

“upset”) salary rate are exempt if they meet a “short” duties test. Those paid between the higher and lower salary rates must meet a more detailed “long” duties test.

The salary tests were originally designed to operate as a ready guide to assist employers in deciding which employees were more likely to meet the duties tests in the exemptions. In fact, the salary levels specified in the regulations were once viewed as the best indicator of exempt status. As last revised effective April 1, 1975, the salary required for executive and administrative employees under the current “long” test is \$155 per week; professional employees are exempt at \$170 per week. The short test salary level (requiring fewer duties to be satisfied) for all three exemptions is \$250 per week. Because these salary levels have not been raised in 28 years, virtually all employees are tested for exemption today under the “short” duties tests. Moreover, while the existing salary tests (\$155, \$170, and \$250 per week) still reflect the interim 1975 rates, a full-time minimum wage worker today earns \$206 per week for a 40-hour work week. Consequently, the existing salary tests no longer provide employees or employers any help in distinguishing between bona fide executive, administrative, and professional employees and those who should not be considered for exemption. Moreover, the outdated salary tests and complex duties tests in the current regulation cause employees to be erroneously misclassified as exempt and thus not paid properly.

Under the currently applicable “short” test exemption requirements, an exempt “executive” employee must be paid at least \$250 per week on a salary basis, have a primary duty to manage the enterprise or a customarily recognized department or subdivision thereof, and regularly direct the work of two or more other employees. An exempt “administrative” employee must be paid at least \$250 per week on a salary or fee basis, have a primary duty of office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers (or similar functions in the administration of a school system or educational institution in work directly related to academic instruction), and perform work requiring the exercise of discretion and independent judgment. An exempt “professional” employee must be paid at least \$250 per week on a salary or fee basis; have a primary duty of (1) work requiring knowledge of an advanced type in a field of science

or learning customarily acquired by prolonged, specialized, intellectual instruction and study, or (2) work that is original and creative in a recognized field of artistic endeavor, or (3) teaching in a school system or educational institution, or (4) work as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer software field; and perform work requiring the consistent exercise of discretion and judgment, or work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Under the professional exemption, the salary or fee requirement does not apply to certain licensed or certified doctors, lawyers and teachers; or to certain computer-related occupations if paid on an hourly basis at \$27.63 or more per hour. An “outside sales” employee who is customarily and regularly engaged away from the employer’s places of business making sales or obtaining orders or contracts for services or use of facilities, and who does not exceed a twenty percent tolerance per work week performing duties unrelated to his or her own outside sales or solicitations, is exempt. There are no salary or fee requirements for outside sales employees.

Employees meeting the foregoing requirements are excluded from the Act’s minimum wage and overtime protections. Thus, they may work any number of hours in the work week and are not subject to the Federal law’s overtime pay requirements. Some state laws have stricter exemption standards than those just described. The FLSA does not preempt any such stricter State standards. If a State or local law establishes a higher standard than the provisions of the FLSA, the higher standard applies. See section 18 of the FLSA, 29 U.S.C. 218.

The executive and administrative exemptions apply generally to certain management and staff-level positions within an employer’s organization. For example, department heads with management as their primary duty, who regularly supervise two or more full time employees in their department, may qualify as executives if they are paid a predetermined salary of \$250 or more per week. An administrative employee must primarily perform office or nonmanual work of substantial importance to the management of the business, but is not required to supervise other employees. Persons with functional (rather than departmental) management authority, or who perform “staff” rather than production or sales work, may qualify as administrative employees if their duties

include “discretion and independent judgment” or decision-making responsibilities on important matters in managing the employer’s general business operations (*e.g.*, if they primarily determine or affect management policies in a particular area, such as credit, personnel, or labor relations). Executive assistants delegated decision-making authority to carry out parts of an exempt executive or administrative employee’s management responsibilities may also qualify as exempt administrative employees.

The professional exemption (aside from the artistic, teaching, and computer-related categories) applies to the recognized professions requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (*i.e.*, the “learned” professions, such as doctor, lawyer, architect, engineer, etc.), and is typically characterized by possession of the appropriate academic degree for the particular profession. Outside sales employees must regularly work away from their employer’s place of business making sales or obtaining orders or contracts; they may not exceed a 20 percent tolerance for performing duties unrelated to their own outside sales work. “Inside sales” employees are not included within the scope of the exemption for “outside sales” employees.

Under the regulatory “salary basis” test codified at 29 CFR 541.118, partial-day deductions from pay based on the number of hours worked (“pay-docking”) are generally not allowed in the private sector (unless made in the first or last weeks of employment or due to unpaid leave taken pursuant to the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*). Disciplinary deductions from pay also violate the “salary basis” test (except for safety rules of major significance, such as no-smoking rules in oil refineries and coal mines). These concepts clarify the intended meaning of the requirements for payment of a guaranteed salary—*i.e.*, the predetermined salary amount may not be reduced because of variations in either the quality or quantity of the work performed by the employee. Pay practices not meeting the guaranteed “salary basis” requirements cause the exemption to be declared inapplicable, in some cases for entire classes of employees.<sup>11</sup>

<sup>11</sup> As noted, a special rule applies to employees of public agencies paid according to regulated pay and leave systems that require deductions for partial-day absences not covered by accrued leave,