

it has become commonplace for employees in the modern work place to use procedures manuals and written guidelines as standard practices for achieving quality control and efficiency.

The administrative exemption is the most challenging of the § 13(a)(1) exemptions to define and delimit, and the “discretion and independent judgment” requirement has become increasingly difficult to apply with uniformity in the 21st century workplace. Thus, the Department proposes to delete this requirement and replace it with the requirement that an employee hold a “position of responsibility.” The Department specifically seeks comments on whether the “discretion and independent judgment” requirement should be deleted entirely, retained as a third alternative for meeting the “position of responsibility” requirement, or retained by itself but modified to provide better guidance on distinguishing exempt administrative employees. The Department invites commenters to submit alternative proposed regulatory language for either “discretion and independent judgment” or “position of responsibility.” The Department solicits comment on how employers currently interpret the “discretion and independent judgment” requirement, and whether individuals currently exempt under that requirement would continue to be exempt under the new “position of responsibility” requirement.

Finally, the proposed regulations also would reorganize, simplify, streamline and update the regulations in other ways. The proposed regulations utilize objective, plain language; eliminate outdated and uninformative examples; and update definitions of key terms and phrases. As with the executive exemption, the proposal for the administrative exemption would move a number of sections pertaining to salary issues (current §§ 541.211, 541.212 and 541.213) to subpart G, and other sections relevant to several or all of the exemption categories would move to the proposed subpart H (Definitions and Miscellaneous Provisions) to eliminate unnecessary repetition. For example, current § 541.203 entitled “Nonmanual work” is moved to proposed new § 541.703. Current § 541.206 entitled “Primary duty” is merged with current § 541.103 and moved to proposed new § 541.700. Current § 541.208 entitled “Directly and closely related” is combined with current §§ 541.108, 541.202, and 541.307 and moved to proposed new § 541.702. Current § 541.210 entitled “Trainees, administrative” is combined with

current § 541.116 (“Trainees, executive”) and current § 541.310 (“Trainees, professional”) and moved to proposed new § 541.704. Provisions related to the administration of educational institutions in current §§ 541.2, 541.201(c), 541.202(e), and 541.215 have been consolidated and moved to new § 541.206; no substantive changes are intended by this consolidation.

*Subpart D, Professional Employees, §§ 541.300–.304*

The current regulations pertaining to the professional exemption contain four separate categories of exempt employees: learned professionals, artistic professionals, teachers, and computer professionals. As with the executive and administrative exemptions, the regulations contain both “short” and “long” duties tests, depending upon the salary level of the employee. The long test contains a separate primary duty requirement for each of the four categories of employees. The long test for learned professionals requires that the primary duty consist of work 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, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes. For creative professionals, the primary duty must consist of 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. For teachers, the primary duty must consist of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge by an employee who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which the person is employed. The duties tests for computer employees are discussed in subpart E. The long test also requires that an exempt employee: Perform work requiring the consistent exercise of discretion and judgment; do work that is predominantly intellectual and varied in character, such that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and devote no more than 20 percent of work hours in a week to activities that are not an essential part of and necessarily

incident to exempt work. The short test in the current regulations for both learned professionals and teachers contains the specific primary duty requirement discussed above, and requires that the employee perform work requiring the consistent exercise of discretion and judgment. For artistic professionals, the work must require invention, imagination or talent in a recognized field of artistic endeavor.

The proposed regulations pertaining to the professional employee exemption would make changes similar to those we propose for the executive and administrative exemptions. The goal is to clarify and simplify the regulations defining the professional employee exemption, while remaining consistent with the purposes of the FLSA. For ease of reference, and making no substantive changes, we propose to move the provisions pertaining to computer professionals to new subpart E, which will contain all information pertinent to such employees. We also propose to simplify the regulations by eliminating the separate short and long tests for each of the remaining three categories and substituting a single standard duties test for each. This restructuring and simplification would eliminate the percentage limitation on nonexempt work and the consistent exercise of discretion and judgment requirement. As discussed above in connection with similar proposed changes to the executive and administrative exemptions, we are proposing to eliminate these subsections because they have proven difficult standards to apply uniformly.

For learned professionals, the proposed new standard test in § 541.301 would provide that employees qualify for exemption as a learned professional if they have a primary duty of performing office or non-manual work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by an equivalent combination of intellectual instruction and work experience. This proposed standard test for learned professionals would focus on the knowledge of the employee and how that knowledge is used in everyday work, not on the educational path followed to obtain that knowledge. Although some flexibility to focus on the worker’s knowledge exists in the current regulation, it is very limited and rarely used. The clarified test reflects changes in the 21st century workplace in how some “knowledge workers” acquire specialized learning and skills: in the modern workplace, some