

# HOW TO MAKE EXEMPTION STATUS DETERMINATIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA)

## Prepare Analyze Conclude

### Prepare

1. *Gather* materials.
  - part 551 of title 5, Code of Federal Regulations
  - exemption criteria summary sheets
  - position description (PD)
  - position classification evaluation statement (eval. statement)
  - position classification standard
2. *Study* materials.
3. *Confirm* PD accuracy and validate classification.

### Analyze

1. *Eliminate* primary duty tests that are obviously not met.
2. *Consider* which of the remaining tests appear, initially, to be met.
3. *Summarize* the criteria for which you must identify evidence.
4. *Analyze* the PD and eval. statement.

### Conclude

1. *Develop* your conclusion.
2. *Write* your FLSA exemption status evaluation statement to support your conclusion.
3. *Review* your written analysis (the FLSA eval. statement) and confirm that the FLSA exemption status determination you made is fully supported.

## Prepare

- Have an up-to-date copy of part 551, subparts A and B, of title 5, Code of Federal Regulations.
- Review 5 CFR 551.202, General principles governing exemptions.
- Review either 5 CFR 551.203, Exemption of General Schedule employees, or 5 CFR 551.204, Exemption of Federal Wage System employees, as appropriate.
- Have up-to-date exemption criteria summary sheets..
- Verify the accuracy of the position description (e.g., interview the incumbent and supervisor) and validate the classification. Remember that the FLSA exemption status is based on the duties the employee *actually performs* (5 CFR 551.202(i)) rather than what is described in the position description.
- Carefully read the position description and position classification evaluation statement. Underline key sentences, phrases, and words.
- Once you have underlined key sentences, phrases, and words in the position description and position classification evaluation statement, you are ready to do your FLSA exemption status determination analysis.

## Analyze

To meet the **executive exemption criteria**, two tests must be met--the primary duty test and the 80 percent test.

To meet the **administrative exemption criteria**, four tests must be met--the primary duty, nonmanual work, discretion and independent judgment, and 80-percent tests.

To meet the **professional exemption criteria**, four tests must be met--the primary duty, intellectual and varied work, discretion and independent judgment, and 80-percent tests.

1. Consider the introductory paragraph and the primary duty test of each of the exemption criteria and identify those which are not met. Make a list of what must still be considered.
2. Consider which of the remaining tests appear, initially, to be met --
  - The nonmanual work test of the administrative exemption (5 CFR 551.206(b));
  - The intellectual and varied work of the professional exemption (5 CFR 551.207(b));
  - The discretion and independent judgment of the administrative and professional exemptions (5 CFR 551.206(c) and 551.207(c), respectively); and
  - The 80-percent test of the executive, administrative, and professional exemptions (5 CFR 551.205(b), 551.206(d), and 551.207(d), respectively).

The 80-percent test applies to certain employees.

(1) *For the executive, administrative, and professional exemptions:* Employees in positions properly classified in the General Schedule at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems);

(2) *For the executive exemption only:* Firefighting or law enforcement employees in positions properly classified in the General Schedule at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29, United States Code; and

(3) *For the executive exemption only:* Supervisors in positions properly classified in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

3. Summarize the criteria for which you must identify evidence through a closer reading of the position description and the position classification evaluation statement.
4. Re-read the pertinent criteria and descriptions.
5. Re-read the position description and position classification evaluation statement and annotate them with section and paragraph identification to indicate support for a specific test.
6. Re-read the general principles governing exemptions.

Remember these points:

- Each employee is presumed to be nonexempt.
- Exemption criteria must be narrowly construed.
- If the employee clearly meets the criteria for exemption (5 CFR 551.202(d)) under one or a combination of criteria (5 CFR 551.202(h)), the employee must be designated FLSA exempt.
- If there is reasonable doubt as to whether the employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

## **Conclude**

Develop your conclusion.

Write your FLSA exemption status evaluation statement to support your conclusion. This evaluation statement should accompany or become part of the position classification evaluation statement.

Review your written analysis (the FLSA eval. statement) and confirm that the FLSA exemption status determination you made is fully supported.

## 5 CFR 551.202 General principles governing exemptions.

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 one or more of the exemption criteria 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 should be designated FLSA nonexempt.

(e) There are groups of General Schedule employees who are FLSA nonexempt because they do not fit any of the exemption categories. These groups include the following:

(1) Nonsupervisory General Schedule employees in equipment operating and protective occupations, and most clerical occupations (see the definition of *participation in the executive or administrative functions of a management official* in subpart A of this part);

(2) Nonsupervisory General Schedule employees performing technician work in positions properly classified below GS-9 (or the equivalent level in other comparable white-collar pay systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent level in other comparable white-collar pay systems); and

(3) Nonsupervisory General Schedule employees at any grade level in occupations requiring highly specialized technical skills and knowledges that can be acquired only through prolonged job training and experience, such as the Air Traffic Control series, GS-2152, or the Aircraft Operations series, GS-2181, unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.

(f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. All exempt work, regardless of category, must be considered. The only restriction is that, when the requirements of one category are more stringent, the combination of exempt work must meet the more stringent requirements.

(g) Failure to meet the criteria for exemption under what might appear to be the most appropriate 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 the exemption category, this is not essential. 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.

(i) The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee.

## **5 CFR 551.203 Exemption of General Schedule employees.**

(a) *GS-4 or below.* Any employee in a position properly classified at GS-4 or below (or the equivalent level in other comparable white-collar pay systems) is nonexempt, unless the employee is subject to the foreign exemption in § 551.209.

(b) *GS-5 or above.* Any employee in a position properly classified at GS-5 or above (or the equivalent level in other comparable white-collar pay systems) is exempt only if the employee is an executive, administrative, or professional employee as defined in this subpart, unless the employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

## **5 CFR 551.204 Exemption of Federal Wage System employees**

(a) *Nonsupervisory.* A nonsupervisory employee in the Federal Wage System or in other comparable wage systems is nonexempt, unless the employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

(b) *Supervisory.* A supervisory employee in the Federal Wage System or in other comparable wage systems is exempt only if the employee is an executive employee as defined in § 551.205, unless the employee is subject to § 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or § 551.209 (the foreign exemption).

## 5 CFR 551.205 Executive exemption criteria.

**must meet 205 introduction and  
PDT -- both 205(a)(1) and (a)(2) and  
80% test, if applicable -- 205(b)**

An *executive employee* is a supervisor or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees and meets both of the following criteria:

(a) **Primary duty test.** The primary duty test is met if the employee--

(1) Has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) **80-percent test.** In addition to the primary duty test that applies to all employees, the following employees must spend 80 percent or more of the worktime in a representative workweek\* on supervisory and closely related work\* to meet the 80-percent test\*:

(1) Employees in positions properly classified in the General Schedule at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems);

(2) Firefighting or law enforcement employees in positions properly classified in the General Schedule at GS-7, GS-8, or GS-9 who are subject to section 207(k)\* of title 29, United States Code; and

(3) Supervisors in positions properly classified in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

### Definitions

**Customarily and regularly** means a frequency which must be greater than occasional but which may be less than constant. For example, the requirement in § 551.205(a)(2) will be met by an employee who normally and recurrently exercises discretion and independent judgment in the day-to-day performance of duties.

**Discretion and independent judgment** means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decisions are not necessary to support exemption. The "decisions" made as a result of the exercise of independent judgment may consist of *recommendations for action* rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

(1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action.

(2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently.

(3) The decisions made independently must be significant. The term “significant” is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee’s own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

**Primary duty** typically means the duty that constitutes the major part (over 50 percent) of an employee’s work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty--

- (1) Constitutes a substantial, regular part of a position;
- (2) Governs the classification and qualification requirements of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

**Recognized organizational unit** means an established and defined organizational entity which has regularly assigned employees and for which a supervisor is responsible for planning and accomplishing a continuing workload. This distinguishes supervisors from leaders who head temporary groups formed to perform assignments of limited duration.

\* see page titled “80 Percent Test”

## 5 CFR 551.206 Administrative exemption criteria.

must meet 206 introduction and  
PDT -- either 206(a)(1) or (2) or (3) and  
NWT -- either 206(b)(1) or (2) and  
DIJT -- 206(c) and  
80% test, if applicable -- 206(d)

An *administrative employee* is an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four of the following criteria:

- (a) **Primary duty test.** The primary duty test is met if the employee's work--
- (1) Significantly affects the formulation or execution of management programs or policies; or
  - (2) Involves management or general business functions or supporting services of substantial importance to the organization serviced; or
  - (3) Involves substantial participation in the executive or administrative functions of a management official.
- (b) **Nonmanual work test.** The employee performs office or other predominantly nonmanual work which is--
- (1) Intellectual and varied in nature; or
  - (2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.
- (c) **Discretion and independent judgment test.** The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) **80-percent test.** In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6\* (or the equivalent level in other comparable white-collar pay systems) must spend 80 percent or more of the worktime in a representative workweek\* on administrative functions\* and work that is an essential part of those functions to meet the 80-percent test.\*

### Definitions

**Discretion and independent judgment** means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decisions are not necessary to support exemption. The "decisions" made as a result of the exercise of independent judgment may consist of *recommendations for action* rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

- (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action.
- (2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently.
- (3) The decisions made independently must be significant. The term "significant" is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

**Formulation or execution of management programs or policies** means work that involves management programs and policies which range from broad national goals expressed in statutes or Executive orders to specific objectives of a small field office. Employees make policy decisions or participate indirectly, through developing or recommending proposals that are acted on by others. Employees significantly affect the execution of management programs or policies typically when the work involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or

making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls).

**Management or general business function or supporting service**, as distinguished from production functions, means the work of employees who provide support to line managers.

- (1) These employees furnish such support by--
  - (i) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts;
  - (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management;
  - (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or
  - (iv) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies.
- (2) Neither the organizational location nor the number of employees performing identical or similar work changes management or general business functions or supporting services into production functions. The work, however, must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

**Participation in the executive or administrative functions of a management official** means the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor's effectiveness.

**Primary duty** typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty--

- (1) Constitutes a substantial, regular part of a position;
- (2) Governs the classification and qualification requirements of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

**Work of an intellectual nature** means work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work requiring mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized application of established procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions.

**Work of a specialized or technical nature** means work which requires substantial specialized knowledge of a complex subject matter and of the principles, techniques, practices, and procedures associated with that subject matter field. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject matter field, as distinguished from professional knowledge characteristically acquired through specialized academic education.

\* see page titled "80 Percent Test"

## 5 CFR 551.207 Professional exemption criteria.

**must meet 207 introduction and  
PDT -- either 207(a)(1) or (2) or (3) and  
IVWT -- either 207(b)(1) or (2) and  
DIJT -- 207(c) and  
80% test, if applicable -- 207(b)**

A *professional employee* is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) **Primary duty test.** The primary duty test is met if the employee's work consists of--

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or

(3) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the following:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or

(ii) 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; or

(iii) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(iv) A combination of the duties described in paragraphs (a)(3)(i), (a)(3)(ii), and (a)(3)(iii) of this section, the performance of which requires the same level of skills.

(b) **Intellectual and varied work test.** The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.

(c) **Discretion and independent judgment test.** The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) **80-percent test.** In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6\* (or the equivalent level in other comparable white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek\* on professional functions\* and work that is an essential part of those functions to meet the 80-percent test\*.

## Definitions

**Primary duty** typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty--

- (1) Constitutes a substantial, regular part of a position;
- (2) Governs the classification and qualification requirements of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

**Discretion and independent judgment** means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decisions are not necessary to support exemption. The "decisions" made as a result of the exercise of independent judgment may consist of *recommendations for action* rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

- (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action.
- (2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently.
- (3) The decisions made independently must be significant. The term "significant" is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

**Work of an intellectual nature** means work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work requiring mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized application of established procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions.

\* see page titled "80 Percent Test"

## 80-Percent Test

### 5 CFR 551.205 Executive exemption criteria.

(b) **80-percent test.** In addition to the primary duty test that applies to all employees, the following employees must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work to meet the 80-percent test:

(1) Employees in positions properly classified in the General Schedule at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems);

(2) Firefighting or law enforcement employees in positions properly classified in the General Schedule at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29, United States Code; and

(3) Supervisors in positions properly classified in the Federal Wage System below situation 3 of Factor I of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

### 5 CFR 551.206 Administrative exemption criteria.

(d) **80-percent test.** In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

### 5 CFR 551.207 Professional exemption criteria.

(d) **80-percent test.** In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.

## Definitions

***Supervisory and closely related work*** means work that is included in the calculation of exempt work for supervisory positions.

(1) Work is considered closely related to exempt supervisory work if it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. Examples of closely related work include the following:

- (i) Maintaining various records pertaining to workload or employee performance;
- (ii) Performing setup work that requires special skills, typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform; and
- (iii) Performing infrequently recurring or one-time tasks which are impractical to delegate because they would disrupt normal operations or take longer to explain than to perform.

(2) Activities in which both workers and supervisors are required to engage themselves are considered to be closely related to the primary duty of the position, for example, physical training during tours of duty for firefighting and law enforcement personnel.

***Essential part of administrative or professional functions*** means work that is included as an integral part of administrative or professional exempt work. This work is identified by examining the processes involved in performing the exempt function. For example, the processes involved in evaluating a body of information include collecting and organizing information; analyzing, evaluating, and developing conclusions; and frequently, preparing a record of findings and conclusions. Often collecting or compiling information and preparing reports or other records, if divorced from the evaluative function, are nonexempt tasks. When an employee who performs the evaluative functions also performs some or all of these related steps, all such work (for example, collecting background information, recording test results, tabulating data, or typing reports) is included in the employee's exempt duties.

***Essential part of administrative or professional functions*** means work that is included as an integral part of administrative or professional exempt work. This work is identified by examining the processes involved in performing the exempt function. For example, the processes involved in evaluating a body of information include collecting and organizing information; analyzing, evaluating, and developing conclusions; and frequently, preparing a record of findings and conclusions. Often collecting or compiling information and preparing reports or other records, if divorced from the evaluative function, are nonexempt tasks. When an employee who performs the evaluative functions also performs some or all of these related steps, all such work (for example, collecting background information, recording test results, tabulating data, or typing reports) is included in the employee's exempt duties.

***Worktime***, for the purpose of determining FLSA exemption status, means time spent actually performing work. This excludes periods of time during which an employee performs no work, such as standby time, sleep time, meal periods, and paid leave.

***Worktime in a representative workweek*** means the average percentages of worktime over a period long enough to even out normal fluctuations in workloads and be representative of the job as a whole.

***Workweek*** means a fixed and recurring period of 168 hours--seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to part 610 of this chapter, the workweek shall be the same as the administrative workweek defined in § 610.102 of this chapter.

***Section 7(k) of the Fair Labor Standards Act of 1938, as amended--***

(k)<sup>58</sup> No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if --

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to Section 6(c)(3) of the Fair Labor Standards Amendments of 1974)<sup>59</sup> in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

**58** Effective January 1, 1975, the complete overtime exemption provided by section 6(c)(2)(A) of the Fair Labor Standard Amendments of 1974 was replaced by the more limited exemption in section 7(k). The present overtime standard--the lesser of 216 hours or the average number of hours (as determined by the Secretary of Labor) in tours of duty of employees in work periods of 28 consecutive days--became effective January 1, 1978. During calendar year 1977 the overtime standard was 216 hours, during 1976 the overtime standard was 232 hours, and during 1975 the overtime standard was 240 hours. The complete overtime exemption remains applicable only to public agencies employing less than 5 employees in fire protection or law enforcement activities. See section 13(b)(20), *infra*.

**59** The results of the Secretary's study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 FR 40518).