

AN OVERVIEW OF THE FAIR LABOR STANDARDS ACT'S WHITE COLLAR EXEMPTIONS

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INTRODUCTION

Section 13(a)(1) of the Fair Labor Standards Act (“FLSA”) exempts from the wage and hour provisions of the FLSA “any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 percent of his hours worked in the workweek are devoted to such activities).” See 29 C.F.R. 541.99.

OVERTIME EXEMPTION FOR EXECUTIVES

Employed in a Bona Fide Executive Capacity

An employee is employed in a bona fide executive capacity if he meets “the long test” or “the short test.” See 29 C.F.R. section 541.1.

To meet “the long test,” the employee must be one:

(a) whose **primary duty** consists of the **management** of the enterprise in which he is employed or of a **customarily recognized department of subdivision** thereof; and

(b) who customarily and regularly **directs the work of two or more other employees** therein;
and

(c) who has the authority to **hire or fire** other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) who customarily and regularly exercises **discretionary powers**; and

(e) who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not **directly and closely related** to the performance of the work described in paragraphs (a) through (d) (however, this requirement does not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed); and

(f) who is compensated for his services on a salary basis at a rate of not less than \$155 per week (or \$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities.

To meet “the short test,” the employee must be one:

(a) whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and

(b) whose primary duty includes the customary and regular direction of the work of two or more other employees therein; and

(c) is compensated on a salary basis at a rate of not less than \$250 per week (or \$200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities.

Primary Duty

The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In most cases, a good rule of thumb is that primary duty means the major part, or over 50 percent, of the employee’s time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty.

Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He may be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programmers and who performs the more complex or responsible jobs in programming may be considered to have management as his primary duty. See 29 C.F.R. Section 541.103.

Management

According to the U.S. Department of Labor, work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies,

machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property. See 29 C.F.R. Section 541.102.

Customarily Recognized Department or Subdivision

The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of men assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; nor is it sufficient that he merely participates in the management of the unit. He must be in charge of and have as his primary duty the management of a recognized unit which has a continuing function.

Where an enterprise comprises more than one establishment, the employee in charge of each establishment may be considered in charge of a subdivision of the enterprise. Questions arise, however, in cases involving supervisors who work outside the employer’s establishment, move from place to place, or have different subordinates at different times. In such instances, in determining whether the employee is in charge of a recognized unit with a continuing function, it is the DOL’s position that the unit supervised need not be physically within the employer’s establishment and may move from place to place, and that continuity of the same subordinate personnel is not absolutely essential to the existence of a recognized unit with a continuing function, although in the ordinary case a fixed location and continuity of personnel are both helpful in establishing the existence of such a unit. For example, the projects on which an individual in charge of a certain type of construction work is employed may occur at different locations, and he may even hire most of his workforce at these locations; the mere fact that he moves his location would not invalidate his exemption if there are other factors which show that he is actually in charge of a recognized unit with a continuing function in the organization.

An otherwise exempt employee usually will not lose the exemption merely because he draws the men under his supervision from a pool, if other factors are present which indicate that he is in charge of a recognized unit with a continuing function. For instance, if this employee is in charge of the unit which has the continuing responsibility for making all installations for his employer, or all installations in a particular city or a designated portion of a city, he would be in charge of a department or subdivision despite the fact that he draws his subordinates from a pool of available men. It is less likely, however, that a supervisor drawn from a pool of supervisors who supervises employees assigned to him from a pool and who is assigned a job or series of jobs from day to day or week to week has the status of an executive, since such an employee may not be in charge of a recognized unit with a continuing function. See 29 C.F.R. Section 541.104.

Customarily and Regularly Supervises at Least Two Employees

An employee will qualify as an “executive” only if he customarily and regularly supervises at least two full-time employees or the equivalent. For example, if the “executive” supervises one full-time and two part-time employees of whom one works morning and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met.

The employees supervised must be employed in the department which the “executive” is managing. Often, a supervisor of a few as two employees performs nonexempt work in excess of the general 20-percent tolerance. In a large machine shop there may be a machine-shop supervisor and two assistant machine-shop supervisors. Assuming that they meet all the other qualifications (and particularly assuming that they are not “working foremen” (discussed below) they may qualify for the exemption.

A small department in a plant or in an office is usually supervised by one person. Any attempt to classify one of the other workers in the department as an executive merely by giving him an honorific title such as assistant supervisor will almost inevitably fail as there will not be sufficient true supervisory or other managerial work to keep two persons occupied.

In a large department, such as a large shoe department in a retail store which has separate sections for men's, women's, and children's shoes, for example, the supervision can be distributed among two or three employees, conceivably among more. In such instances, assuming that the other tests are met, especially the one concerning the performance of nonexempt work, each such employee "customarily and regularly directs the work of two or more other employees therein."

An employee who merely assists the manager or buyer of a particular department and supervises two or more employees only in the actual manager's or buyer's absence, probably would not meet this requirement. For example, where a single unsegregated department, such as a women's sportswear department or a men's shirt department in a retail store, is managed by a buyer, with the assistance of one or more assistant buyers, only one employee, the buyer, can be considered an executive, even though the assistant buyers at times exercise some managerial and supervisory responsibilities.

A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein." See 29 C.F.R. Section 541.105.

Hiring and Firing

The FLSA regulations require that an exempt executive employee have the authority to hire or fire other employees or that his suggestions and recommendations as to hiring or firing and as to advancement and promotion or any other change of status of the employees who he supervises will be given particular weight. Thus, no employee, whether high or low in the hierarchy of management, can be considered as employed in a bona fide executive capacity unless he is directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to whom the hiring and firing functions are delegated. See 29 C.F.R. Section 541.106.

Discretionary Powers

The DOL requires that an exempt executive employee customarily and regularly exercise discretionary powers. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers. A person whose work is so completely routinized that he has no discretion does not qualify for the exemption. See 29 C.F.R. Section 541.107.

Directly and Closely Related

The phrase "directly and closely related" brings within the category of exempt work not only the actual management of the department and the supervision of the employees therein, but also activities which are closely associated with the performance of the duties involved in such managerial and supervisory functions or responsibilities. The supervision of employees and the management of a department include a great many directly and closely related tasks which are different from the work performed by subordinates and are commonly performed by supervisors because they are helpful in supervising the employees or contribute to the smooth functioning of the department for which they are responsible. Frequently such exempt work is of a kind which in establishments that are organized differently or which are larger and have greater specialization of function, may be performed by a nonexempt employee hired especially for that purpose.

Keeping basic records of working time, for example, is frequently performed by a timekeeper employed for that purpose. In such cases the work is not exempt in nature. In other establishments which are not large enough to employ a timekeeper, or in which the timekeeping function has been decentralized, the supervisor of each department keeps the basic time records of his own subordinates. In these instances, the timekeeping is directly related to the function of managing the particular department and supervising its employees. However, the preparation of a payroll by a supervisor, even the payroll of the employees under his supervision, cannot be considered to be exempt work, since the preparation of a payroll does not aid in the supervision of the employees or the management of the department. Similarly, the keeping by a supervisor of production or sales records of his

own subordinates for use in supervision or control would be exempt work, while the maintenance of production records of employees not under his direction would not be exempt work.

Another example of work which may be directly and closely related to the performance of management duties is the distribution of materials or merchandise and supplies. Maintaining control of the flow of materials or merchandise and supplies in a department is ordinarily a responsibility of the managerial employee in charge. In many nonmercantile establishments the actual distribution of materials is performed by nonexempt employees under the supervisor's direction. In other establishments it is not uncommon to leave the actual distribution of materials and supplies in the hands of the supervisor. In such cases it is exempt work since it is directly and closely related to the managerial responsibility of maintaining the flow of materials. In a large retail establishment, however, where the replenishing of stocks of merchandise on the sales floor is customarily assigned to a nonexempt employee, the performance of such work by the manager or buyer of the department is nonexempt. The amount of time the manager or buyer spends in such work must be offset against the statutory tolerance for nonexempt work. The supervision and control of a flow of merchandise to the sales floor, of course, is directly and closely related to the managerial responsibility of the manager or buyer.

Setup work is another illustration of work which may be exempt under certain circumstances if performed by a supervisor. The nature of setup work differs in various industries and for different operations. Some setup work is typically performed by the same employees who perform the "production" work; that is, the employee who operates the machine also "sets it up" or adjusts it for the particular job at hand. Such setup work is part of the production operation and is not exempt. In other instances the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In some plants, particularly large ones, such setup work may be performed by employees whose duties are not supervisory in nature. In other plants, however, particularly small plants, such work is a regular duty of the executive and is directly and closely related to his responsibility for the work performance of his subordinates and for the adequacy of the final product. Under such circumstances it is exempt work. In the data processing field the work of a supervisor when he performs the more complex or more responsible work in a program utilizing several computer programmers or computer operators would be exempt activity. Similarly, a supervisor who spot checks and examines the work of his subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to his managerial and supervisory functions. However, this kind of examining and checking must be distinguished from the kind which is normally performed by an "examiner," "checker," or "inspector," and which is really a production operation rather than a part of the supervisory function. Likewise, a department manager or buyer in a retail or service establishment who goes about the sales floor observing the work of sales personnel under his supervision to determine the effectiveness of their sales techniques, checking on the quality of customer service being given, or observing customer preferences and reactions to the lines, styles, types, colors, and quality of the merchandise offered, is performing work which is directly and closely related to his managerial and supervisory functions. His actual participation, except for supervisory training or demonstration purposes, in such activities as making sales to customers, replenishing stocks of merchandise on the sales floor, removing merchandise from fitting rooms and returning to stock or shelves, however, is not. The amount of time a manager or buyer spends in the performance of such activities must be included in computing the percentage limitation on nonexempt work.

Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which the machinery is largely automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he "keeps an eye out for trouble" is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.

A word of caution is necessary in connection with these illustrations. The recordkeeping, material distributing, setup work, machine watching and adjusting, and inspecting, examining, observing and checking referred to in the examples of exempt work are presumably the kind which are supervisory and managerial functions rather than merely "production" work. Frequently it is difficult to distinguish the managerial type from the type which is a production operation. If work of this kind takes up a large part of the employee's time it would

be evidence that management of the department is not the primary duty of the employee, that such work is a production operation rather than a function directly and closely related to the supervisory or managerial duties, and that the employee is in reality a combination foreman- "setup" man, foreman-machine adjuster (or mechanic), or foreman-examiner, floorman-salesperson, etc., rather than a bona fide executive. See 29 C.F.R. Section 541.108.

Emergencies

Under certain occasional emergency conditions, work which is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work. In effect, this means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a real emergency will not, because of the performance of such emergency work, lose the exemption. Bona fide executives include among their responsibilities the safety of the employees under their supervision, the preservation and protection of the merchandise, machinery or other property of the department or subdivision in their charge from damage due to unforeseen circumstances, and the prevention of widespread breakdown in production, sales, or service operations. Consequently, when conditions beyond control arise which threaten the safety of the employees, or a cessation of operations, or serious damage to the employer's property, any manual or other normally nonexempt work performed in an effort to prevent such results is considered exempt work and is not included in computing the percentage limitation on nonexempt work. This rule, however, does not apply to nonexempt work arising out of occurrences which are not beyond control or for which the employer can reasonably provide in the normal course of business.

DOL Example: A mine superintendent who pitches in after an explosion and digs out the men who are trapped in the mine is still a bona fide executive during that week.

DOL Example: The manager of a cleaning establishment who personally performs the cleaning operations on expensive garments because he fears damage to the fabrics if he allows his subordinates to handle them is not performing "emergency" work of the kind which can be considered exempt.

DOL Example: The manager of a department in a retail store is not performing exempt work when he personally waits on a special or impatient customer because he fears the loss of the sale or the customer's goodwill if he allows a salesperson to serve him.

The performance of nonexempt work by executives during inventory-taking, during other periods of heavy workload, or the handling of rush orders are the kinds of activities which the percentage tolerances are intended to cover. For example, pitching in on the production line in a canning plant during seasonal operations is not exempt "emergency" work even if the objective is to keep the food from spoiling. For example, pitching in behind the sales counter in a retail store during special sales or during Christmas or Easter or other peak sales periods is not "emergency" work, even if the objective is to improve customer service and the store's sales record.

Maintenance work is not emergency work even if performed at night or during weekends.

Relieving subordinates during rest or vacation periods cannot be considered in the nature of "emergency" work since the need for replacements can be anticipated.

Whether replacing the subordinate at the workbench, or production line, or sales counter during the first day or partial day of an illness would be considered exempt emergency work would depend upon the circumstances in the particular case. Such factors as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly would all have to be weighed.

All the regular cleaning up around machinery, even when necessary to prevent fire or explosion, is not "emergency" work. However, the removal by an executive of dirt or obstructions constituting a hazard to life or property need not be included in computing the percentage limitation if it is not reasonably practicable for anyone but the supervisor to perform the work and it is the kind of "emergency" which has not been recurring.

The occasional performance of repair work in case of a breakdown of machinery, or the collapse of a display rack, or damage to or exceptional disarray of merchandise caused by accident or a customer's carelessness may be considered exempt work if the breakdown is one which the employer cannot reasonably anticipate. However, recurring breakdowns or disarrays requiring frequent attention, such as that of an old belt or machine which breaks down repeatedly or merchandise displays constantly requiring re-sorting or straightening, are the kind for which provision could reasonably be made and repair of which must be considered as nonexempt. See 29 C.F.R. Section 541.109.

Occasional Tasks

In addition to the type of work which by its very nature is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which cannot practicably be performed by the production workers and are usually performed by the executive. These small tasks when viewed separately without regard to their relationship to the executive's overall functions might appear to constitute nonexempt work. In reality they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materials, and production. The particular tasks are not specifically assigned to the "executive" but are performed by him in his discretion.

It might be possible for the executive to take one of his subordinates away from his usual tasks, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than to delegate them to other persons. When any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and must be counted as nonexempt work. In determining whether such work is directly and closely related to the performance of the management duties, consideration should be given to whether it is (1) the same as the work performed by any of the subordinates of the executive, or (2) a specifically assigned task of the executive employees, or (3) practicably delegable to nonexempt employees in the establishment, or (4) repetitive and frequently recurring. See 29 C.F.R. Section 541.110.

Percentage Limitations on Nonexempt Work

An employee will not qualify for exemption as an executive if he devotes more than 20 percent (or in the case of an employee of a retail or service establishment if he devotes as much as 40 percent) of his hours worked in the workweek to nonexempt work. This test is applied on a workweek basis, and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

The maximum allowance of 20 percent for nonexempt work applies unless the establishment by which the employee is employed qualifies for the higher allowance as a retail or service establishment within the meaning of the FLSA. Such an establishment must be a distinct physical place of business, open to the general public, which is engaged on the premises in making sales of goods or services to which the concept of retail selling or servicing applies. Such an establishment must make at least 75 percent of its annual dollar volume of sales of goods or services from sales that are both not for resale and recognized as retail in the particular industry. Types of establishments which may meet these tests include (but are not limited to) stores selling consumer goods to the public, hotels, motels, restaurants, some types of amusement or recreational establishments (but not those offering wagering or gambling facilities), hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill residing on the premises (if the premises open to the general public), public parking lots and parking garages, auto repair shops, gasoline service stations (but not truck stops), funeral homes, and cemeteries. Public and private elementary and secondary schools and institutions of higher education are, as a rule, not retail or service establishments, because they are not engaged in sales of goods or services to which the retail concept applies.

There are two special exceptions to the percentage limitations: (1) the exception relating to the employee in "sole charge" of an independent or branch establishment, and (2) the exception relating to an employee owning a 20-percent interest in the enterprise in which he is employed. These except the employee only from the percentage limitations on nonexempt work, but do not except the employee from any of the other requirements. Thus, while the percentage limitations on nonexempt work are not applicable, it is clear that an employee would not qualify for the exemption if he performs so much nonexempt work that he could no longer meet the requirement that his primary duty must consist of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof. See 29 C.F.R. Section 541.112.

Sole Charge Exception to Percentage Limitation

An exception from the percentage limitations on nonexempt work is provided for "an employee who is in sole charge of an independent establishment or a physically separated branch establishment". Such an employee is considered to be employed in a bona fide executive capacity even though he exceeds the applicable percentage limitation on nonexempt work.

To be an "independent establishment," the establishment must have a fixed location and must be geographically separated from other company property. The management of operations within one among several buildings located on a single or adjoining tracts of company property does not qualify for the exemption. In the case of a branch, there must be a true and complete physical separation from the main office.

A determination as to the status as "an independent establishment or a physically separated branch establishment" of any part of the business operations on the premises of a retail or other establishment, must be made on the basis of the physical and economic facts in the particular situation. A leased department cannot be considered to be a separate establishment where, for example, it and the retail store in which it is located operate under a common trade name and the store may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell its pricing policy, its hours of operation and some or all of its hiring, firing, and other personnel policies, and matters such as advertising, adjustment, and credit operations, insurance and taxes, are handled on a unified basis by the store. A leased department may qualify as a separate establishment, however, where, among other things, the facts show that the lessee maintains a separate entrance and operates under a separate name, with its own separate employees and records, and in other respects conducts his business independently of the lessor's. In such a case the leased department would enjoy the same status as a physically separated branch store.

Since the employee must be in sole charge, only one person in any establishment can qualify as an executive under this exception, and then only if he is the top person in charge at that location. (It is possible for other persons in the same establishment to qualify for exemption as executive employees, but not under the exception from the nonexempt work limitation.) Thus, it would not be applicable to an employee who is in charge of a branch establishment but whose superior makes his office on the premises. An example is a district manager who has overall supervisory functions in relation to a number of branch offices, but makes his office at one of the branches. The branch manager at the branch where the district manager's office is located is not in sole charge of the establishment and does not come within the exception. This does not mean that the sole-charge status of an employee will be considered lost because of an occasional visit to the branch office of the superior of the person in charge, or, in the case of an independent establishment by the visit for a short period on one or two days a week of the proprietor or principal corporate officer of the establishment. In these situations the sole-charge status of the employee in question will appear from the facts as to his functions, particularly in the intervals between visits. If, during these intervals, the decisions normally made by an executive in charge of a branch or an independent establishment are reserved for the superior, the employee is not in sole charge. If such decisions are not reserved for the superior, the sole-charge status will not be lost merely because of the superior's visits.

In order to qualify for the exception the employee must ordinarily be in charge of all the company activities at the location where he is employed. If he is in charge of only a portion of the company's activities at his location, then he cannot be said to be in sole charge of an independent establishment or a physically separated branch establishment. In exceptional cases the DOL has found that an executive employee may be in sole charge of all activities at a branch office except that one independent function which is not integrated with those managed by the executive is also performed at the branch. This one function is not important to the activities

managed by the executive and constitutes only an insignificant portion of the employer's activities at that branch. A typical example of this type of situation is one in which desk space in a warehouse otherwise devoted to the storage and shipment of parts is assigned a salesman who reports to the sales manager or other company official located at the home office. Normally only one employee (at most two or three, but in any event an insignificant number when compared with the total number of persons employed at the branch) is engaged in the nonintegrated function for which the executive whose sole-charge status is in question is not responsible. Under such circumstances the employee does not lose his sole-charge status merely because of the desk-space assignment. See 29 C.F.R. Section 541.113.

20-Percent Ownership Interest Exception to Percentage Limitation

An exception from the percentage limitations on nonexempt work is provided for an employee who owns at least a 20-percent interest in the enterprise in which he is employed. This provision recognizes the special status of a shareholder of an enterprise who is actively engaged in its management. The exception is available to an employee owning a bona fide 20-percent equity in the enterprise in which he is employed, regardless of whether the business is a corporate or other type of organization. See 29 C.F.R. Section 541.114.

Working Foremen

The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the "working" foreman or "working" supervisor who regularly performs "production" work or other work which is unrelated or only remotely related to his supervisory activities.

One type of working foreman or working supervisor most commonly found in industry works alongside his subordinates. Such employees, sometimes known as "strawbosses," "gang leaders," or "group leaders" perform the same kind of work as that performed by their subordinates, and also carry on supervisory functions. The work of the same nature as that performed by the employees' subordinates must be counted as nonexempt work and if the amount of such work performed is substantial the exemption does not apply. ("Substantial" means more than 20 percent -- see the 20-percent limitation on nonexempt work.) A foreman in a dress shop, for example, who operates a sewing machine to produce the product is performing nonexempt work. However, this should not be confused with the operation of a sewing machine by a foreman to instruct his subordinates in the making of a new product, such as a garment, before it goes into production.

Another type of working foreman or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his own subordinates, consists of ordinary production work or other routine, recurrent, repetitive tasks which are a regular part of his duties. Such an employee is in effect holding a dual job. He may be, for example, a combination foreman-production worker, supervisor-clerk, or foreman combined with some other skilled or unskilled occupation. His non-supervisory duties in such instances are unrelated to anything he must do to supervise the employees under him or to manage the department. They are in many instances mere fill-in tasks performed because the job does not involve sufficient executive duties to occupy an employee's full time. In other instances the non-supervisory, non-managerial duties may be the principal ones and the supervisory or managerial duties are subordinate and are assigned to the particular employee because it is more convenient to rest the responsibility for the first line of supervision in the hands of the person who performs these other duties. Typical of employees in dual jobs which may involve a substantial amount of nonexempt work are foremen or supervisors who also perform one or more of the production or operating functions, though no other employees in the plant perform such work. An example of this kind of employee is the foreman in a millinery or garment plant who is also the cutter, or the foreman in a garment factory who operates a multiple-needle machine not requiring a full-time operator, and foremen or supervisors who have as a regular part of their duties the adjustment, repair, or maintenance of machinery or equipment. Other examples in this category are the foreman-fixer in the hosiery industry who devotes a considerable amount of time to making adjustments and repairs to the machines of his subordinates, or the planer-mill foreman who is also the "machine man" who repairs the machines and grinds the knives, foremen or supervisors who perform clerical work other than the maintenance of the time and production records of their subordinates, the foreman of the shipping room who makes out the bills of lading and other shipping records, the warehouse foreman who also acts as inventory clerk, the head shipper who also has charge

of a finished goods stock room, assisting in placing goods on shelves and keeping perpetual inventory records, or *the office manager, head bookkeeper, or chief clerk who performs routine bookkeeping*. The head bookkeeper, for example, who spends a substantial amount of his time keeping books of the same general nature as those kept by the other bookkeepers, even though his books are confidential in nature or cover different transactions from the books maintained by the under bookkeepers, is not primarily an executive employee and should not be so considered. See 29 C.F.R. Section 541.115.

Executive Trainees

The executive exemption is applicable to an employee employed in a bona fide executive capacity and does not include employees training to become executives and not actually performing the duties of an executive. See 29 C.F.R. Section 541.116.

Amount of Salary Required

Except as otherwise provided below, compensation on a salary basis at a rate of not less than \$155 per week, exclusive of board, lodging, or other facilities, is required for exemption as an executive. The \$155 a week may be translated into equivalent amounts for periods longer than 1 week. The requirement will be met if the employee is compensated biweekly on a salary basis of \$310, semimonthly on a salary basis of \$335.84 or monthly on a salary basis of \$671.67. However, the shortest period of payment which will meet the requirement of payment “on a salary basis” is a week.

In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an executive is \$130 per week for other than an employee of the Federal Government.

The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the DOL regulations do not prohibit the sale of such facilities to executives on a cash basis if they are negotiated in the same manner as similar transactions with other persons. See 29 C.F.R. Section 541.117.

Salary Basis

An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of the work performed*. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs *any work without regard to the number of days or hours worked*. This policy is also subject to the general rule that an employee need not be paid for any *workweek* in which he performs *no* work.

An employee will not be considered to be on a salary basis if deductions from his predetermined compensation are made for absences occasioned by the employer or by the **operating requirements** of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

Deductions may be made when the employee absents himself from work for a day or more for **personal reasons**, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

Deductions may also be made for absences of a day or more occasioned by **sickness or disability** (including industrial 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 both sickness and disability*. Thus, if the employer’s particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan,

policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan.

In the case of an **industrial accident**, the salary basis requirement will be met if the employee is compensated for loss of salary in accordance with the applicable workers' compensation law or the plan adopted by the employer, *provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.*

Deductions may not be made for absences of an employee caused by **jury duty, attendance as a witness, or temporary military leave**. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

Penalties imposed in good faith for infractions of **safety rules of major significance** will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

Payment of additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of \$155 or more a week and in addition, a **commission** of one percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations.

Another type of situation in which the requirement will be met is that of an employee paid on a **daily or shift basis**, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work.

The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment on a salary basis, e.g., a salary of \$200 in each week in which any work is performed and an additional \$50 which is made subject to deductions which are not permitted.

Failure to pay the full salary in the **initial or terminal week of employment** is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since **casual or occasional employment** for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

The DOL takes the position that **the effect of making a deduction which is not permitted** under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. See 29 C.F.R. Section 541.118.

High Salaried Executives

The "short test" applies to managerial employees who are compensated on a salary basis at a rate of not less than \$250 per week exclusive of board, lodging, or other facilities. Mechanics, carpenters, linotype operators,

or craftsmen of other kinds, however, are not exempt under the proviso no matter how highly paid they might be. See 29 C.F.R. Section 541.119.

OVERTIME EXEMPTION FOR ADMINISTRATIVE EMPLOYEES

Employed in a Bona Fide Administrative Capacity

An employee is employed in a bona fide administrative capacity if he meets “the long test” or “the short test.”

To meet “the long test,” the employee must be one:

(a) whose primary duty consists of either (1) the performance of **office or non-manual work directly related to management policies or general business operations** of his employer or his employer’s customers, or (2) the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) who customarily and regularly exercises **discretion and independent judgment**; and

(c)(1) who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or (2) who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) who executes under only general supervision special assignments and tasks; and

(d) who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c); and

(e)(1) who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week (\$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or (2) who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1), or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed.

To meet “the short test,” the employee must be one:

(a) whose primary duty consists of either (1) the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer’s customers, or (2) the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) whose primary duty consists of the performance of work which includes work requiring the exercise of discretion and independent judgment; and

(c) who is compensated on a salary or fee basis at a rate of not less than \$250 per week (\$200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities. See 29 C.F.R. Section 541.2.

Types of Administrative Employees

Three types of employees are described in the DOL regulations who may qualify for exemption as administrative employees: (1) executive assistants and administrative assistants, (2) staff employees, and (3) those who perform special assignments.

The first type, an “executive assistant” or “administrative assistant,” is the assistant to a proprietor or to an executive or administrative employee. In modern industrial practice there has been a steady and increasing use of persons who assist an executive in the performance of his duties without themselves having executive authority. Typical titles of persons in this group are executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant and, in retail or service establishments, assistant manager and assistant buyer. Generally speaking, such assistants are found in large establishments where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence, and interviews must be delegated.

Employees included in the second alternative, “staff employees,” are those who can be described as staff rather than line employees, or as functional rather than departmental heads. They include among others employees who act as advisory specialists to the management. Typical examples of such advisory specialists are tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, and statisticians. Also included are persons who are in charge of a functional department, which may frequently be a one-man department. Typical examples of such employees are credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations directors.

The third group consists of persons who perform “special assignments.” Among them are to be found a number of persons whose work is performed away from the employer’s place of business. Typical titles of such persons are lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers for oil companies. It should be particularly noted that this is a field which is rife with honorific titles that do not adequately portray the nature of the employee’s duties. The field representative of a utility company, for example, may be a “glorified serviceman.” This classification also includes employees whose special assignments are performed entirely or partly inside their employer’s place of business. Examples are special organization planners, customers’ brokers in stock exchange firms, so-called account executives in advertising firms and contact or promotion men of various types.

A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status under the regulations in subpart A of this part. Titles can be had cheaply and are of no determinative value. The exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of the appropriate section of the regulations.

Individuals engaged in the overall academic administration of an elementary or secondary school system include the superintendent or other head of the system and those of his assistants whose duties are primarily concerned with administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program. In individual school establishments those engaged in overall academic administration include the principal and the vice principals who are responsible for the operation of the school. Other employees engaged in academic administration are such department heads as the heads of the mathematics department, the English department, the foreign language department, the manual crafts department, and the like. Institutions of higher education have similar organizational structure, although in many cases somewhat more complex. See 29 C.F.R. Section 541.201.

Categories of Work

The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition (without regard to whether the work is manual or non-manual):

“Category 1”: Work specifically described in 29 C.F.R. Section 541.2, paragraphs (a), (b), and (c), i.e., work in which the employee (a) (1) engages in the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer’s customers, or (2) engages in the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and the employee customarily and regularly exercises discretion and independent judgment; and (c) the employee (1) regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or (2) performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) executes under only general supervision special assignments and tasks;

“Category 2”: Routine work (work which does not require the exercise of discretion and independent judgment) which is directly and closely related to the performance of the work which is described in (A);

“Category 3”: Routine work (work which does not require the exercise of discretion and independent judgment) which is not related or is only remotely related to the administrative duties.

The work in Category 1 is clearly exempt in nature.

Category 2 consists of work which if separated from the work in category 1 would appear to be routine, or on a fairly low level, and which does not itself require the exercise of discretion and independent judgment, but which has a direct and close relationship to the performance of the more important duties. The directness and closeness of the relationship may vary depending upon the nature of the job and the size and organization of the establishment in which the work is performed. This “directly and closely related” work includes routine work which necessarily arises out of the administrative duties, and the routine work without which the employee’s more important work cannot be performed properly. It also includes a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are functionally related to them directly and closely. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either facilitate or arise incidentally from the performance of such functions and are commonly performed in connection with them.

These “directly and closely related” duties are distinguishable from the last group, Category 3, those which are remotely related or completely unrelated to the more important tasks. The work in Category 3 is nonexempt and must not exceed the 20-percent limitation for nonexempt work (up to 40 percent for a service establishment) if the exemption is to apply.

Work performed by employees in the capacity of “academic administrative” personnel is a category of administrative work limited to a class of employees engaged in academic administration as contrasted with the general usable of “administrative” in the act. The term “academic administrative” denotes administration relating to the academic operations and functions in a school rather than to administration along the lines of general business operations. Academic administrative personnel are performing operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. Examples of jobs in school systems, and educational establishments and institutions, which are outside the term academic administration are jobs relating to building management and maintenance, jobs relating to the health of the students and academic staff such as social workers, psychologist, lunch room manager, or dietitian. Employees in such work which is not considered academic administration may qualify for administrative exemption. See 29 C.F.R. Section 541.202.

Nonmanual (“White Collar”) Work

The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to “white-collar” employees who meet the tests. If the work performed is “office” work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term “administrative” only employees who are basically white-collar employees since the

accepted usage of the term “white-collar” includes all office workers. Persons employed in the routine operation of office machines are engaged in office work (although they would not qualify as administrative employees since they do not meet the other requirements).

The regulations do not completely prohibit the performance of manual work by an administrative employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to white-collar employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a white-collar employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees. An office employee, on the other hand, is a white-collar worker, and would not lose the exemption on the grounds that he is not primarily engaged in nonmanual work, although he would lose the exemption if he failed to meet any of the other requirements. See 29 C.F.R. Section 541.203.

Directly Related to Management Policies or General Business Operations

The phrase “directly related to management policies or general business operations of his employer or his employer’s customers” describes those types of activities relating to the administrative operations of a business as distinguished from “production” or, in a retail or service establishment, “sales” work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer’s customers.

The administrative operations of the business include the work performed by white-collar employees engaged in “servicing” a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

As used to describe work of substantial importance to the management or operation of the business, the phrase “directly related to management policies or general business operations” is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is “directly related” to management policies or to general business operations include those work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. The cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations; the bank teller does not. Likewise, *bookkeepers*, secretaries, and clerks of various kinds hold the run-of-the-mill positions in any ordinary business and are not performing work directly related to management policies or general business operations; a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

An employee performing routine clerical duties is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such

employees are not performing work of such substantial importance to the management or operation of the business that it can be said to be “directly related to management policies or general business operations as that phrase is used in the regulations

Some firms employ persons whom they describe as “statisticians.” If all such a person does, in effect, is to tabulate data, he is not exempt. However, if such an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is doing work directly related to management policies or general business operations.

Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

The test of directly related to management policies or general business operations is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers’ brokers in stock exchange firms, promotion men, and many others.

An employer’s volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

In the data processing field some firms employ persons described as systems analysts and computer programmers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer’s customers, he is clearly doing work directly related to management policies or general business operations.

The “management policies or general business operations” may be those of the employer or the employer’s customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements, may qualify for the exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer’s clients or customers or those of their employer. See 29 C.F.R. Section 541.205.

Primary Duty

In determining whether an employee’s exempt work meets the “primary duty” requirement, the principles governing “primary duty” under the definition of “executive” apply. See 29 C.F.R. Section 541.206.

Discretion and Independent Judgment

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. In addition, the term as used in the regulations implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. According to the DOL, it has been most frequently misunderstood and misapplied by employers and employees in cases involving (1) confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards, and (2) misapplication of the term to employees making decisions relating to matters of little consequence.

According to the DOL, perhaps the most frequent cause of misapplication of the term “discretion and independent judgment” is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard. A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example, to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector’s superior. The inspector is engaged in exercising skill rather than discretion and independent judgment.

A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently cataloged. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee’s memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations in subpart A of this part. The mere fact that the employee uses his knowledge and experience does not change his decision, i.e., that the product does or does not conform with the established standard, into a real decision in a significant matter. For example, certain “graders” of lumber turn over each “stick” to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee’s familiarity with them stems from his experience and training. Skill rather than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judgment. In addition, in those situations in which an otherwise exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the “screening” of applicants by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The screening operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee’s superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations in subpart A of this part. On the other hand an exempt personnel manager will often perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is directly and closely related to the employee’s exempt functions.

Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitor's store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however, by the buyer who evaluates the assistants' reports and on the basis of their findings directs that certain items be re-priced. When performed by the buyer who actually makes the decisions which affect the buying or pricing policies of the department he manages, the comparison shopping, although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

In the data processing field a systems analyst is exercising discretion and independent judgment when he develops methods to process, for example, accounting, inventory, sales, and other business information by using electronic computers. He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programmer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programmer he is exercising discretion and independent judgment. A computer programmer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is clear that the duties of data processing employees such as tape librarians, keypunch operators, computer operators, junior programmers and programmer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

Decisions in Significant Matters

The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truck driver to decide which route to follow in going from one place to another, the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders, and the bookkeeper may usually decide whether he will post first to one ledger rather than another. These decisions do not constitute the exercise of discretion and independent judgment of the level contemplated by the regulations. The DOL has consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence.

It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of discretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.

Final Decisions not Necessary

The term “discretion and independent judgment” as used in the regulations does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter or discard the prepared reply and direct that another be sent instead. This section by the president would not, however, destroy the exempt character of the assistant’s function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president. The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say six months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

Distinguished from Loss Through Neglect

A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures, the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller’s window and in related routine bookkeeping duties may, by crediting the wrong account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading oil onto a ship may, by not applying correct techniques fail to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the exercise of discretion and independent judgment within the meaning of the regulations.

Customarily and regularly

The work of an exempt administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase “customarily and regularly” signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment. See 29 C.F.R. Section 541.207.

OVERTIME EXEMPTION FOR PROFESSIONAL EMPLOYEES

An employee is employed in a bona fide professional capacity if he meets “the long test” or “the short test.”

To meet “the long test,” the employee must be one:

(a) whose primary duty consists of the performance of (1) work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized

intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or (2) work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or (3) teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or (4) work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field (as provided in 29 C.F.R. Section 541.303); and

(b) whose work requires the consistent exercise of discretion and judgment in its performance;
and

(c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week (\$150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities; however, this requirement does not apply to any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, to any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, or to any employee employed and engaged as a teacher as provided above.

To meet “the short test,” the employee must be one:

(a) whose primary duty consists of the performance of (i) work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or (ii) teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or (iii) work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field (as provided in 29 C.F.R. Section 541.303); and

(b) whose primary duty consists of the performance of work which includes work requiring the consistent exercise of discretion and independent judgment, or the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor,

(c) who is compensated on a salary or fee basis at a rate of not less than \$250 per week (or \$200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities. See 29 C.F.R. Section 541.3.

OVERTIME EXEMPTION FOR OUTSIDE SALESMEN

An employee is employed in the capacity of outside salesman is one:

(a) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in making sales, or in 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

(b) whose hours of work of a nature other than that described above do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer (work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, is not regarded as nonexempt work). See 29 C.F.R. Section 541.5.

FOR MORE INFORMATION

For more information, visit the following web sites:

www.VirginiaLaborLaw.com (Virginia Labor Law)

www.dol.gov (U.S. Department of Labor)

www.dli.state.va.us (Virginia Department of Labor and Industry)