



## **The FLSA**

The Fair Labor Standards Act (“FLSA”) mandates that an employer must pay its employees "one and one-half times the regular rate at which he is employed" for any time worked in excess of forty hours per workweek.<sup>1</sup> There are exemptions to this overtime requirement for employees employed in a "bona fide executive, administrative, and professional capacity."<sup>2</sup>

The FLSA does not define "bona fide executive, administrative, or professional capacity" and instead leaves the terms to be "defined and delimited" by regulations of the Secretary of Labor.<sup>3</sup> Exercising that delegated authority, the Secretary of Labor has promulgated a series of regulations defining these so-called "white-collar" exemptions.<sup>4</sup>

To qualify for one of these white-collar exemptions, the employer must show that an employee is: paid on a salary or fee basis; at a rate of not less than \$684 per week; and performs certain primary job duties.<sup>5</sup> The administrative exemption and the highly compensated employee exemption both allow payment on a "salary or fee basis."<sup>6</sup> But the executive exemption only allows payment on a "salary basis."<sup>7</sup>

## **Salary-Basis**

There are multiple components to the salary-basis test. There is the “general rule”<sup>8</sup> – and then there are various exceptions and provisos to that general rule. The “general rule” provides “An employee will be considered to be paid on a ‘salary basis’ within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation.”<sup>9</sup> The rule further provides that “an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.”<sup>10</sup> The general criteria for determining whether an employee is paid on a ‘salary basis’ is...that an employee must receive a predetermined amount constituting all or part of the employees compensation, which is not subject to reduction because of variations in the quality or quantity of work performed.<sup>11</sup>

## **Fee-Basis**

“Fee basis” is described as "an agreed sum for a single job regardless of the time required for its completion."<sup>12</sup> "Fee" payments "resemble piecework payments with the important

---

<sup>1</sup> 29 U.S.C. § 207(a)(2).

<sup>2</sup> Id. § 213(a)(1).

<sup>3</sup> Id.

<sup>4</sup> See 29 C.F.R. § 541.100 ("General rule for executive employees"); id. § 541.200 ("General rule for administrative employees"); id. § 541.601 ("Highly compensated employees"); id. § 541.708 ("Combination exemptions").

<sup>5</sup> See *Swartz v. DJ Eng'g, Inc.*, 2015 WL 4139376, at \*7 (D. Kan. 2015); see also 29 C.F.R. §§ 5410100, 541.200, 541.300.

<sup>6</sup> 29 C.F.R. § 541.200(a)(1); id. § 541.601(b)(1).

<sup>7</sup> Id. § 541.100(a)(1).

<sup>8</sup> 29 C.F.R. § 541.602(a).

<sup>9</sup> Id. § 541.602(a).

<sup>10</sup> Id. § 541.602(a)(1).

<sup>11</sup> 29 C.F.R. § 541.602(a); see also *Anani v. CVS RX Servs., Inc.*, 788 F.Supp.2d 55, 62 (E.D.N.Y.2011) aff'd, 730 F.3d 146 (2d Cir.2013).

<sup>12</sup> Id. 29 C.F.R. § 541.605(a).



distinction that generally a 'fee' is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again."<sup>13</sup> "Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis."<sup>14</sup>

The six categories of "white collar" exemptions are:

1. Executive employees;
2. Administrative employees;
3. Learned professional employees;
4. Creative professional employees;
5. Skilled computer professional employees;
6. Outside sales employees; and
7. Highly compensated employees.<sup>15</sup>

### **Executive Exemption**

The employee's "primary duty" is management, the employee "customarily and regularly directs the work of two or more other employees," and the employee "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."

The regulations provide guidance on how to determine an employee's "primary duty," including a set of non-exclusive factors to consider. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. An employee's "primary" duty is not determined solely by the amount of time he or she devotes to the different categories of tasks (i.e., exempt vs. nonexempt) but on the overall character of his or her position.

### **Administrative Exemption**

The employee's "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers"; and the employee's "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."<sup>16</sup>

---

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> These so-called "white-collar" exemptions. See 29 C.F.R. § 541.100 ("General rule for executive employees"); id. § 541.200 ("General rule for administrative employees"); id. § 541.601 ("Highly compensated employees"); id. § 541.708 ("Combination exemptions").

<sup>16</sup> 29 C.F.R. § 541.200(a).



"Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; and the employee's relative freedom from direct supervision."<sup>17</sup> However, "an employee's 'primary' duty is not determined solely by the amount of time they devote to the different categories of tasks (i.e., exempt vs. nonexempt) but on the overall character of their position."<sup>18</sup>

### **Learned Professional Exemption**

The employee's primary duty must be the performance of work requiring advanced knowledge; the advanced knowledge must be in a field of science or learning; and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction."<sup>19</sup>

"[W]ork requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work... "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades... "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction."<sup>20</sup>

With respect to the term "customarily," the Court of Appeals for the Second Circuit has held that "[i]f a job does not require knowledge customarily acquired by an advanced educational degree—as for example when many employees in the position have no more than a high school diploma—then, regardless of the duties performed, the employee is not an exempt professional under the FLSA."<sup>21</sup>

### **Creative Professional Exemption**

---

<sup>17</sup> Id. §541.700(a).

<sup>18</sup> Marzuqv. Cadete Enters., Inc., 807 F.3d 431, 436 (1st Cir. 2015); see 29 C.F.R. §541.700(a) ("Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.").

<sup>19</sup> 29 C.F.R. § 541.301(a).

<sup>20</sup> 29 C.F.R. §§ 541.301(b)-(d).

<sup>21</sup> Young v. Cooper Cameron Corp., 586 F.3d 201, 204 (2d Cir.2009).



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 as opposed to routine mental, manual, mechanical or physical work.<sup>22</sup>

A "recognized field of artistic endeavor" includes "such fields as music, writing, acting and the graphic arts."<sup>23</sup> The regulations specify that the requirement of "invention, imagination, originality or talent" is generally met by "actors, musicians, composers, conductors, and soloists . . . painters . . . cartoonists . . . essayists, novelists, short-story writers and screen-play writers . . . [and] persons holding the more responsible writing positions in advertising agencies."<sup>24</sup>

### **Skilled Computer Professional Exemption**

Under the FLSA, "any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker" is exempt from coverage when his primary duties fall within those enumerated by the Act.<sup>25</sup> The employee's primary duties must consist of the following: the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 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; the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or a combination of the aforementioned duties, the performance of which requires the same level of skills.<sup>26</sup>

### **Outside Sales Exemption**

The employee's primary duty is 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; and is primarily and regularly engaged away from the employer's place or places of business in performing such primary duty.<sup>27</sup>

In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.<sup>28</sup>

"Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition<sup>29</sup> and the transfer of title to tangible property, and in certain cases, of tangible and valuable evidence of intangible property.<sup>30</sup>

---

<sup>22</sup> 29 C.F.R. § 541.302(a).

<sup>23</sup> 29 U.S.C. § 541.302(b).

<sup>24</sup> 29 C.F.R. § 541.302(c).

<sup>25</sup> 29 U.S.C. § 213(a)(17).

<sup>26</sup> 29 C.F.R. § 541.400.

<sup>27</sup> 29 C.F.R. § 541.500(a).

<sup>28</sup> 29 C.F.R. § 541.500(b).

<sup>29</sup> 29 U.S.C. § 203(k).

<sup>30</sup> 29 C.F.R. § 541.501(b).



## **Highly Compensated Employee Exemption**

The "highly-compensated employee" exemption applies to employees who have a "total annual compensation of at least \$107,432" (which must include at least \$684 per week paid on a salary or fee basis); and who regularly and customarily perform at least one of the duties of an executive, administrative, or professional employee.<sup>31</sup> "A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties."<sup>32</sup> The \$107,432 threshold can include commissions and certain bonuses.<sup>33</sup> The \$107,432 requirement is satisfied for a year in which the employee works less than the full year if he is paid a pro rata portion of the \$107,432 based on the period of time he worked.<sup>34</sup>

---

<sup>31</sup> 29 C.F.R. § 541.601(a), (b)(1); see also *In re Novartis Wage and Hour Litig.*, 611 F.3d 141, 146-47 (2d Cir. 2010); *Zannikos v. Oil Inspections (USA), Inc.*, 605 F. App'x 349, 359 (5th Cir. Mar. 27, 2015).

<sup>32</sup> 29 C.F.R. § 541.601(c).

<sup>33</sup> See 29 C.F.R. § 541.601(b)(1).

<sup>34</sup> See 29 U.S.C. § 541.601(b)(3).