

**Determinations of Nonexempt and Exempt Employees  
in the Fair Labor Standards Act (the “FLSA”)**

The FLSA, 29 U.S.C. § 201, *et seq.*, requires the State to pay nonexempt employees *on time* for hours worked at the federal minimum wage rate (\$7.25), and overtime pay at time and one-half the minimum wage rate (\$10.88) for hours worked in excess of 40 hours per workweek even in the absence of an appropriation.<sup>1</sup> These pay provisions do not apply to certain employees because they are exempted from FLSA coverage.

The FLSA provides specific exemption criteria across select groups. There are also general principles that agencies must observe in making their exemption determinations. See [5 CFR § 551.202](#) (attached). Noteworthy principles include a presumption of non-exemption unless an agency correctly designates otherwise, and those criteria must be narrowly construed to apply only to those who are clearly within the terms and spirit of the exemption.

**Exempt Employees:** Six major exemption categories are highlighted below. Hyperlinks to U.S. Department of Labor fact sheets provide further discussion of each exemption.

<a href="#"><i>Elected, Appointed, or Certain Personal or Legislative Employees Exemption</i></a>	Employees who are (a) not subject to civil service law of the State; <u>and</u> who (b) hold elected office or are members of the personal or policy making staffs of elected officeholders; <u>and</u> (c) are appointed by an officeholder to serve on a policymaking level, <u>or</u> are employees in the legislative branch or legislative body, political subdivision, or agency and are not employed by the legislative library of the State, political subdivision, or agency.
<a href="#">Executive Exemption</a>	Employees (a) paid on a salary basis of not less than \$455 per week; <u>and</u> (b) whose primary duty is to manage an enterprise, department or subdivision; <u>and</u> who (c) regularly supervise two or more full-time employees or their equivalent; <u>and</u> (d) has the authority to hire or fire, or influence with particular weight with regard to an employee’s promotions or any other status change.
<a href="#">Administrative Exemption</a>	Employees (a) paid on a salary basis of not less than \$455 per week; <u>and</u> (b) whose primary duty is office or non-manual work that is directly related to assisting with the running or servicing of the enterprise; <u>and</u> (c) which include exercise of discretion and independent judgment on matters of significance (e.g. executive or administrative assistants in human resources who implement or interpret personnel policies but not those who only process forms or paperwork). On (c), factors to consider include but are not limited to whether the employee has authority to formulate, affect, interpret, or implement management or operating policies, or whether the employee can waive or deviate from established policies without prior approval.
<a href="#">Professional Exemption</a>	Employees (a) paid on a salary basis of not less than \$455 per week; <u>and</u> (b) whose primary duty requires advanced knowledge in a field of science or learning, (c) which was acquired through specialized academic training (e.g. attorneys, accountants, doctors, teachers, scientists, pharmacists). The best evidence of (c) is having the appropriate academic degree.
<a href="#">Highly Compensated Exemption</a>	Employees who (a) earn a total annual compensation of \$100,000 or more, which includes at least \$455 per week; <u>and</u> (b) whose primary duty includes performing office or non-manual work, <u>and</u> (c) customarily and regularly performs <i>at least one but not all</i> of the exempt duties or responsibilities of an

<sup>1</sup> *AFSCME v. Commonwealth of Pennsylvania*, 986 A.2d 63, 78 (Pa. 2009); see also *White v. Davis*, 68 P.3d 74, 107 (Cal. 2003) (“[I]n order to comply with the FLSA, the state, during a budget impasse, must *timely* pay nonexempt employees who do not work overtime at least at the minimum wage rate ...”) (emphasis added).

	exempt executive, administrative or professional employee (described above).
<a href="#"><u>Computer-Related Occupations Exemption</u></a>	Employees (a) paid on a salary basis of not less than \$455 per week <u>or</u> at an hourly rate of not less than \$27.63; <u>and</u> (b) are employed as either a computer systems analyst, or programmer, or software engineer, <u>or</u> whose work requires duties primarily consisting of tasks such as development, modification, testing, or creation of programs and operating systems.

**Nonexempt Employees:** Beyond the expressed exemptions, the FLSA defines employees broadly. 29 U.S.C. § 203(e). Generally, the FLSA’s pay provisions apply to hourly employees, “blue collar” workers, first responders, such as police officers and firefighters, and many clerical workers.

[Blue collar workers](#) are manual laborers or those who perform work involving repetitive operations with their hands, physical skill and energy. They will have gained skills and knowledge required for their work through apprenticeships or on-the-job training. Examples include non-management employees in production, maintenance, and construction, such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, and construction workers.

[First responders](#) typically are not exempt because their primary duty is not management. They include employees engaged in fire protection and law enforcement activities. Other examples include detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees 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; and other similar work are not exempt.

Clerical workers include those whose primary activities involve secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. Examples include personnel clerks; accounting clerks; bookkeepers; and inspectors whose work primarily involves the application of well-established techniques, procedures, or standards (e.g. instructions set forth in a manual).

**Pay Requirements:** Dependent upon whether an employee is exempt or nonexempt, and whether an agency requires an employee to continue to work, the FLSA’s pay provisions should apply as follows.

	<i>FLSA Nonexempt and Working</i>	<i>FLSA Exempt, Whether Working or Not</i>	<i>FLSA Nonexempt and Not Working</i>
Minimum Wage (\$7.25)	Yes	No	No, unless asked to work
Overtime <sup>2</sup> (\$10.88)	Yes	No	No, unless asked to work

<sup>2</sup> FLSA permits public employers to compensate employees’ overtime hours by providing for compensatory time that accrues at one and one-half the normal hourly rate, as long as this was a subject of collective bargaining and other conditions are met. See 29 U.S.C. § 207(o).

## 5 CFR § 551.202, GENERAL PRINCIPLES

*In all exemption determinations, the agency must observe the following principles:*

- (a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM [the United States Office of Personnel Management]. The agency must designate an employee FLSA exempt when the agency correctly determines that the employee meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM.
- (b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
- (c) The burden of proof rests with the agency that asserts the exemption.
- (d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.
- (e) While established position descriptions and titles may assist in making initial FLSA exemption determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee.
- (f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. Employees who perform a combination of exempt duties set forth in this regulation may also qualify for exemption. For example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption, i.e., work that is exempt under one section of this part will not defeat the exemption under any other section.
- (g) Failure to meet the criteria for exemption under what might appear to be the most obvious criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative criteria may be performing exempt executive work.
- (h) Although it is normally feasible and more convenient to identify a single exemption category, this is not always appropriate. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee's primary duty may involve two categories which are intermingled and difficult to segregate. This does not preclude designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria. The agency is responsible for showing and documenting that the work as a whole clearly meets one or more of the exemption criteria.