

FEDERAL OVERTIME PAY EXEMPTION COMPLIANCE GUIDE

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain employees with computer-related occupations. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. ***Job titles do not determine exempt status.*** In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department of Labor's (DOL) regulations.

Use the attached worksheets to evaluate all of the employees your company intends to treat as exempt from the overtime pay requirements. Once you have evaluated each employee's specific job duties and salary basis and determined that the employee is exempt, keep a copy of the completed worksheet in the employee's personnel file. Should your company be audited by the DOL you can use the worksheet to demonstrate your good faith belief that the employee is properly categorized.

General Issues Pertaining to Exempt Employees

- *Circumstances in Which the Employer May Make Deductions from Pay*

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

- *Effect of Improper Deductions from Salary*

The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

- *Safe Harbor*

If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

- *Highly Compensated Employees*

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regu-

larly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

- *Educational Establishments and Administrative Functions*

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for 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; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

- *Teachers*

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

- *Practice of Law or Medicine*

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

- *Promotion Work*

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

- *Drivers Who Sell*

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

Disclaimer: These materials relate solely to the federal overtime exemption rules. Some states have different rules that may apply. These materials have been prepared by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Purchase and/or use of these materials is not intended to create, nor does it constitute, a professional relationship between the law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. and the purchaser or user. No readers of these materials should act upon any information contained in them without first seeking qualified professional counsel.

FEDERAL OVERTIME PAY EXEMPTION WORKSHEET FOR ADMINISTRATIVE EMPLOYEES

Employee's Name _____

Job Title _____

Social Security No. _____

Department _____

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States receive overtime pay at time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA provides an exemption from overtime pay for employees employed as bona fide administrative employees. To qualify for this exemption, employees generally must meet the "Administrative Exemption Test" below. **Remember, job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties and salary must meet **ALL** of the requirements of the Department of Labor's FLSA regulations.

ADMINISTRATIVE EXEMPTION TEST

To qualify for the administrative employee exemption, you must answer **YES** to **ALL** of the following questions about the employee. All of the terms in bold and italics are defined in the "Definitions" section below. You must be able to satisfy the requirements of each definition in order to answer each question on the Test correctly. Where it is appropriate, space is given on this form to allow you to record specific examples of how the employee satisfies each definition.

1. Yes No Is the employee compensated on a **salary or fee basis**¹ at a rate not less than \$455 per week?
2. Yes No Is the employee's **primary duty**² the performance of office or non-manual work **directly related to the management or general business operations**³ of the employer or the **employer's customers**⁴?
3. Yes No Does the employee's **primary duty**² include the exercise of **discretion and independent judgment**⁵ with respect to **matters of significance**⁶?

DEFINITIONS

¹ "**Salary Basis**" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available. **Circumstances in which the employer may make deductions from an exempt employee's pay include when:**

- employee is absent from work for **one or more full days** for personal reasons other than sickness or disability;
- for absences of **one or more full days** due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- to offset amounts employees receive as jury or witness fees, or for military pay;
- for penalties imposed in good faith for infractions of safety rules of major significance;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

"Fee Basis" — Administrative employees may be paid on a "fee basis" rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

² "**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 em-

ployee's job as a whole. The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.** Time alone, however, is not the sole test.

Describe employee's principal, main, major or most important duty (and what percentage of his or her work time is spent performing this duty):

³ **“Directly Related to Management or General Business Operations”** requires the employee to perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Describe employee's activities which are directly related to management or general business operations:

⁴ **“Employer's Customers”** An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

⁵ **“Discretion and Independent Judgment”** involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and similar other factors. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. ***The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.***

⁶ **“Matters of Significance”** refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

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FEDERAL OVERTIME PAY EXEMPTION WORKSHEET FOR COMPUTER-RELATED OCCUPATIONS

Employee's Name _____

Job Title _____

Social Security No. _____

Department _____

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States receive overtime pay at time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA provides an exemption from overtime pay for employees employed in certain computer-related occupations. To qualify for this exemption, employees generally must meet the "Computer Employee Exemption Test" below. **Remember, job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties and salary must meet **ALL** of the requirements of the Department of Labor's FLSA regulations.

COMPUTER EXEMPTION TEST

To qualify for the outside sales employee exemption, you must answer **YES** to **ALL** of the following questions about the employee. All of the terms in bold and italics are defined in the "Definitions" section below. You must be able to satisfy the requirements of each definition in order to answer each question on the Test correctly. Where it is appropriate, space is given on this form to allow you to record specific examples of how the employee satisfies each definition.

- Yes** **No** Is the employee compensated *either* on a **salary or fee basis**¹ at a rate not less than \$455 per week *or*, if compensated on an hourly basis, at a rate not less than \$27.63 an hour?
- Yes** **No** Is the employee employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below?
- Yes** **No** Does the employee's **primary duty**² must consist of one or more 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.

Please Note: The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also **not** exempt under the computer employee exemption.

DEFINITIONS

¹ **"Salary Basis"** means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available. **Circumstances in which the employer may make deductions from an exempt employee's pay include when:**

- employee is absent from work for **one or more full days** for personal reasons other than sickness or disability;
- for absences of **one or more full days** due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- to offset amounts employees receive as jury or witness fees, or for military pay;
- for penalties imposed in good faith for infractions of safety rules of major significance;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

“Fee Basis” — Computer employees may be paid on a “fee basis” rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.” A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

² **“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. The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.** Time alone, however, is not the sole test.

Describe employee’s principal, main, major or most important duty (and what percentage of his or her work time is spent performing this duty):

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FEDERAL OVERTIME PAY EXEMPTION WORKSHEET FOR “CREATIVE” PROFESSIONAL EMPLOYEES

Employee's Name _____

Job Title _____

Social Security No. _____

Department _____

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States receive overtime pay at time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA provides an exemption from overtime pay for employees employed as bona fide creative professional employees. To qualify for this exemption, employees generally must meet the “Creative Professional Exemption Test” below. **Remember, job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties and salary must meet **ALL** of the requirements of the Department of Labor's FLSA regulations.

CREATIVE PROFESSIONAL EXEMPTION TEST

To qualify for the creative professional employee exemption, you must answer **YES** to **BOTH** of the following questions about the employee. All of the terms in bold and italics are defined in the “Definitions” section below. You must be able to satisfy the requirements of each definition in order to answer each question on the Test correctly. Where it is appropriate, space is given on this form to allow you to record specific examples of how the employee satisfies each definition.

1. Yes No Is the employee compensated on a ***salary or fee basis***¹ at a rate not less than \$455 per week?
2. Yes No Is the employee's ***primary duty***² the performance of work requiring ***invention, imagination, originality or talent***³ in a ***recognized field of artistic or creative endeavor***⁴.

DEFINITIONS

¹ “**Salary Basis**” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.” If the employee is ready, willing and able to work, deductions may not be made for time when work is not available. **Circumstances in which the employer may make deductions from an exempt employee's pay include when:**

- employee is absent from work for **one or more full days** for personal reasons other than sickness or disability;
- for absences of **one or more full days** due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- to offset amounts employees receive as jury or witness fees, or for military pay;
- for penalties imposed in good faith for infractions of safety rules of major significance;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

“**Fee Basis**” — Professional employees may be paid on a “fee basis” rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.” A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

² “**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. The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.** Time alone, however, is not the sole test.

Describe employee's principal, main, major or most important duty (and what percentage of his or her work time is spent performing this duty):

³ **“Invention, Imagination, Originality or Talent”** distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and those with similar responsibilities. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Describe employee's activities which require invention, imagination, originality or talent:

⁴ **“Recognized Field of Artistic or Creative Endeavor”** includes such fields as, for example, music, writing, acting and the graphic arts.

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FEDERAL OVERTIME PAY EXEMPTION WORKSHEET FOR EXECUTIVE EMPLOYEES

Employee's Name _____

Job Title _____

Social Security No. _____

Department _____

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States receive overtime pay at time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA provides an exemption from overtime pay for employees employed as bona fide executive employees. To qualify for this exemption, employees generally must meet the "Executive Exemption Test" below. **Remember, job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department of Labor's FLSA regulations.

EXECUTIVE EXEMPTION TEST

To qualify for the executive employee exemption, you must answer **YES** to **ALL** four of the following questions about the employee. All of the terms in bold and italics are defined in the "Definitions" section below. You must be able to satisfy the requirements of each definition in order to answer each question on the Test correctly. Where it is appropriate, space is given on this form to allow you to record specific examples of how the employee satisfies each definition.

1. Yes No Is the employee compensated on a **salary basis**¹ at a rate not less than \$455 per week?
2. Yes No Is the employee's **primary duty**² **managing**³ the enterprise, or managing a **customarily recognized department or subdivision**⁴ of the enterprise?
3. Yes No Does the employee **customarily and regularly**⁵ direct the work of at least **two or more other full-time employees**⁶ or their equivalent?
4. Yes No Does the employee have the authority to hire or fire other employees, or are the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees given **particular weight**⁷?

DEFINITIONS

¹ "**Salary Basis**" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available. **Circumstances in which the employer may make deductions from an exempt employee's pay include when:**

- employee is absent from work for **one or more full days** for personal reasons other than sickness or disability;
- for absences of **one or more full days** due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- to offset amounts employees receive as jury or witness fees, or for military pay;
- for penalties imposed in good faith for infractions of safety rules of major significance;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

² "**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. The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.** Time alone, however, is not the sole test.

Describe employee's principal, main, major or most important duty (and what percentage of his or her work time is spent performing this duty):

³ **“Managing”** includes, but is not limited to, activities such as: interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; evaluating employee performance for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Describe employee's “managing” activities:

⁴ **“Customarily recognized department or subdivision”** is a unit of employees with permanent status and function; not merely a collection of employees assigned from time to time to a specific job or series of jobs.

⁵ **“Customarily and regularly”** generally includes work normally done every workweek, but does not include isolated or one-time tasks.

⁶ **“Two or more other full-time employees”** means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

List two or more full-time employees the employee directs:

⁷ **“Particular weight”** means that the employee's recommendations regarding changing the employment status of other workers is influential. Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have “particular weight” even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

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FEDERAL OVERTIME PAY EXEMPTION WORKSHEET FOR “LEARNED” PROFESSIONAL EMPLOYEES

Employee's Name _____

Job Title _____

Social Security No. _____

Department _____

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States receive overtime pay at time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA provides an exemption from overtime pay for employees employed as bona fide learned professional employees. To qualify for this exemption, employees generally must meet the “Learned Professional Exemption Test” below. **Remember, job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties and salary must meet **ALL** of the requirements of the Department of Labor's FLSA regulations.

LEARNED PROFESSIONAL EXEMPTION TEST

To qualify for the professional employee exemption, you must answer **YES** to **ALL** of the following questions about the employee. All of the terms in bold and italics are defined in the “Definitions” section below. You must be able to satisfy the requirements of each definition in order to answer each question on the Test correctly. Where it is appropriate, space is given on this form to allow you to record specific examples of how the employee satisfies each definition.

1. Yes No Is the employee compensated on a ***salary or fee basis***¹ at a rate not less than \$455 per week?
2. Yes No Is the employee's ***primary duty***² the performance of ***work requiring advanced knowledge***³, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment?
3. Yes No Is the employee's advanced knowledge in the ***field of science or learning***⁴ and ***customarily acquired by a prolonged course of specialized intellectual instruction***⁵?

DEFINITIONS

¹ **“Salary Basis”** means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.” If the employee is ready, willing and able to work, deductions may not be made for time when work is not available. **Circumstances in which the employer may make deductions from an exempt employee's pay include when:**

- employee is absent from work for **one or more full days** for personal reasons other than sickness or disability;
- for absences of **one or more full days** due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- to offset amounts employees receive as jury or witness fees, or for military pay;
- for penalties imposed in good faith for infractions of safety rules of major significance;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

“Fee Basis” — Professional employees may be paid on a “fee basis” rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.” A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

² **“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. The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.** Time alone, however, is not the sole test.

Describe employee’s principal, main, major or most important duty (and what percentage of his or her work time is spent performing this duty):

³ **“Work requiring advanced knowledge”** means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. ***Advanced knowledge cannot be attained at the high school level.***

Describe employee’s activities which requires advanced knowledge:

⁴ **“Fields of science or learning”** include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

⁵ **“Customarily acquired by a prolonged course of specialized intellectual instruction”** - The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be 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. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Disclaimer: These materials relate solely to the federal overtime exemption rules. Some states have different rules that may apply. These materials have been prepared by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Purchase and/or use of these materials is not intended to create, nor does it constitute, a professional relationship between the law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. and the purchaser or user. No readers of these materials should act upon any information contained in them without first seeking qualified professional counsel.

FEDERAL OVERTIME PAY EXEMPTION WORKSHEET FOR OUTSIDE SALES EMPLOYEES

Employee's Name _____

Job Title _____

Social Security No. _____

Department _____

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States receive overtime pay at time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek. However, the FLSA provides an exemption from overtime pay for employees employed as bona fide outside sales employees. To qualify for this exemption, employees generally must meet the "Outside Sales Exemption Test" below. **Remember, job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties must meet **ALL** of the requirements of the Department of Labor's FLSA regulations.

OUTSIDE SALES EXEMPTION TEST

To qualify for the outside sales employee exemption, you must answer **YES** to **BOTH** of the following questions about the employee. All of the terms in bold and italics are defined in the "Definitions" section below. You must be able to satisfy the requirements of each definition in order to answer each question on the Test correctly. Where it is appropriate, space is given on this form to allow you to record specific examples of how the employee satisfies each definition.

- Yes No Is the employee's *primary duty*¹ *making sales*², or *obtaining orders or contracts for services or for the use of facilities*³ for which a consideration will be paid by the client or customer.
- Yes No Is the employee *customarily and regularly*⁴ engaged *away from the employer's place or places of business*⁵.

DEFINITIONS

¹ "**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. The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.** Time alone, however, is not the sole test.

Describe employee's principal, main, major or most important duty (and what percentage of his or her work time is spent performing this duty):

² "**Making sales**" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

³ "**Obtaining orders or contracts for services or for the use of facilities**" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word "services" extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

⁴ "**Customarily and regularly**" means greater than occasional but less than constant; it includes work normally done every work-week, but does not include isolated or one-time tasks.

⁵ **“Away from the employer’s place or places of business”** - An outside sales employee makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

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