

FLSA Exemptions

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OHIO ASSOCIATION OF COUNTY BOARDS SERVING PEOPLE
WITH
DEVELOPMENTAL DISABILITIES
2010 ANNUAL CONVENTION
HILTON COLUMBUS AT EASTON
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General requirements applicable to each exemption

- ◆ FLSA regulations generally require each of 3 tests to be met for the exemption to apply:
 - Employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions because of variations in the quality or quantity of work performed ("salary basis test");
 - Amount of salary paid must meet minimum specified amounts ("salary level test") (\$455 per week (\$23,660 per year)); and
 - Employee's job duties must primarily involve managerial, administrative or professional skills as defined by the regulations ("duties tests").

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Executive Exemption

- ◆ Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- ◆ Employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- ◆ Employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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Executive Exemption

- ◆ Executive employee's primary duty must be managing an enterprise.
 - 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; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

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Executive Exemption

- ◆ A "customarily recognized department or subdivision" must have a permanent status and a continuing function.
- ◆ A human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.
- ◆ When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.
- ◆ A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place.
- ◆ The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

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Executive Exemption

- ◆ Executive must also customarily and regularly supervise two or more other employees.
- ◆ The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.
- ◆ The phrase "two or more other employees" means two full-time employees or their equivalent.
 - One full-time and two half-time employees are equivalent to two full-time employees.
 - 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.
 - 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.

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Executive Exemption

- ◆ Executive must have the authority to hire or fire other employees, or the executive's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.
- ◆ 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.

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Executive Exemption

- ◆ 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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Administrative Exemption

- ◆ Primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- ◆ Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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Administrative Exemption

- ◆ To meet the “directly related to management or general business operations” requirement, an employee must 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.
- ◆ 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.

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Administrative Exemption

- ◆ 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.
- ◆ 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.

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Administrative Exemption

- ◆ 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
 - Other factors set forth in the regulation.

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Administrative Exemption

- ◆ Exercise of discretion and independent judgment implies that the employee has authority to make decisions on their own, without immediate direction or supervision.
 - Employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.
 - 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.
- ◆ 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.

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Administrative Exemption

- ◆ Exercise of discretion and independent judgment must relate to "matters of significance."
 - The term "matters of significance" refers to the level of importance or consequence of the work performed.
 - 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.

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Professional Exemption

- ◆ Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- ◆ Advanced knowledge must be in a field of science or learning; and
- ◆ Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

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Professional Exemption

- ◆ Professions which meet the requirement for a prolonged course of specialized intellectual instruction include: law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, and various types of physical, chemical, and biological sciences, including pharmacy.
- ◆ Includes any recognized profession requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.

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Professional Exemption

- ◆ Advanced knowledge must be in a field of science or learning.
- ◆ 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.

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Professional Exemption

- ◆ The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession.
 - Best evidence of meeting this requirement is having the appropriate academic degree.
- ◆ Knowledge must be of an advanced type.
High school education does not count.
- ◆ Knowledge must be a field of science or learning.
- ◆ Knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

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Professional Exemption

- ◆ 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.
 - Exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

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Professional Exemption

- ◆ Primary duty must involve the performance of work requiring advanced knowledge.
- ◆ “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.
- ◆ Professional 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.

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Application of Exemptions to SSA

- ◆ In January 2006, we rendered the following conclusions:
 - The administrative exemption could be applied to service and support administrators with the following level certifications: Specialist 1, Specialist 2, Management 2 and Management 3.
 - Under the appropriate circumstances, the executive exemption may be applied to an employee with a Management 2 or Management 3 level certification. If the employee were not in charge of the service and support administration department or did not supervise two or more other employees, then the exemption could not apply.
 - No EAP exemption could be applied to an employee with Registered Service level registration.
 - The professional exemption is not applicable to any SSA, given that only an associate's degree is required to be able to perform SSA functions.

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Application of Exemptions to SSA

- ◆ We reached the conclusion regarding the administrative exemption because SSAs meet the following factors for the administrative exemption's requirement that an employee exercise discretion and independent judgment:
 - 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.
- ◆ Meeting at least two or three of these factors indicates an employee is exercising discretion and independent judgment. Of course, they must also be performing "administrative" duties.

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Application of Exemptions to SSA

- ◆ DOL has stated on four occasions (1999, 2005, 2006, 2007) that Program Coordinators, Supported Living Coordinators, Caseworkers, and Case Managers, whose jobs closely tracked SSA functions, were not exempt administrators.
 - Don't perform "administrative duties."
 - Perform production work.

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