

**Introduction to  
The Fair Labor Standards Act  
and  
the Public Sector**

School of Government  
February 19-20, 2019  
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**Exempt Employees**

1. Must be paid on a salary-basis
2. Must earn a minimum weekly salary
3. Must satisfy one of three duties tests
  - Executive
  - Administrative
  - Professional

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**Salary Basis**

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## Minimum Weekly Salary

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**Now and for the immediate future**  
**\$455 per week or \$23,660 annually**

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**January 16, 2019:**  
US DOL sends a new proposed rule to OMB:

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## **Exempt Employees**

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- 1. Must be paid on a salary-basis**
- 2. Must earn a minimum weekly salary**
- 3. Must satisfy one of three duties tests**

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## **Must satisfy one of 3 duties tests**

- Executive
- Administrative
- Professional

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## **Executive Duties Test**

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**1. Management as primary duty**

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**2. Supervision of two employees**

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**3. Hiring, firing *or* promotion authority  
or  
recommendations carry weight**

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## Administrative Duties Test

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**Primary duty:**  
**office or nonmanual work**  
directly related  
to the  
**management or**  
**general business operations**  
of the employer

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**Work includes exercise of**  
**discretion**  
**and**  
**independent judgment**  
**on matters of significance**

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## Directly Related to Management or General Biz Operations

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- Finance, Accounting, Auditing
- Purchasing & Procurement
- Safety of the Government Premises
- Risk Management
- Occupational Health
- Public Information
- Advertising & Marketing
- Computer Network, Database  
and Internet Administration
- Human Resources & Employee Benefits

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## Human Resources

- Human resources managers who formulate,  
interpret or implement policies = exempt
- Personnel clerks who “screen” applicants to  
obtain data regarding minimum qualifications  
and fitness for employment = nonexempt

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**Primary Duty Must Involve:**

**Discretion and Independent Judgment  
on Matters of Significance to the Employer**

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1. Formulates or implements management policies or operating practices
2. Recommends decisions with a significant impact on general business operations or finances
3. Involved in planning organization's long- or short-term objectives
4. Freedom from direct supervision
5. Trouble-shooting or problem-solving responsibilities
6. Authority to set budgets
7. Degree of public contact
8. Advertising and promotion work

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**Discretion and Independent Judgment  
Does Not Include:**

- ☐ Applying well-established techniques, procedures or specific standards described in manuals or other sources
- ☐ Recording or tabulating data

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**Some Government Positions Likely to Satisfy the Administrative Duties Test**

- HR Manager
- Purchasing Agent
- Admin. Asst to Manager, Director, VP
- Ass't Manager, Town Administrator, Dep't or Division Heads
- Law Enforcement Officers of Higher Rank
- Fire Battalion Chiefs
- College admissions officers and recruiters
- College financial aid counselors

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**29 CFR 541.3(b)(1):**

**the** “exemptions 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,

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**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.”

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## The Production Worker Analogy

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### Staff or Production Worker?

“An employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.”

The reason an organization exists

The mission work of a department or agency

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## Academic Administrative Exemption

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**Primary Duty:**

**Performing administrative functions  
directly related to  
academic instruction**

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- Administrative work must be more than just “office or non-manual work”
- No discretion and independent judgment requirement

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**Academic Administrative Exemption:**  
Some DOL Examples

- Superintendent or head of a school system;
- Ass't superintendents responsible for
  - curriculum administration
  - teaching
  - testing of student achievement
  - maintaining academic standards

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**College and university department heads**

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**Academic or guidance counselors  
who administer tests or  
advise students about  
academic problems or degree req'ts.**

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**Remember . . . .**

**Job Title Not Determinative**

**Look to Actual Duties of Position**

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## **The Professional Exemption**

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## **The Professional Exemption**

### **Four Separate Tests:**

**Learned Professional**

**Teacher**

**Computer Professional**

**Creative or Artistic Professional**

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## **The Learned Professional**

1. Employee must perform work requiring advanced knowledge
2. Advanced knowledge must be in a field of science or learning
3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

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### **The Learned Professional**

With 3 - 4 year pre-professional degree programs and appropriate certification:

**Medical Technologists**

**Dental Hygienists**

**Physician Assistants**

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### **Professional Exemption for Teachers**

- Salary basis and minimum salary tests do not apply.
- “Teaching, tutoring, instructing or lecturing in the activity of imparting knowledge”
- Must be in a public school, community college or four-year college or university

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### **Professional Computer Employee**

Employee must be paid

- on a salary-basis, or
- at a minimum rate of \$27.63/hour

*Only Congress may change this rate.*

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### **Professional Computer Employee**

#### **Work must focus on:**

1. The application of systems analysis, techniques and procedures to determine hardware, software or system functional specifications

*This may include consulting with users*

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**OR**

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### **Professional Computer Employee**

- A. the design, development, documentation, analysis, creation, testing or modification of computer systems or programs,
- either based on and related to user or system design specifications, or
  - related to machine operating systems

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## Compensable Time

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### Overtime

Nonexempt employee's usual schedule is  
Mon. – Fri. 8:30 – 5 with a ½ hour unpaid lunch

Employee:

- takes 8 hours paid leave on Mon.
- works her usual schedule Tues. – Fri.
- works 8 hours on Sat. per supervisor's request

**Does Employee get overtime for the Sat. hours?**

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### Straight Time v. Overtime

Ella is scheduled to work 37.5 hours/week.

During busy periods, Ella works 40,  
sometimes even 45 hours in a week.

**How is that additional time to be compensated?**

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### Straight Time v. Overtime

Tom is hired to work 20 hours per week.

**Must Tom be paid overtime for any hours over 20 that he works?**

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### Work or Not Work?



Bill, a nonexempt employee, comes into work a half-hour before he is scheduled to start in order to “catch up” on his work load.

**Does Bill have to be paid for that half-hour?**

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Employee's usual schedule is Mon. – Fri. 8:30 – 5 with a ½ hour unpaid lunch.

Employer rule:

**No O/T w/o prior authorization**

Employee:

- comes in ½-hr. early each day that week
- leaves at scheduled time

**Does Employee get overtime for the extra hours?**

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### Hours Worked:

- All time during which an employee is required to be on the employer's premises or at some other assigned workplace; and
- All time during which the employee is "suffered or permitted to work."

See 29 U.S.C. 203(g); 29 CFR §§ 785.7, 785.11

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### On-Call Time

**Time is compensable only when it is spent predominantly for the employer's benefit.**

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### Compensable On-Call Time

- All of the time an employee must be
  - on the employer's property, or
  - at some other assigned place;
- All of the time when an employee is "suffered or permitted to work."

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**Employee remains in fixed location.**

**Employee must remain at home.**

**Employee must leave cell number.**

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**Factors**

**How quickly must employee call in?**

**How quickly must employee report  
back to work?**

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**Bona Fide Meal Periods  
29 CFR § 785.19**

- **Must be at least 30 minutes.**
- **Employee must be completely relieved  
of duties.**
- **Employee does not have to be allowed  
to leave the premises.**

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**Travel Time**  
**CFR § 785.39**

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- Buena Vista County is sending four nonexempt employees to a SOG workshop in Chapel Hill.
- The workshop runs from 8:30 – 3:30.
- Employees’ usual hours are 8:30 – 5:30.
- The trip to Chapel Hill takes 2 hours.

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- Two employees drive together.
  - They leave at 6:30 am.
  - One of the two does all the driving.
1. Is the travel time compensable for either one of them?
  2. Is their travel time on the return trip compensable?

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- One employee drives to Chapel Hill on Sunday afternoon.
- He leaves Buena Vista at 3 pm.
- The fourth employee takes the train that leaves Sunday at 3 pm.
- What if the employee takes a train leaving at 7 pm on Sunday?

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### Travel Time CFR § 785.39

- Travel away from the workplace is during working hours is compensable.
- Travel time is worktime not only on regular working days during normal working hours but also during the corresponding hours on nonworking days.
- Time spent in traveling outside of regular working hours as a passenger in a car or on a plane is not worktime.
- Work performed while traveling is compensable. An employee who drives is working while riding.

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## Overtime and Comp Time

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### **Second Job with the Same Employer**

**Employee takes second job in Parks & Rec.**

**Schedule: MWF 6 – 9 pm.**

**Does Employee get overtime?**

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### **Comp Time**

- Rate: 1½ hours paid time off for every hour physically worked over 40
- Statutory Limit: 240 hours
- Public Safety Limit: 480 hours

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### **Comp Time**

- Employee agreement needed
- Cash-out at termination
- May require employee to use comp time before using other paid leave

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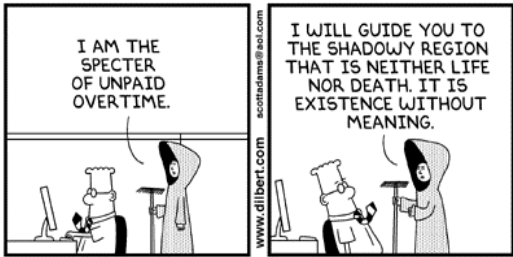
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## Public Safety Issues




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## The Fewer Than Five Rule

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### LEOs and Firefighters: The 207(k) Exemption

- **Law Enforcement:**
  - 171 hours in 28-day cycle
- **Firefighters:**
  - 212 hours in 28-day cycle

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### Work Periods Between 7 & 28 Days

|         | <u>LEOs</u> | <u>Fire Protection</u> |
|---------|-------------|------------------------|
| 28 days | 171 hrs.    | 212 hrs.               |
| 14 days | 86 hrs.     | 106 hrs.               |
| 7 days  | 43 hrs.     | 53 hrs.                |

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### Establishing the 207(k) Exemption

- Requires notation in payroll records
- Notation: Schedule adopted “pursuant to section 207(k) of the FLSA and 29 CFR Part 553.”
- Does not require DOL approval
- Does not have to coincide with payroll periods

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## The Fluctuating Workweek

Use for employees whose hours regularly vary from week to week.

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### How it works . . . .

- Employee is paid a fixed salary to cover whatever hours the employee works in a given week.
- Overtime paid at  $\frac{1}{2}$  the regular rate.
- Regular rate will vary from week to week.

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## Calculating the Regular Rate

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Calculating Overtime —  
Regular Rate of Pay Includes:

- Hourly rate/salary
- Nondiscretionary bonuses
- Retroactive salary increases
- Shift differentials
- On-call pay
- Longevity pay

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Calculating Overtime —  
Regular Rate Does NOT Include:

- Overtime pay
- Travel Expenses
- Severance pay
- Value of Benefits
- Uniform allowances
- Tuition reimbursement
- Automobile allowances

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**Calculating the Regular Rate For an Hourly Employee  
in a Week with a Non-compensable On-Call Time  
Bonus**

- a. Ron works 47 hours this week.
- b. His hourly rate of pay is \$12/hour.
- c. He is on-call this weekend and is paid an additional \$75 simply for being on-call – in addition to the extra 7 hours he records for going out on a call.

***What is his regular rate?***

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*What is his regular hourly rate?*

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*What is his regular hourly rate?*

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***Regular Rate for a Nonexempt Salaried Employee***

- First, establish what salary is meant to cover. Is employee being paid for 40 hours, 37.5 hours, 45, 50?
- Is employee being paid flat salary for any hours worked?
- If employee is paid salary based on 37.5 hours then regular rate is salary divided by 37.5 and so on.

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Calculating the Regular Rate For a Nonexempt Salaried Employee in a Week with a Non-compensable On-Call Time Bonus

- a. Bob is paid \$620 per week for a 40-hour week.
- b. Bob has worked 44 hours this week.
- c. Bob is also on-call two nights during the workweek for which he is paid a bonus \$27.50 per on-call period.
- d. *What is Bob's regular rate this week?*

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Bob's hourly rate is \$15.50 ( $\$620/40$ ).  
What is Bob's regular rate this week?

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***Regular Rate for a Nonexempt Salaried Employee***

If salary covers whatever hours worked then –

- Regular rate is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than minimum wage

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**Calculating the Regular Rate For a Nonexempt Salaried Employee in a Week with a Non-compensable On-Call Time Bonus**

- a. Bob is paid \$620 per week no matter how many hours he works.
- b. Bob has worked 44 hours this week.
- c. Bob is also on-call two nights during the workweek for which he is paid a bonus \$27.50 per on-call period.
- d. *What is Bob's regular rate this week?*

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What is Bob's regular rate this week?

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**Retention Requirements**

- Payroll records: 3 years
- Records on which payroll is based: 2 years.  
This includes:
  - Time sheets
  - Wage rate sheets (pay scales)
  - Work schedules

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### Penalties

- Back wages (2 - 3 yrs)
- Liquidated damages
- Injunction
- Civil Penalty of \$2,014 per violation
- Attorney's Fees

*Can lead to criminal prosecution*

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### How an Employer Can Keep Its Exemptions Even When It Messes Up

- Have a written policy expressly prohibiting illegal deductions from exempt employee pay
- Develop a procedure to report and correct improper deductions
- Promptly reimburse employees for any improper deductions that are taken.

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