

meeting all the requirements for the executive or administrative exemptions. Of course, much has changed since then, and today "computer scientists" who possess advanced academic degrees in the computer field are routinely recognized as exempt professionals.

In November 1990, Congress enacted legislation directing the Department to issue regulations permitting computer systems analysts, computer programmers, software engineers, and other similarly-skilled professional workers to qualify for exemption under FLSA section 13(a)(1). This enactment also extended the exemption to employees in such computer occupations if paid on an hourly basis at a rate at least 6½ times the minimum wage. Final implementing regulations were issued in 1992 following public notice and comment procedures (*see* 29 CFR 541.3(a)(4) and 541.303; 57 FR 46744, Oct. 9, 1992; 57 FR 47163, Oct. 14, 1992). However, when Congress increased the minimum wage in 1996, that law included some of the Department's regulatory language as a separate statutory exemption under a new FLSA section 13(a)(17). The 1996 enactment also froze the hourly compensation test at \$27.63 (which equaled 6½ times the former \$4.25 minimum wage). The original 1990 statute was not affected by the 1996 enactment.

Accordingly, under the current regulations, an exempt computer employee must have a primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, or software engineering. In addition, an exempt computer employee must be engaged in performing these activities as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer software field. Finally, under the current regulations, an exempt computer employee must consistently exercise discretion and judgment, and be paid not less than \$250 per week on a salary basis or not less than \$27.63 an hour if paid an hourly rate.

The proposed regulations would consolidate and condense all of the regulatory guidance on the computer occupations exemption into a new regulatory subpart E by combining provisions of the current regulations found at §§ 541.3(a)(4), 541.205(c)(7), and 541.303. This new subpart will collect in one place the substance of the original 1990 enactment, the 1992 final regulations, and the 1996 enactment. The key regulatory language that

resulted from the 1990 enactment is now substantially codified in section 13(a)(17) of the Act, and thus no substantive changes have been made to that language. However, consistent with changes in the professional exemption, the proposal deletes the additional requirement that an exempt computer employee must consistently exercise discretion and judgment. Further, the former regulatory text has been edited and streamlined to provide a more concise presentation, and the structure has been modified to conform to similar changes proposed in the professional exemption. Because of the tremendously rapid pace of significant changes occurring in the information technology industry, we have avoided citing specific job titles as examples of exempt workers, as they tend to quickly become outdated once included in the regulatory text. The Department recognizes that the computer employee exemption has been particularly confusing, and invites comments on any further clarifications possible under the statute.

#### *Subpart F, Outside Sales Employees, §§ 541.500–.504*

Section 13(a)(1) of the FLSA contains a specific and separate exemption for any employee employed "in the capacity of outside salesman." Under the existing regulations, outside sales employees must be customarily and regularly engaged away from the employer's places of business making sales or obtaining orders or contracts for services or the use of facilities. ("Inside sales" employees are not within the scope of this statutory exemption for "outside sales" employees.) The regulatory interpretations examine whether any given employee's chief duty or primary function is to make sales or take orders while away from the employer's premises, by analyzing the character of the job as a whole, to distinguish exempt outside sales employees from other nonexempt occupations (*e.g.*, route delivery personnel).

Under the current regulations, outside sales employees also may not exceed a 20 percent tolerance, per work week, performing duties unrelated to their own outside sales or solicitations. Activities that are incidental to, and in conjunction with, their own outside sales or solicitations, including incidental deliveries and collections, are not counted against the 20 percent nonexempt work limitation. The 20 percent limit is based not upon the employee's own hours of work performed, but upon the hours worked by other nonexempt employees of the

employer who perform the kind of nonexempt work performed by the outside sales employee. If no one else performs such nonexempt work, the base applied is 40 hours, and the amount of nonexempt work allowed is eight hours per week. There is no salary or fee requirement for the outside sales employee exemption.

In keeping with similar proposed changes to the other exemptions in this part, and to simplify the outside sales exemption, the Department proposes to adopt a primary duty concept similar to the other exemptions, and to eliminate the particularly confusing 20 percent restriction on nonexempt work by outside sales employees. By eliminating this percentage limitation, the Department proposes to avoid any necessity that the employer track hours of outside sales employees. This will provide a consistent approach between this exemption and the exemptions for executive, administrative and professional employees. The essential elements required for exemption would continue, *i.e.*, the outside sales employee's primary duty must be to make sales or obtain orders or contracts for services or the use of facilities, and the employee must be customarily and regularly engaged away from the employer's place of business performing such duty. Outdated illustrations and redundant examples have also been deleted from the regulations, but no substantive changes are intended by these deletions. Finally, although the FLSA refers to the "outside salesman," we propose replacing this gender-specific term and refer instead to the "outside sales employee." The discussion of nonexempt work generally in current § 541.506 has been incorporated into proposed new § 541.701, and the discussion of outside sales trainees in current § 541.508 has been incorporated into proposed new § 541.704. As noted above and in connection with similar proposed changes to the executive, administrative and professional exemptions, the 20-percent limitation on nonexempt work in current § 541.507 is proposed to be deleted.

#### *Subpart G, Compensation Requirements, §§ 541.600–.606*

##### *Salary Levels*

Salary level tests have been included as part of the exemption criteria since the original regulations of 1938. Under the current rules, most executive, administrative and professional employees must earn a minimum salary