____Exempt **EXPLANATION**

____Nonexempt

COVERAGE EXERCISE III

GENERAL SUMMARY

The purpose of this position is to oversee, direct and lead the preparation and service of meals in a federal correctional institution. Supervises the work of between five and thirty inmate food service workers in one of four areas of responsibility within the kitchen, i.e., baking, meal preparation, food service, and cleaning up kitchen and dining room. Rotates between the areas, on a daily basis, and superintends the work of the of the assigned food service workers. Is responsible to the Food Service Administrator for the quantity and quality of work done, and works within general instructions established by the Administrator.

MAJOR DUTIES & RESPONSIBILITIES

1. Assigns various tasks within each area of responsibility, e.g., baking, to the workers based on skills and numbers of inmates available. Determines which inmate workers will perform which tasks, and directs and supervises the actual performance of these tasks. Follows established menus or other work plans established by the Administrator. Assures work is performed as required, and revises work in progress. Ensures that material from storage is delivered to work sites.

2. Demonstrates equipment operation and instructs inmate workers in methods for performing various tasks within the area of responsibility. Assures a complete understanding of methods and techniques to be used, in order to assure inmate worker safety, and proper preparation and service of meals. Explains work requirements, methods and procedures, as needed.

3. Motivates inmate workers. Records the daily and monthly hours of assigned inmates. Using available guidelines, recommends when workers should move into another or higher pay grade. Completes monthly job evaluation ratings and progress reports for inmate workers. Can report uncooperative behavior or rule infractions, and recommend disciplinary action for such breaches. Recommends reassignment out of the food preparation division if performance and/or behavior is unsatisfactory.

4. Picks up keys, a radio and a body alarm upon checking into the institution and reports to the food preparation area. Is responsible for taking appropriate breaks during slow periods or after completion of meal preparation and prior to meal service. Remains alert at all times in order to watch inmates, maintain control, lock and unlock doors, and generally assure that workers carry out assigned tasks and work within established rules.

5. Spends some time in performing inmate worker functions, including demonstrating the operation of equipment and the methods to be used.

FLSA Status _____ Exempt EXPLANATION

_____ Nonexempt

Administrative Exemption Criteria

An administrative employee is an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and whose primary duty includes the exercise of discretion and independent judgement with respect to matters of significance. [29 USC 213(a)(1); 5 CFR 551.206 (2007)]

Application of the Administrative Exemption Criteria

When applying the Administrative Exemption Criteria, an employee must meet the regulatory requirements established above in order to be exempt. To assist in determining if the work meets these requirements, the following material examines many of the phrases that compose the criteria in the order they appear.

Primary Duty

The definition of this term is in the section "Exemption Terms Defined," earlier in this chapter. Typically, this is work that occupies 50 percent or more of the employee's time, but work that takes less than 50 percent of the employee's may be the primary duty if it meets the requirements discussed in the definition.

Office or Non-Manual Work

OPM does not define the phrase "office or non-manual work." In addition, the U.S. Court of Federal Claims has stated the federal courts have not defined the term "non-manual" work in a consistent manner. [Aamold v. U.S. 39 Fed.Cl. 735 (1997)]

The Department of Labor (DOL) explains that this phrase typically includes those considered to be "white-collar" employees. The DOL regulations go on to say that the performance of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with exemption. If the employee performs so much manual work that he cannot be said to be basically a ``white-collar'' employee, then he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment.

Thus, the DOL regulations state, it is obvious that employees who spend most of their time in using tools, instruments,

machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be a bona fide administrative employee. [29 CFR 541.203 (2004)]

In a case decided prior to the 2007 regulations that involved Deputy U.S. Marshals assigned to federal courts protecting jurors, judges and witnesses, a court found the employees did not meet the non-manual work test. It found the Deputy Marshals were required to possess manual skills such as physical strength and stamina, and be involved in running, bending and climbing, and in lifting and carrying heavy objects. The court also found that the work was not performed in a typical white collar office, but included a wide variety of potentially dangerous and physically stressful situations. As a result, the work was declared to be manual in nature and, therefore, nonexempt. [Roney v. U.S. 790 F.Supp. 23 (1992)]

Similarly, in another pre-2007 case involving Senior Border Patrol Agents a court found the employees did not meet the non-manual labor test. They spent a great deal of time in the field, and there is a frequent and recurring need to walk, run over rough terrain, stoop, bend, crawl in restricted areas such as culverts, climb fences and freight car ladders, and protect one's self and others from physical attack. As a result, the work was found to be predominantly manual labor and not to meet the requirement for predominantly non-manual work. [Adam v U.S. 26 Cl.Ct. 782 (1992)]

However, OPM has recognized that many inherently exempt positions entail substantial physical demands and require manual skills. Examples cited include wildlife biologist, foresters, musicians, artists and physicians. The physical efforts, however, are ancillary to and do not change the intellectual or creative nature of the work at the heart of those occupations. [OPM decision # F-0855-12-01, dated 6 August 1998; and, # F-0810-12-01, dated 4 February 1998]

Management or General Business Operations

The regulations issued by OPM in 2007 do not contain a definition of the phrase "management or general business operations." However, pre-2007 materials contained some examples of the kinds of work that are involved in typical management or general business functions. [Attachment to FPM Letter 551-7, dated 1 July 1975, at B.1.h.; 5 CFR 551.104 (1998)]

This material indicated that such employees:

- Provide expert advice in specialized subject matter fields such as that provided by management consultants or systems analysts.
- Assume facets of the management function such as safety management, human resources management, or budgeting and financial management.
- Represent management in business functions such as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments.
- Provide supporting services such as ADP, communications, or procurement and distribution of supplies. Providing a supporting service permits the agency to pursue its basic task while not directly engaging in that task [Campbell v US Air Force, 755 F Supp 893 (1990)].

This list is not exhaustive.

It should be noted that the size of the organization and the volume of work may require the employment of a large number of such staff employees. It may also require their presence at many levels within the organization. As a result many employees may perform identical work or perform work of the same relative importance, and the work each performs may be limited to a segment of the organization such as an office, division, region or the like. Neither the organizational level nor the number of employees performing identical or similar work changes such support or staff functions into a production function. However, to meet this element, each employee's work must involve substantial discretion on matters that are important enough that the employee's actions or decisions have a noticeable impact on the organization's effectiveness in order to be exempted. [5 CFR 551.206(d) (2007); e.g., Piscione v. Ernst & Young, 171 F.3d 527 (1999)]

For example, independent agencies or agency components often provide centralized human resources, information systems, procurement and acquisition, or financial management services as support services to other agencies or agency components. The regulations state that this does not change the inherent administrative nature of the work performed to line or production work. Similarly, employees who develop, interpret, and oversee agency or government-wide policy are performing management support functions. Some of these activities may be performed by employees who would otherwise qualify under another exemption category. [5 CFR 551.206(h) (2007)]

In an earlier version of the regulations, performing work that was a supporting service would sustain exemption from the FLSA. [5 CFR 551.206 (1998)] This phrase is included only once in the 2007 regulations. [5 CFR 551.206 (2007)] A list of earlier federal court decisions regarding exemption of a position as a supporting service under the Administrative Exemption Criteria is provided for your convenience. [Adams v U.S. 27 Fed.Cl. 5 (1992); Palardy v Horner 711 F.Supp. 667 (1989); Hickman v U.S. 10 Cl.Ct. 550 (1986); Campbell v U.S. Air Force 755 F.Supp. 893 (1990); vacated on other grounds, #92-1213 U.S. Court of Appeals for the Federal Circuit, 23 April 1992 (unpublished decision). With the change in the 2007 regulations, positions that were characterized as performing a supporting service should be closely examined to assure that they continue to meet all of the revised criteria for exemption.

Formulate, Affect, Interpret, or Implement Management Policies or Operating Practices - The 2007 regulations define the phrase *formulate, affect, interpret, or implement management policies or operating practices*, which is identified as a characteristic of exempt administrative work at 5 CFR 551.206(b)(1) (2007).

Management policies or operating practices vary in breadth and impact. They range from broad national goals that are expressed in statutes or Executive Orders, to specific objectives and practices of a field office or a local installation. Thus, an employee can be involved in formulating, affecting, etc., management policies or operating practices at the national level, at the local level, or at an intermediate level in the agency and meet this requirement.

Formulating, affecting, interpreting or implementing management policies or operating practices can be accomplished either directly by making policy decisions, or indirectly by developing and recommending proposals acted on by others. Employees who make policy decisions often are managers. Employees who develop and recommend policy options often are program analysts, management analysts, or other kinds of specialists who analyze data and draw conclusions which lead to an agency establishing or modifying agency policy.

The work of employees who significantly affect the execution of management policies may involve obtaining compliance with such policies by other individuals or organizations, either within or outside the federal government. Affecting the execution of management policies also may involve making significant determinations furthering the operation of programs and the accomplishment of program objectives.

Typically, administrative employees who formulate, affect, interpret or implement management policies or operating practices perform one or more phases of program management. Phases of program management include planning, developing, promoting, coordinating, controlling or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls. [5 CFR 551.104]

The courts have made decisions prior to release of the 2007 regulations that help in understanding this phrase. In a case brought by Senior Border Patrol Agents, the court discussed work that is not involved in formulating, affecting, interpreting or implementing management policies or operating practices.

Obtaining compliance with immigration laws clearly does not involve making agency policy, the court found. Such work also is not involved in implementing management policies and operating practices. Rather it is routine law enforcement work involved in obtaining compliance with the nation's immigration laws by preventing and detecting illegal entry of aliens into the country.

Thus, the court differentiated between implementing policy, and executing policy. Executing policy is usually accomplished by front line employees who are doing the line work of the agency while those who are involved in implementing management policies perform management or staff functions and are not front line employees.

The court indicated that part of the problem in applying the administrative exemption criteria may be traced to the "...difference between 'affect' and 'effect.' Presumably every employee 'effects' the execution of policy by carrying it out. But it is only those positions that 'significantly affect,' i.e. influence or change, the policy that are exempt. Those are the positions whose incumbents...plan, develop, promote, coordinate, and/or supervise others. Front-line production-type employees do not fit within this category." Thus, front line employees who are executing agency policies or programs are not involved in formulating, affecting, interpreting or implementing agency policy. As a result, such employees cannot meet the primary duty requirement of the administrative exemption criteria. [Adam v U.S. 26 Cl.Ct. 782 (1992)]

In another case, the court found that the GS-9 and GS-11 Investigators could not be exempted under the administrative criteria because their primary duty was investigations, i.e., the production or line work of their agencies. However, the court

found that most GS-12 and GS-13 Investigators were exempt because they were involved in affecting, implementing and interpreting management policies and operating practices.

The GS-12s obtain others' compliance with the operating programs of the agency by planning and directing investigations. In addition, the GS-13 work generally involved extensive and elaborate planning and coordination to resolve complex jurisdictional problems involving other agencies. The GS-13 also devises novel investigative approaches, techniques and policies. While such administrative work may take up less than 51% of the Investigator's time, it is a substantial, regular part of these positions, governs the classification of the positions, and is clearly exempt work in terms of the basic nature of the tasks, the discretion used, and the significance of the decisions made. As a result, the court found most of the GS-12 and GS-13 Investigators were involved in affecting, interpreting and implementing management polices and operating practices, and were exempt from the FLSA. [Adams v U.S. 27 Fed.Cl. 5 (1992)]

Administrative Work distinguished from Production Work. One of the critical factors in determining if a position meets the exemption requirements as an administrative job is that the work is administrative in nature and not line or production work.

The federal courts have emphasized that administrative functions are different from the production or the line work of the organization. Much of the following material is drawn from *Berg v. United States*, 49 Fed.Cl. at 471-472 (2001).

One court made this point clear in a case involving federal employees by saying that employees covered by the administrative exemption perform management or staff functions and are not frontline or production workers. [Adam v. U.S., 26 Cl.Ct. 782, at 788 (1992)]

In a case involving non-federal employees another court reminded us that the concept of production is not limited to production on a manufacturing line. [Martin v. Cooper Elec. Supply Co., 940 F.2d 896, at 903-04 (1991); *cert. denied* 503 U.S. 936 (1992)] A different federal court also rejected the argument that production only applies to manufacturing. Instead it quoted a case involving non-federal employees [*Dalheim v. KDFW-TV* 918 F.2d 1220, at 1230 (1990)], which drew a distinction between employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the goods or services that the enterprise exists to produce. [Bell v. Farmers Ins. Exch.,

87 Cal.App.4th 805 (2001), 105 Cal.Rptr.2d 59, at 70-71 (2001), *reh'g denied* (29 March 2001)]

To resolve this production/administration issue a federal court recommends identifying the nature of the employer's business. One must determine: what is the nature of the business in which the organization is engaged; what products or services is the organization in business to produce; what is the mission assigned to the organization by a legislature or other mandate?

This examination is to determine whether the employee's job is to produce the product or services the employer offers to the public or whether the employee is engaged in administering the business. The employee may administer the business by performing such tasks as advising management, planning, negotiating, representing the company, purchasing, promoting sales, etc. [Martin v. Cooper Elec. Supply Co., 940 F.2d 896, at 903 (1991), *cert. denied* 503 U.S. 936; Cooke v. General Dynamics Corp., 993 F.Supp 50, at 61 (1997)].

As an example, the court cited a private sector case involving automobile damage appraisers employed by an adjustment company whose business was resolving automobile damage claims. The appraisers were deemed nonexempt production workers since they performed the company's daily tasks rather than administering the business [Reich v. American Int'l. Adjustment Co., 902 F.Supp. 321, at 325 (1994)].

The court went on to say that State Police Investigators were also deemed nonexempt production workers since the State Police's business is law enforcement and the primary function of the investigators was to conduct or produce criminal investigations and not to administer the affairs of the Bureau of Criminal Investigation [Reich v. State of New York, 3 F.3d 581, 587 (2nd Cir.1993), *cert. denied* 510 U.S. 1163]. In contrast, a customer service coordinator for a moving company was an exempt administrative employee because she was not involved in producing the employer's service of moving goods from point A to point B [Haywood v. North Am. Van Lines, 121 F.3d 1066, 1072 n. 6 (7th Cir.1997)]. [Scott Wetzel Services Inc. v. New York State Board of Industrial Appeals, 682 N.Y.S.2d 304, at 305 (1998)]

In short, in examining a position to determine whether or not it meets the exemption tests under the Administrative Exemption Criteria, one must assure that the position is administrative in nature. The first step is to examine the purpose for which the employer exists, i.e., the products, goods or services the organization was established to produce. The second step is determining the primary purpose of the position. If the purpose of the position is to produce the

products, goods or services the employer offers, then it is involved in the production or line work of the organization and will not meet the Administrative Exemption Criteria. If the primary purpose is to perform office or non-manual work directly related to the management or general business operations of the employer, then the position is involved in administrative work and may meet the Administrative Exemption Criteria.

Exercises Discretion and Independent Judgement

A definition for the phrase discretion and independent judgement is included in the section entitled "Exemption Terms Defined," above. In addition, the regulations provide the following list of factors to consider when deciding whether or not an employee exercises discretion and independent judgement. While it is emphasized that this list is not exhaustive and other factors can be considered, these factors should help in making a decision on this important requirement. [5 CFR 551.206(b) (2007)]Does the employee:

- Have the authority to formulate, affect, interpret, or implement management policies or operating practices?
- Carry out major assignments in conducting the operations of the organization?
- Perform work that affects the organization's operations to a substantial degree? This requirement can be met even if the employee's assignments are related to operation of a particular segment of the organization.
- Have authority to commit the employer in matters that have significant financial impact?
- Have authority to waive or deviate from established policies and procedures without prior approval?
- Have authority to negotiate and bind the organization on significant matters?
- Provide consultation or expert advice to management?
- Have involvement in planning long or short term organizational objectives?
- Investigate and resolve matters of significance on behalf of management? And,
- Represent the organization in handling complaints, arbitrating disputes or resolving grievances?

When many of these or similar factors are performed by an employee, then it may support exemption. When few or none of these or similar factors are performed by an employee, the position may be nonexempt or exempt under another category should be explored.

The regulations also emphasize that neither the location of the work nor the number of employees performing the same or similar work turns such work into a production function.

Directly and Closely Related Work

Remember when making a determination about whether or not an employee meets the Administrative Exemption Criteria that all work performed by the employee being reviewed must be examined. In reaching a decision about exemption both the work that is clearly exempt, and work that is *directly and closely related* to the performance of exempt work and that contributes to or facilitates performance of exempt work is to be considered. The definition, provided earlier in this chapter, discusses the characteristics of work that qualifies as directly and closely related to exempt work and of work that cannot be considered directly and closely related.

See the example included in the discussion about the term 'directly and closely related' given in the Exemption Terms Defined portion of this chapter, above.

In addition, the regulation provides an example of work that is not directly and closely related to administrative work. This involves a traffic manager in charge of planning an organization's transportation function. The work includes identifying the most economical and quickest routes for shipping material to and from the activity, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to material, and involves a traffic manager in charge of planning an organization's transportation function. The work includes identifying the most economical and quickest routes for shipping material to and from the activity, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to material, and making the necessary rearrangements resulting from delays, damages or irregularities in transit. Such work is exempt. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work. [5 CFR 551.104, definition of the term 'directly and closely related', paragraph (4) (2007)]

Examples Listed in the Regulations

The regulations provide five examples to assist in making a determination about whether or not work performed by an employee meets the requirements for exemption under the Administrative Exemption Criteria.

The first example is an employee who leads a team of other employees assigned to complete major projects. Such projects can involve acquisitions; negotiating real estate transactions or collective bargaining agreements; designing and implementing productivity improvements; designing and performing oversight, compliance or program reviews; and carrying out various kinds of investigations. An employee performing such work generally meets the duties requirements for the administrative exemption even if the employee does not have direct supervisory responsibility over the other employees on the team. [5 CFR 551.206(i) (2007)]

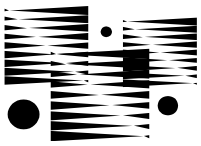
The second example is an executive or administrative assistant to a high level manager or senior executive. Such employees will be exempt if, without specific instructions or prescribed procedures, are delegated authority regarding matters of significance. [5 CFR 551.206(j) (2007)]

The third example is a human resources employee who formulates, interprets or implements human resources management policies; such employees generally meet the duties requirements for the administrative exemption. In addition, if a human resources employee interviews and screens applicants, and makes the hiring decision or makes recommendations for hiring from a pool of qualified applicants, then such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions. [5 CFR 551.206(k) (2007)]

The fourth example describes management analysts who study the operations of an organization and propose changes in the organization, program analysts who study program operations and propose changes to the program, and other management advisors. Generally, employees performing such work meet the duties requirements for the administrative exemption criteria. [5 CFR 551.206(l) (2007)]

The fifth example is an acquisition employee with authority to bind the organization to significant purchases. Generally, such employees meet the duties requirements for the administrative exemption even if they must consult with higher management officials when making a commitment. [5 CFR 551.206(m) (2007)]

The final example discusses work that typically will not meet the duties requirements for the administrative exemption. It describes an employee who performs ordinary inspection work. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work, but only within closely prescribed limits. As a result, ordinary inspection work generally does not meet the duties requirements for the administrative exemption. [5 CFR 551.206(n) (2007)]



COVERAGE EXERCISE IV

GENERAL SUMMARY
Formulates, presents and executes the computer data processing portion of the department's annual operating budget. The assigned budget includes related personnel salaries and expenses, supplies, and computer hardware and software.

MAJOR DUTIES & RESPONSIBILITIES

1. Develops plans, procedures and instructions for formulating and executing the automated data processing (ADP) budget for all departmental components nationwide.

2. Reviews budget requests submitted by subordinate organizational components (e.g., bureaus and regional offices) to assure their consistency, accuracy and adherence to instructions. Negotiates desired changes with program managers and the budget and administrative staffs of submitting components.

3. Reviews computer operations work plans of subordinate organizational components to assure conformance with the agency's overall budget execution plan.

4. Prepares documents needed to process budget estimates, requests for supplemental appropriations, requests for deficiency apportionments, and allotments for the department needed to finance new programs or program changes brought about by legislative action.

5. Develops and coordinates budgetary actions in the phases of budget formulation and execution for assigned area of responsibility.

6. Negotiates with program managers and budget and administrative staffs of major organizational subdivisions (i.e., bureaus and regional offices) to determine the amount and timing of funding and staffing allowances, and recommends approval or disapproval of requests for funds to purchase new computer hardware and software. Accomplishes reprogramming of funds, as needed, to support the ADP program.

FLSA STATUS ____Exempt **EXPLANATION**

____Nonexempt

COVERAGE EXERCISE V

GENERAL SUMMARY

In a developmental capacity, performs routine and recurring budget administration duties which facilitate the conduct of more complex and detailed review and analysis functions conducted by the supervisor and higher graded co-workers. Work performed supports the installation's budget for personnel salaries and expenses in activities financed through direct annual appropriations.

MAJOR DUTIES & RESPONSIBILITIES

1. Gathers extracts, reviews, verifies and consolidates a variety of narrative information and statistical data needed in the formulation and presentation of budget requests (e.g., estimates of the funding needs of subordinate organizational components).

2. Cross-checks the accuracy of budget and program data in related budgetary forms, schedules and reports. Changes or recommends the adjustment of inconsistent totals, subtotals and individual entries.

3. Compares figures in current estimates of funding needs by line item or object class with prior year expenditures and brings significant variations to the attention of the supervisor or higher graded analyst.

4. Researches guides to extract legal, regulatory, program and budgetary information for use by the supervisor or higher graded analysts. Prepares summaries of narrative, quantitative and statistical data in budget forms, schedules and reports.

5. Prepares preliminary budget estimates and reviews justifications for a few relatively stable program and/or program support activities.

6. Receives, screens and recommends approval, disapproval or modification of budget execution documents (e.g., requests for allotment of funds, requests for personnel action to fill vacancies, and travel orders) when such recommendations can be made on the basis of availability of funds and compliance with regulatory requirements.

FLSA STATUS ____Exempt **EXPLANATION**

____Nonexempt

COVERAGE EXERCISE VI

GENERAL SUMMARY
The incumbent assists the Chief, Audit Division of a District Internal Revenue Service Office by relieving the Chief of clerical and administrative support work such as:

MAJOR DUTIES & RESPONSIBILITIES

1. Receiving telephone calls and visitors, referring callers directly to the Chief, or redirecting them to more appropriate offices in Audit or other divisions.

2. Assisting in implementing the Chief's intentions by explaining reporting requirements to subordinates and arranging for timely submission of required information.

3. Receiving and controlling mail, routing items directly to the appropriate Audit Division offices for action, assembling background information before routing mail to the Chief, and notifying the Chief of pending delays and their reasons.

4. Reviewing outgoing correspondence for signature of the Chief and the District Director for proper format, conformance with procedural instructions, grammar, typographical accuracy, and necessary attachments.

5. Searching for, assembling and summarizing information as required from files and documents as requested by the supervisor or in anticipation of the supervisor's needs.

6. Arranging for meetings, including making reservations for meeting rooms and notifying all participants.

7. Advising individuals concerned when appointments must be rescheduled, arranging mutually convenient times for new appointments, and informing the supervisor of pending appointments, meetings and other commitments.

8. Making travel arrangements for supervisor and staff, contacting travelers en route to relay information, and typing various travel vouchers and reports.

9. Providing advice to secretaries in subordinate branches concerning such matters as time and leave procedures, travel vouchers, and reporting and correspondence procedures.

10. Organizing and maintaining files and records, manuals, books, and other related materials. Maintaining listings of all Audit Division employees.

11. Serving as timekeeper for personnel in the Audit Division.

FLSA STATUS ____Exempt EXPLANATION

____Nonexempt

COVERAGE EXERCISE VII

GENERAL SUMMARY

The incumbent acts as an administrative assistant to the Director, an SES position, of a hospital which includes two divisions with a total of over 1,000 beds and is affiliated with two schools of medicine. Oversees the work of one office automation clerk.

MAJOR DUTIES & RESPONSIBILITIES

1. Acts as office manager for the Director's office and ensures that the practices and procedures used by secretaries in subordinate offices are consistent with those of the Director's office. On own initiative, recommends changes in administrative policies. Devises and installs office procedures and practices to be used by secretaries in subordinate offices. Prepares agenda for and conducts periodic secretarial training sessions for all secretaries to department heads. The training includes all phases of secretarial work such as correspondence, telephone procedures, publications, directives, reports and public relations responsibilities.

2. Responds to inquiries and administrative problems brought to the Director by members of the staff and officials of the agency's central office, state and local governments, other hospitals and organizations, other federal agencies, and congressional staff. Notifies the appropriate staff officials of the need for information or recommendations, and either prepares the response or follows up to ensure a timely response by others.

3. Exercises exclusive control over the Director's appointments, with complete authority for commitments of time. Screens calls and visitors, answering most questions and completing most business involving established policy or routine matters without referring people to the Director.

4. Receives all correspondence for the Director; replies to mail not requiring the Director's attention; routes matters requiring action by hospital department heads; and follows up to ensure that actions are completed. Screens all correspondence prepared for the Director's signature for clarity, completeness of reply, and grammatical and procedural correctness. Returns inadequate submissions for retyping or recomposition. Signs correspondence and certain procedural authorizations in the name of the Director when previous instructions have covered the matter. Screens all publications, directives and periodicals, and brings those of significance to the Director's attention.

5. Maintains a file of correspondence and events when the Director is absent, and brings such matters to the Director's attention upon return. As Classified Information Officer for the hospital, is responsible for the receipt, control, logging, safekeeping and necessary action on all classified material received in the hospital.

6. Arranges conferences for the Director and, at the request of central office officials, for meetings to be held locally. This includes preparing an agenda, notifying participants, and arranging luncheons and similar matters. Develops background information and composes drafts of introductions and talks to be presented at various meetings by the Director. Attends and records minutes of meetings which are later summarized and distributed. Checks to ensure that commitments made at meetings are met and keeps the Director informed.

FLSA STATUS ____Exempt **EXPLANATION**

____Nonexempt

Professional Exemption Criteria

A professional employee is an employee whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. [29 USC 213(a)(1); 5 CFR 551.207 (2007)]

Application of the Professional Exemption Criteria

The revisions to the regulations promulgated by the OPM in 2007 provide guidance regarding what kind of work must be performed by those who are termed learned professionals, creative professionals, and computer employees in order to be exempt under the Professional Exemption Criteria. Each one of these categories is examined in the following material.

Primary Duty

Please see the definition of this term in the section "Exemption Terms Defined," earlier in this chapter. Also note that OPM reminds us that the definition of the term *primary duty* includes the requirement to exercise *discretion and independent judgement*, which is discussed in the definition section of this chapter.

Learned Professionals

To qualify for the learned professional exemption, the employee must meet the requirement established at 5 CFR 551.207 (2007), given above. In addition, the work must include the following three elements. [5 CFR 551.208(a) (2007)]

(1) First, the employee must perform work requiring advanced knowledge. Work requiring advanced knowledge is predominantly intellectual in character, and requires the consistent exercise of discretion and judgement. This advanced knowledge is used to analyze, interpret or make deductions from varying facts or circumstances.

OPM's previous guidance has indicated that work requiring knowledge of an advanced type involves utilizing such general intellectual abilities as perceptiveness, analytical reasoning, perspective and judgement. It also involves utilizing mental processes which involve substantial judgement based on considering, selecting, adapting and applying principles to numerous variables. Such work requires the employee to recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the "best" option from among a broad range of possible actions. The employee cannot rely on standardized application of established procedures or precedents. [Attachment to FPM Letter 551-7, dated 1 July 1975, at B.1.j.]

Work requiring advanced knowledge is distinguished from the performance of routine mental, manual, mechanical or physical work. Thus, advanced knowledge that meets the requirements of this element cannot be attained at the high school level.

(2) The second required element is that the advance knowledge must be in a field of science or learning. The phrase *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.

The use of this phrase serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(3) The third required element is that the advance knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The phrase *customarily acquired by a prolonged course of specialized intellectual instruction* restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence that an employee meets this required element is possession of the appropriate academic degree, typically a bachelor's or higher degree.

However, the word *customarily* means that the exemption is appropriate for employees in such professions who have substantially the same knowledge level and perform substantially the same work as degreed employees, but who

attained the advanced knowledge through a combination of work experience and intellectual instruction.

The courts have emphasized the importance of having and applying knowledge of an advanced type that is customarily acquired by a prolonged course of specialized intellectual instruction and study in order to be exempt as a professional employee. For example, in a case decided before the release of the 2007 regulations [Palardy v Horner], GS-11 technicians were responsible for preparing drawings and schematics used in installing and reconfiguring equipment on naval vessels. The tasks were practical rather than theoretical, and were accomplished by consulting standard texts, guides and established formulas. The more complex tasks related to the work were performed by professional engineers. The technicians are required to have a high school diploma, and did not require an advanced course of academic study. Incumbents worked with only a minimum amount of supervision.

The court found that the plaintiffs required specialized training to perform their tasks, but "...the assignments do not involve 'theoretical...knowledge of the specialty', nor are they required to have a knowledge of related disciplines and new developments in the field....Consequently, none of the plaintiffs' positions can properly be characterized as professional." As a result, the court said none could be exempted as bona fide professional employees. In finding the technicians nonexempt, the court emphasized the importance of having an advanced degree, or equivalent knowledge, and applying it to the assigned work in order to qualify as an exempt professional employee. [Palardy v Horner 711 F.Supp. 667 (1989)]

The regulations go on to remind us that the learned professional exemption is not applicable to occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. 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.

EXPANSION OF THE LEARNED PROFESSIONAL EXEMPTION. The regulations state that the areas in which the learned professional exemption may apply are expanding. This occurs where knowledge is developed, academic training is broadened, and specialized degrees are offered in new and diverse fields. When an advanced specialized degree becomes

a standard requirement for a particular occupation that occupation may have acquired the characteristics of a learned profession.

This expansion of areas in which the learned professional exemption may apply also occurs when accrediting and certifying organizations similar to the ones discussed in 5 CFR § 551.208(b) are created. Such organizations may develop specialized curriculums and certification programs. If one of these programs become a standard requirement for a particular occupation, then this may indicate that the occupation has acquired the characteristics of a learned profession. Thus, the specialist assigned to make FLSA coverage and exemption determinations must remain vigilant with regards to the development of new specializations in particular fields of science or learning. [5 CFR 551.208(b) (2007)]

Specific Learned Professions

PRACTICE OF LAW. This exemption applies to an employee in a professional legal position requiring admission to the bar and involved in rendering legal advice and services. An employee who is in a professional legal position is exempt regardless of his or her annual rate of basic pay as discussed in the section on *Salary Based Coverage*, above.

The employee in a professional legal position qualifies for this exemption by performing any one or more of the following functions: preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; preparing interpretive and administrative orders, rules, or regulations; drafting, negotiating , or examining contracts or other legal documents; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; and drafting and reviewing decisions for consideration and adoption by agency officials. [5 CFR 551.208(c) (2007)]

PRACTICE OF MEDICINE. This exemption applies to an employee who holds a valid license or certificate permitting the practice of medicine or any of its branches and is actually engaged in the practice of the profession. An employee who meets the requirement in the preceding sentence is exempt regardless of his or her annual rate of basic pay as discussed in the section on *Salary Based Coverage*, above.

This exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and

healing or any of the medical specialties practiced by physicians or practitioners. The term 'physician' includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

This exemption also applies to an employee who holds the required academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession. Such employees must meet two requirements to satisfy this element: (1) earn the appropriate degree required for the general practice of their professions; and (2) enter an internship or resident program. When engaged in an internship or resident program this exemption applies even if the employee was not licensed to practice prior to him or her commencing the program. [5 CFR 551.208(d) (2007)]

ACCOUNTING. A certified public accountant generally meets the duties requirements for the learned professional exemption. An employee performing similar professional work in a position with a positive educational requirement and requiring the application of accounting theories, concepts, principles, and standards also may meet the duties requirements for the learned professional exemption.

In contrast, accounting clerks and technicians and other employees who normally perform a great deal of routine work generally will not qualify as exempt learned professionals. [5 CFR 551.208(e) (2007); cf., 29 CFR 541.301(e)(5)]

ENGINEERING. An engineer generally meets the duties requirements for the learned professional exemption. Professional engineering work typically involves the application of a knowledge of such engineering fundamentals as the strength and strain analysis of engineering materials and structures; the physical and chemical characteristics of engineering materials such as elastic limits, maximum unit stresses, coefficients of expansion, workability, hardness, tendency to fatigue, resistance to corrosion, and engineering adaptability; and, engineering methods of construction and processing.

This exemption applies to those performing exempt professional engineering work, which includes equivalent work performed in any of the specialized branches of engineering, e.g., electrical, mechanical, or materials engineering. See the discussion about the importance of

having and utilizing advanced knowledge in the field of engineering in Palardy v. Horner, 711 F.Supp. 667 (1989) to qualify for this exemption.

On unusual occasions, this exemption may apply to engineering technicians[5] who perform work that is comparable to that performed by professional engineers when performing this work requires the use of *advanced knowledge*. In such instances, the employee actually is performing the work of an occupation that generally requires a specialized academic degree and is performing substantially the same work as the degreed employee. However, such employees have gained the same advanced knowledge through a combination of work experience and intellectual instruction which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.[6] [5 CFR 551.208(f) (2007)]

A federal court has supported the idea that an employee without an advanced degree can be an exempt professional. In a case involving Network Communication Systems Instructors working for a NASA contractor the court found that being required to take an extensive and highly specialized in-house training program that may last up to one year and that involves both practical and theoretical aspects of the subjects before beginning work allows the employee to meet the specialized learning portion of the professional exemption. This is true even though the training did not result in a degree being granted. As long as the employee meets the other requirements, e.g., the frequent exercise of discretion and independent judgement, the court found the employees could qualify as exempt professionals. [Hashop, et al. v. Rockwell Space Operations Company, 867 F.Supp. 1287 (1994)]

ARCHITECTURE. An architect generally meets the duties requirements for the learned professional exemption.

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[5] Positions in technician series typically involve quasi-professional work performed using a limited knowledge of engineering or scientific theory and technical knowledge resulting from practical experience. Such work is NONEXEMPT.

[6] In the past OPM has advised that employees in technician occupations also may qualify for exemption if they perform work involving the *exercise of program responsibility.* Such work may entail developing preventive maintenance programs; or recommending changes to current practices, e.g., design, materials used, storage or maintenance practices. This kind of work involves analysis of information, such as analyzing defects reports and evaluating both administrative and technical considerations. Technicians performing this kind of work may be EXEMPT under the Administrative exemption criteria. [Attachment to FPM Letter 551-7, dated 1 July 1975, at C.3.d.]

Professional architectural work typically requires the application of a knowledge of architectural principles, theories, concepts, methods, and techniques; a creative and artistic sense; and an understanding and skill to use pertinent aspects of the construction industry as well as engineering and the physical sciences related to the design and construction of new, or the improvement of existing buildings. [5 CFR 551.208(g) (2007)]

TEACHERS. A teacher is any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. An employee who meets the requirement in the preceding sentence is exempt regardless of his or her annual rate of basic pay as discussed in the section on *Salary Based Coverage*, above. [5 CFR 551.208(h) and (h)(4) (2007)]

For the purpose of this exemption, an educational establishment is defined as one of the following: a nursery school; an elementary or secondary school system; an institution of higher education; other educational institutions; and, in certain circumstances, training facilities. The term 'other educational establishment' includes special schools for mentally or physically disabled or gifted children, regardless of such schools being classified as elementary, secondary or higher. [5 CFR 551.104 (2007)]

Other organizations may qualify as an educational establishment if they are licensed by a state agency responsible for the state's educational system or accredited by a national accrediting or certification organization. [Franklin v. Breton International, Inc. No. 06 Civ. 4877 (DLC) 2006 U.S. Dist. LEXIS 88893 (2006)]

OPM goes on to outline guidance that is designed to assist in making a decision on whether or not this exemption applies to a particular employee.

(1) A teacher is exempt when serving in any one of various typical roles such as a regular academic teacher; teacher of kindergarten or nursery school pupils, gifted or disabled children, or skilled and semi-skilled trades and occupations; teacher engaged in automobile driving instruction or aircraft flight instruction; home economics teacher; vocal or instrumental music instructor; or instructor in an institution of higher education or another educational establishment when the primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge. This list is illustrative not exhaustive. An employee engaged to teach but also

spends a considerable amount of time in extracurricular activities (e.g., coaching athletic teams, acting as moderator or advisor in such areas as drama, speech, debate, or journalism) is deemed to be engaged in teaching. Such activities are a recognized part of an educational establishment's responsibility in contributing to the educational development of the student. [5 CFR 551.208(h)(1) (2007)]

(2) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying individuals expected to be within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of what term is used by the certifying entity. Please note that a teacher's certificate is not generally necessary for post-secondary educational establishment. [5 CFR 551.208(h)(2) (2007)]

Even if an employee does not hold a teaching certificate, but is certified by a national certification organization the employee may qualify as an exempt teacher if she or he is employed by an educational establishment and has a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge. [*The Fair Labor Standards Act 2006 Cumulative Supplement*, Monica Gallagher editor in chief, Federal Labor Standards Legislation Committee, ABA Section of Labor and Employment Law, Chicago (2006), pages 205-207]

(3) A teacher is not exempt when serving in certain types of roles such as teachers of skilled and semi-skilled trade, craft, and laboring occupations when the paramount knowledge is the knowledge of and ability to perform the trade, craft, or laboring occupation.

In contrast, if the primary requirement for the instructor is the ability to instruct, rather than the knowledge of and ability to perform a trade, craft or laboring occupation, then the instructional position at the post-secondary level may be exempt. [5 CFR 551.208(h)(3) (2007)]

In a case involving Network Communication Systems Instructors working for a NASA contractor, a federal court found two conditions must be present to qualify as an exempt teacher. First, the employees must be certified teachers. Second, the training must be given in a school. While exceptions have been made, e.g., instructors for aircraft flight and automobile driving, these were for training given in an organized school-like setting. Without having these two conditions in their jobs, the courts will not find employees to be exempt teachers. [Hashop, et al. v. Rockwell Space Operations Company 867 F.Supp. 1287 (1994)]

MEDICAL TECHNOLOGISTS. A registered or certified medical technologist generally meets the duties requirements for the learned professional exemption as long as she or he has successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association. [5 CFR 551.208(i) (2007)]

NURSES. A registered nurse who is registered by the appropriate State examining board generally meets the duties requirements for the learned professional exemption.

In contrast, licensed practical nurses and other similar health care employees generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations. [5 CFR 551.208(j) (2007)]

OPM reminds us that this guidance must be read in conjunction with the section on salary based nonexemption, discussed earlier in this chapter. Registered nurses paid on an hourly basis will not meet the annual pay basis requirements in 5 CFR 551.203(a). Registered nurses who do not meet the salary basis requirements will be nonexempt. [5 CFR 551.203 and 72 Fed.Reg. 52759, 17 September 2007, @ 52759]

DENTAL HYGIENISTS. A dental hygienist who has successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meets the duties requirements for the learned professional exemption. [5 CFR 551.208(k) (2007)]

PHYSICIAN ASSISTANTS. A physician assistant who has successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meets the duties requirements for the learned professional exemption. [5 CFR 551.208(l) (2007)]

PARALEGALS. A paralegal or a legal assistant generally does *not* meet the duties requirements for the learned professional exemption because possession of an advanced, specialized academic degree is not a standard prerequisite for entry into the field. Many paralegals possess general four-year

advanced degrees, however, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. This two-year degree will not qualify the paralegal for the learned professional exemption.

The learned professional exemption is applicable to paralegals that possess an advanced, specialized degree in other professional fields when they apply their advanced knowledge in those fields in the performance of their paralegal duties.

It is good to keep in mind that a paralegal may be performing exempt administrative work, such as overseeing a full range of support services for a large legal office, if she or he does not meet the professional exemption criteria. [5 CFR 551.208(m) (2007)]

Creative Professionals

To qualify for the creative professional exemption, the employee must meet the requirement established at 5 CFR 551.207 (2007), discussed earlier in this chapter. In addition, the primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Routine mental, manual, mechanical, or physical work does not meet this requirement. [5 CFR 551.209(a) (2007)]

To meet the requirement that the work must be performed in a recognized field of artistic or creative endeavor means the work, typically, is performed is such fields as music, writing, acting, and the graphic arts.

To meet the requirement that the work must involve invention, imagination, originality, or talent means that creative professional work is different from work that primarily depends on intelligence, diligence, and accuracy. Similarly, creative professional work also is different from work that can be produced by a person with general manual or intellectual ability and training, which is not exempt work.

The duties of employees vary widely, and exemption as a creative professional depends on the extent (i.e., the range, scope, degree, level) of the invention, imagination, originality, or talent exercised by the employee. Thus, determination of exempt creative professional status **must** be made on a case-by-case basis.

Examples of work that generally meets the requirements for being identified as exempt creative professionals include work performed by actors, musicians, composers, conductors and

soloists; painters who at most are given the subject matter of their painting; and writers who choose their own subjects and hand in a finished piece of work to their employers.

An example of work that generally does not meet the requirements for being identified as an exempt creative professional includes work performed by a person employed as a retoucher of photographs.

In earlier guidance, OPM indicated that employees who create original works of art or who apply interpretive creativity, such as critics and commentators, may meet the professional exemption criteria. The most significant criterion is that the work be creative and individualized. The work of art or commentary must result from the invention, imagination or talent of the employee.

Employees assigned to positions classified in the GS-1000 Information & Arts Group and possibly a few others such as Clothing Design GS-062, and comparable employees outside the GS are most likely to meet the requirements for exemption under this category. [Attachment to FPM Letter 551-7, dated 1 July 1975, at C.3.b.]

The regulations go on to discuss federal employees who are engaged in the work of newspapers, magazines, television, or other media. Such employees are not exempt if they only collect, organize and record information that is routine or already public, such as rewriting press releases, or writing standard recounts of public information by gathering facts on routine community events like the scheduled meeting of a committee or organization, the times various groups may use a public pool, or the planned school lunch menus for the upcoming week. Similarly, such employees are not exempt if they do not contribute a unique interpretation or analysis to a news product. Such employees also are not exempt if their work product is subject to substantial control by the organization, e.g., point of view, conclusions, etc.

In contrast, federal employees who are engaged in the work of newspapers, magazines, television, or other media and who perform work that requires invention, imagination, originality, or talent may qualify as exempt creative professionals. Such employees may be exempt if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator.

The regulations remind us that work that does not fully meet the creative professional exemption criteria is not necessarily nonexempt. Practitioners should examine the work to determine if it meets the requirements for exemption under another exemption category. For example, a public affairs specialist whose work is controlled by his or her agency and, therefore, does not meet the creative professional exemption may meet administrative exemption requirements. [5 CFR 551.209(b) (2007)]

Computer Employees

This provision was added by P.L. 101-583, November 15, 1990, 104 Stat. 2871. The final regulations issued by OPM in September 2007 addresses the exemption criteria for skilled workers in the computer field for the first time. The regulations indicate that computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption under 29 USC 213(a)(1) and 213(a)(17). However, the regulations note that titles change quickly in the computer industry and, therefore, job titles are not determinative in deciding if work is exempt under this exemption category. [5 CFR 551.210(a) (2007); cf., 57 Fed.Reg. 46742 (1992) and 29 CFR 541.400-541.402 (2007)]

EXEMPTING COMPUTER EMPLOYEES. The regulation identifies a two step process for making an exemption determination for those working in the computer field. First, the employee's pay must meet one of the levels established by the FLSA. Second, the employee's primary duties must consist of one or more of those listed in the regulations. [5 CFR 551.210(b) (2007)]

The first pay "test" is established for those exempted under 29 USC 213(a)(1). An employee working in the computer field can be considered for exemption as long as the employee's annual rate of basic pay is more than the amount established in 5 CFR 551.203(a) for salary based nonexemption, which was discussed earlier in this chapter. That amount in 2007 is $23,600 per annum.

The second pay "test" is established for those exempted under 29 USC 213(a)(17). An employee working in the computer field can be considered for exemption as long as the employee is paid on an hourly basis at a rate of basic pay of $27.63 an hour or more.

In addition to being paid at one of the two levels just described, the employee's primary duty must consist of one or more of the following:

(1) Apply systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.
(2) Design, develop, document, analyze, create, test or modify computer systems or programs, including prototypes, based on and related to user or system design specifications.
(3) Design, document, test, create or modify computer programs related to machine operating systems. OR
(4) A combination of the duties described in paragraphs (1), (2) and (3), above, as long as the performance of this combination of duties requires the same level of skill needed to perform the duties described in those paragraphs.

NONEXEMPT COMPUTER EMPLOYEES. The regulations state that there are two groups of employees who will not meet the exemption criteria for skilled workers in the computer field. These are:

- Employees engaged in the manufacture or repair of computer hardware and related equipment. Examples may include electronics technicians or electronic digital computer mechanics.
- Employees whose work is highly dependent on or facilitated by the use of computers and computer software programs, but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer related occupations identified in paragraphs (1), (2), (3) and (4) at the top of this page. Examples may include engineers, drafters and others skilled in using computer-aided design software.

EXECUTIVE AND ADMINISTRATIVE COMPUTER EMPLOYEES. The regulations go on to discuss the possibility of computer employees meeting the requirements for exemption under the administrative or executive exemptions. Both employees working in the computer field who are covered by the computer employees exemption discussed above and those who are not covered by the computer employees exemption may qualify as exempt from the FLSA under one of the other exemption categories. [5 CFR 551.210(d) (2007)]

One example involves systems analysts and computer programmers who generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employing organization or its customers. In order to exempt such

employees under the administrative exemption criteria, the employee also must meet all of the other requirements established for the administrative exemption, discussed earlier in this chapter.

A second example involves a senior or lead computer programmer who generally meets the duties requirements for the administrative exemption if his or her primary duty includes leading a team of other employees assigned to complete a major project that is directly related to the management or general business operations of the employer or the employer's customers. Such an individual can be an exempt administrative employee even if she or he does not have direct supervisory responsibility over the other employees on the team. In order to exempt such employees under the administrative exemption criteria, the employee also must meet all of the other requirements established for the administrative exemption, discussed earlier in this chapter.

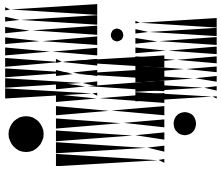
A third example involves a senior or lead computer programmer who generally meets the duties requirements for the executive exemption if his or her primary duty involves managing the work of two or more other programmers in a customarily recognized organization unit, and has his or her recommendations regarding the hiring, firing, advancement, promotion or other change of status of the other programmers given particular weight. In order to exempt such employees under the executive exemption criteria, the employee also must meet all of the other requirements established for the executive administrative exemption, discussed earlier in this chapter.

Directly and Closely Related Work

Remember when making a determination about whether or not an employee meets the Professional Exemption Criteria that all work performed by the employee being reviewed must be examined. In reaching a decision about exemption both the work that is clearly exempt, and work that is *directly and closely related* to the performance of exempt work and that contributes to or facilitates performance of exempt work are to be considered. The definition, provided in the section entitled "Exemption Terms Defined" earlier in this chapter, discusses the kind of work that qualifies as directly and closely related to exempt work and that which cannot be considered directly and closely related. The following paragraphs discuss tasks that may meet the requirements for being directly and closely related to exempt professional work.

The regulations provide a very brief example of work that is directly and closely related to exempt professional duties. The example involves a chemist who performs such nonexempt tasks as cleaning a test tube in the middle of an original experiment, even though such tasks can be assigned to laboratory assistants. Such a task can be considered as directly and closely related to the exempt duties and, therefore, support meeting the duties requirements for the professional exemption.

The regulations provide a second example of work that is directly and closely related to exempt professional duties. The example involves a teacher who takes students on a field trip, and drives a school van or monitors the students' behavior in a restaurant. These tasks that are ancillary to exempt work of imparting knowledge can be considered as directly and closely related to the exempt duties and, therefore, support meeting the duties requirements for the professional exemption. [5 CFR 551.104, definition for Directly and Closely Related Work, examples (5) and (6)].



COVERAGE EXERCISE VIII

GENERAL SUMMARY

The purpose of this position is to provide support for the organization's audiovisual production facility by performing studio and remote photography and videography. The incumbent uses a variety of types of still cameras and videographic cameras to record photographic images and videotapes for use in displays, training aids, promotional literature, and other places. After briefing by the supervisor or director, utilizes a substantial knowledge of the various kinds of camera equipment, lighting techniques, exposure requirements, and the like to capture the desired image, style and quality.

MAJOR DUTIES & RESPONSIBILITIES

1. Meets with the supervisor or director to discuss the script or client requirements which the incumbent will be following. Receives direction on the production's photographic and stylistic requirements, and raises questions to help clarify the director's/client's needs. May make recommendations regarding the kinds of equipment, locations, lighting and other technical details that may improve the quality or impact of the photographic or videographic images desired.

2. Selects, sets-up, adjusts and operates a variety of photographic and videographic cameras using a substantial knowledge of cameras, lighting, film type, lenses and exposures. Works indoors and outdoors, in confined and spacious areas, in natural and artificial lighting, and in daylight as well as night conditions. Captures a variety of situations including award presentations, official portraits, buildings and grounds, museum artifacts, equipment components, and artwork.

3. Uses different photographic techniques, such as sweeps, pans, close-ups, fade-ins and fade-outs, to capture the needed images. May use only one technique, or varying combinations of techniques in order to create the proper mood or focus the attention of the viewer on the central point of the production, e.g., focusing on a portion of a painting and then panning to different details in the painting to imply movement where the painted image is fixed.

4. Develops still photographs as necessary, and uses a substantial knowledge of exposures, enlargement equipment, and other techniques to produce the best possible photograph from the recorded image. Works with the director to integrate the recorded videographic images into the production to satisfy the script's production requirements. Retakes still photographs and re-shoots videotapes, where possible. When working with one-time events, makes the best possible use of recorded images to satisfy the client's needs.

FLSA STATUS ____Exempt EXPLANATION

____Nonexempt

COVERAGE EXERCISE IX

GENERAL SUMMARY

The purpose of this position is to provide support for the organization's audiovisual production facility by performing assignments in unusual or unprecedented situations that require new, modified or adapted equipment and procedures to meet new photographic and videographic requirements. Works independently and as the knowledgeable person on a team to capture and create the finished photographic images and/or videotapes needed to satisfy clients' needs. The incumbent uses a comprehensive knowledge of a wide range of specialized photographic equipment, techniques and processes to develop and create photographic images and videotapes for use in displays, training aids, promotional literature, and other places.

MAJOR DUTIES & RESPONSIBILITIES

1. The incumbent independently plans and produces photographic and videotape productions based on a basic concept from the client. Working with the client, helps to define the needs and move from a concept to a script to guide the shooting. During production, takes additional field shots to facilitate editing, captures interesting scenes that were not anticipated, and minimizes distracting audio and visual elements. Edits the videotape or photographic images, adds graphics, animation and music, and presents the product for critique by the client. In other situations, the employee participates as a member of a planning team and contributes photographic knowledge of the capabilities and limitations of cameras and equipment in the planning of substantial productions.

2. Creates photographic products or evaluates the possibilities for improving, modifying or replacing existing equipment, materials and techniques based on a knowledge of the most recent advancements in the field of photography and of the range of new equipment, experimental materials, techniques and processes, newly available.

3. Presents a realistic photographic rendering of events or occurrences that, in fact, are not subject to successful "real life" photography using a highly developed artistic and creative ability. Uses special effects photography requiring a high degree of ingenuity and imagination. Exercises control over the setting or action of the event by "staging" actions to improve the artistic effect of the photographs, where possible.

4. Provides insight into the object photographed or presents a heightened aspect of reality through the application of a substantial knowledge of photographic techniques and methods. Also creates the illusion of real action, simulates events, and uses trick photography in unprecedented situations where artistic and creative ability is required.

FLSA STATUS ____Exempt EXPLANATION

____Nonexempt

COVERAGE EXERCISE X

GENERAL SUMMARY

This position reports to the Branch Chief, and is responsible for developing changes in maintenance manuals, installation techniques, and design specifications for equipment in order to eliminate or minimize problems identified while reviewing all maintenance reports, both scheduled and emergency, performed on various kinds of electronic equipment used at airports around the nation.

MAJOR DUTIES & RESPONSIBILITIES

1. Reviews all reports of equipment failures, equipment repairs, and repairs and other actions taken during preventive maintenance and periodic maintenance checks on all electronics equipment being used at airports around the nation.

2. Analyzes these reports to determine if patterns or trends appear in the repairs or other maintenance actions related to the way the equipment is used, its geographic location, and/or length of service. Identifies and reports on these patterns or trends.

3. Periodically, performs on-site maintenance program evaluations at the airports. Also visits specific locations that frequently appear in the maintenance reports, e.g., all cities that have more than 90 days/year with below freezing temperatures, and examines maintenance programs and procedures as well as the equipment to determine if problems are caused by improper maintenance techniques and procedures, improper equipment usage, and/or improper installation.

4. Investigates the causes or contributing circumstances that produce these patterns by performing tests that simulate field conditions. Designs and carries out laboratory and field tests of equipment, to test possible causes for equipment failure, high maintenance needs, or frequent component breakdown.

5. Develops changes in maintenance manuals, procedures and programs; installation techniques or locations; and design specifications for the equipment, to eliminate or minimize identified problems. Uses the results of the tests, the on-site maintenance program evaluations, and research into contract specifications, design principles, construction methods, etc., in writing these proposed changes.

FLSA STATUS ____Exempt EXPLANATION

____Nonexempt

Temporary Duty & Coverage

An employee who performs different work or duties for a temporary period may affect his or her exemption status. The regulations about temporary duty apply only when the employee must perform work or duties that are not consistent with his or her primary duties for an extended period, i.e., more than 30 consecutive calendar days. The different work or duties an employee performs for a temporary period may be performed at his or her regular duty station or at a duty location that is in a different geographic location. The regulations about temporary duty do not apply when an employee is detailed to an identical additional position as the employee's position, or to a position at the same level and with the same basic duties and exemption status as the employee's official position description. [5 CFR 551.211(a) (2007)]

Generally, an agency may not change an employee's exemption status when assigned to different duties temporarily based on a snapshot of the employee's duties during a particular workweek. [5 CFR 551.211(b) (2007)] Rather the agency must:

- Assess an employee's temporary work or duties over a reasonable period of time (the 30-day test), compare them with the primary duties on which the employee's exemption status is based, and determine the employee's exemption status using the material discussed in this chapter and listed at 5 CFR 551.203-551.210; AND
- Ensure reassessment and, perhaps changing, an employee's exemption status is not avoided by breaking up periods of temporary work or duties with periods when the employee performs his or her regular work or duties. For example, an agency may not assign exempt employee to perform nonexempt work or duties for 29 consecutive calendar days, return them to their exempt duties for two or three days, then assign them again to perform nonexempt work for another 29 days.

An agency cannot aggregate, combine or total nonconsecutive calendar days over an extended period of time to meet the 30 day test, and such an aggregated total of nonconsecutive calendar days cannot be used to change an employee's exemption status. For example, if an exempt employee performs nonexempt duties 4 days in one week, 2 days in the following week and so on over a period of weeks or months, the days of nonexempt work may not be aggregated or combined for the purpose of changing the employee's exemption status. [5 CFR 551.211(c) (2007)]

Nonexempt Employees

A NONEXEMPT employee who temporarily performs work that is different from his or her primary duties remains NONEXEMPT for the entire period of temporary work or duty unless both of the following conditions are met.

- The period of temporary work or duties is more than 30 calendar days long; AND
- The employee's primary duties during the temporary duty is EXEMPT work, as discussed earlier in this chapter.

If the employee's temporary duties meet the above tests and the employee becomes EXEMPT, then she or he must be considered EXEMPT for the entire period of temporary duty. This will require re-calculating the employee's pay retroactive to the beginning of the period of temporary duties or work if the employee received FLSA overtime during the first thirty calendar days. The employee may be eligible for title 5 overtime pay or its equivalent. [5 CFR 551.211(d) (2007)]

Exempt Employees

An EXEMPT employee who temporarily performs work that is not consistent with or is different from his or her primary duties remains EXEMPT for the entire period of temporary work or duties unless both of the following tests are met.

- The temporary work or duties exceed 30 consecutive calendar days; AND
- The employee's primary duties during the period of temporary assignment do not meet the criteria for one or more of the FLSA exemption categories discussed earlier in this chapter.

If the temporary duties meet the above tests and the employee becomes NONEXEMPT, then she or he must be considered NONEXEMPT for the entire period of temporary duties. This will require re-calculating the employee's pay if she or he was paid any title 5, or its equivalent, overtime pay during the first thirty consecutive calendar days. The employee may be eligible for FLSA overtime pay. [5 CFR 551.211(e) (2007)]

In reviewing a claim for coverage during an emergency, OPM decided that a Civil Engineer, GS 810-12, did not meet the requirements for coverage by the FLSA. The employee claimed that during a deployment to a hurricane related emergency, he performed work that made him nonexempt. The OPM claims examiner determined that he spent his time managing the Emergency Operations Center (EOC) for this

natural disaster. While he may have performed some tasks that could be considered nonexempt in nature, e.g., sending faxes and answering telephones, overall the work met the criteria for exemption as being exempt administrative or closely related work involved in managing the EOC. OPM found the employee did not perform nonexempt emergency work within the meaning of the FLSA. [OPM decision # F-0810-12-01, dated 4 February 1998]

In another decision, OPM found that an Electronics Engineer, GS 855-12, became nonexempt during an emergency situation. Here the employee spent 60 percent or more of his time performing computer technician/assistant work comparable to the GS-5 or GS-6 level. This included unpacking and assembling computers at work stations; making, pulling and installing cables; installing printers and fax machines; etc. As a result, the work performed by the employee during this flood related emergency did not meet the requirements of the administrative exemption criteria and, therefore, was nonexempt during the assignment to emergency duties and owed FLSA overtime wages. [OPM decision #F-0855-12-01, dated 6 August 1998]

Emergency Situations

An agency has the authority to determine when an emergency situation exists. In order to be an emergency, temporary conditions must threaten human life or safety, serious damage to property, or serious disruption to an activity's operations. An employee is performing work in connection with a designated emergency when she or he performs work that is directly related to resolving, or coping with the emergency or its immediate aftermath, as determined by the employing agency. [5 CFR 551.104 (2007)]

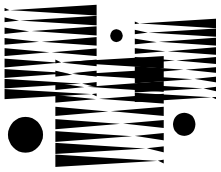
During such a designated emergency, there may be no other recourse than to assign qualified employees to temporarily perform work or duties in connection with the emergency. In such a designated emergency situation:

> NONEXEMPT employees remain NONEXEMPT whether the employees performs NONEXEMPT work or EXEMPT work during the emergency. [5 CFR 551.211(f)(1) (2007)]

As an exception to the rule that an employee's exemption status while performing temporary duties or work cannot be based on a snapshot of the work performed during one week, the exempt status of an EXEMPT employee must be determined on a workweek basis during an emergency situation. The exempt employee's exemption status will be

determined for the workweek using the following guidelines. [5 CFR 551.211(f)(2) (2007)]

> EXEMPT employees remain EXEMPT for any workweek in which their primary duties for the period of emergency work are exempt as discussed earlier in this chapter and at 5 CFR 551.203-551.210 (2007).
>
> EXEMPT employees become NONEXEMPT for any workweek in which the employee's primary duties for the period of emergency are nonexempt as discussed in this chapter.



HOURS OF WORK UNDER FLSA

All time spent by an employee performing an activity for the benefit of or under the control or direction of an agency is hours of work under the FLSA. This includes:

- on-duty time;
- suffered and permitted time; and,
- waiting or idle time under the control and for the benefit of the agency.

Time that is considered hours of work for the FLSA shall be used only in determining entitlement to minimum pay or overtime pay under FLSA. [5 CFR 551.401(a)-(d), and portions of 5 CFR 532 & 550]

The regulations also state that any brief rest period that does not exceed 20 minutes and that occurs within the workday shall be considered hours of work. [5 CFR 551.402(b)]

Agencies are responsible for exercising appropriate controls to assure that only work for which it intends to make payment is performed. [5 CFR 551.402(a)] One way of accomplishing this is to follow the regulations covering the establishment of employee schedules. While the FLSA establishes no requirements for scheduling employee work, the regulations in Part 610, Title 5, Code of Federal Regulations apply to nonexempt employees as it does to all federal employees. [5 CFR 551.421]

Under 5 CFR 610.102, 610.111 and 610.121 an administrative workweek of 7 consecutive days is to be established by the head of each executive agency and military department. For example, the Treasury Department established 0001 Sunday to 2400 Saturday as the administrative workweek.

Within this administrative workweek, each employee should have a regularly scheduled administrative workweek. The full time employee's basic workweek is to be 40 hours on 5 consecutive days with each day 8 hours in length. However, schedules must represent the employee's real work requirements and be established to accomplish the agency's mission without unduly increasing agency costs. Once the schedule is established, it should be clearly communicated to the employee.

Simply establishing employee schedules is not sufficient under the FLSA. The manager must assure that the employee works only the scheduled hours. More importantly, the manager must actively assure that nonexempt employees do not work any unscheduled hours unless directed to by the manager. To allow the nonexempt employee to work beyond the scheduled hours, by coming in early, by staying late or by working through lunch hours, establishes a requirement under the FLSA to pay for the additional hours.

Workday, for purposes of the FLSA, is the period of time between the start of the principal activities that an employee is engaged to perform on a given day and the end of the principal activities for that day. Under the regulations the workday is not limited to a calendar day or any other 24-hour period. [5 CFR 551.104 & 511.411(a)]

Workweek, for purposes of the FLSA, is a fixed and recurring period of 168 hours - seven consecutive 24-hour periods. Under the Act the workweek is not required to coincide with the calendar week, but may begin on any day and at any hour of a day. However, for employees who are covered by Part 610 of Title 5 of the Code of Federal Regulations, the workweek shall be the same as the administrative workweek defined above [5 CFR 551.104 & 5 CFR 610.102].

On Duty Time

When the FLSA was extended to federal employees in 1974, on duty time meant only that period of time the employee was present at the work site and performing work. [5 CFR 551.104]

This changed in May 1987 when the U.S. Court of Appeals for the Federal Circuit decided the case known as Lanehart versus Horner. [818 F.2nd 1574 (1987)] The court found that the leave with pay statutes prevent any reduction in the customary and regular pay of the federal firefighters who brought the suit, including overtime pay under Title 29. The court went on to explain that only if the overtime is on a regularly recurring basis and within the normal scheduled work period does it meet the definition of customary and regular. Cf. Armitage v. U.S. 23 Cl.Ct. 483 (1991). OPM interpreted this decision to credit some paid non-worktime as hours of work.

The passage of the Federal Employees Pay Act of 1990 (FEPCA) and the implementing regulations establish that all paid non-work time, such as paid leave, holidays, compensatory time off and excused absence, is counted as hours of work. [5 CFR 551.401(b)]

All unpaid non-work time, such as leave without pay (LWOP), absence without leave (AWOL), is not considered to be hours of work under the FLSA. [5 CFR 551.401(c)]

Suffered or Permitted Time

This concept was introduced to federal compensation practice when FLSA coverage was extended to federal employees. Under Title 5, the employee must prove overtime was ordered or approved before payment is required. Under the FLSA that is not the case. [5 CFR 551.104]

An employee who comes into work early, stays at his/her desk during officially designated lunch periods, or stays after the end of officially designated work hours, and performs work that is accepted by the employer, is performing suffered or permitted overtime.

It does not matter that the employee was not asked to stay and work. If the work is performed for the benefit of the agency, the supervisor knows or has reason to believe that the work is being performed, and the supervisor has an opportunity to prevent the work from being performed and has not done so, then the work has been suffered or permitted and is payable.

Other Times

Waiting/Idle Time

If this time is controlled by and benefits the agency, then waiting or idle time is considered hours of work. Normally, this happens when there is no work to perform for a short period of time and the employee is asked to stay at the work site. For example, time standing around waiting while machinery is repaired, or time standing around waiting for materials to arrive. [5 CFR 551.401(a)(3)]

Pre-shift and Post-shift Activities

Pre-shift and post-shift activities that are closely related to an employee's regular work tasks and are indispensable to their performance are considered hours of work and, therefore, payable under FLSA. [5 CFR 551.412] Such compensable pre- and post-shift activities are termed *prepatory* and *concluding* activities.

The agency must schedule time for these preparatory and concluding activities, once they have been determined to be closely related to the principal work. The employee will be credited with the time actually spent performing these tasks, but never more than the time the employer schedules.

Pre-shift and post-shift activities not closely related to the employee's regular tasks, are not considered to be hours of work and are not compensable. These are termed preliminary and postliminary activities.

The federal courts have provided guidance to help in differentiating between prepatory and concluding activities, and preliminary and postliminary activities. In one case brought by federal employees, the court reminded us that whether pre- and post-shift activities are compensable must turn on the facts of the situation. In this case, the court found that time spent picking up keys, a radio and a body alarm, walking to the work station before the shift, and returning these items to the pick-up point after the shift are an integral part of food service work in a federal correctional institution. This makes them prepatory and concluding activities and, therefore, compensable. [Amos v. U.S. 13 Cl.Ct. 442 (1987)]

In another case, the court thoroughly explored the issues that allow us to differentiate between compensable pre- and post-shift activities and non-compensable pre- and post-shift activities. The court listed at least 10 earlier decisions involving both federal and non-federal employees that deal with this topic. The court also noted that the OPM and DOL regulations and guidance in this area "...are largely identical in effect...." in the way they describe and treat compensable pre- and post-shift activities. In the circumstances of this case, the court found that retrieving protective clothing and reporting to a roll-call for briefing and inspection of the protective clothing before shift and returning the protective clothing after the shift were a necessary and integral part of the employees' principal activities as firefighters and, therefore, was compensable as overtime under FLSA. [Riggs v. U.S. 21 Cl.Ct. 664 (1990); cf., U.S. Department of Air Force v. FLRA 952 F.2d 446 (1991); Bobo v U.S. 37 Fed.Cl. 690 (1997), affm'd. 136 F3d 1466 (1998); Dooley v. Liberty Mutual Insurance Company 307 F.Supp.2d 234 (2004)]

De minimus Concept

An important part of the compensability of pre- and post-shift activities is how long they take. A court found that the concept of *de minimus* does apply in FLSA cases. The court went on to discuss what makes otherwise compensable time de minimus and, therefore, excludable from compensation. The court, after exploring the issue exhaustively by reviewing earlier cases, decided that de minimus is determined by considering such factors as: "...(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time [involved]; and (3) the regularity

of the additional work." [Lindow v. U.S. 738 F.2d 1057 (1984)]

The Supreme Court also has spoken to the de minimus concept. Where the activity "…only concerns a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded…It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." [Anderson v. Mt Clemons Pottery Co. 328 US 680, at 692 (1946)] Another federal court, following the guidance in Lindow, specifically upheld OPM's requirement that to be compensable pre- and post-shift activities must exceed 10 minutes per day. It went on to say that it did not see a conflict between this rule and DOL's interpretation and application in the private sector of the statutory provision on which OPM's de minimus rule is based. [Riggs v. U.S. 21 Cl.Ct. 664 (1990); cf., Bobo v. U.S. 37 Fed.Cl. 690 (1997), affm'd. 136 F3d 1466 (1998); 5 CFR 551.104]

Time Spent in Travel

Time spent traveling during regular work hours is considered hours of work. [5 CFR 551.401(h), 422 & 550.112(g), 5 USC 5544, FPM Letter 551-10 dated 30 April 1976, FPM Letter 551-11 dated 4 October 1977]

Time spent traveling outside of regular work hours is considered hours of work if it is approved/directed by an official of the employing agency and benefits the agency, and the travel meets one of the following requirements.

- Work is performed while traveling. Such work can include operating a vehicle, operating some device on the vehicle, assisting in operation of the vehicle (if sharing the driving, then each is working during the period of operation only). Additional examples include sky marshals, couriers with classified documents, guards escorting prisoners, security specialists guarding classified/valuable equipment in transit. (Attachment to FPM Letter 551-10 table 3) OR

- Employee travels as a passenger on a one-day assignment outside the duty station. (Attachment to FPM Letter 551-10 table 4, Attachment to FPM Letter 551-11 table 1) For example, a one-day trip to Indianapolis when stationed in Washington, DC.

  Both normal waiting time at a common carrier terminal and actual travel time are counted as hours of work.

Normal home to work/work to home (home to terminal/terminal to home) travel time, and bona fide meal times are not counted as hours of work. OR

- Employee travels as a passenger overnight away from the duty station. When the travel is performed during normal duty hours, the travel time is counted as hours of work. If the travel is performed on non-workdays during hours that correspond to normal duty hours, the travel time is counted as hours of work. [Attachment to FPM Letter 551-11 table 2] Travel time outside of normal duty hours, either on a workday or non-workday, is not counted as hours of work when the employee is on an overnight trip.

In addition, the FEPCA authorized travel performed under the following circumstances to be counted as hours of work under the FLSA. [5 CFR 550.112(g)]

- The travel involves the performance of actual work while traveling, or is incident to travel that involves the performance of work while traveling. [61 Comp.Gen. 626 (1982)] Generally, this means work that can only be performed while traveling, such as escorting a prisoner. However, if directed by the manager to perform work while traveling, the employee will be paid for the work even though it is the kind of work normally performed at the employee's worksite.

- The travel is carried out under such arduous and unusual conditions that the travel is inseparable from work. Arduous has to be determined on a case by case basis. However, travel over hard surface roads or where no unusually adverse weather conditions are encountered, or travel by rail or other common carrier is not arduous even when it extends over many hours. [41 Comp. Gen. 82 (1961), B-250889 dated 28 April 1993] OR

- The travel results from an event which could not be scheduled or controlled administratively, including traveling to and returning from such an event. To qualify the event requiring off duty travel must be administratively uncontrollable (i.e., something not controlled by an Executive Branch agency of the federal government), and there must be an immediate official necessity to travel occasioned by the unscheduled and administratively uncontrollable event. [69 Comp.Gen. 385 (1990); cf., 69 Comp.Gen. 545 (1990), 60 Comp.Gen. 681, 685 (1981)]

Commuting. Time spent traveling is NOT considered hours of work if it is commuting (home to work/work to home travel). This is considered a normal incident of employment and is not counted as hours of work. There are, of course, some exceptions to this. If the travel benefits the agency, then it is considered hours of work. [FPM Letter 551-10 Table 1; Aguilar v. U.S. 36 Fed.Cl. 560 (1996)]

Travel within the official duty station. If the travel is directly related to the performance of a given assignment and serves to extend the employee's regular tour of duty, the travel is considered work and is compensable. Thus, travel is considered hours of work and is compensable where the employee: is transported to another job site from the normal duty station, travels from one job site to another, or returns to the normal duty location from another job site. [FPM Letter 551-10 Table 2]

However, if the employee goes directly from home to an alternate work site or from the alternate work site to home, this is not hours of work and is not compensable - essentially this is home to work travel (commuting).

The official duty station often is defined as the corporate limits of the city or town in which the employee is stationed. Where the duty station is not in an incorporated city/town, the agency may define the official duty station as the reservation, station or established area, or, in the case of large reservations, the established subdivision with defined boundaries.

The agency faces to limitations when defining the "official duty station" for purposes of travel under the FLSA. First, the duty station cannot be more than 50 miles in diameter. Second, the duty station may NOT be smaller than the definition used for official station and post of duty under the federal travel regulations issued by the General Services Administration. [41 CFR 301-1.3(c)(4); 5 CFR 551.422(d)]

Special Circumstances Related to Travel.

- Other modes of transportation. If an employee chooses not to use the mode of transportation the agency selects, the employee will be credited with the LESSER of either:
  - That portion of the actual travel time considered work time under FLSA, or

- That portion of the estimated travel time considered work time under FLSA (60 Comp.Gen. 434).

○ Other travel times. If the employee, for personal reasons, chooses not to travel at the selected times, or chooses to travel by an indirect route, or chooses to stop somewhere en route, the employee shall be credited with the LESSER of either:

- That portion of the actual travel time considered work time under FLSA, or

- That portion of the estimated travel time considered work time under FLSA,

if the employee had gone by the route and time selected by the agency.

Usually the agency indicates the time during which travel should be performed. To the maximum practicable extent, this should be within normal duty hours. However, this is not always possible. [5 CFR 551.422(c)]

○ Two or more time zones. The zone of origination is the one used to determine whether or not the individual performed travel during regular work hours. EXAMPLE - a trip from Washington, DC to Denver to Los Angeles, the DC time zone is used to establish the hours of work.

Training

Time spent in training during regular working hours is considered hours of work, whether or not the training is under the purview of 5 CFR 410. [5 CFR 551.423 & 410.402, FPM Letter 551-17 dated 28 January 1981]

OPM provided guidance on the meaning of the phrase “during regular working hours” on its website in summer 2003. This guidance reminded us that the regulations at 5 CFR 551.421 clarify that, for purposes of part 551, "regular working hours" means the days and hours of an employee's regularly scheduled administrative workweek established under 5 CFR part 610. The phrase "regularly scheduled administrative workweek" is defined in 5 CFR 610.102 as the period within an administrative workweek within which an employee is regularly scheduled to work. As an example, OPM cited employees scheduled to attend a 6 day training week at the Federal Law Enforcement Training Center (FLETC) for entry level classes. OPM emphasized that the fact that this is entry level training is irrelevant to the decision, as is the fact that no productive work is performed. Because the training was

scheduled in advance of the administrative workweek, the employees are to be paid overtime for the scheduled 6th day of training. [www.opm.gov/oca/pay/HTML/TrainQA.asp; 5 CFR 551.421]

In contrast, time spent in training outside of regular working hours, whether or not it is under the purview of 5 CFR 410, shall be considered hours of work only if both of the following conditions are met. [5 CFR 551.423(b)]

- The employee is directed to participate by the employing agency, i.e., the training is required by the agency, and the employee's performance or retention is jeopardized by not taking the training. The employee must be directed to participate in order to make the time payable. The fact that an agency pays for all or part of the training expenses does NOT, by itself, create an entitlement to overtime. AND
- The purpose is to improve the employee's performance of the current duties and responsibilities. This can be either remedial or refresher training to bring the employee to an acceptable level of performance, e.g., a pilot going to refresher training; or training to learn a new method or procedure, piece of equipment or technique that becomes a part of the job, e.g., an employee learning to use a new automated system.

In addition, FEPCA authorized training that meets the exceptions outlined in 5 CFR 410.402(b) to be counted towards hours of work for FLSA overtime purposes.

- Training given when the employee is already receiving premium pay, e.g., Sunday pay.

- Training given at night because situations the employee must learn to handle only occur at night.

- Training given during premium hours when the costs of training, including premium pay, are less than the costs of the same training that is confined to regular duty hours.

- Training given to criminal investigators who are eligible for law enforcement availability pay [cf., 5 CFR 550.185(b) & (c)].

- Training for employees receiving annual premium pay for standby and administratively uncontrollable overtime duty during a temporary assignment covered by 5 CFR 550.162(c).

- Training given to firefighters paid under 5 CFR 1301-1308 in any week in which attendance at agency sanctioned training reduces the hours in the firefighter's regular tour of duty. If the training is voluntary, i.e., not ordered by the agency, then this protection does not apply.

- Training given during premium time under circumstances approved by the U.S. Office of Personnel Management.

Training outside of regular duty hours that does not meet one of the seven exceptions is not considered hours of work and, therefore, is time for which the employee cannot be paid overtime or other premium pay. In addition, the employee cannot be given compensatory time off, and cannot be paid at straight time rates for such additional training time. [39 Comp. Gen. 453]

Apprenticeship training. Regulations prohibit crediting as hours of work time spent in apprenticeship or other entry level training outside of regular working hours as long as no productive work is performed during these hours. Of course, time spent by an employee performing work during a period of training shall be credited as hours of work. [5 CFR 551.423(a)(3) & (4)]

Homework. Time spent in preparation for training (homework) that the agency or instructor defines shall be counted as hours of work. The instructor should clearly state the amount of time the preparation is expected to take. Any hours the employee spends beyond the stated time are not hours of work. [Attachment to FPM Letter 551-17 at table 1] The training must meet the requirements listed in 5 CFR 551.423(a)(2) if the homework is performed outside of work hours in order to payable. [5 CFR 551.423(c)]

Time spent attending a meeting, lecture or conference, e.g., professional society luncheon seminar, shall be considered hours of work if:

- It is held during regular working hours; or

- It is held outside of regular working hours and the employee is directed by the agency to attend, or if the employee performs work for the benefit of the agency during the meeting.

Adjusting Grievances

Time spent by an employee adjusting his/her grievance or any appealable action within an agency during the time the employee is required to be on the agency's premises shall be

considered hours of work. This includes such activities as developing the grievance, meeting with management, talking to a union representative or Labor Relations Specialist, etc. [5 CFR 551.424(a)]

Performing Representational Functions

Official time granted by an agency to perform representational functions during the time the employee is otherwise in a duty status shall be considered hours of work. This includes regular working hours and regularly scheduled overtime. [5 CFR 551.424(b); Association of Civilian Technicians v. U.S. 269 F.3d 1119 (2001)]

Events related to representational functions that arise during irregular or unscheduled overtime that must be dealt with during the irregular overtime will be considered hours of work, e.g., safety or health concern due to breakdown of equipment.

Medical Attention

Time spent waiting for and receiving medical attention for illness or injury shall be considered hours of work if all of the following conditions are met.
[5 CFR 551.425]

- The medical attention is required on a workday the employee reported for work and subsequently became ill or was injured; AND
- The time occurs during the regular working hours; AND
- The medical attention is provided on the agency's premises or at an outside medical facility to which the agency directs the employee to go.

Time spent taking a physical examination that is required for the employee's continued employment shall be considered hours of work. However, only the time spent taking the examination and associated tests is compensable. In a claim decided by the Comptroller General even though the employee was in the hospital for 3 1/2 days for a required fitness for duty examination, only the hours spent being examined and tested are creditable as hours worked.
[B-209768, 15 July 1983]

Charitable Activities

Time spent working for public or charitable purposes at an agency's request or direction shall be considered hours of work. For example, working on the Combined Federal Campaign or a blood drive. [5 CFR 551.426]

Time spent voluntarily in such activities outside an employee's regular working hours is not hours of work.

Time spent voluntarily in such activities outside an employee's regular working hours is not hours of work.

Off-Duty Time – Standby vs. On-Call

Time spent off duty may be considered hours of work under certain circumstances. To be counted as hours of work and be compensable the employee must meet the following requirements. [5 CFR 551.431, FPM Letter 551-14 dated 15 May 1978]

- The employee is restricted by official order to a designated post of duty, for work related reasons; AND
- The employee's activities are substantially limited so that s/he cannot use the time effectively for his/her own purposes; AND,
- The employee is required to remain in a state of readiness to perform work.

The U.S. District Court for the Northern District of California has identified additional factors to consider in determining if time off is compensable.

-- Are the off duty responsibilities similar to and as demanding as the regular duties?
-- Is there a required response time?
-- How frequently is the employee called during off duty time?
-- Are the employee's activities limited geographically?
-- To what extent can the employee engage in personal activities during the off duty time?
-- Must the employee get approval before trading off-duty responsibilities?
-- Is there an agreement between the employer and employees regarding off-duty time?

The answers to such questions can help in deciding whether the time is so restricted as to make it compensable, or whether the employee's use of off duty time is unrestricted enough to be non-compensable. [Berry v. Sonoma County 791 F.Supp. 1395 (1992)]

In an early decision related to this case, the court also emphasized the benefit of following the guidance from the U.S. Supreme Court's interpretation of the FLSA. The Supreme Court has said that whether or not the time is compensable is "...dependent upon all the circumstances of the case." and will depend on "[w]hether time is spent predominantly for the employer's benefit or for the employee's." Where the time is mostly under the control of and benefits the employer, it is more likely the employee is in a standby status, which is compensable. [Berry v. Sonoma County 763 F.Supp. 1055 (1991); cf., McIntyre v. Division of Youth Rehabilitation Services 795 F.Supp. 668 (1992).

Conversely, time spent off duty is not considered hours of work and, therefore, in NOT compensable if:

- The employee is allowed to leave a telephone number or carry a "beeper" to allow quick contact; AND
- The employee is required to remain within a reasonable call back radius; OR,
- The employee may arrange for any work that arises during the on-call period to be performed by another person.

In a claim decided by the Comptroller General, unless the employee's time is severely restricted the employee is not entitled to overtime compensation even though he MUST live in government owned housing at a dam site and respond to telephone calls after hours. (B-218519, 15 October 1985)

The U.S. Court of Appeals for the District of Columbia Circuit concluded that Marine Corps employees who were asked to carry beepers were in an on-call status, which is not compensable, because the use of their time off was not overly restricted. While the employees were somewhat restricted in the use of their off-duty time, because they must stay within 20 miles of the radio transmitter towers for the beepers to work, they were not restricted enough to be in a stand-by situation, which would be compensable. In fact the court stated that to be compensable, the Corps would have to impose additional restrictions on the employees' use of their time-off. [U.S. Department of Navy v. FLRA 962 F.2d 1066 (1992)]

In a similar case involving deputy U.S. Marshals the court had earlier ruled time "on-call" was not compensable. Although employees, when acting as duty officers, had to carry beepers, remain sober and within beeper range, the time and location was not restrictive enough to qualify as "standby" time and, therefore, the time was not compensable. [Allen v. U.S. 1 Cl.Ct. 649 (1983)]

Sleep Time

Bona fide sleep time shall NOT be considered hours of duty. To be bona fide sleep time, all of the following conditions must be met. [5 CFR 551.432(a), Attachment 2 to FPM Letter 551-5 at C.4. and Attachment 3 at B.3.]

- The work shift is 24 hours or more in length; AND
- Adequate facilities exist to allow an uninterrupted period of sleep; AND
- There are at least 5 hours available for sleep during this period.

The regulations indicate that no more than 8 hours sleep and meal time in a 24-hour may be disregarded. [5 CFR 551.432(c)] When sleep time is interrupted by a call to duty, the time spent on duty is considered hours of work. [5 CFR 551.432(d)]

The courts have concurred with limiting the amount of sleep and meal time to be deducted to no more than 8 hours in 24. The courts also agreed that any call to duty during the period of sleep is counted as hours of work. In addition, the courts have said that when less than 5 hours is available for sleep, then all sleep time is counted as hours of work. [Armour & C. V. Wantock 323 U.S. 126 (1944), Skidmore v. Swift & Co. 323 U.S. 134 (1944)]

The regulations state that those receiving standby premium pay under 5 USC 5545(c)(1) will NOT have on-duty sleep time during regularly scheduled hours excluded from hours of work. [5 CFR 551.432(e)] Similarly, firefighters compensated under 5 U.S.C. 5545b will NOT have on-duty sleep time excluded from hours of work. [5 CFR 551.432(f)]

At least one court has supported these regulatory provisions by saying that law enforcement or fire protection employees who receive annual premium pay either for standby duty or for administratively uncontrollable overtime shall have sleep time counted as hours of work when tours of duty are 24 hours or less. [Beebe v. U.S. 640 F.2d 1283 (1981)]

Meal Time

Bona fide meal times shall not be considered hours of work. To be excluded, adequate facilities must exist to allow the employee to get away from the work and the time must usually be uninterrupted. [Armour & Co. v. Wantock 323 U.S. 126 (1944), Skidmore v. Swift & Co. 323 U.S. 134 (1944); cf., Attachment 2 to FPM Letter 551-5 at C.4. and Attachment 3 at B.3.]

Another court stated it a little differently. "As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA." [Hill v United States 751 F.2d 810, 814 (1984)]

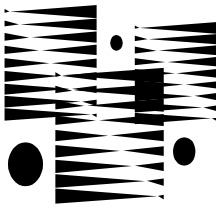
The regulations state that those receiving premium pay under 5 USC 5545(c)(1) or (c)(2) will NOT have on-duty meal-time during regularly scheduled hours excluded from hours of work. [5 CFR 551.411(c) & 551.432(e)] Similarly, firefighters compensated under 5 U.S.C. 5545b will NOT have on-duty meal time excluded from hours of work. [5 CFR 551.411(c) & 551.432(f)]

Fire protection and law enforcement employees who receive annual premium pay either for standby duty or for administratively uncontrollable overtime shall have meal times counted as hours of work when tours of duty are 24 hours or less. [Beebe v. U.S. 640 F.2d 1283 (1981)]

Except that law enforcement and fire protection employees with tours of duty of more than 24 hours may exclude meal period by agreement between the employer and the employee. [5 CFR 551.411(c)]

Call-Back Time

The Federal Employees Pay Comparability Act added call-back time, a concept well established under Title 5, to NONEXEMPT federal employees' entitlements. This enables a NONEXEMPT federal employee who is called in to perform irregular or occasional overtime on a day when s/he was not scheduled to work to be credited with at least 2 hours of work. Similarly, an employee who is called back to his/her work place after going home shall be credited with at least 2 hours of work. [5 CFR 551.401(e)]



HOURS OF WORK EXERCISES

Exercise 1

The Sector Chief requires all Border Patrol Agents to report to work 20 minutes before the start of each shift in order to brief them on the latest alerts for possible smugglers and terrorist activities, and to be updated on the latest conditions and activities at the assigned posts. The Chief also requires all Agents to complete reports after the end of their regular shifts and to finish processing any aliens detained during the shift. Is this time creditable as hours of work under the FLSA? Why or why not?

____ **Creditable** **Explanation**

____ **Not Creditable**

Exercise 2

Employees voluntarily report to work 10 minutes early to change into their government issued uniforms even though the port director authorizes them to wear their uniform to and from work. After the end of each shift employees again congregate in the locker room to change out of their uniforms and to discuss the events of the day. Is this time creditable as hours of work under the FLSA? Why or why not?

____ **Creditable** **Explanation**

____ **Not Creditable**

Exercise 3

Two employees were directed to travel to Harrisburg, Pennsylvania, for temporary duty. The employees' normal workweek was Monday through Friday from 7:45 a.m. to 4:15 p.m. On Sunday, the first employee left home at 12:45 p.m. and drove to the second employee's home arriving at 1:30 p.m. The second employee took over driving and they left at 2 p.m. for Harrisburg arriving at 7:30 p.m. that night. Is the time spent traveling creditable as hours of work under the FLSA? Why or why not?

____ **Creditable** **Explanation**

____ **Not Creditable**

Exercise 4

A nonexempt employee is given a temporary assignment in Paris for a period of four weeks. The employee's normal work schedule is 8 a.m. to 5 p.m. Monday through Friday with one hour for lunch. The employee leaves on Sunday of the first week of the assignment at noon. The non-stop flight arrives in Paris eight and one-half hours later. Is the travel time creditable as hours of work

under the FLSA? If so, how much of the time is considered hours of work? Are there any other issues the supervisor must be aware of while preparing time and attendance records for this employee during the detail?

____ **Creditable** **Explanation**

____ **Not Creditable**

Exercise 5

Anselm, a nonexempt employee, has a backlog of work due to the sudden increase in workload caused by the end of year requirement to renew permits. Anselm decides, without discussing it with his supervisor, to stay two extra hours each day at the end of the shift to eliminate the backlog. While the supervisor normally leaves before the end of Anselm's shift, supervisors of nearby units who work late as well as Anselm's colleagues tell the supervisor that Anselm is working late each day. In addition, the supervisor realizes that Anselm is turning in more work than can normally be produced in a 40 hours workweek. Is the time creditable as hours of work under the FLSA? Why or why not?

____ **Creditable** **Explanation**

____ **Not Creditable**

OVERTIME UNDER FLSA

Overtime for NONEXEMPT Defined

7(a) Employees

For most NONEXEMPT federal employees, i.e., those who perform neither fire protection nor law enforcement activities, Section 7(a) of the FLSA defines overtime as all hours that exceed 40 in a workweek and that meet the Hours of Work criteria discussed above. [29 USC 207(a)(1), 5 CFR 551.501]

In addition, FEPCA authorizes NONEXEMPT employees to be compensated for all hours of work that exceed 8 in a day that meet the hours of work criteria set forth in 5 CFR 410.402 (Training), 5 CFR 532.503 (Federal Wage System) and 5 CFR 550.112 (General Schedule) as appropriate. [5 CFR 551.401(f)]

Time compensated under annual premium pay provisions either for standby duty or for administratively uncontrollable overtime (AUO) will not be counted toward time that exceeds 8 in a day. For those receiving Standby Pay, only irregular overtime will be counted towards the hours that exceed 8 hours in a day. For those receiving AUO, only regularly scheduled overtime will be counted towards the hours that exceed 8 in a day. Federal Wage System employees will not have time in a standby or on-call status, or time spent sleeping or eating credited towards the time that exceeds 8 hours.

FEPCA authorizes NONEXEMPT employees to be compensated for all hours of work that exceed 40 hours in a workweek that meet the hours of work criteria set forth in 5 CFR 410.402 (Training), 5 CFR 532.503 (Federal Wage System) and 5 CFR 550.112 (General Schedule) as appropriate. [5 CFR 551.401(g)]

Employees will not be given credit for the hours worked under both sets of criteria, i.e., exceeding both 8 hours in a day and 40 hours in a week.

A federal court has helped to define the 40-hour requirement, in a case involving relief Power Plant Operators at the Bureau of Reclamation. The relief operators claimed overtime for working outside of their regular 40-hour schedule. These employees were scheduled to work Monday through Friday

from 8 a.m. to 4:30 p.m., but relieved other operators who became ill, took leave, etc. The relief operators asked for overtime because they were directed to work outside their normal Monday through Friday 8 a.m. to 4:30 p.m. regular schedule on the relief assignments. The court found that overtime is due under the FLSA only for exceeding 40 hours of work per week, and the established Monday through Friday schedule was a device for assuring that the relief operators were paid for a full workweek. When they relieved another operator, then they took on that person's schedule, and only by exceeding 40 hours per week were they entitled to overtime pay. [Presser v. United States 15 Cl.Ct. 672 (1988)]

7(k) Employees

For NONEXEMPT federal employees who perform fire protection or law enforcement activities (described in Appendix B) and do not meet one of the exemption criteria discussed above, separate overtime standards have been established for a specified work period [29 USC 207(k), 5 CFR 551.541].

The work period is established by each agency and shall be neither more than 28 days nor less than 7 days. For example, the Treasury Department establishes the 14 days that coincide with the regular biweekly pay period as the specified work period.

The separate standards were established for these employees because Congress was aware that the work schedules of fire protection and law enforcement employees vary from the schedules of other employees. This difference required some adjustment to the usual rules for determining overtime.

The separate standards for overtime are based on a survey of hours normally worked by non-federal fire protection and law enforcement employees. When FLSA coverage was first extended to federal fire protection and law enforcement employees in 1975, the standard was 240 hours in a work period of 28 days. However, the standard has been reduced over the years based on new survey information. Currently, the standards are all hours that exceed:

- 171 hours in a 28 day period (85 1/2 hours in a 14 day period or 42 3/4 hours in a 7 day period) for employees engaged in law enforcement activities; and,

- 212 hours in a 28 day period (106 hours in 14 days or 53 hours in 7 days) for employees engaged in fire protection work.

A court decision, in a case brought by employees of the Uniformed Division of the Secret Service, has upheld these requirements. The decision stated that employees have no entitlement to overtime for the five hours beyond the normal 80 hour bi-weekly pay period even though they were required to stand roll-call during the five hours. [Abbott v United States 41 Fed.Cl. 553, at 567 (1998)]

When determining whether or not the employee's hours exceed these standards, all the time the employee is on duty (i.e., the whole tour of duty) shall be included. This means that sleep and meal times are included unless they meet the criteria discussed in the Hours of Work section, above, for exclusion.

Those engaged in fire protection or law enforcement activities, who do not receive premium pay on an annual basis for standby or administratively uncontrollable overtime duty, and those engaged in fire protection activities not compensated under 5 USC 5545b, are entitled to overtime for all hours that exceed 40 hours in a workweek. For a firefighter compensated under 5 USC 5545b, overtime is paid for all hours that exceed 106 in a biweekly pay period. [5 CFR 550.1302]

In addition, FEPCA authorizes NONEXEMPT employees to be compensated for all hours of work that exceed 40 hours in a workweek that meet the hours of work criteria set forth in 5 CFR 410.402 (Training), 5 CFR 532.503 (Federal Wage System) and 5 CFR 550.112 (General Schedule) as appropriate. [5 CFR 551.401(f)]

Employees on Flexible or Compressed Work Schedules

Employees working on Flexible Work Schedules (under 5 USC 6122 through 6126) will have hours of work that are officially ordered or approved in advance that exceed 8 hours in a day or exceed the weekly overtime standard for the week credited as overtime hours. Additional hours voluntarily worked, including credit hours, are not counted as overtime for those on flexible schedules.

Employees working on Compressed Work Schedules (under 5 USC 6127 and 6128) will have hours of work in excess of the daily compressed work schedule credited as overtime. In addition, hours of work in excess of the weekly compressed

work schedule will be overtime hours on the basis of exceeding the applicable weekly (or other appropriate work period) overtime standard [cf., 5 CFR 551.501(a)(6)].

Crediting Fractional Hours of Work

A NONEXEMPT employee must be compensated for every minute of work performed during his/her regularly scheduled administrative workweek, including regular overtime work.

For irregular/occasional overtime work one quarter of an hour shall be the largest fraction of an hour to be used in calculating overtime pay for a NONEXEMPT employee. When irregular/occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up/down to nearest full fraction used to credit overtime work.

Agency policy may provide payment for fractions of less than a quarter hour, e.g., 10 minutes, 5 minutes. [5 CFR 551.501(a)(8) & 521; FPM Letter 551-19 dated 1 September 1983; FPM Supplement 990-2, Book 550, Appendix I]

Coverage by More than One Overtime Law

Other statutes provide additional compensation for particular kinds of duty. Typically, these statutes apply only to specified groups of federal employees. For example, 19 USC 267, covering Bureau of Customs & Border Protection employees; 7 USC 394, 394a, 2260 covering U.S. Department of Agriculture employees; etc.

Where employees are entitled to overtime under the FLSA and under statutory provisions other than Title 5, they shall be paid under whichever authority provides the greater overtime pay entitlement. [29 USC 207(h), 5 CFR 551.513]

A federal court decision supported this regulatory provision. In it, the court said employees cannot pick and choose among premium pay laws, and get the maximum compensation from each applicable law. Rather the regulation correctly provides for comparing overtime entitlements under applicable laws, and paying the most generous amount. [Alexander v. U.S. 28 Fed.Cl. 475 (1993); affm'd. 2 WH Cases2d 393 (1994)]

On appeal, the court emphasized that the FLSA established a minimum amount or "floor," for overtime pay. Where the employee is entitled to premium pay for services in excess of a specified maximum work period that exceeds the FLSA floor, such premium is not paid in addition to the FLSA pay.

Rather such premium pay is paid in lieu of the FLSA pay. [Alexander v. U.S. 32 F.3d 1571 (1994)]

Other FLSA Provisions

In addition to the pay for overtime hours worked the FLSA contains two other entitlements – minimum wage provisions and child labor provisions – that apply to federal employees.

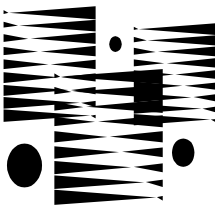
Minimum Wage

The Act requires that a covered employer, such as the Federal Government, pay each of its employees at a rate that is not less than the minimum wage specified in 29 USC 206(a)(1) for all hours of work, as that term is defined in this material. The minimum wage rose to $5.85 per hour on 24 July 2007. Two more increases are scheduled: $6.55 per hour on 24 July 2008, and $7.25 per hour on 24 July 2009. Also remember that many states have minimum wage requirements, some of which may exceed the FLSA level. As an exception, these minimum wage requirements do not apply to criminal investigators receiving availability pay. [5 CFR 551.301]

Various minimum wage exceptions apply under specific circumstances to workers with disabilities, full-time students, youth under age 20 in their first 90 consecutive calendar days of employment, tipped employees and student learners. [5 CFR 551.311]

Minimum Age

The Act establishes a minimum age of 16 years for most kinds of employment covered by its child labor provisions [see 29 USC 203(1)]. However, for employment the Secretary of Labor has declared to be particularly hazardous for minors or detrimental to their health or well-being, the Act establishes a minimum age of 18 years. [5 CFR 551.601] Agencies should review material at 29 C.F.R. § 570 for guidance regarding the employment of those under 18 years of age. [5 CFR 551.602(a)]



OVERTIME COMPENSATION UNDER FLSA

Payment for Overtime Under the FLSA

Employees who are covered by the provisions of the FLSA, i.e., are NONEXEMPT, shall be paid one and one half times their "hourly regular rate of pay" for all hours that exceed 8 hours in a day or 40 hours in a work week for 7(a) employees; or, for all hours in a tour of duty that exceed the separate overtime standard established for 7(k) employees. [5 CFR 551.501(a) and 551.541(a)]

The employee is entitled to both:

- The straight time rate of pay for all overtime hours worked; and,
- One-half the employee's "hourly regular rate of pay" for all overtime hours worked. [5 CFR 551.512(a)]

The employee's "straight time rate" is equal to the rate of basic pay for his/her position (exclusive of any premiums, differentials, or cash awards or bonuses) unless the employee is authorized premium pay on an annual basis for regularly scheduled standby duty or administratively uncontrollable overtime (AUO). For those receiving such annual premium pay, the straight time rate is equal to the rate of basic pay plus the annual premium pay divided by the hours covered by the basic pay plus annual premium pay. [5 CFR 551.512(b)]

A number of cases have been brought to court regarding the method for computing FLSA overtime. All of the cases listed below confirm that OPM's requirements set out at 5 CFR 551.512 and the guidance offered in FPM Letter 551-5 will properly pay the employee for overtime under the Fair Labor Standards Act. [Brooks v. Weinberger 730 F.Supp. 1132 (1989); Zumerling v. Marsh 591 F.Supp. 537 (1984) "The regular rate of pay at which the employee is employed shall in no event be less than the statutory minimum specified under section 6 of the FLSA[;]" Abreu v. U.S. 22 Cl.Ct. 230 (1991), affm'd. 948 F.2d 1229 (1991); Alexander v. U.S. 1 Cl.Ct. 653 (1983); Slugocki v. U.S. 816 F.2d 1572 (1987)]

For those receiving a non-foreign cost of living allowance (COLA), the straight time rate is equal to the rate of basic pay plus the non-foreign COLA. [5 CFR 591.239(a)]

For firefighters who are paid under the provisions of 5 USC 5545b, overtime is paid at one and one-half times the firefighter hourly rate of basic pay as established under 5 CFR 550.1303(a) and (b)(2). [5 CFR 550.1304(a), 5 CFR 551.541(d)]

There is no maximum limitation under the FLSA that curtails the amount of premium pay a NONEXEMPT employee can earn. Thus, under the FLSA, the employee shall be paid at the appropriate rate (i.e., the regular rate for all non-overtime hours and the overtime rate for all overtime hours) for all hours that meet the Hours of Work criteria, discussed above. [5 CFR 551.501(d)]

Compensatory Time Off

Under the FEPCA, a NONEXEMPT GS employee may be granted compensatory time off from his/her tour of duty for an equal amount of irregular or occasional overtime work instead of being paid under the above provisions. Compensatory time off is provided at the rate of one hour off for each hour of irregular overtime worked. [5 CFR 551.501(a)(7) & 551.531]

The National Defense Authorization Act for FY1997 [P.L. 104-201] §1610 amended 5 USC 5543 and authorizes agency heads to approve a NONEXEMPT prevailing rate (FWS) employee's request for compensatory time off at the rate of one hour off for each hour of irregular or occasional overtime worked, effective September 23, 1996.

The NONEXEMPT employee may not be required to take compensatory time off in lieu of pay for overtime work. In addition, the regulations emphasize that an employee may not be intimidated, threatened, or coerced to request or not request compensatory time off.

For a NONEXEMPT employee working under a flexible work schedule, the head of an agency may grant compensatory time off for an equal amount of overtime work.

Limits On Use. Revised regulations released in March 2007 provide that an employee must use accrued compensatory time off to which she or he is entitled by the end of the 26th pay period after the pay period during which it was earned.

As explained in the regulations this is a "rolling" 26 pay period limit. This means that a new 26 pay period cycle begins at the end of each pay period. Thus, an employee who earns comp time

during pay period 9 of this year will have 26 pay periods in which to use the comp time beginning with pay period 10. Similarly, an employee who earns comp time during pay period 10 will have 26 pay periods in which to use the comp time beginning with pay period 11. [72 Fed.Reg. 12032, 15 March 2007, @12034]

Compensatory time off that has been earned by a NONEXEMPT employee and that is not used by the end of the 26 pay period limit established for using accrued comp time, must be paid for at the rate of overtime pay the employee would have received for hours of overtime worked in the pay period during which the comp time off was earned. [5 CFR 551.531(d) & (g) (2007)]

When a nonexempt employee transfers to another federal agency or separates from federal service before the expiration of the 26 pay period timeframe just discussed, the employee must be paid for the comp time at the rate of overtime pay the employee would have received for hours of overtime worked in the pay period during which the comp time off was earned. [5 CFR 551.531(d) (2007)]

An employee who separates from federal service or who is placed in a leave without pay status because either (1) the employee will perform service in the uniformed services [as defined in 38 U.S.C. 4303 or 5 CFR 353.102] or (2) the employee experiences an on-the-job injury with entitlement to injury compensation under chapter 81, title 5, United States Code, must be paid for the comp time at the rate of overtime pay the employee would have received for hours of overtime worked in the pay period during which the comp time off was earned. [5 CFR 551.531(f) (2007)]

When compensatory time off is liquidated or when pay limitations are calculated, the dollar value shall be the amount of overtime pay the employee otherwise would have received for the overtime work during the pay period in which it was performed. [5 CFR 551.531(g) (2007)]

Transition Provisions The March 2007 regulations provide a transition period of three years that was not discussed in the January 2005 proposed rule. An employee who has compensatory time off to his or her credit on 14 May 2007, the effective date of the new provisions, must use the comp time by the end of the pay period ending 3 years after 14 May 2007.

A NONEXEMPT employee who fails to use comp time to which she or he is entitled by the end of pay period ending 3 years after 14 May 2007 must be paid for such unused comp time off at the appropriate rate. [5 CFR 551.531(e) (2007)]

Hourly Regular Rate of Pay Defined

To determine the appropriate amount to be paid the employee we must first determine the "Hourly Regular Rate of Pay" for the employee. The "Hourly Regular Rate of Pay" is computed by dividing the total remuneration paid to the employee in a workweek by the total number of hours of work in the workweek.
[29 USC 207(e), 5 CFR 551.511]

Total remuneration normally includes the following types of payments (subject to the conditions noted in the following paragraph):

- Scheduled rate (or basic rate under a statutory pay system);
- Night shift differential;
- Environmental differential/hazard pay;
- Sunday premium pay and holiday pay;
- Cost of living allowance [5 CFR 591.239(a)];
- Recruitment incentive in Guam;
- Post differential [5 CFR 591.239(a)];
- Representation allowance paid to employees assigned to the United Nations in New York;
- Locality payments and interim geographic adjustments [5 CFR 531.611(c)]; and,
- Retention incentives *.

* Authorized for inclusion in total remuneration and straight time rate of pay by the FEPCA (see FPM Letter 551-24, 14 January 1992, Attachment 1, ¶ 17).

A continued rate of pay, for one who formerly received an interim geographic adjustment on top of a worldwide or nationwide special

rate under 5 USC 5305, is included in the total remuneration as well as the straight time rate for NONEXEMPT employees. [5 CFR 531.703(d)] This provision was repealed with the issuance of the Code of Federal Regulations for 2005.

Inclusion of AUO and standby premium pay in the total remuneration used to calculate the hourly regular rate has been questioned by employees in court a number of times. The courts have ruled that AUO is included in computing the hourly regular rate for at least 3 reasons - it is not a premium rate paid for certain hours [Zumerling v. Devine 769 F.2d 745 (1985)], it is not a fixed amount per hour and it is not a multiple of the non-overtime rate [Slugocki v. U.S. 816 F.2d 1572 (1987)], but is paid as a percentage of the employee's basic rate of pay regardless of how many hours are worked. Cf. Alexander v. U.S. 1 Cl.Ct. 653 (1983), Alexander v. U.S. 28 Fed.Cl. 475 (1993).

The longevity pay paid to employees of the Uniformed Division of the U.S. Secret Service is properly included in the hourly regular rate when computing FLSA overtime for these employees. [Abbott v. United States 41 Fed.Cl. 553, at 569 (1998)]

Total remuneration does NOT include payments of the following types [29 USC 207(e)(1)-(7), 5 CFR 551.511(b)(1)-(7)]:

- Payments not based on hours of work, production or efficiency, e.g., cash awards for suggestions;
- Reimbursements for travel expenses or other similar expenses incurred by an employee that are not related to hours of work;
- Payments recognizing services performed during a specific period when if the payment is made and what the amount of the payment will be are determined solely by the agency, e.g., incentive awards for high quality work;
- Contributions to retirement, insurance or similar benefit fund made by the agency;
- Extra compensation paid under a premium rate for hours of work that exceed eight in a day or exceed the employee's normal workweek; [Alexander v. U.S. 32 F.2d 1571, at 1577 (1994)]
- Extra compensation paid under a premium rate for hours of work performed on a Sunday or a holiday AS LONG AS the premium rate is at least one and one-half times the employee's non-overtime rate of pay for work performed on other days;

- Extra compensation paid under a premium rate for hours of work performed outside an employee's regular working hours, AS LONG AS the premium rate is at least one and one-half times the employee's non-overtime rate of pay; or,
- Recruitment and relocation incentives paid under 5 USC 5753.

Nondiscretionary Bonuses

As noted above, discretionary bonuses are not included when computing a nonexempt employee's overtime. However, OPM emphasizes that a non-discretionary cash award or bonus (e.g., gainsharing) must be taken into account in determining overtime pay for the period of time during which the bonus was earned. The regulations prescribe several methods for accomplishing this end. Three methods are described for computing overtime on where a bonus is earned on an individual basis. Two methods are provided for computing overtime when a bonus is earned on a group basis. [5 CFR 551.514; cf., 29 CFR 778.209]

Computing Overtime for NONEXEMPT Employees

Use the following steps when computing the FLSA overtime pay for NONEXEMPT employees.

a. Determine if the employee's hours of work exceed the applicable FLSA overtime standard [i.e., 8 hours a day or 40 hours per week for 7(a) employees; 212 hours in a 28 day period for firefighters; or, 171 hours in a 28 day period for law enforcement officers];
b. Compute total remuneration which includes multiplying the employee's straight time rate of pay by all overtime hours worked;
c. Determine the employee's "hourly regular rate of pay;"
d. Multiply one-half the employee's "hourly regular rate of pay" by the number of hours of overtime; and,
e. Combine the employee's basic pay, any additional pay, and the FLSA overtime pay to get the employee's total FLSA pay.

Note that computations for fire fighters and law enforcement officers [so-called 7(k) employees] differ somewhat from those for non-fire fighter and non law enforcement officer employees [so-called 7(a) employees].

EXAMPLE OF 7(a) OVERTIME COMPUTATION

A GS employee earns $12.71/hour, has a tour of duty Sunday through Thursday 10 p.m. – 6 a.m. Night differential is paid for the scheduled hours between 6 p.m. and 6 a.m. Sunday differential (SD) is paid for the entire regular shift beginning 10 p.m. Sunday. The differential for hazardous duty (HP) occurring on Wednesday and Thursday is paid for the entire 8-hour shift. The employee also works 8 a.m. to 6 p.m. on Friday. [Cf., www.opm.gov/oca/pay/HTML/computeFLSA.asp]

Hours Worked	**S**	**M**	**T**	**W**	**H**	**F**	**S**	**Total**
# Regular Hours	8	8	8	8	8			40
# Overtime Hours						10		10
Total Hours Worked								50
ND (10%)	8	8	8	8	8			40
SD (25%)	8							8
HP (25%)				8	8			16

Determine FLSA Overtime Entitlement

50 hours worked
- 40 7(a) overtime standard
10 FLSA overtime hours

Compute Total Remuneration

Basic pay	$12.71 x 40 =	$508.40
Night differential	$1.27 x 40 =	$ 50.80
Sunday differential	$3.18 x 8 =	$ 25.44
Hazard pay	$3.18 x 16 =	$ 50.88
Straight time rate for OT hours	$12.71 x 10 =	$127.10
Total remuneration		$762.62

Determine "Hourly Regular Rate of Pay"

$762.62/50 hours = $15.25

Multiply OT Hours by One-Half "Hourly Regular Rate"

½ x $15.25 x 10 hours/OT = $76.25

Find Total FLSA Pay

Total remuneration	$762.62
Additional ½ times "hourly regular rate"	$ 76.25
Total FLSA Pay	$838.87

EXAMPLE 1 OF 7(k) OVERTIME COMPUTATION - Firefighter[7]

Under 5 USC 5542(f) and 5545b, the method for paying overtime for FLSA nonexempt firefighters has changed somewhat. The rate of basic pay is now derived by dividing the annual rate by 2,756 hours. Once that basic hourly rate is found, the firefighter is paid one and one-half times that rate for all hours over 106 in a bi-weekly pay period. If dividing the firefighter's annual rate by 2,756 hours results in his/her rate being $10/hour, and if the firefighter's work period is 14 regularly scheduled days with six 24 hour shifts (8 a.m. one day to 8 a.m. the next), then pay is derived as below.

S	**M**	**T**	**W**	**H**	**F**	**S**	**S**	**M**	**T**	**W**	**H**	**F**	**S**	**Total**
	24		24		24			24		24		24		144

a. Determine FLSA overtime entitlement.

144 Total hours
-106 Special overtime provision for firefighters
38 FLSA overtime hours

b. Compute total remuneration.

Basic Pay	144 x $10 =	$1,440.00
Total remuneration		$1,440.00

c. Determine "hourly regular rate of pay."

$1,440.00 / 144 hours of work = $10.00

d. Multiply overtime hours by one-half the "hourly regular rate."

1/2 x $10.00 x 38 hours = $190.00

e. Find total FLSA pay.

Basic pay	$1,440.00
Additional 1/2 times "hourly regular rate"	$190.00
Total FLSA pay	$1,630.00

[7] Cf., CPM 96-19, dated 30 December 1996, Memorandum for Directors of Personnel, and CPM 97-5, dated 13 June 1997, Memorandum for Directors of Personnel.

EXAMPLE 2 OF 7(k) OVERTIME COMPUTATION - Law Enforcement Officer[8]

A GS law enforcement officer earns $10.61/hour and has a tour of duty of 8 hours a day, Monday through Friday, and receives premium pay on an annual basis for administratively uncontrollable overtime (AUO) work (25% of basic pay). Employee works a total of 12 hours of AUO time, and works 12 hours regularly scheduled overtime on Saturday.

Hours Worked	**S**	**M**	**T**	**W**	**H**	**F**	**S**	**Total**
Regular Hours		8	8	8	8	8		40
AUO Work		2		4	1	5		12
Scheduled OT							12	12
Total Hours								64

a. Determine FLSA overtime entitlement.

64	Total hours
- 42 3/4	Special overtime provision for law enforcement employees
21 1/4	FLSA overtime hours

b. Compute total remuneration.

Basic pay	40 x $10.61 =	$424.40
AUO pay (25% of base pay)	.25 x $424.40 =	$106.10
Straight time rate for 12 hours scheduled overtime	($424.40 + 106.10 = $530.50/52 hrs = 10.20 x 12)	$122.40
Total remuneration		$652.90

c. Determine "hourly regular rate of pay."
$652.90 / 64 hours of work = $10.20

d. Multiply overtime hours by one-half "hourly regular rate."
1/2 x $10.20 x 21 1/4 hours = $108.38

e. Find total FLSA pay.

Basic pay	$424.40
AUO pay	$106.10
Straight time pay for scheduled overtime	$122.40
Additional 1/2 "hourly regular rate"	$108.38
Total FLSA pay	$761.28

[8] Cf., CPM 96-19, dated 30 December 1996, Memorandum for Directors of Personnel, and CPM 97-5, dated 13 June 1997, Memorandum for Directors of Personnel.

COMPUTATION EXERCISE 1

A WG employee earns $16.48/hour and has a tour of duty is Monday through Friday, 4 p.m. to midnight, a night shift for which a differential of 7 1/2% is paid. Employee is exposed to a hazard for which an environmental differential (ED) of 25% is payable on an actual exposure basis. Exposure occurs for 4 hours on each regular shift on Wednesday and Thursday. Employee works irregular overtime after the regular shift 4 hours each on Tuesday and Wednesday, and for 8 hours on Saturday (4 p.m. to midnight).

Hours Worked	**S**	**M**	**T**	**W**	**H**	**F**	**S**	**Total**
Reg'l. Hours		8	8	8	8	8		40
Overtime			4	4			8	16
Total Hours Worked								56
ED* (25% WG-10/2)				4	4			8
ND+ (7 1/2%)		8	12	12	8	8	8	56

\+ Night Differential Rate 1.24

* Environmental Differential Rate 4.03
[25% x $16.12 (WG-10/2)]

COMPUTATION EXERCISE 2

A GS employee earns $12.71/hour and has a tour of duty of 8 hours a day, Monday through Friday, 8 a.m. to 4:30 p.m. with one half hour for lunch. Employee works 2 hours beyond the regular 8-hour day on Monday, and works 10 hours on Saturday. Employee is on LWOP Wednesday through Friday.

Hours Worked	S	M	T	W	H	F	S	Total
Sched. Hours		8	8					16
LWOP				8	8	8		24
Add'l. Hours		2					10	12

RECORD KEEPING REQUIREMENTS UNDER FLSA

To assure that an agency can demonstrate its adherence to the provisions of the Fair Labor Standards Act it is beneficial to keep certain kinds of records. The records serve two purposes. The first is to aid in the review of employer operations and assure that employees have been treated properly. As noted in the next chapter, this review can be carried out by agency staff or by those from outside the agency.

The second purpose is to assist in redressing any inequities brought to light by reviews of agency operations or by claims filed by employees. Once a claim is filed by an employee or group of employees, all records related to the claim and the period of time covered by it should be preserved, regardless of official records preservation requirements, until the claim is resolved. The claim may come from a grievance, a lawsuit or be filed by an employee or group of employees with the agency or with OPM.

While OPM has published no guidance regarding what records should be kept and in what media, the Department of Labor, in its regulations at 29 CFR 516.1, states that "…every employer subject to any provisions of the Fair Labor Standards Act of 1938, as amended, is required to maintain records containing the information and data required by the specific sections of this part [i.e., requirements in 29 CFR 516.5 and 516.6]. The records may be maintained and preserved on microfilm or other memory or storage media provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required by this part are made available upon request.

The material in this chapter summarizes the kinds of records it is beneficial to retain.

Position Descriptions

The position description is defined by OPM as a statement of major duties, nature and extent of responsibility for carrying out the duties, and supervisory relationships. Qualifications requirements should be evident, and specialized requirements should be mentioned and supported by the duties. An accurate position description will support making accurate FLSA coverage decisions.

Be sure the position description is up-to-date and reflects the work actually performed by the employee(s). [U.S. Office of Personnel Management, Introduction to the Position Classification Standards, Section III.E., Use of Position Descriptions, pages 11-12 (TS-107, August 1991)]

Position descriptions should be maintained as long as employees are assigned to them. After that the normal records destruction provisions should be followed unless an FLSA claim is filed or the position is covered by special law enforcement retirement provisions.

Position Coverage Evaluation Statement

An evaluation statement demonstrating how the position is exempt from coverage by the Fair Labor Standards Act, should be included with the position description. The evaluation statement should contain information like the following.

- An accurate summary of work actually performed by employees based on documentary research, and on information gathering techniques such as a desk audit. Be sure that differences between work performed by multiple incumbents of a position are clearly understood.

- List all tests required for exemption in the appropriate category. Be aware of all parts of the criteria. Understand the basic principles for making exemption determinations, and the definitions of exemption terms. Explain clearly and in detail how the work meets the exemption tests.

Use specific examples of the work performed, not just the words in the position description, in the evaluation statement. Assure that differences between incumbents are not significant for exemption purposes. Remember, when challenged by the employee or his or her representative, the burden of proving the employee is exempt is on the agency. Thus, an accurate evaluation statement that demonstrates how a position meets each requirement in the exemption criteria will be invaluable in explaining why the position was exempted. See Appendix D for assistance in preparing position coverage evaluations.

To assist in showing that a willful violation of the Act was not committed and, therefore, that a three year damage period is not appropriate, the evaluation also should include the steps taken by the classifier or other agency official to assure a thorough understanding of the work and of the OPM requirements. These can include on-site discussions with employees and supervisors, observation of work operations, research into precedents issued by the OPM and the federal courts, review of OPM guidance such as FPM Letters, Federal Register notices, the FLSA website, etc.

Payroll Records

Payroll records should contain a full range of information about the employees and the payments that were provided to them. Information maintained should include such items as name and address, sex and occupation (for federal employees - title, series, grade and step), work schedule, hours worked each day and total hours worked each workweek. It also should include the straight time or basic rate of pay (which for most employees is their basic rate of pay), any additional pay entitlements such as premium pay, and total payment made to the employee.

In addition, bargaining unit agreements and wage rate tables should be maintained as well. [29 CFR 516.2 (2001)]

If your payroll is handled by an outside organization, for example, the USDA National Finance Center in New Orleans, Louisiana, they will fulfill most of the record keeping requirements in the payroll arena. However, if the agency processes its own payroll, or if it has changed from one payroll processor to another over the years, it is important to assure that earlier records will continue to be available even when the new processor has taken over operations.

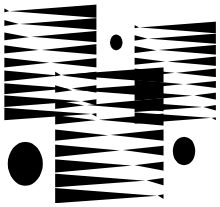
Records that are maintained in almost any media, such as magnetic tape or in a microform, can be damaged or lost over time. Even when available, storage media can degrade and data may become unreadable or difficult to access. Thus, it is wise to assure that records will continue to be available even after long periods of time by placing them on a stable storage media and having more than one copy of the records. This is an area of particular concern where employee claims have been filed at some time in the past but have not yet been resolved.

Records Preservation Period

Records should be maintained for no less than two years for FLSA purposes. It is safer to maintain records for three years. This is because the provisions at 29 USC 255a impose a 2 year statute of limitations for most FLSA claims. If, however, it can be shown that the agency committed a willful violation of the FLSA, then the

3 year statute of limitations is operative. [5 CFR 551.702(a) and 702(b)] The statute of limitations and claim periods are discussed further in the next chapter. [29 CFR 516.5 and 516.6 (2001)]

Once a complaint, grievance or lawsuit has been filed, records related to the employees involved in the action must be maintained until all claims related to the complaint, grievance or lawsuit have been resolved.



FLSA COMPLIANCE & CLAIM PROCESSES

Quite often when a statute is passed, it contains a method to redress any violations of its provisions. The Fair Labor Standards Act provides such a method. Through courts of competent jurisdiction, a covered employee may recover unpaid minimum wages or unpaid overtime wages when an employer violates section 206 [minimum wage] or section 207 [maximum hours] of the Act. The Act provides also for liquidated damages, in an amount that may be as large as the unpaid minimum or overtime wages, under certain circumstances. This right is given to all non-exempt employees, and can be exercised either after exhausting all administrative remedies or without using any of the administrative remedies.

In addition, the U.S. Office of Personnel Management (OPM), following the precedent set by the U.S. Department of Labor (DOL) in the non-federal sector, has established an administrative compliance and claims program to vigorously enforce the FLSA overtime pay, minimum wage, and child labor provisions. This program covers all federal employees, paid from both appropriated and non-appropriated funds, who are covered by OPM's administration of the FLSA. There are two parts to these enforcement efforts:

- Conducting compliance reviews of agency actions; and
- Resolving employee complaints alleging violations.

Under these provisions the federal employee has the right to file a claim directly with OPM when she or he believes an FLSA violation has occurred. [FPM Letter 551-9 March 30, 1976]

This chapter looks at the OPM compliance program first, at the OPM claim program next and, finally, at the federal court claim process.

OPM Compliance Program

A compliance program is designed to accomplish three goals:

- to assure that past actions have complied with federal law and regulation;
- to identify where more or better guidance is needed; and,
- to indicate the areas in an organization's program that require strengthening

The U.S. Office of Personnel Management's compliance program is implemented through the normal personnel management evaluation program, and is designed to assure that federal employees are properly paid under the Fair Labor Standards Act (FLSA) premium pay provisions. While carrying out its regularly scheduled institutional assistance and other kinds of visits, OPM may probe agency adherence to the FLSA premium pay provisions.

In addition, the General Accounting Office (GAO), the Inspector General (IG) and similar groups may probe agency adherence to the FLSA minimum and overtime pay and child labor provisions.

Agencies also are encouraged to periodically review the implementation of the FLSA's provisions. Joint teams of payroll, timekeeping and human resource specialists should review records to assure employees are paid properly under the Act's provisions. [72 Fed.Reg. 52753, 17 September 2007, @52756]

During a review, agency time and pay records, work recording systems, agency guidance, and employee understanding should be probed to determine if employees are being paid properly under provisions of the FLSA.

When weaknesses, misunderstandings and/or errors are found, efforts should be made to assure the problems are corrected. Corrections can involve changes to automated and manual systems and procedures, revised and updated guidelines, and/or one-time or cyclical training programs.

When representatives from OPM or other outside organizations identify concerns, they will establish the remedy. When an agency team identifies concerns, the team members will develop an appropriate remedy. The advantage of using an agency team is that it can develop a response that is in keeping with the root cause while being more in tune with the organization's culture.

OPM Claim Program

The purpose of a claim program is to assure that individual dissatisfactions and perceived inequities or errors are resolved following an established procedure. The following discusses the provisions of OPM's administrative claim program for the FLSA which is designed to redress these dissatisfactions or errors.

OPM has designed this program to address concerns about FLSA coverage and exemption, claims related to the child labor provisions of the Act, and pay claims for minimum wage and overtime. [5 CFR 551.701(a)] Claims related to the equal pay provisions of the Act must be filed with the Equal Employment Opportunity Commission (EEOC). [5 CFR 551.102(b) & 701(b)]

Where to File a Claim

Depending on his or her status, a federal employee has one or more venues in which she or he may file an FLSA complaint.

- **Within the Agency** - A federal employee who believes an FLSA violation has occurred may try to resolve the problem within his or her supervisory channels first. Agency procedures must be followed when submitting a claim for resolution. The employee may request the agency to forward the claim to OPM on his or her behalf. In order to use this venue, the employee cannot be a member of a bargaining unit during the claim period, or if a member of a bargaining unit be without a collective bargaining agreement or have a collective bargaining agreement that specifically excludes FLSA matters. [5 CFR 551.703(b) & 705(b)]

- **U.S. OPM** – If the employee decides not to raise the question within his/her organization, or if she or he does not receive a satisfactory response, the employee may file an FLSA claim with the U.S. Office of Personnel Management, Classification Appeals and FLSA Program, 1900 E Street NW, Washington DC 20415-0001. [5 CFR 551.710 (2007)] In order to use this venue, the employee cannot be a member of a bargaining unit during the claim period, or if a member of a bargaining unit be without a collective bargaining agreement or have a collective bargaining agreement that specifically excludes FLSA matters. [5 CFR 551.703(b) & 705(c)]

  P.L. 104-53, which was signed by the President on 19 November 1995, transferred the responsibility for adjusting federal employee pay and compensation claims to the U.S. Office of Personnel Management from the U.S. General Accounting Office (now the Government Accountability Office) effective 30 June 1996.

- **Bargaining Unit Employees** – Federal employees who are covered by a collective bargaining agreement with a negotiated grievance procedure that does not specifically exclude FLSA complaints **must** use the negotiated

grievance procedure as the exclusive method for resolving such disputes. [5 CFR 551.703(a) (2007)]

This determination is based on 5 U.S.C. 7121(a)(1), a provision of the Civil Service Reform Act, which authorizes grievance procedures set out in a collective bargaining agreement as the exclusive procedure for resolving grievances which fall within its coverage. As a result, a bargaining unit employee must use the negotiated grievance procedure to resolve FLSA complaints. [5 CFR 551.703(a); cf., Carter v. Gibbs, 909 F.2d 1452 (1990); Riggs v. U.S. 21 Cl.Ct. 664 (1990); Beall v. U.S. 22 Cl.Ct. 59 (1990); Ackerman v. U.S. 21 Cl.Ct. 484 (1990); Armitage v. U.S. 22 Cl.Ct. 767 (1991); Muniz v. U.S. 972 F.2d 1304 (1992); Hennessey v. U.S. Dept. Of Defense 46 F.3d 356 (1995); Matter of Cecil E. Riggs, et al., File B-222926.3, 23 April 1992, 71 Comp.Gen. 374; O'Connel v. Hove 22 F.3d 463 (1994); Addison-Taylor v. U.S. 51 Fed.Cl. 25 (2001); O'Connor v. U.S. 50 Fed.Cl. 285 (2001); Mudge v. U.S. 50 Fed.Cl. 500 (2001)]

In addition, since the amendment of the FEPCA, the following decisions have supported the concept that the negotiated grievance procedure is the sole administrative remedy: Bailey v. U.S. 52 Fed.Cl. 105 (2002); Abbott v. U.S. 47 Fed.Cl. 582 (2002); Abramson v. U.S. 42 Fed.Cl. 621 (1998); cf., Mudge v. U.S. 308 F.3d 1220 (2002).

The courts have gone on to say that jurisdiction flows from the employee's status at the time that the complaint arose. Thus, if an employee is covered by a negotiated grievance procedure at the time the claim arose, then the exclusive remedy is through that procedure. This remains true even if the employee is no longer covered by the negotiated grievance procedure at the time of filing because of promotion, separation or death. [Aamodt v. U.S. 22 Cl.Ct. 716 (1991)]

- **Federal Court** – The employee also has a right to file a claim in the federal court system if she or he believes that a violation of the FLSA either has gone unredressed in the administrative claims procedure or without recourse to the administrative claims procedure. [5 CFR 551.703(c) (2007)]

What Goes Into a Complaint?

A complaint filed with OPM must be in writing, and must be signed by the claimant or the claimant's representative. It also must: identify the employee and any designated representative; the employing agency; telephone number and

facsimile telephone number, and current mailing address; the position occupied by the claimant during the claim period.

Also needed is a description of the nature of the claim and the specific issues or incidents giving rise to the claim, including the time period covered by the claim. A description of the complainant's actions to resolve the claim and the results; a copy of any relevant decision or written response by the agency; evidence supporting the claim including the identity, commercial telephone number and location of other individuals who may be able to provide information relating to the claim also must be included. In addition, the claimant or representative should include: the remedy sought; evidence showing the claim period was preserved; and a statement that the claimant was not a member of a collective bargaining unit at any time during the claim period. If the claimant was a member of a bargaining unit during the claim period, a statement must be included that indicates she or he was/was not covered by a negotiated grievance procedure during the claim period and, if covered, whether the procedure specifically excluded the claim from the scope of the negotiated grievance procedure. [5 CFR 551.705(c)]

What Matters Cab Be Brought to OPM's Attention?

An employee, or a third party such as an employee representative, may bring to OPM any matter considered/thought to be a violation of the FLSA. Normally, the matters raised involve:

- **Failure to pay proper overtime wages.**
- **Allegations of work suffered or permitted** outside of regular work hours without proper compensation.
- **Minimum wage violations** – effective 24 July 2007, the minimum wage is $5.85/hour; beginning 24 July 2008, the minimum wage will rise to $6.55 per hour; and to $7.25 per hour effective 24 July 2009.
- **Child labor law violations** - while recent reports show dramatic increases outside the federal government, only a very few have been reported within the federal government. and,
- **Exemption determinations** - may be reviewed at anytime. Injury from the current exemption status does not have to be demonstrated. However, no hypothetical exemption questions will be answered by OPM.

FPM Letter 551-9, 30 March 1976, paragraph 3; 5 CFR 551.702(a) (2007).

A complaint about different wages being paid to men and women for performing the same or similar jobs in the same

organization is now reviewed by the Equal Employment Opportunity Commission (EEOC). [29 U.S.C. 206(d)]

How to Preserve the Claim Period

The employee must preserve his/her claim period by securing the beginning date of the entitlement to back pay. The employee must do so by specifically requesting this in writing. For example, "I wish to preserve my claim period as of the date you receive this. Please date stamp my claim and return it to me at the following address." The documentation related to filing the claim certified, return receipt mail also can be used to demonstrate the claim period has been preserved. The employee is responsible for proving when the claim was received, and for retaining the documentation that establishes when the claim was received by the agency or OPM.

The written notice may be secured either from the agency that employed the claimant at the time the claim arose, or from the appropriate OPM FLSA claims office. A copy of the written notice securing the employee's claim must be attached with any claim filed with U.S. OPM. [5 CFR 551.104 & 702(c)]

Claimant's Representative

An employee or former employee who files a claim concerning his or her FLSA exemption status, or entitlement to minimum wage or overtime pay for work performed under the Act may designate a representative. Such designation must be made in writing. The regulations note that a claimant's designated representative may not participate in OPM interviews unless specifically requested to do so by OPM.

An agency may disallow a representative who is a federal employee in any of the following circumstances: (1) the individual's activities as a representative would cause a conflict of interest or position; (2) the designated representative cannot be released from his or her official duties because of the priority needs of the federal government; or, (3) the release of the designated representative would give rise to unreasonable costs to the federal government. [5 CFR 551.704]

Confidentiality

The claimant may request that his or her identity not be revealed to the agency, if she or he wishes the claim to be treated confidentially. Witnesses or other sources may also request confidentiality. OPM will make every effort to honor the claimant's request unless doing so will prevent OPM staff

from gathering enough information to make a decision. In such circumstances, OPM will notify the claimant that the claim will be denied. At this point the claimant may voluntarily provide written authorization to reveal his or her name. This will allow OPM to move forward with information gathering and to make a decision on the claim. [5 CFR 551.706(a)(2)]

Responsibilities

Claimant. Once a claim has been submitted to OPM, the claimant or claimant's representative must supply requested information within 15 workdays after the date of request. If this is not possible, then the claimant may request additional time. If OPM grants a longer period of time, then the employee should promptly provide the information within the extended time.

The disclosure of information is voluntary on the claimant's part. However, without requested information, OPM may not be able to make a decision on a claim. As a result, when requested information is not provided, OPM may cancel the claim without further action. [5 CFR 551.706(a)]

Agency. If the claim is filed with the agency, then it must provide the claimant with written acknowledge of the date the claim was received. If the claim is filed with OPM, then the agency must provide requested information within 15 workdays. The agency, too, may request an extension if needed. If OPM grants a longer period of time, then the agency should promptly provide the information within the extended time. The agency also must provide the claimant with information relevant to his or her claim, subject to Privacy Act requirements. [5 CFR 551.706(b) (2007)]

Time Limits

Under the Fair Labor Standards Act an employee is entitled to full back pay for any violations of the Act's minimum wage and overtime pay provisions as long as the employee files a claim for back pay within two years of the date the violation is alleged. The exception, if the violation is shown to be a willful violation, the claim must be filed within three years of the alleged violation. [29 USC 255a; 5 CFR 551.702(a)-(b)]

Claims related to the FLSA child labor provisions or a claim challenging the correctness of an employee's exemption status determination may be filed at any time.

Previously the Comptroller General (CG) allowed claims to be filed up to six years after the alleged violation and still

receive full back pay if she or he prevailed. This changed in 1994 with a series of decisions which recognized that the Barring Act [31 USC 3702] applied only if a more specific time limit was not established. [Matter of: Jos. M. Ford, 1994 WL 201742 or B-250051, 23 May 1994; Matter of Marvin B. Atkinson, 1996 WL 31212]

At about the same time, the Congress passed two Acts. The first, passed in 1994 [Section 640 of P.L. 103-329, 108 Stat. 2432] stated that the six year time limit would apply to claims filed prior to 30 June 1994. The second, an amendment passed in 1995 [Section 640 of P.L. 104-52, 109 Stat. 468-69] affirmed the 30 June 1994 end of the six year claim period, and established an additional limitation. Even when claims were filed before 30 June 1994, if the employee received overtime compensation under any other provision of law, then the two year (3 years for willful violations) time limit from the FLSA applied. These statutes were upheld by the U.S. District Court for the District of Columbia [Adams v Bowsher 946 F.Supp. 37 (1996)]

In applying the time limits it is critical to know when the employee's claim becomes enforceable. The CG has stated that in regard to a pay claim, "…the word 'claim' obviously refers to the right itself. There is for consideration, then the date of accrual of the right which now is asserted; and there seems little doubt but that such date was the particular …[day]…on which the services for which extra compensation…is claimed were rendered, since under that Act, as construed in United States v. Myers [321 U.S. 561 (1944)] and the O'Rourke case [O'Rourke v. United States, 109 Ct.Cl. 33 (1947)] all events necessary to fix the right to and the amount of the extra compensation, as well as the Government's liability therefore, occurred on that date." [Cf., B-238323, 70 Comp.Gen. 292 (1991); B-191388, 58 Comp.Gen. 3 (1978); Mellus v. Potter 91 Cal.App. 700, 704; 267 P. 563]

The CG said, it is evident from a reading of the O'Rourke case "…that the court considered that a 'claim first accrued' within the meaning of the statute of limitations there applicable when a cause of action accrued—a failure or refusal to pay on some customary pay day after the rendition of the services being a condition precedent to the accrual of a cause of action in the particular case involved." [B-93649, 29 Comp.Gen. 517 (1950)]

In short, the claim or right to the compensation occurs on the day the service is rendered for which additional compensation is appropriate, e.g., overtime worked. The right to file the claim occurs when a cause of action accrues, in the example, overtime pay is not included in the employee's payment on the usual pay day.

Burden of Proof

The burden of proof lies with the agency. Because the FLSA is an employee protection act, once the employee files a claim, the burden of proving that the allegation is untrue is primarily on the agency especially regarding an exemption status determination claim. [5 CFR 551.202(c) & 706(b)(1)]

By statute, employers are required to "...make, keep and preserve all records[9] of the wages, hours and other conditions and practices of employment [29 U.S.C. 211(c)]." When the agency does not keep the appropriate records, the CG has discussed what may occur. He said that "...it is sufficient for the employee to prove she...performed overtime for which she was not compensated...and produce sufficient evidence for the employee to show the amount and extent of that work as a matter of just and reasonable inference." [B-199783, 9 March 1981; 61 Comp.Gen. 174 (B-200534, 31 December 1981)]

Thus, it is the employer's responsibility to produce evidence that negates the employee's claims. If the agency cannot do so, then typically the employee shall prevail. For example, the employee in B-199783 provided a list transcribed from her calendar of the dates, times and hours of overtime she worked and a statement from her supervisor that the employee did work overtime but he was not sure how much. The agency was not able to prove the contrary, so the employee prevailed.

Withdrawing or Canceling a Claim

A claimant or his or her representative may withdraw an FLSA claim at any time prior to the issuance of a decision. To do so, the employee must submit a written notice to the agency or to OPM, depending on where the claim was filed.

OPM may, at its discretion, cancel a claim if the claimant or his or her representative do not provide requested information within the 15 workday timeframe established by OPM. If the employee can show circumstances beyond his or her control prevented the employee from pursuing the claim OPM may, at its discretion, reconsider a cancelled claim. [5 CFR 551.707]

[9] See the earlier chapter: Record Keeping Requirements Under the FLSA.

Decision

OPM will use all of the information gathered from the employee, and the agency to make a decision. Based on this decision, a compliance order will be issued that will indicate the required corrective actions. A copy of the decision will be sent to the claimant or the claimant's representative, and to the employing agency. OPM will not decide a claim that is in litigation.

A decision by OPM under the Act is considered a binding ruling. It is binding on all administrative, certifying, payroll, disbursing and accounting officials in the federal government. Upon receipt, the agency employing the claimant at the time the basis of the claim occurred must take all steps necessary to comply with the decision. Compliance actions must be completed within the time specified in the decision, unless an extension is granted by OPM if one is requested by the agency. The agency should identify all similarly situated current and former employees to ensure that they are treated in a manner consistent with the decision. The agency must inform the similarly situated current and former employees in writing of their right to file an FLSA claim with the agency or OPM.

There is no further right of administrative appeal. OPM may, at its discretion, reconsider its FLSA claim decision when material information was not considered or there was a factual effort of law, regulations, or fact in the original decision. The request to reconsider must be submitted in writing and received by OPM within 45 calendar days after the date of the decision. OPM may, at its unreviewable discretion, waive the 45 calendar day time limit. [5 CFR 551.708 (2007)]

Availability of Information

The agency and the claimant must provide to each other a copy of all information submitted with respect to the claim, unless the claimant has requested confidentiality.

OPM will disclose to the parties involved the information in a FLSA claim file. If the claimant requested confidentiality, then any information identifying the claimant will be deleted before releasing the information in the claim file.

The parties concerned, in this portion of the regulations, is defined as the claimant, the claimant's representative who has been designated in writing, and any representative of the agency or OPM involved in the proceeding.

OPM, upon request which identifies the individual from whose file the information is sought, will release the information in a FLSA claim file to a member of the public as long as the claimant has not requested confidentiality or the disclosure would constitute an unwarranted invasion of personal privacy. The regulation identifies the specific information that OPM will release when appropriate. [5 CFR 551.709 (2007)]

Corrective Actions

Where alleged violations are substantiated by OPM during a complaint investigation, OPM will require that corrective actions be taken within the timeframe established in the decision unless an extension of time is granted by OPM.

Such corrective actions may take the form of retroactive wage payments, assurance of future compliance, revision of procedures and practices, and other necessary or appropriate actions. OPM follows up to assure corrective actions are taken, as appropriate.

The regulations require that an agency should identify all current and former employees who are similarly situated to the individual or group who filed the claim. This enables the agency to treat this individual or group in a manner consistent with the decision on FLSA coverage. The agency should inform this individual or group of their right to file an FLSA claim with the agency or OPM. [5 C.F.R. 551.708(c)(2) (2007)]

As the FLSA is designed to protect the employee, any discriminatory action or reprisal taken by the agency against the employee who files an FLSA complaint is strictly prohibited and can be the grounds for further complaints, corrective action orders, and follow-up by OPM. [5 CFR 551.708; cf., FPM Letter 551-9, 30 March 1976]

Federal Court Review

Nothing in the administrative claim process just discussed hinders the employee from bringing an action in an appropriate United States court. However, OPM will not decide an FLSA claim that is before such a United States court at the same time. [5 CFR 551.703(c)]

Authority to Recover Unpaid Wages

The concept of immunity of the sovereign from court actions, descended from the English common law upon which so much of the law of the United States is based, protects the federal government from claims unless it gives consent. The consent may be founded on the Constitution, a statute, a regulation of an executive department, or a contract. For the FLSA, the waiver is found in the 1974 amendments to the Act. [29 U.S.C. § 203(e)(2)]

Under 29 U.S.C. 216(b) a non-exempt employee is empowered to recover unpaid minimum or overtime wages when an employer violates section 206 [minimum wage] or section 207 [maximum hours]. The federal government is defined as an employer [29 USC 203(e)(2)(A)] which establishes the right of an Executive Branch employee to file a claim for unpaid overtime or minimum wages against the federal government.

Authority to Hear Cases

Any court of competent jurisdiction may hear an FLSA case brought by a federal employee. However, certain requirements for filing in a federal court have been established. Claims of more than $10,000 must go to the U.S. Court of Federal Claims, under the Tucker Act [28 U.S.C. 1491]. An appeals court has determined that this includes employees of Non-Appropriated Fund Instrumentalities. [El-Sheikh v U.S. 177 F.3d 1321 (1999)]

Both the U.S. Court of Federal Claims and the U.S. District Courts may hear any claim that is under $10,000 [28 U.S.C. 1346(a)]. To file in a specific U.S. District Court, the claimant must reside in the district. [Saraco v. Hallett 831 F.Supp. 1154 (1993), affm'd. Saraco v United States 61 F3d 863 (1995); Wheeler v. U.S. 3 Cl.Ct. 686 (1983)] The controlling factor is the amount of each individual claim, including any attorneys' fees requested, where there is more than one claim in a suit. [Zumerling v. Marsh 591 F.Supp. 537 (1984)] Information regarding where a NAFI employee can file is at Cosme Nieves v. Deschler 786 F.2d 445 (1986).

Time Limits

To protect the employee's full rights to restitution, the FLSA requires the employee to file within two years of the alleged violation. However, if the violation is willful, then the filing period is extended to three years. [29 U.S.C. 255(a)] Employees should note that filing an administrative claim with OPM or with an agency does not toll the statute of

limitations governing FLSA claims filed in an appropriate United States court. [5 CFR 551.703(c)]

The 3-year limitation will apply when the standard of willfulness adopted by the Supreme Court is met. This standard says the employer either must have known or showed reckless disregard as to whether its conduct was prohibited by the FLSA. [McLaughlin v. Richland Shoe Co. 486 U.S. 128, 108 S.Ct. 1667 (1988) quoted in Campbell v. U.S. Air Force 755 F.Supp 893, at 897 (1990); cf. Doyle v. U.S. 20 Cl.Ct. 495 (1990), 931 F.2d 1526 (1991), cert. denied 502 U.S. 1029 (1992)] The Court of Federal Claims reminds us, however, that there is no presumption that the employee is entitled to three years of back pay. The employee must prove that the government acted willfully before being entitled to three years of back pay. [Adams v. U.S. 46 Fed.Cl. 616 (2000)]

In applying the time limits it is critical to know when the employee's claim becomes enforceable. "A claim accrues when all events have occurred which fix liability and entitle plaintiffs to institute an action." [Hopland Band of Pomo Indians v. U.S. 855 F.2d 1573 (1988) quoted in Doyle v. U.S. 20 Cl.Ct. 495 (1990)]

Under the FLSA, all events have occurred which fix liability and entitle the employee to institute an action when the employer fails to pay what the law requires. Specifically, a separate cause of action accrues, with the concomitant 2 year statute of limitation to pursue the action, each payday an employer is required to pay overtime but does not. [Friedman v. U.S. 159 Ct.Cl. 1 (1962) cert. denied sub. nom.; Lipp v. U.S. 373 U.S. 932, 83 S.Ct. 1540, 10 L.Ed.2d 691 (1963); Hodgson v. Behrens Drug Co. 475 F.2d 1041 (1973); Beebe v. U.S. 640 F.2d 1283(1981), 226 Cl.Ct. 308 (1981) quoted in Doyle v. U.S. 20 Cl.Ct. 495 (1990] Cf. McIntyre v. Division of Youth Rehabilitation Services 795 F.Supp. 668 (1992).

Time limits may be extended under a limited number of circumstances. For example, in one case a court allowed a longer period of time for filing when the employer (the defendant under FLSA) concealed its alleged violations from the employees. Thus, the plaintiffs (the employees) were unaware of the violations at the date the entitlement accrued. The point at which the plaintiffs reasonably could have known about the alleged violations, e.g., the alleged violations were revealed by an inspection, is the time when the claim accrued. This date may be later than the two years (3 years for willful violations). [Udvari v United States 28 Fed.Cl. 137 (1993)]

Decisions

The court will consider all of the facts and information the plaintiffs and defendants bring before it. The court will use the Act itself and OPM regulations and guidance to help make its decision. In addition, the court can use the U.S. Department of Labor regulations and interpretations to aid in understanding the FLSA. [Adam v. U.S. 26 Cl.Ct. 782 (1992)]

The courts have stated in many decisions that "[t]he determination of whether an exemption applies to a given individual...is a very fact-specific exercise." In one decision, the U.S. Claims Court went so far as to say that even when two or more persons share the same occupational series and title they might not necessarily both be exempt or nonexempt. [Tumminello v. U.S. 14 Cl.Ct. 693 (1988)]

To enhance the likelihood of a favorable ruling in court, the agency should be able to show that all the employees are performing like tasks, and that the tasks meet all of the requirements for exemption.

Remedies

An employer who has violated the minimum wage or overtime compensation provisions of the FLSA is liable to the employee(s) affected in the amount of the unpaid minimum wage or unpaid overtime compensation. In addition, the employer may also be compelled to pay liquidated damages in an amount equal to the unpaid minimum wage or overtime compensation. [29 USC 216(b)]

The awarding of liquidated damages is discretionary with a court. They are compensatory in nature, to reimburse the employees for not getting their money on time. [Brooklyn Savings Bank v. O'Neill 324 U.S. 697 (1945)] If it can be shown the employer acted in good faith and grounded in a belief that the employees were not covered by the minimum wage and/or overtime provisions, the court is not required to award liquidated damages. [Parks v. Puckett 154 F.Supp 842 (1957); Jones v. Donovan 26 WH Cases 1602 (1984)] Based on the circumstances of the case, the court has the authority to reduce the liquidated damages or award none at all.

If the federal government is able to establish that it meets the good faith standard, there would be no liability for either pre-judgement interest or liquidated damages in lieu of interest. [Doyle v. U.S. 931 F.2d 1526 (1991); cert. denied 502 U.S. 1029 (1992)] In general, however, "the employer's burden [of

showing good faith] is heavy and difficult to meet and double damages are the norm, single damages the exception." [*The Fair Labor Standards Act*, Bureau of National Affairs, 1999, page 1254]

The Court of Federal Claims reminds us there is no presumption that the employer acted in good faith. Plaintiffs are entitled to liquidated damages unless the government proves that it acted in good faith. [Adams v. U.S. 46 Fed.Cl. 616 (2000)] The employer must demonstrate an honest intention to ascertain the Act's requirements and to follow them. [Kinney v. District of Columbia 994 F2d 6 (1993); Amos v. U.S. 13 Cl.Ct. 442 (1987)]

Showing the actions were not willful is not sufficient to meet this requirement. [Martin v. Cooper Electric Supply 940 F2d 596 (1993), cert. denied 110 S.Ct. 1473] The employer must also prove it reasonably believed its actions or omissions did not violate the statute. [Thomas v. Howard University Hospital 39 F3d 370 (1994)] That is, the employer did not act with reckless disregard. A definition for the term reckless disregard may be found at 5 C.F.R. 104. Guidance on what constitutes an honest intention to ascertain the Act's requirements and to follow them is provided in an article by Romualdo P. Eclavea in the American Law Reports. [26 ALR Fed 607; cf., Abbott v. United States 41 Fed.Cl. 553 (1998), affm'd. 204 F.3d 1099]

The statute also directs the court deciding an FLSA claim, in addition to any judgment awarded to the plaintiff or plaintiffs, to require defendant to pay a reasonable attorney's fee, and costs of the action. While the awarding of attorney's fees is mandatory to a prevailing plaintiff, the amount of the award is discretionary with the court. Guidance for determining the amount of the fees has been constructed by the courts, and includes such elements as: the time and labor involved, novelty and difficulty of the questions presented, whether other employment is precluded, etc. [Fields v. Luther 1988 WL 121791; Vaughns v. Board of Education 598 F.Supp. 1262 (1984), aff'd. 770 F.2d 1244 (1985); Slugocki v. U.S. 816 F.2d 1572 (1987)]

The courts have been asked to look at the issue of whether or not the Government can be required to pay interest on unpaid overtime under the FLSA. Typically, the courts have ruled that both liquidated damages and interest are not recoverable [e.g.., Martin v. Cooper Electric Supply Co., 940 F.2d 896 (1991)]. In addition, the U.S. Court of Federal Claims has ruled that the Back Pay Act did not waive the federal

government's immunity from paying interest on FLSA back pay awards [Adams v. U.S. 48 Fed.Cl. 602 (2001)]. In general, the practice is not to pay interest on back payments of FLSA overtime.