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**Overview of General  
Requirements for  
Employer Compliance  
With the Fair Labor  
Standards Act of 1938**

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# Overview of General Requirements for Employer Compliance With the Fair Labor Standards Act of 1938

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## I. An Introduction to the Fair Labor Standards Act

This guide is intended to provide employers with a general overview of the Fair Labor Standards Act of 1938 (“FLSA” or “the Act”). Section I provides a brief history of the Act and its statutory development. The guide subsequently discusses important compliance concerns including coverage issues, key provisions and specific requirements, exemptions, and possible repercussions for failure to comply with the Act and its interpretive regulations. Finally, the guide briefly notes certain important state variations that require more of employers than does the federal Act.

### A. Historical Overview

FLSA was signed into law by Franklin D. Roosevelt on June 25, 1938. The Act offered unprecedented protections to a broad class of workers and imposed on employers many requirements to enforce those protections. FLSA’s several amendments throughout the years responded to changing needs and concerns of the times by adjusting and adding to the statute’s original requirements.

FLSA sets the federal minimum wage, determines maximum workweek hours and overtime pay requirements, ensures that workers are paid equally regardless of sex, and imposes restrictions on child labor, among other things. The U.S. Department of Labor (DOL) administers FLSA through its Wage and Hour Division (WHD), which was created by FLSA,<sup>1</sup> and periodically issues regulations interpreting and applying the Act’s provisions.

### B. Effect and Importance

It is imperative that today’s employers educate themselves fully about FLSA to ensure compliance with its provisions. An employer’s failure to comply with the Act and its accompanying regulations can result in costly, time-consuming private litigation or DOL enforcement proceedings. Further, because states are free to provide employees with greater protection than FLSA requires, an employer must familiarize itself with its particular jurisdiction’s laws as well.

## II. Coverage Issues

### A. “Enterprise”

A threshold FLSA issue is determining who is covered under the Act. The statutory language refers to certain business operations as “enterprises”<sup>2</sup> and provides that an enterprise is covered under FLSA if its total annual gross sales equal or exceed \$500,000 and if it handles goods, materials, or services that have been moved or produced in interstate commerce. Certain enterprise activities, such as the operation of hospitals, mental institutions, schools, certain public transportation systems, and public agencies, are always considered to be “performed for a business purpose” regardless of revenue. See 29 U.S.C. § 203(r)(2). And individual employees are covered without regard to their employer’s status if the employees are engaged in commerce or the production of goods for commerce.

As is apparent, FLSA has a broad definition of a covered employer. More likely than not, if a business’s sales equal or exceed \$500,000, it is a covered enterprise for purposes of FLSA and must ascertain its compliance obligations with regard to specific types of employees. As noted, smaller businesses may also find themselves within FLSA’s reach if any of their employees are involved in interstate commerce as part of their job functions.

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<sup>1</sup> 29 U.S.C. § 204(a).

<sup>2</sup> See 29 U.S.C. § 203(r)(1) (defining “enterprise” as “the related activities performed ... by any person or persons for a common business purpose,” regardless of how many locations the employer has). The definition specifically excludes independent contractors.

## B. “Engaged in Commerce or in the Production of Goods for Commerce”

The provisions of FLSA may apply when an employee is engaged, whether individually or through his employment enterprise, in commerce or in the production of goods for commerce.<sup>3</sup> It is important to know what these terms mean.

FLSA defines “enterprise engaged in commerce or in the production of goods for commerce” as one that “(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated).” *Id.* § 203(s)(1)(A).

Certain enterprises are engaged in commerce or in the production of goods for commerce by definition, regardless of sales. These enterprises are those “engaged in the operation of” hospitals, mental institutions, and schools. *Id.* § 203(s)(1)(B). The enterprise activities of public agencies are also automatically considered engaged in commerce or in the production of goods for commerce. *See id.* § 203(s)(1)(C).

FLSA makes a special exception for small, family-owned businesses. If an establishment’s “only regular employees” consist of “the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner,” the establishment is not an enterprise engaged in commerce or in the production of goods for commerce. *Id.* § 203(s)(2). Further, “[t]he sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.” *Id.*

## III. Basic Provisions and Requirements

### A. Minimum Wage

#### 1. Basic Requirements

One of FLSA’s primary achievements was the introduction of a federal minimum wage. The initial wage requirement was set at just 25 cents.<sup>4</sup> Naturally, that amount has been adjusted many times throughout the years, but the basic requirement remains the same: Employees who are engaged during any workweek in commerce or in the production of goods for commerce, or who are employed in an enterprise that is engaged in commerce or in the production of goods for commerce, must be paid at least the amount required by the current federal minimum wage. *See* 29 U.S.C. § 206(a). Today, the minimum wage is set at \$7.25. *See id.* § 206(a)(1)(C).

#### 2. Youth Opportunity Provision

FLSA provides that workers under age 20 may be paid a reduced minimum wage for a limited period of time following their initial hire. This so-called “youth opportunity” exception to the general minimum wage requirement allows the employer to pay the young employee a minimum wage of \$4.25 per hour for the first 90 consecutive calendar days following the employee’s hire. *See* 29 U.S.C. § 206(g).

As the DOL recently clarified in its 2011 regulations, FLSA prohibits employers from taking “any action to displace employees” (including termination or reduction in wages, hours, or benefits) hired under this provision for the purpose of hiring new employees at the reduced rate. This means that, for example, an employer may not simply hire and fire young employees every 90 days just to take advantage of lower wage requirements. If an employer does take such unlawful action, he will have violated the Act’s prohibition on retaliatory acts against employees. *See* 29 C.F.R. § 786.300.

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<sup>3</sup> “Commerce” is broadly defined as “trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.” *Id.* § 203(b).

<sup>4</sup> *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, Monthly Labor Review, June 1978, available at <https://www.dol.gov/general/aboutdol/history/flsa1938>.

### 3. The Equal Pay Act

In 1963, FLSA was amended by the Equal Pay Act, which prohibited employers from paying unequal wages to employees based on sex discrimination.<sup>5</sup> This amendment to FLSA was an important victory for working women, who had long been subject to sex-based wage discrimination.

If an employee is covered by the protections of FLSA's minimum wage provisions, her employer shall not "discriminate ... on the basis of sex by paying wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). Importantly, the Act prohibits employers from "reduc[ing] the wage rate of any employee" to bring their practices into compliance with the statute. *Id.* Therefore, if a male employee had been receiving a higher wage for the same work as his female counterpart, the employer would be required to raise the female's wage, rather than reduce the male's wage. The Act also provides that employers are liable for unpaid minimum wages or overtime pay withheld as a result of a violation of the statute. *See id.* § 206(d)(3).

#### B. Overtime Pay

FLSA's overtime pay requirements provide employees with extra pay for hours worked in excess of normal workweek hours. The overtime provisions are located in the Act at Section 207, and they apply to any employee engaged in commerce or in the production of goods for commerce, whether individually or through an enterprise engaged in such activities. *See* 29 U.S.C. § 207(a)(1). Certain employees are exempt from FLSA's overtime pay provisions and the main types of exempted workers fall into six categories, which are discussed further below. *See id.* § 213. Additionally, there are some exceptions regarding collective bargaining agreements and certain independently owned and operated petroleum distribution enterprises. *See id.* § 207(b).

The original FLSA workweek for purposes of calculating overtime pay was 44 hours. *See* 29 U.S.C. § 207(a)(2)(A). Today, the standard is 40 hours, with some variations for certain jobs. *See id.* § 207(a)(1). A covered employee must be paid at least one and one-half times (commonly referred to as "time and a half") his regular rate of pay for each hour over 40 that he works in any given week. *See id.* Importantly, this calculation must be determined on an individual, week-by-week basis. *See* 29 C.F.R. § 778.315. For example, if an employee works 30 hours one week and 50 the next, he is entitled to 10 hours of overtime for the second week, despite the fact that his two-week total of 80 hours average out to 40 hours per week.

#### 1. Regular Rate of Pay

An employee's regular rate must be determined for purposes of calculating how much overtime pay the employee is owed. FLSA defines "regular rate" as including "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). However, the Act lists many exclusions from this simple definition. An employee's "regular rate" does not include payments made as gifts that are not based on the employee's hours worked or level of production or efficiency; payments made during vacation, illness, or other occasional times when no work is performed; reasonable remuneration for travel; employer contributions to retirement and insurance plans; and certain stock option income. A full list of remuneration excluded from the calculation of an employee's regular rate of pay can be found in the Act at Section 213(e).

#### 2. Working Hours

Whether certain employee activities should be counted toward an employee's total working hours for purposes of overtime calculation has been the subject of some confusion. Certain employee activities, such as engaging in the daily commute to and from work, are incidental to employment and are not included in the calculation of the employee's hourly rate. *See* 29 C.F.R. § 785.35. However, an employee is generally considered to be "working" for purposes of calculating his rate when (a) "[employee] is required to be on duty or to be on the employer's premises or at a prescribed workplace" and (b) "employee is suffered or permitted to work whether or not he is required to do so." 29 C.F.R. § 778.223. A relevant consideration is whether the employer knows or should know that the employee is performing work that is counting toward his working hours. *See id.* § 785.11. The duty always rests with management to control the amount of work being done; an employer may not reap the benefits of employees'

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<sup>5</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56.

labor and try to refuse payment for such services on the ground that the employer did not request the work to be done. See *id.* § 785.13.

When calculating an employee's work time, an employer should keep in mind the general rule that if an employee is not free "to use the time effectively for his own purposes," his time should be considered working hours. See *id.* § 785.16. The emphasis here is on the employer's control of the worker's time. This principle applies to periods of idleness "where waiting is an integral part of the job" (such as firefighters awaiting a fire, police awaiting an emergency call, or delivery drivers awaiting a shipment); times when work is not available but the employee is still "on-duty"; and "on-call" hours (if the employee is required to remain on premises or close to it while on-call, and he therefore is precluded from using his time the way he might wish to, he is considered to be working). See *id.* §§ 785.15-17. Short breaks are also generally compensable, but "bona fide meal periods" are not. See *id.* § 785.18-19.

In its 2011 regulations, the DOL attempted to clarify when a workday begins for timekeeping purposes. A provision was added addressing employees' use of company vehicles, providing that "[t]he use of an employer's vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered 'principal' activities" when the employee is using the company car to travel within the "normal commuting area for the employer's business or establishment," and the employee and employer have entered into an agreement regarding the employee's use of the company vehicle. *Id.* § 785.9(a).

### 3. Compensatory Time

Employees of public agencies eligible for overtime compensation may opt to receive time off from work rather than overtime pay. This is referred to as "compensatory time" or "comp time," and it must be given to the employee at a rate of at least one and one-half times each hour of overtime the employee worked. See 29 U.S.C. § 207(o)(1). The general rule is that employers may only exercise this option if it is so provided in a collective bargaining agreement, or if the employer and employee reach an agreement between each other before the overtime work is performed. See *id.* § 207(o)(2)(A)(i)-(ii). In either case, the employee must not have exceeded the applicable limit for comp time, as set forth in the Act. See *id.* § 207(o)(2)(B). There are many distinct provisions in the Act related to the specifics of comp time, and they are set forth at 29 U.S.C. § 207(o). It is important to note that this option is not available to private employers; it applies only to government agencies and their employees.

#### C. Child Labor Restrictions

FLSA restricts the age at which children may begin working, as well as the number of hours they may work and the type of work they may perform. These restrictions vary based on whether the children are employed in agricultural jobs or not. The Act grants the Secretary of Labor and his representatives the authority to "make all investigations and inspections" regarding the employment of minors and, subject to the direction and control of the Attorney General, to bring enforcement proceedings as necessary. 29 U.S.C. § 212(b).

In addition, the Act restricts the movement in commerce of goods produced in a United States establishment where "oppressive child labor has been employed" within the preceding 30 days. *Id.* § 212(a). FLSA defines "oppressive child labor" as "a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer [other than a parent or guardian, so long as the child's employment does not involve manufacturing, mining, or particularly hazardous work], or (2) any employee between the ages of sixteen and eighteen years is employed ... in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being." *Id.* § 203(l). The Secretary of Labor may issue regulations providing that children between ages 14 and 16 may be employed in occupations other than mining or manufacturing, if the Secretary "determines that such employment ... will not interfere with their schooling [or] health and well-being." *Id.*

The child labor provisions of Section 212 do not apply to children "employed in agriculture outside of school hours," so long as several conditions are met. *Id.* § 213(c)(1). As a threshold matter, any employee under age 16 is covered by the protections of Section 212 if he is engaged in agricultural employment that the Secretary of Labor has found to be "particularly hazardous" for such children, unless the child is engaged in such work on the farm of his parent or guardian. *Id.* § 213(c)(2). Assuming this hazardous condition exclusion does not apply, if the child is under age 12, he is not covered by Section 212 if he is either employed by a parent or guardian on that parent or guardian's farm or employed on a farm with the consent of his parent or guardian, and

none of the employees at that farm are required to be paid the minimum wage.<sup>6</sup> If the child is age 12 or 13, he is not covered by Section 212 if his agricultural work is performed either with the consent of his parent or guardian or on the same farm where his parent or guardian is employed. Finally, if the child employed in agriculture is age 14 or older, he is not covered by Section 212 and there are no additional exceptions to meet.

FLSA's child labor provisions do not apply to children engaged in at-home wreathmaking or the delivery of newspapers, or who are employed by a parent's or guardian's business, so long as such business is non-hazardous and does not involve mining or manufacturing. See 29 C.F.R. § 570.122(a). The provisions also exclude children who perform in film, theatrical, radio, or television productions, and there are other miscellaneous exemptions as well. See *id.* Generally, though, most minor children will be covered by the Act's protective provisions.

#### **D. New Protections for Nursing Mothers**

FLSA was recently amended by the Patient Protection and Affordable Care Act of 2010.<sup>7</sup> Pursuant to this amendment, FLSA now requires employers to provide certain accommodations and support for nursing working mothers who are non-exempt employees under 29 U.S.C. § 207. The Act requires most covered employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 207(r)(1)(B). The employer must also provide the nursing mother with "a reasonable break time ... to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." *Id.* § 207(r)(1)(A).

Employers are not required to compensate nursing working mothers for these breaks,<sup>8</sup> and employers with fewer than 50 employees need not comply with the section's requirements if doing so "would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." *Id.* § 207(r)(2)-(3). Thus, employers with 50 or more employees cannot obtain exemptions from the requirements, and it appears determinations regarding possible exemptions for smaller businesses will be made on an ad-hoc, situation-specific basis. Additionally, the statute expressly grants states the authority to accord additional protections to nursing mothers. *Id.* § 207(r)(4).

### **IV. Types of Employees and Their Rights Under FLSA**

Although the statutory text of FLSA itself refers to many different types of employees, responsibility rests with the DOL to meaningfully define these various types of workers.

#### **A. Employees Exempt from FLSA's Minimum Wage and Overtime Pay Provisions**

Some employees are exempt from FLSA's minimum wage and overtime pay provisions. This means that, regardless of their involvement in commerce or their employer's status as a covered employer, these employees are not entitled to the benefits of those provisions.<sup>9</sup> The main types of exempted workers discussed below fall into six categories: (1) executives, (2) administrative employees, (3) professional employees, (4) certain computer specialists, (5) outside salespersons, and (6) highly compensated workers. However, there are many more specific types of employees who also fall into this category of exempted workers, and the full list is codified in the Act in Section 213. Examples include employees of certain recreational establishments, camps, and religious or nonprofit educational conference centers; fishermen; certain agricultural workers; employees of small newspapers; certain switchboard operators; seamen aboard non-American vessels; "casual" domestic service employees, such as occasional babysitters; and certain criminal investigators. See 29 U.S.C. § 213(a).

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<sup>6</sup> This minimum wage exception refers to 29 U.S.C. § 213(a)(6)(A), which exempts from minimum wage and overtime protections any agricultural employee whose employer "did not, during any calendar quarter during the previous calendar year, use more than five hundred man-days of agricultural labor."

<sup>7</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Title IV, § 4207, 124 Stat. 577 (2010).

<sup>8</sup> However, employers who compensate employees for break time must compensate nursing mothers who use that break time to express breast milk. See *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, U.S. Dep't of Labor, available at <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>.

<sup>9</sup> It is important to note that FLSA explicitly provides that many employees who are not covered by the rest of the minimum wage and overtime pay protections nevertheless remain covered by the provisions against sex-based wage discrimination. See 29 U.S.C.A. § 213(a).



The DOL has issued substantial regulations interpreting the meaning of executive, administrative, professional, computer, and outside sales employees. The regulations emphasize that job titles alone are insufficient to support an exemption. Rather, an employee's status is heavily fact-based and must be determined by analyzing his work activities and salary. See 29 C.F.R. § 541.2.

### 1. Executives

Employees classified as "executives" are exempt from FLSA's minimum wage and overtime pay requirements. The DOL has issued a general rule defining these types of workers as those who receive a weekly salary of at least \$684 and whose primary duty is management of the enterprise or its departments or subdivisions.<sup>10</sup> The executive must "customarily and regularly" direct at least two other employees' work, and must have either direct authority to hire and fire employees or have "particular weight" given to his opinions regarding such decisions. *Id.* § 541.100. The regulations clarify that the requirement to customarily and regularly direct at least two other employees' work refers to "two full-time employees or their equivalent." *Id.* § 541.104(a). Thus, the direction of four half-time workers would satisfy the requirement, as would one full-time and two half-time employees. *See id.*

Certain business owners are also defined as "executives" for purposes of the Act. If a person owns at least 20% equity in her employing enterprise and is "actively engaged in its management," she will be classified as an "executive" regardless of her weekly salary. *Id.* § 541.101.

The regulations provide a non-exhaustive list of what is meant by "management" for purposes of defining an employee's duties to determine whether she is properly defined as an executive. The list includes activities such as interviewing, hiring, and training; directing employees' work and adjusting their pay rates and schedules; conducting employee reviews; and handling inventory. *See id.* § 541.102.

Employees who satisfy the criteria for executive exemption but concurrently perform nonexempt work generally remain exempt if they "make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work." *Id.* § 541.106(a). However, this determination is made on a case-by-case basis, and an employee whose main duties consist of "ordinary production work or routine, recurrent or repetitive tasks" does not qualify for the exemption. Particular emphasis is placed on retained control of the business operations and other employees; a "supervisor" who primarily performs nonexempt work and only occasionally directs other employees is not exempt under this provision, notwithstanding his job title. *Id.* § 541.106(b)-(c).

### 2. Administrative Employees

Administrative employees are those whose primary duties involve 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," as well as the "exercise of discretion and independent judgment with respect to matters of significance." *Id.* § 541.200(a)(2)-(3). Further, like the general rule applicable to most executives, the worker must receive a weekly salary of at least \$684 per week. *See id.* § 541.200(a)(1). The regulations note that an exempt administrative employee is one whose work is "directly related to assisting with the running or servicing of the business." *Id.* § 541.201(a).

Common types of administrative employees include insurance claims adjusters, executive or administrative assistants who exercise authority with respect to matters of significance, and human resource managers. *Id.* § 541.203. Tax and financial experts whose work is directly related to their clients' management or general business operations may also be considered exempt administrative workers, as long as their primary duty is not the sale of financial products. *Id.* §§ 541.201(c), 541.203(b).

### 3. Professional Employees

Professional employees are those who, like administrative and executive employees, receive a weekly salary of at least \$684. *See id.* § 541.300(a)(1). There are two main types of exempt professional employees: "learned" and "creative." *Id.* §§ 541.301, 541.302.

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<sup>10</sup> When the DOL regulations require a minimum salary of \$684 per week, an exception often is provided requiring a minimum salary of "\$455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or \$380 per week if employed in American Samoa by employers other than the Federal government." 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1), & 541.400(b).

“Learned professionals” are those whose primary duties involve work that requires knowledge “of an advanced type” in fields typically requiring advanced degrees or special knowledge acquired through experience and learning. *Id.* § 541.301(a). Whether an employee’s primary duties satisfy that requirement is determined by analyzing whether the employee’s work requires advanced knowledge; whether the advanced knowledge is “in a field of science or learning”; and whether such advanced knowledge is typically gained after “a prolonged course of specialized intellectual instruction.” *Id.* § 541.301(a). Each factor must be satisfied for the employee’s work to be considered exempt. Employees such as nurses, accountants, and chefs would generally be covered by this definition. *Id.* § 541.301(e).

“Creative professionals,” on the other hand, are those whose primary duties involve work that requires “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor,” as distinguished from routine work. *Id.* § 541.302(a). Occupations involving music, writing, the performing arts, and graphic design are considered to qualify as being in a “recognized field of artistic or creative endeavor.” *Id.* § 541.302(b).

Some employees are separately, explicitly covered under the professional employee exemption. These include most teachers, all practicing doctors and lawyers holding valid licenses, and medical interns or residents holding required degrees. *Id.* § 541.304(a). Notably, these employees are exempt regardless of whether they meet the requirements discussed above. *Id.* § 541.304(d). Thus, even if they are not paid a minimum of \$684 per week, they are still exempt.

Certain computer specialists are considered “professional employees” for purposes of FLSA exemption as well. Those workers, and the requirements for their exemption, are discussed below.

#### **4. Computer Specialists**

Certain computer employees are exempt from FLSA’s minimum wage and overtime protections. The DOL has emphasized that “[b]ecause job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.” *Id.* § 541.400. Thus, employers must look beyond mere job titles to determine whether their computer employees are covered by the exemption.

There are two separate wage thresholds for computer specialist, and if he meets either he may be covered. Computer employees earning a weekly salary of \$684 are exempt as “professionals,” and those earning an hourly rate of at least \$27.63 are exempt under a separate provision for computer system analysts, programmers, and software engineers. *Id.* § 541.400(b); 29 U.S.C. § 213(a)(17).

Regardless of which wage threshold applies, a computer employee falls under the exemption only if his primary duty involves “(1) [t]he application of systems analysis techniques and procedures ... (2) [t]he design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes ... (3) [t]he 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.” 29 C.F.R. § 541.400(b)(1)-(4).

#### **5. Outside Salespersons**

Outside salespersons are not subject to the minimum salary thresholds required for other types of exempt employees. Rather, any employee “[w]hose primary duty is ... making sales [as defined by FLSA] ... [or] obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client ... and [w]ho is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty” is exempt from FLSA’s minimum wage and overtime pay requirements. *Id.* § 541.500(a)(1)-(2).

Salespersons covered under this exemption are those who work outside of the employer’s offices and directly sell goods, services, or the use of facilities. DOL regulations note that selling “the use of facilities” includes selling airtime and ads in newspapers or magazines. *See id.* § 541.501(c). Outside salespersons must be “on the move” and their work must be conducted face-to-face; soliciting business by merely mailing flyers, for example, does not qualify. *See id.* § 541.502. The regulations provide that “any fixed site, whether home or office, used by a salesperson as a headquarters or for ... solicitation of sales is ... one of the employer’s places of business,” and the employee working out of such a place would not be exempt; this is true even if the employee owns the property from which he works. *Id.*

The DOL defines “sales” as transactions involving “the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.” *Id.* § 541.501(b). The Supreme Court addressed the status of pharmaceutical salespersons “whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer’s prescription drugs” in 2012. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012). The Court held that such workers are considered “outside salesmen” for purposes of the Act and are thus exempt from FLSA’s minimum wage and overtime pay requirements. *See id.* Interestingly, the Court’s holding was in conflict with the DOL’s opinion on the subject, which took the position that pharmaceutical salespersons were *not* exempt because they did not transfer title to property. *See id.* at 154. But the Court ruled that the agency’s interpretation was not entitled to deference because the agency’s previous regulations defining a “sale” had only required a “consummated transaction directly involving the employee for whom the exemption is sought,” and pharmaceutical manufacturers had reasonably relied on that definition. *Id.*

The *SmithKline* Court noted that “[t]o defer to the agency’s interpretation ... would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” *Id.* at 156. The Court placed importance on the fact that to hold otherwise would impose considerable cost on the pharmaceutical industry, and that the DOL had “never initiated any enforcement actions” in this type of situation, despite the industry’s long-standing classification of pharmaceutical salespersons as exempt. *See id.* at 158. The Court noted that “the broad statutory definition of ‘sale’ ... employs the broad catchall phrase ‘other disposition,’” which could be reasonably interpreted to include transactions between pharmaceutical sales representatives and physicians. *Id.* at 157. Comparing the pharmaceutical salespersons to other outside salespersons under the Act, the Court noted that they “are well paid ... and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week.” *Id.* at 158.

## 6. Highly Compensated Employees

An employee whose total annual compensation meets or exceeds \$107,432 is exempt from FLSA’s minimum wage and overtime pay requirements if she “customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.” 29 C.F.R. § 541.601(a)(1). Additionally, while the employee’s total compensation may derive partially from commissions or bonuses, she must also receive at least a weekly salary of \$684. *Id.* § 541.601(b)(1). The rationale for this exemption category is that highly compensated workers are typically exempt anyway, and creating this category “eliminat[es] the need for a detailed analysis of the employee’s job duties.” *Id.* § 541.601(c). Thus, if an employee is compensated as discussed and performs at least one of the duties customarily associated with executive, administrative, or professional workers, she is exempt notwithstanding her failure to satisfy all of the criteria that would normally apply.

### B. Employees Exempt from FLSA’s Maximum Hour Provisions

Other workers are covered by FLSA’s minimum wage requirements but exempt from its maximum hour requirements. The Act sets forth many types of workers who fall under this category. Employees of retail or service establishments are not subject to the overtime provisions as long as at least half of their compensation is derived from commissions, and their regular rate of pay exceeds one and one-half times the federal minimum wage. *See* 29 U.S.C. § 207(i). Due to the nature of their occupations, fire protection and law enforcement workers<sup>11</sup> who are employed by public agencies are also subject to different workweek standards and corresponding differences in overtime pay calculations. *See id.* §§ 203(o), 207(k).

Salespersons of certain expensive retail items such as automobiles, trucks, farm machinery, trailers, boats, and aircraft are also exempt if they meet certain criteria. *See id.* § 213(b)(10)(A)-(B). A salesperson of automobiles, trucks, or farm machinery must be primarily engaged in the sale *or* service of the items. *See id.* Salespersons of trailers, boats, and aircraft are exempt only if they are primarily engaged in the sale, not service, of the items. *See id.* In either case, the salesperson’s employer must not be a manufacturer and must be primarily engaged in selling the covered items to ultimate buyers. *See id.*

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<sup>11</sup> An employee engaged in fire protection activities is one who “[1] is trained in fire suppression, [2] has the legal authority and responsibility to engage in fire suppression ... [3] is employed by a fire department of a municipality, county, fire district, or State; and [4] is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.” 29 U.S.C. § 203(y)(1)-(2). As usual with FLSA, job titles are not determinative here. A “fire protection worker” may be a “firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker,” so long as the requirements above are satisfied. *Id.* § 203(y). For purposes of FLSA, “law enforcement workers” includes any employee engaged in law enforcement activities, which includes correctional facility security personnel. *Id.* § 207(k).

Partsmen and mechanics whose primary duty involves the sale or service of automobiles, trucks, or farm machinery are exempt from the overtime pay requirements if, like salespersons of these items, they are employed by non-manufacturers whose primary business operations involve selling these items to ultimate purchasers. *See id.* § 213(b)(10)(A).

Other workers exempt from the overtime pay provisions include rail carrier operators; air carrier employees; outside buyers of poultry, eggs, cream, or milk; seamen; certain employees of radio or television stations, including some announcers, news editors, and chief engineers; certain delivery drivers; certain agricultural workers; taxi drivers; live-in domestic employees; houseparents; movie theater employees; and several more. *See id.* § 213(b). The full list can be found in Sections 207 and 213 of the Act.

### C. Special Considerations for Tipped Employees

Employers of tipped workers must pay special attention to FLSA's special requirements for such employees. A tipped employee is defined in the Act as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." 29 U.S.C. § 203(t). "Tip" is defined as a discretionary amount of money "presented by a customer as a gift or gratuity in recognition of some service performed for him," as distinguished from "payment of a charge, if any, made for the service." 29 C.F.R. § 531.52. The DOL has clarified that all tips belong solely to the employee, and an employer may not use the tips for any purpose except to take a "tip credit" or "in furtherance of a valid tip pool" where authorized by FLSA. *See id.*

A tip credit allows an employer to avoid paying a full cash wage to meet its minimum wage obligations to tipped employees, and thus can substantially reduce an employer's wage costs. An employer may take this tip credit subject to several conditions. The maximum amount of the tip credit is calculated by subtracting the current federal minimum wage required by FLSA, minus \$2.13. *See id.* § 531.59(a). As the minimum wage is currently \$7.25 per hour, the maximum tip credit is set at \$5.12 per hour, and the employer must pay an hourly cash wage of at least \$2.13.<sup>12</sup> An employer may take less than the maximum allowable tip credit, but not more.

An employer may only take a tip credit "for hours worked by the employee in an occupation in which the employee qualifies as a 'tipped employee.'" *Id.* § 531.59(b). This means that if an employee performs tipped as well as non-tipped work for the employer, the employer must differentiate between the two types of work and must pay the employee an hourly cash wage meeting or exceeding the federal minimum wage for all non-tipped work performed. *See id.* The employer may only offset his minimum wage obligations with a tip credit for hours the employee spends performing tipped work. The DOL notes that activities incidental to tipped work may be included in the employee's tipped work time. For example, "a waitress who spends part of her time cleaning and setting tables" is performing "related duties in ... a tipped occupation" and thus hours spent performing those duties may be included in her tipped work hours. *Id.* § 531.56(b). However, a waiter who also serves as a janitor for the same employer is only considered a tipped employee for the hours he spends as part of his duties as a waiter. He must be paid an hourly cash wage meeting or exceeding the minimum wage for his time spent performing janitorial work. *See id.*

An employer claiming the maximum tip credit "must demonstrate that the employee received at least that amount in actual tips." *Id.* § 531.59(b). Otherwise, the employer is required to pay the difference. *See id.* This provision seeks to guarantee that tipped workers will always be paid at least the minimum wage and will not suffer due to their employers' use of the tip credit. Similarly, if employees participate in a mandatory tip pooling arrangement, the employer's maximum tip credit must be based on the actual amount of tips received by each employee. *See id.* § 531.54. Mandatory tip pools are only acceptable if all of the employees customarily and regularly receive tips. *See id.*

Significantly, as discussed further below, an employer must provide employees with advance notice regarding the tip credit. Failure to do so will constitute forfeiture of the right to claim the credit, and the employer may be liable for back pay as a result. This could clearly result in serious financial strain for an employer of tipped workers, so it is crucial to comply with the notice requirement as set forth below.

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<sup>12</sup> The maximum allowable tip credit may vary by state, depending on the state's own minimum wage requirements (which must meet or exceed the federal minimum wage) and allowable tip credit provisions. Employers should consult their jurisdiction's relevant statute to determine what amount applies.

## V. Records, Reports, and Notices

FLSA imposes on employers many requirements relating to recordkeeping, reporting, notices, and posters.<sup>13</sup> These regulations are found at Title 29, Part 516 of the Code of Federal Regulations.

The DOL has issued a general rule applicable to employers whose employees are protected by either the minimum wage provisions alone or both the minimum wage provisions and the overtime pay provisions. In addition, there are separate rules covering employees who are exempt from the minimum wage and overtime pay protections. A full description of the many different types of requirements pertaining to specific employees is beyond the scope of this guide, but the discussion below addresses several common scenarios.

### A. Rules Applicable to Employers Whose Employees Are Subject to FLSA's Minimum Wage or Minimum Wage and Overtime Pay Provisions

Special reporting, recordkeeping, and notice requirements apply to employees who are protected by FLSA's minimum wage or minimum wage and overtime provisions. The relevant regulations for these types of employees are as follows:

#### 1. Records

The DOL has specified that certain "payroll records" must be kept for each employee subject to either FLSA's minimum wage requirements or both the minimum wage and overtime pay requirements. See 29 C.F.R. § 516.2(a). These payroll records include the employee's full name, address, date of birth (if 18 or under), sex and occupation; the time and day of the start of the employee's workweek; the employee's regular rate of pay for any week where overtime pay is required, basis of the pay, and a description of any payments that are excluded from the employee's regular rate; the employee's total hours worked each day and week, as well as her total daily and weekly regular earnings and overtime earnings, which must be separately recorded; a description and accounting of any additions or deductions from wages per pay period; and for each pay period, the total wages, date of pay, and the dates covered. See *id.*

In addition to the payroll records, employers must record any instances of back wages paid under the supervision of the WHD. See *id.* § 516.2(b). These records must contain the amount, pay period, and date. See *id.* § 516.2(b)(1). A special report must be made for each payment, with copies distributed to the employee, filed with the WHD, and kept in the employer's files. See *id.* § 516.2(b)(2). Finally, if an employee works on a fixed schedule, his employer has the option of recording the employee's normal schedule rather than the hours per workday and workweek. See *id.* § 516.2(c). The employer must "indicate[] by check mark" when the employee works according to that recorded schedule; if his actual hours worked deviate from the schedule in any given week, the employer must make note of that change. See *id.* § 516.2(c)(1)-(2).

The DOL regulations also address the amount of time employers are required to maintain records. Employers must keep and preserve certain records for at least two years. These records include basic items such as employment and earnings records; wage rate tables; order, shipping, and billing records; and certain records of employee wage increases or decreases, as well as cost, operation, maintenance, and other costs factored into such wage changes. See *id.* § 516.6.

Additionally, some records must be maintained for at least three years. Such records include the payroll records discussed above, as well as certain certificates, agreements, plans, and notices, including some collective bargaining agreements, plans, trusts, and employment contracts, and written agreements or memoranda summarizing the terms of certain oral agreements, where the agreements were not memorialized in writing. See *id.* § 516.5(a)-(b). Further, records must be kept of the employer's total dollar value of sales or business and a total volume of goods purchased or received during specific periods of time. See *id.* § 516.5(c).

Records must remain safe and accessible at the employment location(s), or at a central recordkeeping facility. If the records are stored at such an off-site location, though, employers must ensure the documents are available within 72 hours of a DOL request for them. See *id.* § 516.7(a). Further, regardless of where they are stored, records must be "available for inspection and transcription" by the DOL. *Id.* § 516.7(b).

#### 2. Reports

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<sup>13</sup> 29 U.S.C. § 211(c) sets forth a blanket reporting requirement, directing the DOL to set forth what is specifically required.

The WHD may require, at its discretion, an employer subject to the recordkeeping requirements to provide certain computations or reports. These may include “such extension, recomputation, or transcription of the records” as the WHD requires. *Id.* § 516.8. Additionally, reporting requirements may include “reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in the records as ... [the WHD] may request in writing.” *Id.*

### 3. Notices

If an employer has any employees covered by the minimum wage protections, he must comply with certain notice (poster) requirements. DOL regulations require that such an employer “post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places” so employees have a meaningful opportunity to “observe readily a copy.” *Id.* § 516.4. If employees are exempt from the overtime pay provisions, an employer is free to adjust the poster “with a legible notation to show that the overtime provisions do not apply.” *Id.*

#### B. Rules Applicable to Other Types of Employees

##### 1. Records

Employers must retain limited records regarding employees who are categorized as executive, administrative, or professional workers and are thus exempt from FLSA’s overtime and minimum wage requirements. Records that must be kept for such an employee include her name and any identifying symbol used in place of her name in employment records; home address; date of birth if under age 19; sex and occupation; the time and day of the week on which her workweek begins; the amount of wages paid per pay period; and the date of each payment and the pay period for which the payment is made.<sup>14</sup> In addition, the employer must explain “in sufficient detail” the basis on which wages are paid to these types of employees in order “to permit calculation for each pay period of the employee’s total remuneration for employment including fringe benefits and prerequisites.” *Id.* § 516.3.

The regulations also contain various recordkeeping requirements for other types of employees covered by miscellaneous exemptions under FLSA. Employers are encouraged to refer to Title 29 of the Code of Federal Regulations, Part 516, Subpart B for details on these specific types of employees.

##### 2. Required Notices for Tipped Employees

Special notice requirements apply to employers who wish to claim a tip credit for their tipped employees.

In addition to the requirements of Section 516(a), employers of tipped employees must keep other records including “[a] symbol, letter, or other notation placed on the pay records identifying each employee whose wage is determined in part by tips”; the weekly or monthly amount of tips the employee reports; the amount by which the employer determines the employee’s wages have been increased by tips; any hours worked per workday wherein the employee does not receive tips, as well as the payment received for such work; and the hours per workday in which the employee does receive tips, and total earnings for these hours. *Id.* § 516.28(a). Further, the employer must notify the employee in writing “each time [the tip credit claimed by the employer] change[s] from the amount per hour taken in the preceding week.” *Id.* § 516.28(a)(3).

Important separate notice requirements apply to tipped employees. FLSA requires that employers may not claim a tip credit “unless such employee has been informed [about the tip credit] by the employer.” 29 U.S.C. § 203(m). If employers fail to do this, they may forfeit the right to claim a tip credit. Courts have shown little sympathy for employers who fail to provide the requisite notice. Recent DOL regulations note that this requirement “has been strictly enforced by the Department and by the courts ... [c]ourts have disallowed the use of the tip credit for lack of notice even ‘where the employee has actually received and retained base wages and tips that together amply satisfy the minimum wage requirements.’” 76 Fed. Reg. 18839 (Apr. 5, 2011) (citing *Reich v. Chez Robert, Inc.*, 28 F.3d 401, 404 (3d Cir. 1994) (quoting *Martin v. Tango’s Rest.*, 969 F.2d 1319, 1323 (1st Cir. 1992))). Courts have rationalized this strict enforcement by noting that “[i]f the penalty for omitting notice appears harsh, it is also true that notice is not difficult for the employer to provide.” *Id.*

Because the Act’s language caused employers some confusion regarding the necessary form and content of the mandatory notice, the DOL attempted to clarify the requirements in its recent regulations. The notice provided to tipped employees must provide:

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<sup>14</sup> *Id.* § 516.3 (referring to provisions at § 516.2(a)(1)-(5) & (11)-(12)).

The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section.

29 C.F.R. § 531.59(b). Additional notice must be given to employees who participate in mandatory tip pooling arrangements. The employer must notify these employees “of any required tip pool contribution amount.” *Id.* § 531.54.

The DOL regulations do not require an employer to provide this notice in writing. However, as a practical matter, an employer should provide the notice in writing to protect itself against possible future litigation about this issue.

## VI. Enforcement, Sanctions, and Related Issues

### A. Enforcement

FLSA operates under a two-year statute of limitations for non-willful violations, and three years for willful violations. See 29 U.S.C. § 255(a). Within that time, an employee is free to bring a suit against her employer for alleged violations of the Act. In addition, the DOL may initiate its own investigation, bring suit against the employer, or take the reins from an employee and litigate the claim on her behalf. Collective action suits joined by multiple employees are also a possibility. Suits may be brought in state or federal court. See *id.* § 216(b)-(c).

### B. Sanctions

Sanctions imposed against an employer found responsible for FLSA violations can be quite costly, particularly when liquidated damages are involved. For instance, the DOL in 2014 reached a settlement requiring LinkedIn to pay over \$6 million in overtime back wages and liquidated damages. See Press Release, Dep’t of Labor, *LinkedIn to pay nearly \$6M in unpaid overtime wages and damages to 359 employees following US Labor Department investigation* (Aug. 4, 2014).<sup>15</sup> DOL’s investigation found that LinkedIn had failed to record, account, and pay for all hours worked in a workweek in violation of the FLSA’s overtime pay and recordkeeping requirements. In addition to paying back wages and liquidated damages, LinkedIn entered into an enhanced compliance agreement with the department that includes agreeing to: provide compliance training and distribute its policy prohibiting off-the-clock work to all nonexempt employees and their managers; meet with managers of current affected employees to remind them that overtime work must be recorded and paid for; and remind employees of LinkedIn’s policy prohibiting retaliation against any employee who raises concerns about workplace issues. See *id.* In another 2014 case, Shell Oil Co. and Motiva Enterprises LLC agreed to pay nearly \$4.5 million in overtime back wages following a DOL investigation. See Press Release, Dep’t of Labor, *Shell Oil and Motiva Enterprises to pay nearly \$4.5M in overtime back wages to employees after US Labor Department investigation* (Sept. 16, 2014).<sup>16</sup> Shell Oil violated FLSA’s overtime provisions by failing to compensate employees for, and properly record, mandatory pre-shift meetings. See *id.*

In addition to being ordered to pay any back wages owed due to overtime or minimum wage violations, the employer may also be required to pay liquidated damages equal to the amount of the past-due wages. See 29 U.S.C. § 216(b). It is clearly in an employer’s best interest to pay minimum and overtime wages when they are due, rather than at a court’s order when he could be forced to pay double. Attorney’s fees and other costs related to the lawsuit are also available to a FLSA plaintiff. See *id.*

Employers are prohibited from taking retaliatory action, including discharge or any type of discrimination, against an employee involved in a FLSA complaint against the employer. See *id.* § 215(a)(3). Employers found liable for such unlawful retaliation may be subject to any appropriate legal or equitable relief, including but not limited to employment, reinstatement, promotion, back wages owed, and liquidated damages in an amount equal to the past due wages. See *id.* § 216(b).

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<sup>15</sup> Available at <https://www.dol.gov/newsroom/releases/whd/whd20140804#>.

<sup>16</sup> Available at <https://www.dol.gov/newsroom/releases/whd/whd20140916#>.

Willful, repeated violations of FLSA are punished severely. The Act provides that any employer who willfully violates any provision of Section 215<sup>17</sup> shall be subject to a fine of up to \$10,000, imprisonment for up to six months, or both. See *id.* § 216(a). However, employers only face imprisonment if they have previously been convicted of an offense under Section 215. See *id.* Repeated and willful violations of the minimum wage and overtime pay provisions are also subject to civil penalties of up to \$1,100 per violation. See *id.* § 216(e)(2).

The most serious financial penalties are reserved for violators of FLSA's child labor provisions.<sup>18</sup> Such persons may be fined up to \$11,000 for each minor employee whose rights were violated under those provisions. See *id.* § 216(e)(1)(A)(i). The penalty skyrockets to up to \$50,000 for each violation resulting in a minor employee's death or serious injury; this amount may be doubled in instances of repeated or willful violations. See *id.* § 216(e)(1)(A)(ii).

### C. Defenses

The employer accused of a FLSA violation is not without possible defenses, however. If an employer can show that he relied in good faith on an administrative order, regulation, or ruling, he may be able to escape sanctions. See *id.* § 259(a). Similarly, if the employer's actions were based on good faith or a reasonable belief that he was not violating FLSA, he may be able to avoid paying liquidated damages, although he could still be accountable for back wages. See *id.* § 260.

### D. Settlements

Requirements for settlement of FLSA claims vary by jurisdiction. For example, the Eleventh Circuit has long held that employers who wish to settle FLSA claims may do so with DOL review and supervision or judicial review and approval. See *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982). However, the Fifth Circuit has held that private settlements between employers and employees may be enforceable when they involve "resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves." *Martin v. Spring Break '83 Prods.*, 688 F.3d 247, 255 (5th Cir. 2012).

Other federal district courts, including the District of Columbia, have adopted the *Martin* analysis. *Sarceno v. Choi*, 66 F. Supp. 3d 157, 170, 178 (D.D.C. 2014) (internal citations omitted) (agreeing with the *Martin* rule that FLSA settlements may be enforceable without judicial or DOL approval if there was a bona fide dispute and the settlement terms are "fair and reasonable," but distinguishing the *Martin* facts to conclude that the settlement at issue was unenforceable). Employers should consult with counsel prior to entering into any settlements of FLSA claims in order to ensure the settlement is appropriate and binding.

## VII. Relation to State and Local Laws

States are free to provide workers with greater (not less) protection than FLSA requires. Whichever law is more favorable to employees will control, so it is important for employers to familiarize themselves with their particular state's requirements. See 29 U.S.C. § 218(a). Local and state legislatures sometimes set higher minimum wage requirements than the federal government. For example, the city of Seattle has the highest minimum wage in the U.S. at \$15.45 an hour, while a number of other cities, including New York City, San Francisco, and Washington D.C. have moved to a \$15 minimum wage.<sup>19</sup>

Another potential variation is the ability to take tip credits. Some states, including Minnesota, Montana, and Washington, do not allow employers to take tip credits at all.<sup>20</sup> This can have significant implications for employers of tipped workers, who must pay their employees a cash wage equal to or greater than the federal minimum wage. States may also have different protections in place for nursing mothers. For instance, Colorado requires employers to provide break time for nursing mothers for up to two

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<sup>17</sup> Section 215 prohibits, with certain exceptions, dealing in goods produced in violation of FLSA's minimum wage or overtime pay requirements or the DOL's implementing regulations; violating the minimum wage or overtime pay requirements or the DOL's implementing regulations; unlawfully retaliating against an employee involved in a FLSA action against the employer; violating the Act's child labor provisions under Section 212; and violating Section 211's data requirements or making false statements, reports, or records. See 29 U.S.C. § 215.

<sup>18</sup> The relevant child labor provisions are located at 29 U.S.C. §§ 212 & 213(c).

<sup>19</sup> See State Minimum Wage Laws, Wage & Hour Div., U.S. Dep't of Labor (October 1, 2020), available at <https://www.dol.gov/agencies/whd/minimum-wage/state>.

<sup>20</sup> See Minimum Wages for Tipped Employees, Wage & Hour Div., U.S. Dep't of Labor (July 1, 2020), available at <http://www.dol.gov/whd/state/tipped.htm>.



years after the child's birth.<sup>21</sup> This is in excess of FLSA's nursing mother protections, which do not extend past the first year after the child's birth.

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<sup>21</sup> See Colo. Rev. Stat. Ann. § 8-13.5-104(1) (West 2020).

## FLSA EXEMPTIONS RESOURCE GUIDE

To qualify for exemption under the FLSA, employees generally must meet certain tests outlined below regarding their job duties and be paid on a salary basis at not less than \$684 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the DOL regulations.

### I. SALARY LEVEL TEST

To qualify for all of the white-collar exemptions from the FLSA (with the exception of the outside sales exemption, for which there is no minimum salary level), an employee must be paid at least \$684 per week exclusive of board, lodging or other facilities.

The \$684 a week may be translated into equivalent amounts for periods longer than one week. However, the shortest period of payment that will meet this requirement is one week.

Minimum Salary Amount	Payment Period
\$684.00	Weekly
\$1368.00	Biweekly
\$1482.00	Semimonthly
\$2,964.00	Monthly
\$35,568.00	Annually

#### What Is "Total Annual Compensation?"

Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during the year at issue. Compensation does not, however, include board, lodging, payments for medical insurance, contributions to retirement plans, or the cost of other fringe benefits.

#### Additional Compensation

An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least \$684 each week paid on a salary basis may also receive additional compensation of a 1% commission on sales.

#### Computation of Salary

An exempt employee's earnings may be computed on an hourly, daily, or shift basis without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.

### II. SALARY BASIS TEST

With the exception of computer professionals making at least \$27.63 an hour, doctors, lawyers, teachers, and outside sales employees, white-collar exempt employees will normally be paid on a "salary basis."

An employee will be considered to be paid on a "salary basis" within the meaning of the FLSA regulations if the employee regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation, and the amount is not subject to reduction because of variations in the quality or quantity of work performed. Other than in the examples described below, an exempt employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

**Impermissible Deductions Under the FLSA**

- An employee's salary cannot be reduced based on quality or quantity of the employee's work.
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available or for absences occasioned by the employer or by the operating requirements of the business.

**Allowable Deductions Under the FLSA*****Full Day Deductions from Pay***

- When an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability;
- When an employee is absent for one or more full days due to sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability;
- To offset money that an employee receives as jury or witness fees or military pay;
- As a penalty imposed for violation of employer safety rules of major significance;
- As a penalty imposed for an employee suspended one or more full days for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees;
- Time not worked in the initial or terminal week of employment. An employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last weeks of employment;
- Time not worked in weeks in which an employee takes unpaid leave under FMLA. An employer may pay a proportionate part of the full salary of the time actually worked.

***Partial Day Deductions from Pay***

- Time not worked in the initial or terminal leave of employment. The regulations allow for the payment of an hourly or daily proportionate part of an employee's full salary for the time actually worked in the first and last weeks of employment;
- For intermittent leave taken under FMLA. An employer may pay a proportionate part of the full salary of the time actually worked; and
- As a penalty imposed for violation of employer safety rules of major significance.

**If an Employer Improperly Deducts, What Happens?**

An employer who makes improper deductions from exempt employees' salaries will lose the exemption if the facts demonstrate that the employer did not intend to pay the employees on a salary basis.

Improper deductions that are either isolated or inadvertent will not result in loss of the exempt status for any employees subject to such improper deductions if the employer reimburses the employees for such improper deductions.

An actual practice of making improper deductions, however, demonstrates that the employer did not intend to pay employees in the job classification on a salary basis.

Factors to consider in determining if an employer has an "actual practice" of making improper deductions include (but are not limited to):

- The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline;
- The time period during which the employer made improper deductions;
- The number and geographic location of employees whose salary was improperly reduced;
- The number and geographic location of managers responsible for taking the improper deductions; and

- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

When DOL determines that an employer has an actual practice of making improper deductions, the exemption is lost:

- During the time period in which the improper deductions were made;
- For all employees in the same job classification; and
- For other employees who work for the manager responsible for the improper deductions.

Employees in different job classifications or who work for different managers would not lose their status as exempt employees.

### An Employer's Safe Harbor Related to Improper Deductions

#### *An Employer May Create a "Safe Harbor" by Following Three Steps:*

1. Adopt a clearly communicated policy that prohibits the improper pay deductions and includes a complaint mechanism;
2. Reimburse the employee(s) for any improper deductions; and
3. Make a good faith commitment to comply in the future.

If these three steps are met, the employer will not lose the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook, or publishing the policy on the employer's intranet.

In regard to improper deduction from salary, the regulations note: "This section shall not be construed in an unduly technical manner so as to defeat the exemption." 29 C.F.R. § 541.603

### III. FEE BASIS TEST

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

To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$684 per week if the employee worked 40 hours.

- ❖ **For example**, an artist paid \$350 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$700 if 40 hours were worked.

### IV. PRIMARY DUTY

To qualify for any of the white-collar exemptions, the employee's "primary duty" must be the performance of exempt work.

#### What Qualifies as a "Primary Duty?"

An employee's primary duty is the main, major, or most important duty that an employee performs.

#### How Does an Employer Determine an Employee's Primary Duty?

The employer should consider the following factors:

- The amount of time the employee spends doing the exempt work;
- The relative importance of the exempt work compared to the employee's other duties;

- The employee's freedom from direct supervision; and
- The relationship between the employee's salary and the wages other employees are paid for performing the same kind of non-exempt work.

### Amount of Time

While the amount of time an employee spends doing exempt work is not solely determinative of exempt status, generally, if an employee spends more than 50% of his or her time doing exempt work, that employee's primary duty is exempt work. But nothing requires that an employee spend more than 50% of their time performing exempt duties. The regulations specifically state that "employees who do not spend more than 50% of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion."

## V. THE EXECUTIVE EXEMPTION

The General Test for the Executive Exemption Is as Follows:
The employee must be compensated on a salary basis.
The employee's salary level must be at least \$684 per week.
The employee's primary duty is the management of the enterprise or of a customarily recognized department or subdivision.
The employee customarily and regularly directs the work of two or more other employees.
The employee has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion, or other change of status of employees are given particular weight.

### What if an Employee Performs Non-Exempt and Exempt Duties Concurrently?

An exempt executive can perform non-exempt duties concurrently with exempt job duties and not lose his/her exempt status.

There is no set percentage test or general requirement regarding exactly how many non-exempt duties the employee can perform before losing his or her exempt status.

Generally, if an exempt employee decides when to perform the non-exempt duties and remains responsible for business operations, he or she will retain exempt status.

- ❖ **For example**, if an assistant manager at a restaurant has a primary duty of management, in which s/he does such activities as scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, authorizing payment of bills, etc., that employee will not lose exempt status if s/he also performs work such as serving customers, cooking food, stocking shelves, and cleaning the establishment, i.e., non-exempt work. In fact, this employee can spend the actual majority of his or her time on non-exempt work without losing his or her exemption as long as the primary duty remains management, the employee directs the work of at least two other employees, and the employee has the requisite authority to change the status of other employees.

In contrast, if the employee is directed to perform exempt work or only performs exempt work for a defined, temporary period of time, the employee is likely non-exempt.

An example of this kind of employee is a relief supervisor or working supervisor whose primary duty is performing non-exempt work in the production line in a manufacturing plant. This employee does not become exempt merely because s/he occasionally has some responsibility for directing the work of other non-exempt production line employees when, for example, the exempt supervisor is on vacation.

Another example is an employee whose primary duty is to work as an electrician but who also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the contractor. This person would not lose the non-exempt status.

**What Are Considered Managerial Duties?**

The DOL gives guidance on what the new rules consider managerial duties in a supervisory capacity, including (but not limited to):

Interviewing, selecting, and training employees	Planning and apportioning work among employees
Disciplining employees	Maintaining production or sales records
Setting and adjusting pay and work hours	Handling employee complaints and grievances
Setting and adjusting pay and work hours	Appraising employee productivity and efficiency for the purpose of recommending promotions or other changes in their status

Management also may encompass other types of duties related to running or servicing the business, including (but not limited to):

Determining the techniques to be used	Planning and controlling a budget
Determining the merchandise to be bought, stocked and sold	Providing for the safety and security of employees or property
Determining the type of materials, supplies, machinery, equipment, or tools to be used	Monitoring or implementing legal compliance measures

**What Is a Customarily Recognized Department or Subdivision?**

A customarily recognized department or subdivision is a subpart of the business that has a permanent status in the company or workplace and a continuing function.

The department or subdivision does not have to be physically within the workplace and can move from place to place.

The same subordinate personnel do not have to continue in the job in order for the department or subdivision to be a recognized division. And an exempt employee can work in more than one location and still remain exempt.

The supervising employee of each branch of a company or establishment supervises a recognized subdivision.

It does not include seasonal departments or subdivisions.

If an executive supervises employees in a recognized unit, it does not matter if some of the employees are drawn from other recognized units. On the other hand, a recognized unit does not include a collection of employees assigned from time to time to a specific job or series of jobs.

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

The supervision and direction must occur normally and recurrently in every workweek, not just occasionally from time to time. It must be of a frequency that is greater than occasional but may be less than constant. It cannot consist of an isolated incident of direction or of one-time tasks.

In other words, the executive must direct the work of other employees at least once a week but not necessarily every day. An exempt executive will not lose the exemption, though, if a week passes without giving instructions to subordinates.

- An employee **who merely assists** the manager of a particular department and supervises two or more employees only in the actual manager’s absence, however, does not meet this requirement.
- **“Two or more employees”** means **full-time** employees or the equivalent.

- Full time generally refers to **40 hours a week**. DOL will recognize industry standards defining full-time as 35 or 37 hours per week but not less.
- Supervising four half-time employees or one full-time and two half-time employees qualifies under this element. In other words, the executive employee must direct a **total of 80 hours per work week**, not counting the executive's own work hours.

The supervision of the same employees can be shared by exempt employees but the hours of each subordinate employee can only be credited once to meet this element for the exempt employees.

### **What Is “Particular Weight?”**

When determining whether an employee's suggestions and recommendations as to hiring, firing, advancement, promotion, or other changes of status of employees are given particular weight, an employer can look to the following factors:

- Whether it is part of the employee's job duties to make such suggestions and recommendations;
- The frequency with which the employee's suggestions and recommendations are made or suggested, the more likely the suggestions carry weight. An occasional suggestion regarding the status of a co-worker does not meet the standard;
- The more frequent the employee's suggestions and recommendations are relied upon, the more likely the suggestions carry weight;
- Generally, an exempt executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs;
- An employee's recommendations or suggestions can be considered weighty even if they are reviewed by a higher manager or supervisor;
- The employee does not need to have the authority to make any final decisions; and
- Further, the suggestion or recommendation must be about a change in status, not merely to reprimand, suspend, or create a performance review.

Evidence that an employee's recommendations are given particular weight could include witness testimony that recommendations were made and considered; the exempt employee's job description listing responsibilities in this area; the exempt employee's performance reviews documenting the employee's activity in this area; and other documents regarding promotions, demotions or other change of status that reveal the employee's role in this area.

### **The 20% Owner Exempt Executive Employee**

The executive exemption also includes employees who:

- Own at least a bona fide 20% equity interest in the enterprise; and
- Are actively engaged in management of the enterprise.

The salary basis and salary level requirements do **not** apply to 20% equity owners.

**VI. THE ADMINISTRATIVE EXEMPTION**

<b>The General Test for the Administrative Exemption is as Follows:</b>
The employee must be compensated on a salary basis or fee basis.
The employee's salary level must be at least \$684 per week.
The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

**What Work Is Directly Related to the Management or General Business Operations of the Employer or the Employer's Customers?**

Work directly related to the management or general business operations of the employer or the employer's customers is defined as work the employee performs that assists with the running (or servicing) of the business.

Such work is directly distinguished in the regulations from working on a manufacturing production line or selling a product in a retail or service establishment.

Examples of work directly related to the management or general business operations of the employer or the employer's customers include work in functional areas, such as:

Tax	Procurement	Employee Benefits
Finance & Accounting	Advertising	Labor Relations
Budgeting	Marketing	Public Relations
Auditing	Research	Government Relations
Insurance	Safety and Health	Computer Network
Quality Control	Personnel Management	Internet & Database Administration
Purchasing	Human Resources	Legal & Regulatory Compliance

**How Do the Regulations Define the Exercise of Discretion and Independent Judgment with Respect to Matters of Significance?**

In general, an employee exercises discretion and independent judgment when he or she evaluates and analyzes possible courses of conduct and makes a decision once the various possibilities have been considered.

The requirement of exercise of discretion and independent judgment does not mean that the employee has unlimited authority and a complete absence of review. Instead, it implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.

Factors to consider include, but are not limited to:

- Whether the employee has authority to establish or implement employer policies or operating practices;
- Whether the employee carries out major assignments in conducting the operations of the business;
- Whether the employee has authority to commit the employer in matters that have significant financial impact; and
- Whether the employee has authority to change established policies and procedures without prior approval.



An employee must do more than simply apply well-established procedures or standards that are described in manuals or other sources. Repetitive work like tabulating data does not qualify as exercise of discretion.

**Importance of Employee’s Role**

An employee does not exercise discretion and independent judgment with respect to matters of significance just because the employer may experience large 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.

**There Are Specific Provisions Regarding Employees in Educational Institutions**

There is a special provision in the regulations specifically stating that employees whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment qualify for the administrative exemption. These employees include the superintendent of an elementary or secondary school system as well as a principal or vice-principal responsible for the operation of an elementary or secondary school.

**VII. THE PROFESSIONAL EXEMPTION – LEARNED PROFESSIONAL**

<b>The General Test for the Learned Professional Exemption is as Follows:</b>
The employee must be compensated on a salary or fee basis.
The employee’s salary level must be at least \$684 per week.
The 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.

**What Is Advanced Knowledge?**

- “Work requiring advanced knowledge” means work, which is predominantly intellectual in character that requires the consistent exercise of discretion and judgment.
- The performance of routine mental, manual, mechanical, or physical work does not require advanced knowledge.
  - ❖ **For example**, 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.

**Can an Employee Qualify for the Learned Professional Exemption if He or She Uses a Manual?**

An employee who uses a manual or set of guidelines may qualify for the learned professional exemption if the manuals relate to highly specific, technical, or complex matters and can be understood only by those who have advanced knowledge or specialized skills.

**What Qualifies as a Field of Science or Learning?**

These fields include occupations with recognized professional status:

Law	Engineering
Medicine	Architecture
Theology	Teaching
Accounting	Physical, Chemical, & Biological Sciences
Actuarial Computation	Pharmacy

Note: the mechanical arts or skilled trades are not considered fields of science or learning.

### What Is a “Prolonged Course of Specialized Intellectual Instruction?”

Specialized academic training is customarily a prerequisite for entering the profession in question.

The best evidence that an employee meets this requirement is the possession of the appropriate academic degree.

### Who Does Not Qualify for the Learned Professional Exemption?

The learned professional exemption is not available for those professions where knowledge is acquired by an academic degree in any field, by apprenticeship, or by training in the performance of routine mental, manual, mechanical, or physical processes.

Importantly, the learned professional exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

Employers should note, however, that the learned professional exemption is also available to those employees 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 available to a lawyer who has not gone to law school, or a chemist who does not possess a degree in chemistry.

### Examples of Employees Who Would Qualify for the Learned Professional Exemption

Nurses who are registered by the appropriate state examining board;

Medical Technologists who are registered or certified and who have completed three years of pre-professional study and one year of professional course work at a school of medical technology;

Dental Hygienists who have completed four years of pre-professional and professional study at an approved college or university;

Physician Assistants who have completed four years of pre-professional and professional study including graduation from an approved program and who are certified by the National Commission on Certification of Physician Assistants;

Athletic Trainers who have completed four years of pre-professional and professional study including graduation from an approved program and who are certified by the Board of Certification of the National Athletic Trainers Association;

Certified Public Accountants and Accountants who perform similar job duties to certified public accountants;

Chefs and Sous-Chefs who have attained a four-year specialized academic degree in a culinary arts program;

Funeral Directors or Embalmers who have completed four years of pre-professional and professional study including graduation from an approved program and who are licensed by and working in a state that has these requirements;

Teachers whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who are employed as a teacher by an educational establishment qualifies as a learned professional. This includes regular academic teachers, nursery school teachers, special education teachers, teachers of skilled occupations, driving instruction teachers, home economics teachers, and music teachers. Faculty members who also spend a considerable amount of time coaching athletic teams or acting as advisors to drama, debate, or journalism activities are considered to be engaged in teaching; and

Medical Professionals who hold a valid license or certificate permitting the practice of medicine and are actually engaged in the practice of medicine qualifies as a learned professional. This includes osteopathic physicians, podiatrists, dentists, and optometrists. This also includes participants in an internship or resident program if the employee enters the program after having earned a medical degree.

**VIII. THE PROFESSIONAL EXEMPTION – CREATIVE PROFESSIONAL**

<b>The General Rule for the Creative Professional Exemption is as Follows:</b>
The employee must be compensated on a salary basis or fee basis.
The employee’s salary level must be at least \$684 per week.
The employee’s primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

**What Is a “Recognized Field of Artistic or Creative Endeavor?”**

Music, writing, acting, and the graphic arts are all examples of recognized fields of artistic or creative endeavor.

**What Kind of Work Requires “Invention, Imagination, Originality or Talent?”**

This requirement generally is met by:

Actors	Essayists
Musicians	Novelists
Composers	Conductors
Painters who at most are given the subject matter of their paintings	Employees holding the more responsible writing positions in advertising agencies
Short-story writers and screenplay writers who choose their own subjects and hand in a finished piece of work to their employers	Cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept

The duties of these employees will vary widely, so a determination of whether an employee qualifies for this exemption will take place on a case-by-case basis.

- ❖ **For example**, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator. Journalists will not be exempt if they collect or record information as a routine or if they do not contribute their own unique analysis or interpretation of the material.

**Who Does Not Qualify for the Creative Professional Exemption?**

Employees whose work depends on diligence or accuracy or whose work can be done by someone with general manual ability or training will most likely not qualify for the creative professional exemption.

## IX. COMPUTER EMPLOYEES

<b>The General Test for the Computer Employee Exemption is as Follows:</b>	
	The employee must be compensated on a salary basis or fee basis.
	The employee's salary level must be at least either \$684 per week or \$27.63 per hour.
	The employee's primary duty consists of:
	<ul style="list-style-type: none"> <li>• The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;</li> </ul>
	<ul style="list-style-type: none"> <li>• 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;</li> </ul>
	<ul style="list-style-type: none"> <li>• The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or</li> </ul>
	<ul style="list-style-type: none"> <li>• A combination of the aforementioned duties, the performance of which requires the same level of skills.</li> </ul>

### Who Does Not Qualify for This Exemption?

The exemption for employees in computer occupations does not include:

- Employees engaged in the manufacture or repair of computer hardware and related equipment; or
- Employees whose work is highly dependent upon the use of computers and computer software programs but who are not primarily engaged in computer-related occupations. Engineers, drafters and others skilled in computer-aided design software would most likely not qualify for this exemption.

It is important to note that employees who qualify for the computer employee exemption may also qualify for the executive or administrative exemptions.

- ❖ **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 employer or the employer's customers.

Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to 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.

## X. THE OUTSIDE SALES EXEMPTION

<b>The General Test for the Outside Sales Exemption is as Follows:</b>	
	The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
	The employee must be customarily and regularly engaged away from the employer's place(s) of business.

### How Does an Employer Determine an Outside Sales Employee's Primary Duty?

An employer should consider all of the facets of the job but maintain an emphasis on the character of the employee's job as a whole.

“Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

Obtaining orders for the “use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

“Services” extends the exemption to employees who sell or take orders for a service that may be performed for the customer by someone other than the person taking the order.

Importantly, work performed **incidental to and in conjunction with** the employee’s own outside sales or solicitations – including incidental deliveries and collections – is regarded as exempt outside sales work. In addition, work that **further the employee’s sales effort** – including writing sales reports, updating or revising the employee’s sales or display catalogue, planning itineraries and attending sales conferences – is also considered exempt work.

The employer does not have to take actual measures of the time the outside sales employee spends on various activities because the 20% rule has been eliminated.

**Customarily and Regularly Engaged Away from the Employer’s Place(s) of Business**

- “**Customarily and regularly**” means greater than occasional but less than constant, including work normally done every workweek. It does not include one-time tasks.
- “**Away from an employer’s place of business**” means that the employee generally makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home.

This does not include sales made by mail, telephone, or the Internet **unless** such contact is used merely in addition to personal calls outside of the place(s) of business.

Any place, whether in a home or office, used by a salesperson as a headquarters or for telephone sales, is considered one of the employer’s places of business, even if the employer is not in any formal sense the owner or tenant of the property.

**Promotion Work and Drivers**

Promotional work that is performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. Promotion work that is incidental to sales made, or to be made by another person, is not exempt work under this element.

An employee who drives to sell and deliver products may qualify as an outside sales exempt employee only if the employee’s primary duty is making sales.

**XI. HIGHLY COMPENSATED EMPLOYEES**

<b>The General Rule for the Highly Compensated Employees is as Follows:</b>
The employee must make at least \$107,432 per year, which includes at least \$684 per week paid on a salary basis.
The employee’s primary duty must include performing office or non-manual work.
The employee must customarily and regularly perform one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

**Can an Employer Make a Special “Catch-Up” Payment to Make an Employee Exempt?**

If an employee’s total annual compensation does not total \$107,432 by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. If the employer makes such a catch-up payment within one-month after the end of the 52-month period, that payment only counts toward the employee’s wages for the previous year.

**When Can an Employer Make a Pro-Rata Payment?**

An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a pro rata amount which would have been equal to at least \$107,432 if the employee had worked the full year.

**How Is the Year At-Issue Defined?**

The employer may utilize any 52-week period as the year in question. Options include a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other 52-week period in advance, the calendar year will apply.

**Employees Who Cannot Qualify as ‘Highly Compensated’ Employees**

This section applies only to employees whose primary duty includes performing office or non-manual work and not to “blue-collar” workers. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers, and other employees who perform work involving repetitive operations with their hands, physical skill, and energy are not exempt under this section no matter how highly paid they might be.

**XII. NON-COMPLIANCE WITH THE FLSA AND ITS PENALTIES****What Are the Penalties for FLSA Violations?**

In a private suit against an employer, employees may recover

- Back wages for compensation due
- Liquidated damages in an amount equal to back pay entitlement
- Reasonable costs and attorney’s fees

**Defenses Available to an Employer**

- Statute of Limitations
  - An employer can be liable for claims for unpaid overtime compensation for periods that extend back two years. In cases of willful violations, the statute of limitations is three years.
- Good Faith Reliance
  - Complete defense: Employer relied in good faith on written official ruling or DOL interpretation.
  - Court discretion to reduce liquidated damages: Employer acted in good faith with reasonable grounds for believing that its conduct did not violate FLSA.
  - Employer demonstrates that employee qualifies for an exemption from minimum wage and overtime requirements.