

United States Senate

OFFICE OF THE
SENATE CHIEF COUNSEL FOR EMPLOYMENT
SUITE SH-103
WASHINGTON, DC 20510
(202) 224-5424

FAX: (202) 228-2557
TDD/TTY: (202) 224-1240

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BY E-MAIL (comments@ocwr.gov)

Teresa James
Acting Executive Director
Office of Congressional Workplace Rights
110 Second Street, S.E.
Room LA-200
John Adams Building
Washington, DC 20540-1999

RE: Notice of Proposed Rulemaking, April 26, 2022

Dear Ms. James:

The Office of the Senate Chief Counsel for Employment (“SCCE”) submits the following comments to the Office of Congressional Workplace Rights (“OCWR”) in response to the Notice of Proposed Rulemaking (“NPRM”) published in the Congressional Record on April 26, 2022. *See* 168 Cong. Rec. S2157-69 (daily ed. Apr. 26, 2022). The OCWR Board of Directors (“Board”) submitted the NPRM pursuant to the Board’s obligation to issue regulations implementing section 203 of the Congressional Accountability Act of 1995 (“CAA”), *see* 2 U.S.C. § 1313(c). Section 203 of the CAA, as amended, makes “subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1) and (d), 207, 212(c)) [applicable] to covered employees.” 2 U.S.C. § 1313(a)(1).

The Board’s NPRM endeavors to modernize the overtime exemption regulations applicable to employing offices in the Senate and other congressional entities. The SCCE supports the Board’s initiative to modernize the Senate’s Part S541 regulations,¹ subject to the modifications proposed below, which, if implemented, will be beneficial to covered employees and employing offices of the Senate. For instance, proposed regulation § 541.602(b)(5) sensibly allows Senate offices to place employees who have violated serious workplace conduct rules on unpaid suspensions of

¹ Substantive Regulations Adopted by the Board of Directors of the Office of Compliance and Approved by Congress Extending Rights and Protections Under the Fair Labor Standards Act of 1938: Subtitle A – Regulations Relating to the Senate and Its Employing Offices (S Series), S541 (available at https://www.ocwr.gov/wp-content/uploads/2021/09/final_regulations_flsa_senate_19960419.pdf) (“Senate FLSA Reg.”).

less than a week, without jeopardizing their exemption. As the Department of Labor noted when enacting a similar change, “[T]his is a common-sense change that will permit employers to hold exempt employees to the same standards of conduct as that required of their nonexempt workforce.” Department of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed. Reg. 22122, 22177 (Apr. 23, 2004).

As explained in detail below and as shown in the Attachment containing an edited version of the proposed regulations in the NPRM, the SCCE recommends the following: (1) promulgating a Senate-specific body of regulations; (2) eliminating examples that do not pertain to any Senate workplace; (3) incorporating Senate-relevant examples; and (4) making typographical and other corrections.

I. A Piecemeal Update of the FLSA Regulations Creates Unnecessary Confusion

The Board has proposed updating only a portion (Part 541) of the Fair Labor Standards Act (“FLSA”) regulations applicable to congressional employing offices. This approach would have been fine had the Board also proposed conforming amendments and appropriate cross-references to the existing FLSA regulations (e.g., Senate FLSA regulations in Parts S501, S531, S547, S553, and S570). Instead, the Board’s piecemeal approach, if left unchanged, would result in unnecessary confusion for both employees and employing offices.

Some confusion results from the proposed regulations pointing outside of the existing Senate FLSA regulations for definitions of terms that are, in fact, already defined within the existing regulations. For instance, proposed regulation § 541.1 includes a definition of “covered employee” that points externally to the text of the CAA. That phrase is, however, *already* defined within the existing Senate FLSA regulations, which define the phrase with specific reference to the Senate. *Compare* Senate FLSA Reg. S501.102(c) (defining “covered employee” as “any employee of the Senate, including an applicant for employment and a former employee”) *with* 2 U.S.C. § 1313(a)(3) (defining “covered employee” more broadly and not in a Senate-specific manner). If the regulations are adopted as is, the Senate’s FLSA regulations will contain two separate, and conflicting, definitions of the exact same phrase.

Similarly, proposed regulation § 541.1 defines “intern” by pointing externally to Section 203 of the CAA. CAA section 203, however, defines “intern” by reference to the regulations, creating a confusing circularity that is entirely avoidable by cross-referencing subsection S501.102(h) of the existing Senate FLSA regulations, which actually contains a definition of “intern.”

Confusion also results from the proposed regulations' references to the CAA as amended by CAARA², while the existing regulations, which would remain unaltered by the proposed regulations, contain references to the CAA prior to CAARA. For instance, Part S501 and many other sections of the existing Senate FLSA regulations repeatedly reference the "Office of Compliance" ("OOC") which no longer exists under that name, while proposed Part 541 references the Office of Congressional Workplace Rights. Again, while experienced users of the CAA and its implementing regulations will understand that these two names refer to the same office, individuals with less experience—including covered employees who might be new to the Senate—may not understand that the OCWR and the OOC are the same entity. This does a disservice to the regulated community.

If, after receiving comments on the NPRM, the Board chooses to make substantive updates to Part 541 only, SCCE recommends that the Board at least update the rest of the existing FLSA regulations to make technical, conforming amendments.

II. A Separate, Individualized Body of Regulations is Needed for Senate Offices and Their Employees

The specific substantive modifications the SCCE proposes below reveal the need for an individualized body of regulations applicable to the Senate and employees of the Senate, as required by the CAA.

As the Board acknowledged in its introduction to the NPRM, the CAA "requires that the substantive rules of the Board of Directors 'shall consist of 3 separate bodies of regulations, which shall apply, respectively, to—(i) the Senate and employees of the Senate; (ii) the House of Representatives and employees of the House of Representatives; and (iii) the other covered employees and employing offices.'" See 168 Cong. Rec. S2158 (quoting 2 U.S.C § 1384(a)(2)(B)). The NPRM, however, only proposes one body of regulations that will have different numbering prefixes rather than working through how each of these three distinct groups of employing offices (Senate, House, and other Legislative Branch) and their covered employees may need or benefit from substantively distinct regulations. The proposed regulations therefore do not satisfy the CAA's requirement for "3 separate bodies of regulations," 2 U.S.C. § 1384(a)(2)(B).

As the Board correctly asserted in the NPRM, "Substantive Regulations that are focused solely on occupations existing within the Legislative Branch would be more effective for the implementation of the rights and protections under this section." 168 Cong. Rec. S2158. Given the Board's assertion and the CAA's command for "3 separate bodies of regulations," 2 U.S.C. § 1384(a)(2)(B), the Board must propose substantive regulations that are focused on occupations existing within the Senate, because those regulations "would be more effective for the

² Congressional Accountability Act of 1995, as amended, 2 U.S.C. §§ 1301-1438 (2018 & Supp. I 2019).

implementation of the rights and protections under this section [for the Senate and employees of the Senate],” 168 Cong. Rec. S2158. Unfortunately, the proposed regulations contain almost no variance from the Department of Labor’s Part 541³ regulations nor any customization to account for the uniqueness of many Senate occupations or the Senate workplace. Instead, the proposed regulations discuss many non-Congressional occupations such as insurance adjusters, chefs, athletic trainers, dental hygienists, and comparison shoppers, among others. *See, e.g.*, 168 Cong. Rec. S2162-64 (subsections 541.203(a), (b), (i); subsections 541.301(e)(1) – (4), (e)(6), (e)(8)).

The changes proposed by the SCCE in section I above and in sections III-V below, demonstrate how Senate-specific regulations would achieve more effective (and comparatively streamlined) FLSA regulations for the Senate and employees of the Senate.

III. Regulatory Text That Does Not Apply to the Senate Should be Removed

The Board noted in the NPRM that it had deliberated whether “good cause” exists for varying the proposed Part 541 regulations from the Department of Labor’s Part 541 regulations, and that the Board had concluded “that subsections that refer to occupations that do not apply in any manner to the Congressional branch . . . should not be retained as part of the regulations adopted and/or approved for the Legislative branch.” 168 Cong. Rec. S2158. As a consequence, the Board removed section 541.101 – Business owner, and Subpart F – Outside Sales Employees, from the proposed regulations.

The SCCE agrees with the Board’s “good cause” determination. The regulations should not contain extensive text related to occupations that do not exist within the Senate. However, the Board did not go far enough in removing from the Department of Labor’s regulations’ references to occupations that do not exist in the Senate, and further excision of the proposed regulations is warranted based on inapplicability to the Senate workplace. Accordingly, the SCCE recommends deletion of the following subsections (in whole or part) from the body of proposed regulations applicable to the Senate, as itemized below:

Subsections in the proposed regulations requiring complete redaction because these positions do not exist within the Senate:

- § 541.203(a), pertaining to insurance adjusters;
- § 541.203(b), pertaining to employees in the financial services industry;
- § 541.203(i), pertaining to comparison shoppers;
- § 541.301(e)(1), pertaining to registered or certified technologists;
- § 541.301(e)(2), pertaining to nurses;

³ 29 C.F.R. § 541 (2020).

- § 541.301(e)(3), pertaining to dental hygienists;
- § 541.301(e)(4), pertaining to physicians assistants;
- § 541.301(e)(6), pertaining to chefs;
- § 541.301(e)(8), pertaining to athletic trainers; and
- § 541.706(c)(1), pertaining to mine superintendents.

Sections and subsections in the proposed regulations requiring only partial redaction to remove references to legal requirements or occupations that do not exist within the Senate:

§ 541.4. Proposed regulation § 541.4 observes that the FLSA sets the minimum applicable standards for minimum wage and maximum workweek, but notes that employing offices can exceed those standards, and provides the following example: “Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act.” This example applies to private sector employers—entities that are subject to such “laws, regulations or ordinances”; however, it does not apply to Senate employing offices, which are not subject to State or municipal laws, regulations or ordinances. Accordingly, the above-quoted sentence should be deleted.

§ 541.304. Delete all references pertaining to the practice of medicine.

§ 541.602(b)(2). Delete the sentence pertaining to deductions made pursuant to State laws, which do not apply to the Senate.

§ 541.606(b). Proposed subsection 541.606(b) incorporates by reference the portions of 29 CFR Part 531 (“DOL Part 531”) that “defin[e] what constitutes ‘board, lodging, or other facilities,’” but does not specify which parts of DOL Part 531 are incorporated. The incorporation by reference of unspecified portions of DOL Part 531 would create a couple of problems, discussed below, both of which can be avoided by revising the proposed regulations (as shown in Section IV).

1. DOL Part 531 pertains to “Wage Payments Under the Fair Labor Standards Act of 1938.” The current FLSA regulations applicable to the Senate already contain a Part S531 pertaining to “Wage Payments Under the Fair Labor Standards Act of 1938” (“Senate Part S531”). Senate Part S531, which is comprised of four sections (S531.1, S531.2, S531.3, and S531.6), is essentially identical to its counterpart in DOL Part 531 at sections 531.1, 531.2, 531.2, and 531.6, respectively. Each of the sections in Senate Part S531 contains the phrase “board, lodging, or other facilities.” Accordingly, as to at least these four sections of DOL Part 531, the Senate already has applicable regulations and incorporation of the same regulations from DOL Part 531 is unnecessary and confusing.

2. The phrase “board, lodging, or other facilities” appears 27 times in 14 different sections of DOL Part 531.⁴ The phrase “other facilities” appears an additional three times in two additional sections of DOL Part 531.⁵ The NPRM does not identify which of these 16 sections of DOL Part 531 the Board believes provides the definition of what constitutes “board, lodging, or other facilities.” Accordingly, the SCCE recommends that the Board either (1) propose updated regulations for Senate Part S531 that define what constitutes “board, lodging, or other facilities,” or (2) include in proposed regulation § 541.606 language defining what constitutes “board, lodging, or other facilities” (see Section IV.3., below, for an example of option 2).

§ 541.703(b)(7). Modify to make this example of activities of a “credit manager” normally considered as directly and closely related to exempt work, applicable to Senate employees who are responsible for making and administering office budgets:

A manager who makes and administers the budget policy of the employing office, establishes spending limits for the employing office, and authorizes expenditures would be performing work exempt under § S541.200.

IV. Senate-Specific Provisions and Examples Would be More Effective for Implementation of the FLSA

As mentioned above, Senate employees and employing offices would benefit from the inclusion of Senate-specific examples that contain practical examples of employees whose jobs fit into the various exemption categories. The proposed regulations in Subpart C of Part 541 include various examples taken from the DOL regulations, *see, e.g.*, 29 C.F.R. § 541.203(a)-(j), to guide employers on the application of the administrative exemption, which when compared to the executive and professional exemptions, is a difficult exemption to evaluate. Many of those examples are inapplicable in the Senate because they contain references to jobs and duties that Senate employees do not perform. Their inapplicability to the Senate makes them unhelpful in evaluating positions that exist in employing offices of the Senate. Accordingly, the SCCE suggests modifying or replacing the unhelpful examples, as listed below, to illustrate the administrative exemption functions:

1. Proposed regulation § 541.202(c) – Examples of discretion and independent judgment.

⁴ See 29 CFR subsections 531.2(a), (b); 531.3(a), (c); 531.4(a), (b)(2); 531.5(a); 531.6(a); 531.27(a), (b); 531.29; 531.30; 531.31; 531.34; 531.36(a), (b); 531.37(a), (b); 531.38; and 531.59(a).

⁵ See 29 CFR subsections 531.32 and 531.33(b).

- a. Replace “For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies.” with the following:
For example, the policies formulated by the administrative director of an employing office may be subject to review by other management officials who may approve or disapprove these policies.
 - b. Replace “The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.” with the following:
The department director who has made a study of the operations of the department and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is approved.
2. Proposed regulation § 541.203 – Administrative exemption examples.
- a. New subsection S541.203(k) – An example of how the administrative exemption would apply to an employee who performs “advertising,” “public relations,” and “marketing” duties set forth in proposed regulation § 541.201(b):
(k) Employees who perform public relations work for an employing office, such as developing and implementing a media strategy or managing and coordinating media contacts and activities for the office, generally meet the duties requirements for the administrative exemption.
 - b. New subsection S541.203(l) – An example of how the administrative exemption would apply to an employee who performs “research” and “government relations” duties set forth in proposed regulation § 541.201(b):
(l) Employees who perform research and government relations functions for an employing office, such as devising and formulating legislative initiatives, serving as a Senator’s principal advisor on legislative matters, and working with governmental and non-governmental offices to gather support for particular legislative proposals, generally meet the duties requirements for the administrative exemption.
 - c. New subsection 541.203(m) – An example of how the administrative exemption would apply to an employee in a state office who performs “public relations” and “government relations” and “research” work set forth in proposed regulation § 541.201(b):
(m) Employees who act as a Senator’s liaison to government, community and constituent groups and leaders in assigned geographic or issue areas and who research and advise the Senator on community, legislative or other developments in the assigned area, generally meet the duties requirements for the administrative exemption.

3. Proposed regulation § 541.606 – Board, lodging or other facilities. As discussed in Section III, above, proposed regulation § 541.606(b) incorporates by reference unspecified portions of DOL Part 531 that “defin[e] what constitutes ‘board, lodging, or other facilities.’” This approach of directing Senate employees and employing offices to unspecified sections of inapplicable executive branch⁶ regulations is unhelpful. The SCCE recommends a different approach: include within the Senate-specific body of regulations the meaning of the phrase “other facilities” as well as Senate-specific examples of items that might constitute “other facilities” that do not count towards “minimum salary” for assessing exempt status. For example:

The term “other facilities” refers to items similar to board and lodging, such as meals, dormitory rooms, and transit fare media given to employees pursuant to the public transportation subsidy program.

4. Proposed regulation § 541.710 – Employees of public agencies. The phrase, “public agency” is defined in S553.1(c) of the existing Senate FLSA regulations to mean an “employing office” as that term is defined in Senate regulation S501.102(e). Since all employees covered by the proposed regulations are employees of employing offices, the SCCE recommends deleting all references to “public agency” in proposed regulation § 541.710 and replacing the current heading with a more helpful heading as follows: **S541.710 Effect of certain reductions on exempt employee pay.**

V. Other Edits and Corrections

The SCCE recommends the following additional edits to the regulations.

1. As explained in existing Senate regulation S541.01, the exemptions provided in section 13(a)(1) of the FLSA apply to covered Senate employees “by virtue of” 2 U.S.C. § 1361(e)(1), see Senate FLSA Reg. S541.01 (citing CAA section 225 at subsection (f)(1), which now appears as subsection (e)(1)). Similarly, the exemptions provided in section 13(a)(17) of the FLSA apply to covered Senate employees through CAA section 225(e)(1). See 2 U.S.C. § 1361(e)(1). An explanation of the statutory basis for applying the FLSA exemptions to the Senate is absent from the proposed regulations, and the SCCE recommends that the explanation be restored in proposed regulation § 541.0(a), as shown in blue below:

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides . . . **and applies to covered employees by virtue of section 225(e)(1) of the CAA, as amended, 2 U.S.C.**

⁶ See 2 U.S.C. § 1361(e)(3) (the CAA “shall not be construed to authorize enforcement by the executive branch.”).

§ 1361(e)(1). Section 13(a)(17) of the Act provides . . . , **and applies to covered employees by virtue of section 225(e)(1) of the CAA, as amended, 2 U.S.C. § 1361(e)(1).**

2. According to proposed regulation § 541.1, “Employer, company, business, or enterprise each mean an ‘employing office’ as defined in section 101(9) of the CAA, 2 U.S.C. 1301(9) [sic].” For the reasons set forth below, this sentence is unnecessary and potentially confusing and, therefore, should be removed from the proposed regulations for the Senate.
 - a. This sentence, if retained in the final Part 541 regulations, would create a conflict with the existing definition contained in Senate regulation S501.102(e), which limits the meaning of “employer” and “employing office” to the following: “(1) the personal office of a Senator; (2) a committee of the Senate or a joint committee; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the Senate.” See Senate FLSA Reg. S501.102(e).
 - b. Even if the Board retains an explanation of the meaning of “employer” and “employing office” in the proposed regulations for the Senate, the Board should merely cross-reference existing Senate regulation S501.102(e).
 - c. An employing office of the Senate is not a “company, business, or enterprise.” To the extent that it would be appropriate to substitute the term “employing office” for any of those three terms in the proposed regulations for the Senate, the SCCE has done so in the Attachment.
3. Proposed regulation § 541.1 cites “2 U.S.C. 1301(3) through (8)” and “2 U.S.C. 1301(9).” The correct citations are 2 U.S.C. § 1301(a)(3) through (a)(8) and 2 U.S.C. § 1301(a)(9).
4. In the heading for Subpart G replace subsection 541.607 with **541.606** because subsection 541.607 does not exist in the proposed regulations.
5. Move the heading for Subpart H to the end of Subpart G.
6. Other typographical corrections as shown in the Attachment.

Respectfully submitted,

Claudia Kostel

Claudia A. Kostel
Senate Chief Counsel for Employment

Enclosure

PROPOSED OVERTIME EXEMPTION

REGULATIONS ([Senate](#))

Part [§541](#)—Defining and Delimiting the Exemptions

for Executive, Administrative,

Professional, and Computer Employees

SUBPART A—GENERAL REGULATIONS

Sec.

[§541.0](#) Introductory statement.

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CONGRESSIONAL RECORD 3

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[SUBPART F—OUTSIDE SALES EMPLOYEES]

[[§541.500](#) General rule for outside sales employees.]

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[[§541.502](#) Away from employer’s place of business.]

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[§541.601](#) Highly compensated employees.

[§541.602](#) Salary basis.

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[§541.606](#) Board, lodging or other facilities.

SUBPART H—DEFINITIONS AND MISCELLANEOUS PROVISIONS

[§541.700](#) Primary duty.

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S541.708 Combination exemptions.

S541.710 Employees of public agencies.

SUBPART A—GENERAL REGULATIONS

~~(§§ 5~~ S541.0–541.4)

§ S541.0 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act’s minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), and applies to covered employees by virtue of section 225(e)(1) of the CAA, as amended, 2 U.S.C. § 1361(e)(1). Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees, and applies to covered employees by virtue of section 225(e)(1) of the CAA, as amended, 2 U.S.C. § 1361(e)(1).

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative

employees, subpart C; professional employees, subpart D; computer employees, subpart E. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions. (c) Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools). The equal pay provisions in section 6(d) of the Fair Labor Standards Act are administered and enforced by the Office of Congressional Workplace Rights.

§ S541.1 Terms used in regulations.

Act means the Fair Labor Standards Act of 1938, as amended.
CAA means Congressional Accountability Act of 1995, as amended.
Office means the Office of Congressional

Workplace Rights. Employee means a “covered employee” as defined in section [S501.102\(c\) of these regulations](#); ~~101(3) through (8) of the CAA, 2 U.S.C. § 1301(a)(3) through (a)(8)~~, but not an “intern” as defined in section [S501.102\(h\) of these regulations](#); ~~203(a)(2) of the CAA, 2 U.S.C. 1313(a)(2)~~. Employer, company, business, or enterprise each mean an “employing office” as defined in [S501.102\(e\) of these regulations](#); ~~section 101(9) of the CAA, 2 U.S.C. § 1301(a)(9)~~.

§ ~~S~~541.2 Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.

~~§-5~~ § ~~S~~541.3 Scope of the section 13(a)(1) exemptions.

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt “blue collar” employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships

and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims;

preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the [enterprise employing office](#) in which the employee is employed or a customarily recognized department or subdivision thereof as required under [§ 5§ S541.100](#).

Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required

under [§ 5§ S541.200](#).

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance 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 or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under [§ 5§ S541.300](#).

Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

[§ 5§ S541.4](#) **Other laws and collective bargaining agreements.**

The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. ~~Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly~~ [For example](#), employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory

minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.

SUBPART B—EXECUTIVE EMPLOYEES

(~~§ 5~~ ~~§ S~~541.100–~~S~~541.106)

~~§ 5~~ ~~§ S~~541.100 General rule for executive employees.

- (a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:
- (1) Compensated on a salary basis pursuant to ~~§ 5~~ ~~§ S~~541.600 at a rate of not less than \$684 per week, exclusive of board, lodging or other facilities;
 - (2) Whose primary duty is management of the ~~enterprise~~[employing office](#) in which the employee is employed or of a customarily recognized department or subdivision thereof;
 - (3) Who customarily and regularly directs the work of two or more other employees; and
 - (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement,

promotion or any other change of status of other employees are given particular weight.

(b) The phrase “salary basis” is defined at ~~§ 5~~ ~~§ S~~541.602; “board, lodging or other facilities” is defined at ~~§ 5~~ ~~§ S~~541.606; “primary duty” is defined at ~~§ 5~~ ~~§ S~~541.700; and “customarily and regularly” is defined at ~~§ 5~~ ~~§ S~~541.701.

~~§ 5~~ ~~§ S~~541.102 Management.

Generally, “management” 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.

~~§ 5~~ § 5 **41.103 Department or subdivision.**

(a) The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a large employer’s 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.

(b) When an employing office ~~enterprise~~ has more than one ~~establishment~~location, the employee in charge of each ~~establishment~~ location may be considered in charge of a recognized subdivision of the ~~enterprise~~employing office.

(c) 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.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

~~§ 5~~ § 5 **41.104 Two or more other employees.**

(a) To qualify as an exempt executive under ~~§ 5~~ § 5 41.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase “two or more other employees” means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

(b) 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. Thus, for example, a department with five full-time nonexempt workers may have up to

two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee cannot be credited more than once for different executives.

Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

§-5§ S541.105 Particular weight.

To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions

and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and 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.

§-5§ S541.106 Concurrent duties.

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of §-5§ S541.100 are otherwise met. Whether an employee meets the requirements of §-5§ S541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in §-5§ S541.700. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for

defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials

for the job, and handles requests from the prime contractor.

SUBPART C—ADMINISTRATIVE EMPLOYEES

(~~§ 5~~ ~~§ S~~541.200–~~S~~541.204)

~~§ 5~~ ~~§ S~~541.200 General rule for administrative employees.

(a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee:

- (1) Compensated on a salary or fee basis pursuant to ~~§ 5~~ ~~§ S~~541.600 at a rate of not less than \$684 per week, exclusive of board, lodging or other facilities;
- (2) Whose primary duty is 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
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term “salary basis” is defined at ~~§ 5~~ ~~§ S~~541.602; “fee basis” is defined at ~~§ 5~~ ~~§ S~~541.605; “board, lodging or other facilities” is defined at ~~§ 5~~ ~~§ S~~541.606; and “primary duty” is defined at ~~§ 5~~ ~~§ S~~541.700.

~~§ 5~~ ~~§ S~~541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must

be the performance of work directly related to the management or general business operations of the employer or the employer's customers.

The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to

assisting with the running or servicing of the business employing office, as distinguished, for example, from

working on a manufacturing production line or selling a product in a retail or service establishment.

(b) 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. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) 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, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the 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. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises.

Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance 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~~employing office; whether the employee performs work that affects ~~business~~office operations to a substantial degree, even if the employee's assignments are related to operation of a particular ~~segment~~department or division of the ~~business~~employing office; 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; whether the employee has authority to negotiate and bind the ~~company~~employing office on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term ~~business~~ objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the ~~company~~employing office in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent

judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the ~~credit manager~~administrative director of an ~~large corporation~~employing office may be subject to review by ~~higher company~~other management officials who may approve or disapprove these policies. The ~~management consultant~~department director who has made a study of the operations of a ~~business~~the department and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors

before it is ~~submitted to the client~~ [approved](#).

(d) An employer's volume of ~~business work~~ [may](#) make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) 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. See also ~~§ 5§ S5~~ [§ 5§ S5](#)41.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) 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. For example, a messenger who is entrusted with carrying large sums of money

does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. 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.

~~§ 5§ S5~~ [§ 5§ S5](#)41.203 **Administrative exemption examples.**

(a) ~~[RESERVED] Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.~~

(b) ~~[RESERVED] Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's~~

~~income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.~~

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as setting up ~~purchasing, selling~~ or closing all or part of ~~the~~ a Senate office business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to ~~a business owner~~ the head of an employing office or a member of senior management executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding

matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a ~~business~~ an employing office and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the employing office company.

The minimum standards are usually set by the exempt human resources manager or other ~~company~~ employing office officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other employing office ~~company~~ officials. Thus,

when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants,

such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the employing office ~~company~~ on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for ~~raw~~-materials in excess of the contemplated ~~plant~~-needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work

involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

~~(i)-[RESERVED] Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.~~

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations

of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

[\(k\) Employees who perform public relations work for an employing office, such as developing and implementing a media strategy or managing and coordinating media contacts and activities for the office, generally meet the duties requirements for the administrative exemption.](#)

[\(l\) Employees who perform research and government relations functions for an employing office, such as devising and formulating legislative initiatives, serving as a Senator's principal advisor on legislative matters, and working with governmental and non-governmental offices to gather support for particular legislative proposals, generally meet the duties requirements for the administrative exemption.](#)

[\(m\) Employees who act as a Senator's liaison to government, community and constituent groups and leaders in assigned geographic or issue areas and who research and advise the Senator on community, legislative or other developments in the assigned area, generally meet the duties requirements for the administrative exemption.](#)

~~§ 5~~ **§ 5541.204 Educational establishments.**

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act also includes employees:

- (1) Compensated on a salary or fee basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
- (2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in

secondary education. The term “other educational establishment” includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state’s educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase “performing administrative functions directly related to academic instruction or training” means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations.

Such academic administrative functions include operations directly in the field of education.

Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) 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 administration of the mathematics department, the English department, the foreign language department, etc.; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under ~~§ 5~~ [§ 541.200](#) or under other sections

of this part, provided the requirements for such exemptions are met.

SUBPART D—PROFESSIONAL EMPLOYEES

(~~§ 5~~ ~~§ S~~541.300–~~§~~541.304)

~~§ 5~~ ~~§ S~~541.300 General rule for professional employees.

(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis pursuant to ~~§ 5~~ ~~§ S~~541.600 at a rate of not less than \$684 per week, exclusive of board, lodging or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term “salary basis” is defined at ~~§ 5~~ ~~§ S~~541.602; “fee basis” is defined at ~~§ 5~~ ~~§ S~~541.605; “board, lodging or other facilities” is defined at ~~§ 5~~ ~~§ S~~541.606; and “primary duty” is defined at ~~§ 5~~ ~~§ S~~541.700.

~~§ 5~~ ~~§ S~~541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee’s primary duty must be the performance of work requiring

advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase “work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge 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.

(c) The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical,

chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is also 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. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily

may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(e)(1) ~~[RESERVED] Registered or certified medical technologists.~~

~~Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.~~

(2) ~~[RESERVED] Nurses. Registered nurses who are registered~~

~~by the appropriate State examining board generally meet the duties requirements for the learned professional exemption.~~

~~Licensed practical nurses and other similar health care employees, however, generally~~

~~do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.~~

(3) ~~[RESERVED] Dental hygienists. Dental hygienists~~

~~who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.~~

(4) ~~[RESERVED] Physician assistants. Physician assistants~~

~~who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.~~

(5) Accountants. Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt

learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) ~~[RESERVED] Chefs. Chefs, such as executive chefs~~

~~and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.~~

(7) Paralegals. Paralegals and legal assistants

generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal

to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

~~(8) [RESERVED] Athletic trainers. Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.~~

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations ~~similar to those listed in paragraphs (e)(1), (e)(3), (e)(4) and (e)(8) of this section~~ also may be created in the future. Such organizations may develop ~~similar~~ specialized curriculums and certification

programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

~~§ 5~~ § 5 41.302 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

(b) To qualify for exemption as a creative professional, the work performed must be "in a recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting and the graphic arts.

(c) The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore,

must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an “animator” of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media 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. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

~~§ 5~~ [§ 5](#) 41.303 Teachers.

(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term “educational

establishment” is defined in

~~§ 5~~ [§ S541.204\(b\)](#).

(b) Exempt teachers include, but are not limited to: Regular academic teachers; teachers of kindergarten or nursery school pupils; 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 instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools’ responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher’s certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or

unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher’s certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of ~~§ 5~~ [§ S541.300](#) and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

~~§ 5~~ [§ S541.304](#) **Practice of law ~~or medicine~~.**

(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act also shall mean:

- ~~(1) Any employee who is the holder of a valid license or certificate permitting the practice of law ~~or medicine or any of their branches~~ and is actually engaged in the practice thereof; and~~
- ~~(2) Any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the~~

~~practice of the profession.~~

~~(b) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term “physicians” includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).~~

(c) Employees engaged in internship ~~or resident~~ programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship ~~or resident~~ programs after the earning of the appropriate degree required for the general practice of their profession.

(d) The requirements of ~~§ 5~~ [§ S541.300](#) and subpart G (salary requirements) of this part do not apply to the employees described in this section.

SUBPART E—COMPUTER EMPLOYEES

~~(§ 5~~ [§ S541.400–S541.402](#))

~~§ 5~~ [§ S541.400](#) **General rule for computer employees.**

(a) Computer systems analysts, computer programmers, software engineers or other

similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities.

The section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate of not less than \$27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) 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;
- (3) The design, documentation, testing, creation or modification of computer programs

related to machine operating systems;

or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The term “salary basis” is defined at

~~§ 5§ S5~~41.602; “fee basis” is defined at ~~§ 5§ S5~~41.605;

“board, lodging or other facilities” is defined

at ~~§ 5§ S5~~41.606; and “primary duty” is defined at

~~§ 5§ S5~~41.700.

~~§ 5§ S5~~**41.401 Computer manufacture and repair.**

The exemption for employees in computer occupations 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 ~~§ 5§ S5~~41.400(b), are also not exempt computer professionals.

~~§ 5§ S5~~**41.402 Executive and administrative computer employees.**

Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive

and administrative duties which qualify the employees for exemption under subpart B or subpart C of this part. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer’s customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption.

SUBPART G—SALARY REQUIREMENTS

~~(§ 5§ S5~~**41.600–**~~§541.6067)~~

~~§ 5§ S5~~**41.600 Amount of salary required.**

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging

or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in ~~§ 5~~ [§ 541.605](#).

(b) The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. For example, the \$684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than \$1,368, semimonthly on a salary basis of not less than \$1,482, or monthly on a salary basis of not less than \$2,964. However, the shortest period of payment that will meet this compensation requirement is one week.

(c) In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in ~~§ 5~~ [§ 541.204\(a\)\(1\)](#).

(d) In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than \$27.63 an hour, as provided in ~~§ 5~~ [§ 541.400\(b\)](#).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (see ~~§ 5~~ [§ 541.303](#)); employees who hold a

valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (see ~~§ 5~~ [§ 541.304](#)); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (see ~~§ 5~~ [§ 541.304](#)). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

~~**SUBPART H—DEFINITIONS AND MISCELLANEOUS PROVISIONS (§§541.700–541.710)**~~

~~§ 5~~ [§ 541.601](#) **Highly compensated employees.**

(a)(1) Beginning on January 1, 2020, an employee with total annual compensation of at least \$107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.

(2) Where the annual period covers periods both prior to and after January 1, 2020, the

amount of total annual compensation due will be determined on a proportional basis.

(b)(1) "Total annual compensation" must include at least \$684 per week paid on a salary or fee basis as set forth in ~~§ 5~~ [§ 541.602](#) and [541.605](#), except that ~~§ 5~~ [§ 541.602\(a\)\(3\)](#) shall not apply to highly compensated employees.

Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in ~~§ 5~~ [§ 541.606](#), and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the amount specified in the applicable subsection of paragraph (a) by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, for a 52-week period beginning January 1, 2020, an employee may earn \$90,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn \$17,432 in

commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns \$12,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least \$5,432 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C, or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a pro rata portion of the minimum amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week

period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year.

If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under ~~§ 5~~ [§ 5](#) 41.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating

engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

~~§ 5~~ [§ 5](#) 41.602 **Salary basis.**

(a) *General rule.* An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

(2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the [business employing office](#). If

the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(3) Up to ten percent of the salary amount required by ~~§ 5~~ [§ 5](#) 41.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. This provision does not apply to highly compensated employees under ~~§ 5~~ [§ 5](#) 41.601.

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by ~~§ 5~~ [§ 5](#) 41.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

(ii) An employee who does not work a full 52-week period for the employer, either because

the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment.

(b) *Exceptions.* The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in

accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.

The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder.

Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement

benefits. ~~Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.~~

(3) While an employer cannot make deductions

from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a

generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.

However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph

(b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

~~§ 5~~ § 5 **41.603 Effect of improper deductions from salary.**

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The 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 discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location

of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(b) If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at an [employing office's](#) ~~company~~ facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

(c) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in ~~§ 5~~ [§ 541.602\(a\)](#) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

(e) This section shall not be construed in an unduly technical manner so as to defeat

the exemption.

~~§ 5~~ § 5 **41.604 Minimum guarantee plus extras.**

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least \$684 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least \$684 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$684 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating

the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least \$725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid \$210 per shift without violating the \$684-per-week salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

~~§ 5~~ [§ 5](#) **41.605 Fee basis.**

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a “fee basis” within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion.

These payments resemble piecework payments with the important distinction that generally a “fee” is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by ~~§ 5~~ [§ 5](#) 41.600(a) and 541.602(a), if the employee worked 40 hours. Thus, an artist paid \$350 for a picture that took 20 hours to complete

meets the \$684 minimum salary requirement for exemption since earnings at this rate would yield the artist \$700 if 40 hours were worked.

~~§ 5~~ [§ 5](#) **41.606 Board, lodging or other facilities.**

(a) To qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in ~~§ 5~~ [§ 5](#) 41.600, “exclusive of board, lodging or other facilities.” The phrase “exclusive of board, lodging or other facilities” means “free and clear” or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption under this part 541. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.

(b) ~~Regulations defining what constitutes “board, lodging, or other facilities” are contained in 29 CFR part 531 which are incorporated herein.~~ The term “other facilities” refers to items similar to board and lodging, such as meals, dormitory

[rooms, and transit fare media given to employees pursuant to the public transportation subsidy program.](#)

SUBPART H—DEFINITIONS AND MISCELLANEOUS

PROVISIONS (§§541.700–

541.710)

§ 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee’s “primary duty” must be the performance of exempt work. The term “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. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) 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, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

§ 541.701 Customarily and regularly.

The phrase “customarily and regularly” means a frequency that must be greater than occasional but which, of course, may be less

than constant. Tasks or work performed “customarily and regularly” includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

~~§ 5~~ § 541.702 Exempt and nonexempt work.

The term “exempt work” means all work described in ~~§ 5~~ § 541.100, § 541.101, § 541.200, § 541.300, § 541.301, § 541.302, § 541.303, § 541.304, and § 541.400, and the activities directly and closely related to such work. All other work is considered “nonexempt.”

~~§ 5~~ § 541.703 Directly and closely related.

(a) Work that is “directly and closely related” to the performance of exempt work is also considered exempt work. The phrase “directly and closely related” means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, “directly and closely related” work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee’s exempt work cannot be performed properly. Work “directly and closely related” to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or

presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not “directly and closely related” if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

- (1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive’s function of managing a department and supervising employees.
- (2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.
- (3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.
- (4) A supervisor who sets up a machine

may be engaged in exempt work, depending upon the nature of the industry and the operation.

In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform.

In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive

notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A ~~credit~~ manager who makes and administers the ~~credit~~ budget policy of the employ~~ing~~ office, establishes ~~credit~~ spending limits for ~~customers~~ the employ~~ing~~ office, and authorizes ~~expenditures~~ the shipment of orders on credit, and makes decisions on whether to exceed ~~credit limits~~ would be performing work exempt under ~~§ 5§~~ S541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for

analysis, and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

§ 5 § S541.704 Use of manuals.

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

§ 5 § S541.705 Trainees.

The executive, administrative, professional, and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, or computer employee.

§ 5 § S541.706 Emergencies.

(a) An exempt employee will not lose the

exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

(b) An "emergency" does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

(1) ~~[RESERVED] A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a bona fide executive.~~

(2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

(3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the office

location ~~establishment~~ and of the executive's department, the nature of the ~~industry~~ work performed by the employing office, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

(4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

~~§ 5~~ § 5 **41.707 Occasional tasks.**

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: Whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice for the exempt employee to perform the task.

~~§ 5~~ § 5 **41.708 Combination exemptions.**

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

~~§ 5~~ § 5 **41.710 ~~Employees of public agencies~~ Effect of certain deductions on exempt employee pay.**

(a) An employee ~~of a public agency~~ who otherwise meets the salary basis requirements of ~~§ 5~~ § 5 41.602 shall not be disqualified from exemption under § 5 41.100, 5 41.200, 5 41.300 or 5 41.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the ~~public agency~~ employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less

than one work-day when accrued leave is not used by an employee because:

- (1) Permission for its use has not been sought or has been sought and denied;
- (2) Accrued leave has been exhausted; or
- (3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee ~~of a public agency~~ for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.