

**HOW TO MAKE
EXEMPTION STATUS DETERMINATIONS
UNDER THE
FAIR LABOR STANDARDS ACT
(FLSA)**

PREPARE

ANALYZE

CONCLUDE

Preparation

Gather materials:

- Part 551 of Title 5, Code of Federal Regulations
- Exemption criteria summary sheets
- Position description and position classification evaluation statement
- Position classification standard

Study materials.

Confirm position description accuracy and validate classification.

Analysis

Eliminate primary duty tests that are obviously not met.

Consider which of the remaining tests appear, initially, to be met.

Summarize the criteria for which you must identify evidence.

Analyze the position description and evaluation statement.

Conclusion

Develop your conclusion.

Write your FLSA exemption status evaluation statement to support your conclusion.

Review your written analysis (the FLSA evaluation statement) and confirm that the FLSA exemption status determination you made is fully supportable.

FLSA EXEMPTION STATUS DECISION MAKING

Preparation

Have an up-to-date copy of subparts A and B, part 551, title 5, Code of Federal Regulations.

Review section 551.202, General Principles, governing exemptions.

Review either subsection 551.204(a), nonsupervisory white collar employees, or subsection 551.204(b), nonsupervisory employees in the Federal Wage System, as appropriate.

Have a set of up-to-date exemption criteria summary sheets.

Verify the accuracy of the position description (e.g., interview the incumbent and supervisor) and validate the classification. Remember that the FLSA exemption status is based on the duties the employee *actually performs* [551.202(e)] rather than what is described in the position description.

Carefully read the position description and position classification evaluation statement. Underline key sentences, phrases and words.

Once you have underlined key sentences, phrases and words in the position description and evaluation statement, you are ready to do your FLSA exemption status determination analysis.

Analysis

To meet the *executive exemption criteria*, the employee's primary duty must be management of an organizational unit.

To meet the *administrative exemption criteria*, the employee's primary duty must be office or non-manual work directly related to the management or general business functions of the employer.

To meet the *professional exemption criteria*, the employee's primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired through prolonged specialized intellectual instruction, or must involve invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Consider the introductory paragraph of each of the exemption criteria and identify those that are not met. Make a list of what must still be considered.

Consider which of the remaining tests appear, initially, to be met --

- The customary and regular direction of two or more other employees [551.205(a)(1)];
- The authority to hire or fire other employees or to recommend such actions when such recommendations are given particular weight [551.205(a)(1) and (b)];
- The requirement for an administrative employee to exercise discretion and independent judgement on matters of significance [551.206(a) through (h)];
- The exercise of discretion and independent judgement in performance of work requiring advanced knowledge that is predominantly intellectual in character [551.208(a)].
- The performance of systems design, development, documentation, analysis, creation, testing or modification when

FLSA EXEMPTION STATUS DECISION MAKING

the compensation exceeds established standards [551.210(b)]

Summarize the criteria for which you must identify evidence through a closer reading of the position description and the position classification evaluation statement.

Re-read the pertinent criteria and descriptions.

Re-read the position description and evaluation statement, and annotate them with section and paragraph identification to indicate support for a specific test.

Re-read the general principles governing exemptions.

Remember these important points:

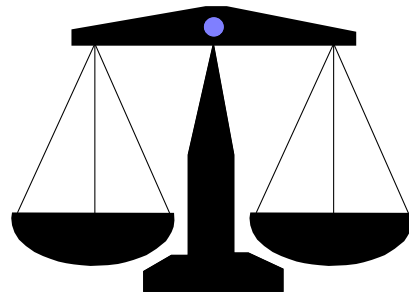
- Each employee is presumed to be nonexempt.
- Exemption criteria must be narrowly construed.
- If the employee clearly meets the criteria for exemption under one or a combination of criteria, then the employee must be designated FLSA exempt.
- If there is reasonable doubt as to whether the employee meets the criteria for exemption, then the employee should be designated FLSA nonexempt.
- Consider the impact of the requirement to make employees nonexempt when their salaries are less than a prescribed annual amount [5 CFR 551.203]

Conclusion

Develop your conclusion.

Write your FLSA exemption status evaluation statement to support your conclusion. This evaluation statement should accompany or become part of the position classification evaluation statement.

Review your written analysis (the FLSA evaluation statement) and confirm that the FLSA exemption status determination you made is fully supportable.



FLSA EXEMPTION STATUS DECISION MAKING

FEDERAL REGULATIONS THAT GUIDE FLSA EXEMPTION STATUS DECISION MAKING

General Principles

TITLE 5--CODE OF FEDERAL
REGULATIONS
PART 551--PAY ADMINISTRATION
UNDER THE FAIR LABOR
STANDARDS ACT

Subpart B--Exemptions and Exclusions

Sec. 551.202 General principles governing exemptions.

In all exemption determinations, the agency must observe the following principles:

(a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria of this subpart and such supplemental interpretations or instructions issued by OPM. The agency must designate an employee FLSA exempt when the agency correctly determines that the employee meets the requirements of one or more of the exemption of this subpart and such supplemental interpretations or instructions issued by OPM.

(b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(c) The burden of proof rests with the agency that asserts the exemption.

(d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

(e) While established position description and titles may assist in making initial FLSA exemption determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee.

(f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. Employees who perform a combination of exempt duties set forth in this regulation may also qualify for exemption. For example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption, i.e., work that is exempt under one section of this part will not defeat the exemption under any other section.

(g) Failure to meet the criteria for exemption under what might appear to be the most obvious criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative criteria may be performing exempt executive work.

(h) Although it is normally feasible and more convenient to identify the exemption category, this is not always appropriate. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee's primary duty may involve two categories that are intermingled and difficult to segregate. This does not preclude designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria. The agency is responsible for showing and documenting that the work as a whole clearly meets one or more of the exemption criteria. [5 C.F.R. 551.202 (2007)]

Exemption Based on Salary

Sec. 551.203 Salary-based nonexemption.

- (a) An employee, including a supervisory employee, whose annual rate of basic pay is less than \$23,600 is nonexempt, unless:
- (1) The employee is subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status); or
 - (2) The employee is subject to § 551.212 (Foreign exemption criteria); or
 - (3) The employee is a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) of § 551.208.
- (b) For the purposes of this section, “rate of basic pay” means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR 531, subpart F, special rate supplement under 5 CFR part 530, subpart C, or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind, such as premium payments, differentials, and allowances. [5 C.F.R. 551.203 (2007)]

White- and Blue-collar Employees Covered

Sec. 551.204 Nonexemption of certain employees.

- (a) Certain nonsupervisory white-collar employees are FLSA nonexempt (unless the employees are subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status) or § 551.212 (Foreign exemption criteria)) because they do not fit any of the exemption categories. They include:
- (1) Employees in equipment operating and protective occupations, and most clerical occupations;
 - (2) Employees performing technician work in positions properly classified below GS-9 (or equivalent level in other white-collar pay systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent level in other white-collar pay systems); and
 - (3) Employees at any grade, or equivalent level, in occupations requiring highly specialized, technical skills and knowledge that can be acquired only through prolonged job training and experience, such as in the Air Traffic Control series, or in the Aircraft Operations series unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.
- (b) Nonsupervisory employees in the Federal Wage System or in other comparable wage systems are nonexempt, unless the employee is subject to § 551.211 (Effect of performing temporary work or duties for a temporary period of time on FLSA exemption status) or § 551.212 (Foreign exemption criteria). [5 C.F.R. 551.204 (2007)]

Executive Exemption Criteria

Sec. 551.205 Executive exemption criteria.

- (a) An *executive employee* is an employee whose primary duty is management (as defined in § 551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and who:
- (1) *Customarily and regularly directs* the work of two or more other employees. However, an employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement. In addition, hours worked by an employee cannot be credited more than once for different executives. This takes into consideration those organizations that use matrix management, i.e., a system of "shared" leadership, where supervision cuts across product and service lines in terms of accessing activities and advising top management on business operations, but where the supervisor/leader does not have the operating authority over all employees. Thus, a shared responsibility for the supervision of the same two employees in the same recognized organizational unit does not satisfy this requirement. However, a fulltime employee who works 4 hours for one supervisor and 4 hours for a different supervisor will be credited as a half-time employee for both supervisors; and

- (2) Has the 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.

- (b) *Particular weight*. Criteria to determine whether an employee's suggestions and recommendations are given particular weight by higher-level management include, but are not limited to: whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. Particular weight does not include consideration of an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have particular weight even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status. [5 C.F.R. 551.205 (2007)]

Definitions

Customarily and regularly - means a frequency which must 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

FLSA EXEMPTION STATUS DECISION MAKING

workweek. It does not include isolated or one-time tasks.

Management - means performing activities means performing activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or 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; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Directly and closely related – means work that work that is directly and closely related to the performance of exempt work which is also considered exempt work. The phrase directly and closely related means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Directly and closely related work may include typically nonexempt tasks that arise out of and are integral to exempt duties. Those nonexempt tasks must be performed by the exempt employee to perform his or her exempt work. Work directly and closely related to the performance of exempt duties may also 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 workers and supervisors are required to perform is considered to be closely related to the primary duty of the position (for example, physical training during tours of duty for firefighting and law enforcement personnel) and is exempt work. Work is not directly and closely related if the work is remotely related or completely unrelated to exempt duties. The following examples illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Work is closely related to exempt supervisory work when it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(2) Depending upon the nature of an organization, a supervisor who sets up a machine may be engaged in exempt work. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. In such cases, setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such

FLSA EXEMPTION STATUS DECISION MAKING

work may be a regular duty of the executive employee and is directly and closely related to the executive employee's responsibility for the subordinates' work performance and for the adequacy of the final product. In addition, performing setup work that requires special skills typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform. Such closely related work may include performing infrequently recurring or one-time tasks which are impractical to delegate, because they would disrupt normal operations or take longer to explain than to perform. Under such circumstances, it is exempt work.

(3) A management analyst may take extensive notes recording the flow of work and materials through an organization; the analyst may personally use a computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would not be exempt. However, because this work is necessary for analyzing the data and making recommendations (which is exempt work), it is directly and closely related to exempt work.

(4) A traffic manager in charge of planning an organization's transportation function, including 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, is performing exempt work. 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) An example of work directly and closely related to exempt professional duties is a chemist performing nonexempt tasks such as cleaning a test tube in the middle of an original experiment, even though such tasks can be assigned to laboratory assistants.

(6) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant. [5 C.F.R. 551.104 (2007)]

Primary duty - typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty:

- (1) Constitutes a substantial, regular part of the work assigned and performed;
- (2) Is the reason for the existence of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment as discussed in § 551.206, and the significance of the decisions made.

Recognized organizational unit - 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. This distinguishes supervisors from leaders who head temporary groups formed to perform assignments of limited duration.

- (1) The term recognized organizational unit is intended to distinguish between a mere collection of employees assigned from time to

FLSA EXEMPTION STATUS DECISION MAKING

time to a specific job or series of jobs and a unit with permanent status and function. A recognized organizational unit must have a permanent status and a continuing function. For example, a large human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and recruitment and placement, each of which has a permanent status and function.

- (2) 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.
- (3) 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 a recognized organizational unit with a continuing function.



Two or more other employees - means the equivalent of two or more full-time employees. For the purpose of this definition, an employee is equal to a full-time equivalent (FTE). For example, one full-time and two half-time employees are equivalent to two full-time employees. [5 C.F.R. 551.104 (2007)]

Administrative Exemption Criteria

Sec. 551.206 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, as distinguished from production functions, of the employer or the employer's customers and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase *discretion and independent judgment* must be applied in light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

(1) Has authority to formulate, affect, interpret, or implement management policies or operating practices;

(2) Carries out major assignments in conducting the operations of the organization;

(3) Performs work that affects the organization's operations to a substantial

degree, even if the employee's assignments are related to operation of a particular segment of the organization;

(4) Has authority to commit the employer in matters that have significant financial impact;

(5) Has authority to waive or deviate from established policies and procedures without prior approval;

(6) Has authority to negotiate and bind the organization on significant matters;

(7) Provides consultation or expert advice to management;

(8) Is involved in planning long- or short-term organizational objectives;

(9) Investigates and resolves matters of significance on behalf of management; and

(10) Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level. Thus, the term *discretion and independent judgment* does not require that decisions made by an employee 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 judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

(d) An organization's workload may make it necessary to employ a number of employees to perform the same or similar work. The

FLSA EXEMPTION STATUS DECISION MAKING

fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

(f) The use of manuals, guidelines, or other established procedures containing or relating to highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exemption status. However, employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances will be nonexempt.

(g) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to

matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

(h) Employees in certain occupations typically assist and support line managers and assume facets of the overall management function. Neither the location of the work nor the number of employees performing the same or similar work turns such work into a production function. 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. However, 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 Governmentwide policy are performing management support functions. Some of these activities may be performed by employees who would otherwise qualify under another exemption. Depending upon the purpose of the work and the organizational context, work in certain occupations may be either exempt or nonexempt. For example, criminal investigators who perform work directly related to the internal management of the agency and typically would be expected to provide recommendations of great significance based on the analysis of investigative findings would likely be considered as performing a staff function. In contrast, the performance of investigative and inspectional work to confirm whether specific regulatory requirements have been met for an investigative/inspectional component of any agency would likely be considered as performing a line rather than a staff function.

(i) An employee who leads a team of other employees assigned to complete major

FLSA EXEMPTION STATUS DECISION MAKING

projects (such as acquisitions; negotiating real estate transactions or collective bargaining agreements; designing and implementing productivity improvements; oversight, compliance, or program reviews; investigations) 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. An example is a lead auditor who oversees an audit team in an auditing agency and who is assigned responsibility for leading a major audit requiring the use of substantial agency resources. This auditor is responsible for proposing the parameters of the audit and developing a plan of action and milestones to accomplish the audit. Included in the plan are the methodologies to be used, the staff and other resources required to conduct the audit, proposed staff member assignments, etc. When conducting the audit, the lead auditor makes on-site decisions and/or proposes major changes to managers on matters of significance in accomplishing the audit, including deviations from established policies and practices of the agency.

(j) An executive assistant or administrative assistant to a high level manager or senior executive generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(k) Human resources employees who formulate, interpret or implement human resources management policies generally meet the duties requirements for the administrative exemption. In addition, when interviewing and screening functions are performed by the human resources employee who makes the hiring decision or makes recommendations for hiring from a pool of qualified applicants, such duties constitute exempt work, even though

routine, because this work is directly and closely related to the employee's exempt functions.

(l) 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 meet the duties requirements for the administrative exemption.

(m) Acquisition employees with authority to bind the organization to significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with higher management officials when making a commitment.

(n) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits. [5 C.F.R. 551.206 (2007)]

Definitions

Directly and closely related – means work that work that is directly and closely related to the performance of exempt work which is also considered exempt work. The phrase directly and closely related means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Directly and closely related work may include typically nonexempt tasks that arise out of and are integral to exempt duties. Those nonexempt tasks must be

FLSA EXEMPTION STATUS DECISION MAKING

performed by the exempt employee to perform his or her exempt work. Work directly and closely related to the performance of exempt duties may also 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 workers and supervisors are required to perform is considered to be closely related to the primary duty of the position (for example, physical training during tours of duty for firefighting and law enforcement personnel) and is exempt work. Work is not directly and closely related if the work is remotely related or completely unrelated to exempt duties. The following examples illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Work is closely related to exempt supervisory work when it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(2) Depending upon the nature of an organization, a supervisor who sets up a machine may be engaged in exempt work. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. In such cases, setup

work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive employee and is directly and closely related to the executive employee's responsibility for the subordinates' work performance and for the adequacy of the final product. In addition, performing setup work that requires special skills typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform. Such closely related work may include performing infrequently recurring or one-time tasks which are impractical to delegate, because they would disrupt normal operations or take longer to explain than to perform. Under such circumstances, it is exempt work.

(3) A management analyst may take extensive notes recording the flow of work and materials through an organization; the analyst may personally use a computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would not be exempt. However, because this work is necessary for analyzing the data and making recommendations (which is exempt work), it is directly and closely related to exempt work.

(4) A traffic manager in charge of planning an organization's transportation function, including 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

FLSA EXEMPTION STATUS DECISION MAKING

irregularities in transit, is performing exempt work. 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) An example of work directly and closely related to exempt professional duties is a chemist performing nonexempt tasks such as cleaning a test tube in the middle of an original experiment, even though such tasks can be assigned to laboratory assistants.

(6) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant. [5 C.F.R. 551.104 (2007)]

Formulate, affect, interpret, or implement management policies or operating practices

means perform work that involves management policies or operating practices which range from specific objectives and practices of a small field office to broad national goals expressed in statutes or Executive orders. Employees performing such work make policy decisions or participate indirectly through developing or recommending proposals that are acted on by others. The work of employees who significantly affect the execution of management policies involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or

of other organizations subject to regulation or other controls).

Primary duty - typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty:

(1) Constitutes a substantial, regular part of the work assigned and performed;

(2) Is the reason for the existence of the position; and

(3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment as discussed in § 551.206, and the significance of the decisions made. [5 C.F.R. 551.104 (2007)]

Administrative Work distinguished from Production Work - OPM and the federal courts have made it clear that only those employees who are involved in administrative functions will meet the Administrative Exemption Criteria, and that these functions are different from the production or the line work of the organization.

The concept of production is not limited to production on a manufacturing line. Rather the line or production work of an organization produces the goods or services that the enterprise exists to produce. In contrast, administrative employees administer the business affairs of the



FLSA EXEMPTION STATUS DECISION MAKING

enterprise from those whose primary duty

To resolve question of whether the work is production or administrative, it is necessary to identify the nature of the employer's business. 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, and business and research and control.

To illustrate this, a few examples from recent federal court decisions are provided. First, a private sector case involving automobile damage appraisers employed by a 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. Second, State Police Investigators were deemed to be 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. In contrast to the preceding two examples, a customer service coordinator for a moving company was determined to be an exempt administrative employee because she was not involved in producing the employer's service of moving goods from point A to point B.

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. This is

accomplished, first, by examining the purpose for which the employer exists, i.e., the products, goods or services the organization is established to produce. The second step is to determine the primary purpose of the position. Is it to produce the products, goods or services? Then it is involved in the production or line work of the organization and will not meet the Administrative Exemption Criteria. Or, is the primary purpose to formulate or execute management programs or policies, to provide management or general business functions or supporting services of substantial importance to the organization, or to administer the business affairs of the organization? Then the position is involved in administrative work and may meet the Administrative Exemption Criteria. If the work is found to be administrative in nature, then the third step is to apply the 4 tests in the Administrative Exemption Criteria to determine if the position meets the requirements for exemption.

Professional Exemption Criteria

Sec. 551.207 Professional exemption criteria.

To qualify for the professional exemption, an employee's primary duty must be 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. Learned professionals, creative professionals, and computer employees are described in §§ 551.208, 551.209, and 551.210, respectively.

Sec. 551.208 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The work must include the following three elements:

(1) The employee must perform work requiring advanced knowledge. Work requiring advanced knowledge is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced

knowledge cannot be attained at the high school level;

(2) The advanced knowledge must be in a field of science or learning which 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 as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction which restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic 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 the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is appropriate in unusual cases where a lawyer has not gone to law school, or a chemist does not possess a degree in chemistry. However, 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

FLSA EXEMPTION STATUS DECISION MAKING

not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The position of Engineering Technician is an example of such an occupation where the employee collects, observes, tests and records factual scientific data within the oversight of professional engineers, and performs work using knowledge acquired through on-the-job and classroom training rather than by acquiring the knowledge through prolonged academic study.

(b) Expansion of professional exemption. The areas in which the professional exemption may be applicable are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in this section also may be created in the future. Such organizations may develop similar, specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

(c) Practice of law.

(1) This exemption applies to an employee in a professional legal position requiring admission to the bar and involved in preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; rendering legal advice and services; 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.

(2) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(d) Practice of medicine.

(1) 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 is exempt. The 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 "physicians" includes medical doctors, including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(2) 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 is exempt. Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(3) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(e) Accounting. Certified public accountants generally meet the duties requirements for

FLSA EXEMPTION STATUS DECISION MAKING

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 may qualify as an exempt learned professional. However, accounting clerks and technicians and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(f) Engineering. Engineers generally meet 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, engineering adaptability, and engineering methods of construction and processing. Exempt professional engineering work includes equivalent work performed in any of the specialized branches of engineering (e.g., electrical, mechanical, or materials engineering). On unusual occasions, engineering technicians performing work comparable to that performed by professional engineers on the basis of advanced knowledge may also be exempt. 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, but has 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.

(g) Architecture. Architects generally meet the duties requirements for the learned professional exemption. Professional architectural work typically requires 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.

(h) 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.

(1) A teacher performs exempt work when serving, for example, as a regular academic teacher; teacher of kindergarten or nursery school pupils; teacher of gifted or disabled children; teacher of skilled and semi-skilled trades and occupations; teacher engaged in automobile driving instruction; aircraft flight instructor; home economics teacher; or vocal or instrumental music instructor. A faculty member who is engaged as a teacher but also spends a considerable amount of time in extracurricular activities such as coaching athletic teams or acting as a moderator or advisor in such areas as drama, speech, debate, or journalism is engaged in teaching. Such activities are a recognized part of an educational establishment's responsibility in contributing to the educational development of the student. An instructor in an institution of higher education or another educational establishment whose primary duty is teaching, tutoring, instructing, or lecturing in

FLSA EXEMPTION STATUS DECISION MAKING

the activity of imparting knowledge is also an exempt teacher.

(2) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by appropriate certifying entities. However, a teacher's certificate is not generally necessary for post-secondary educational establishments.

(3) Exempt teachers do not include teachers of skilled and semi-skilled trade, craft, and laboring occupations when the paramount knowledge is the knowledge of and the ability to perform the trade, craft, or laboring occupation. Conversely, if the primary requirement of the post-secondary education instructor is the ability to instruct, as opposed to knowledge of and ability to perform a trade, craft, or laboring occupation, then the position may be exempt.

(4) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(i) Medical technologists. Registered or certified medical technologists who have successfully completed 3 academic years of pre-professional study in an accredited college or university, plus a 4th year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association, generally meet the duties requirements for the learned professional exemption.

(j) Nurses. Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional

exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(k) Dental hygienists. Dental hygienists who have successfully completed 4 academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(l) Physician assistants. Physician assistants who have successfully completed 4 academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants, generally meet the duties requirements for the learned professional exemption.

(m) Paralegals. Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced, specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general 4-year advanced degrees, most specialized paralegal programs are 2-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is applicable to paralegals who possess advanced, specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. In addition, a paralegal who fails to meet the

FLSA EXEMPTION STATUS DECISION MAKING

professional exemption criteria may be performing exempt administrative work, e.g., overseeing a full range of support services for a large legal office.

Sec. 551.209 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. The work performed must be "in a recognized field of artistic or creative endeavor," including such fields as music, writing, acting, and the graphic arts. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of "invention, imagination, originality, or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Determination of exempt creative professional status must be made on a case-by-case basis. This requirement generally is met 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. This requirement generally is not met by a person who is employed as a retoucher of photographs, since such work is not properly described as creative in character.

(b) Federal employees engaged in the work of newspapers, magazines, television, or other media are not exempt creative professionals if they only collect, organize,

and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. For example, employees who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Employees also do not qualify as exempt creative professionals if their work product is subject to substantial control by the organization. However, when the work requires invention, imagination, originality, or talent, as opposed to work which depends primarily on intelligence, diligence, and accuracy, such employees may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator. Work that does not fully meet the creative professional exemption criteria does not preclude exemption under another exemption category. For example, public affairs work under control of the organization that does not meet the creative professional exemption may meet the administrative exemption.

Sec. 551.210 Computer employees.

(a) Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The exemption in section 13(a)(1) of the Act applies to any computer employee

FLSA EXEMPTION STATUS DECISION MAKING

whose annual remuneration exceeds the salary-based nonexemption prescribed in Sec. 551.203. The exemption in section 13(a)(17) applies to any computer employee compensated on an hourly basis at a rate of basic pay (as defined in Sec. 551.203(b)) not less than \$27.63 an hour. In addition, these exemptions apply only to computer employees whose primary duties consist of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) Computer manufacture and repair. The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations as identified in paragraph (b) of this section, are also not exempt computer professionals.

(d) Executive and administrative computer employees. Computer employees within the scope of this exemption, as well as those

employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under this subpart. For example, systems analysts and computer programmers 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 organization or the organization's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized organizational unit, and whose recommendations regarding the hiring, firing, advancement, promotion, or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption. Alternatively, a senior or lead computer programmer who leads 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 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.

Definitions

Directly and closely related – means work that work that is directly and closely related to the performance of exempt work which is also considered exempt work. The phrase directly and closely related means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Directly and closely related work may include typically nonexempt tasks

FLSA EXEMPTION STATUS DECISION MAKING

that arise out of and are integral to exempt duties. Those nonexempt tasks must be performed by the exempt employee to perform his or her exempt work. Work directly and closely related to the performance of exempt duties may also 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 workers and supervisors are required to perform is considered to be closely related to the primary duty of the position (for example, physical training during tours of duty for firefighting and law enforcement personnel) and is exempt work. Work is not directly and closely related if the work is remotely related or completely unrelated to exempt duties. The following examples illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Work is closely related to exempt supervisory work when it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(2) Depending upon the nature of an organization, a supervisor who sets up a machine may be engaged in exempt work. In some cases the setup work, or adjustment of the machine for a particular job, is typically

performed by the same employees who operate the machine. In such cases, setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive employee and is directly and closely related to the executive employee's responsibility for the subordinates' work performance and for the adequacy of the final product. In addition, performing setup work that requires special skills typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform. Such closely related work may include performing infrequently recurring or one-time tasks which are impractical to delegate, because they would disrupt normal operations or take longer to explain than to perform. Under such circumstances, it is exempt work.

(3) A management analyst may take extensive notes recording the flow of work and materials through an organization; the analyst may personally use a computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would not be exempt. However, because this work is necessary for analyzing the data and making recommendations (which is exempt work), it is directly and closely related to exempt work.

(4) A traffic manager in charge of planning an organization's transportation function, including 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

FLSA EXEMPTION STATUS DECISION MAKING

making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. 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) An example of work directly and closely related to exempt professional duties is a chemist performing nonexempt tasks such as cleaning a test tube in the middle of an original experiment, even though such tasks can be assigned to laboratory assistants.

(6) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant. [5 C.F.R. 551.104 (2007)]

Educational establishment means 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 any classification of such schools as elementary, secondary, or higher.

Primary duty - typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty:

- (1) Constitutes a substantial, regular part of the work assigned and performed;
- (2) Is the reason for the existence of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with

which the employee must exercise discretion and independent judgment as discussed in § 551.206, and the significance of the decisions made. [5 C.F.R. 551.104 (2007)]

