Fair Labor Standards Act

Executive, Administrative, and Professional Exemptions

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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Fair Labor Standards Act (FLSA)

Federal Minimum Wage

- $7.25/hour

Overtime

- 1 ½ times the regular rate of pay for all hours over 40 hours in a work week

Exemption Requirements

"EAP" Exemptions

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide capacity:

Executive

Administrative

Professional

Outside Sales

Certain Computer Employees

Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA

Three Tests for Exemption

Salary Level

+

Salary Basis

+

Job Duties

=

Exemption

Salary Levels

Minimum Salary Levels

Standard Salary Level

Pursuant to 29 CFR 541.600

$ 684 per week

Highly Compensated Employees (HCE)

Total annual compensation level, pursuant to 29 CFR 541.601

$107,432 per year

Special Salary Levels

American Samoa – pursuant to 29 CFR 541.600

- $380 per week

Puerto Rico, US Virgin Islands, CNMI, Guam – pursuant to 29 CFR 541.600

- $455 per week

Motion Picture industry - pursuant to 29 CFR 541.709

- $1,043 per week

Minimum Salary Level: $684

- For most employees, the minimum salary level required for exemption is $684 per week
- Must be paid “free and clear”

The $684 per week may be paid in equivalent amounts for periods longer than one week:

Biweekly	Semimonthly	Monthly
$1,368	$1,482	$2,964

Bonuses & Catch-Up Pay

Nondiscretionary Bonuses and Incentive Payments

- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees
  - e.g. bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula
- May be used to satisfy up to 10% of the standard salary and special salary levels
  - Minimum of 90% of salary level (approx. $616) must be paid as a weekly salary
- Bonuses must be paid on an annual or more frequent basis

Catch-Up Payments

- If an employee does not earn enough from the nondiscretionary bonus, commission, or incentive payments in a given year to meet the standard salary level in the 52-week period – an employer may make a “catch-up” payment within one pay period of the end of the 52-week period
- Any such “catch-up” payment will count only toward the prior 52-weeks salary amount and not toward the salary amount during the period in which it is paid

Highly Compensated Employees

Highly Compensated Employees (HCE) Test

- Total annual compensation of at least $107,432
- At least $684 per week paid on a salary or fee basis
    - The HCE test does not allow employers to credit nondiscretionary bonuses, commissions, or incentive payments towards the $684 weekly requirement
- Perform office or non-manual work
- Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions

HCE: Total Annual Compensation

Total Annual Compensation Includes:	
Commissions	Nondiscretionary bonuses
Other nondiscretionary compensation earned during a 52-week period	

Total Annual Compensation Does Not Include:	
Credit for board, lodging or other facilities	Payments for medical or life insurance
Contributions to retirement plans or fringe benefits	

HCE: Make-Up Payment and Pro-Rating

- If an HCE's total annual compensation does not equal $107,432 by the end of the year:
  - The employer may, within one month after the end of the year, make one final payment to reach the $107,432 level; or
  - The employee will be tested for exemption under the standard duties tests
- The $107,432 may be pro-rated for employees who do not work the full year
- The employer may use any 52-week period as the year

HCE: Office or Non-Manual Work

The highly compensated test is not available for:

- ✗ Non-management production line workers
- ✗ Non-management employees in maintenance, construction and similar occupations
- ✗ Other employees who perform work involving repetitive operations with their hands, physical skill, and energy

HCE: Customarily and Regularly

- A frequency that must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every workweek
- Does not include isolated or one-time tasks

Salary Basis

Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Need not be paid for any workweek when no work is performed

Deductions from Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay

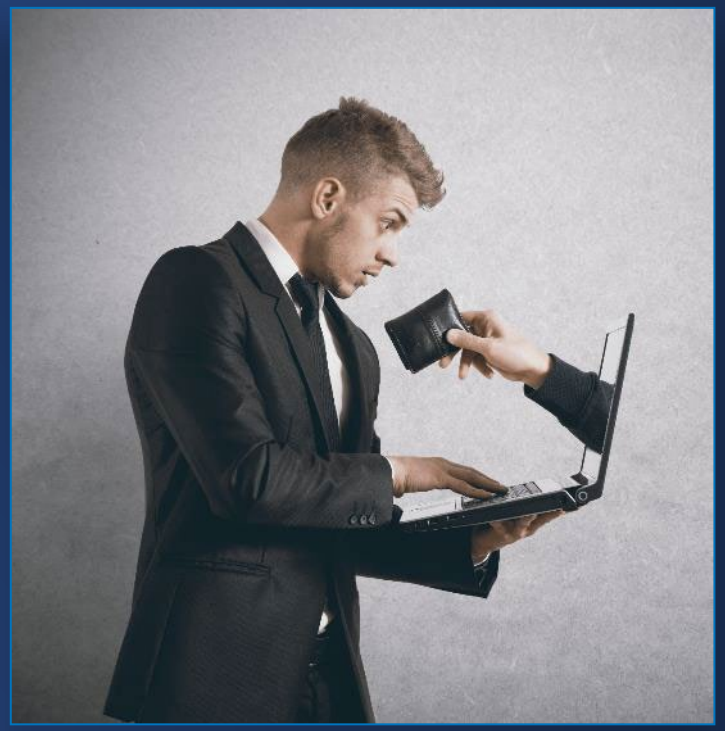
More Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
6. Proportionate part of an employee’s full salary paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act

Improper Deductions Examples

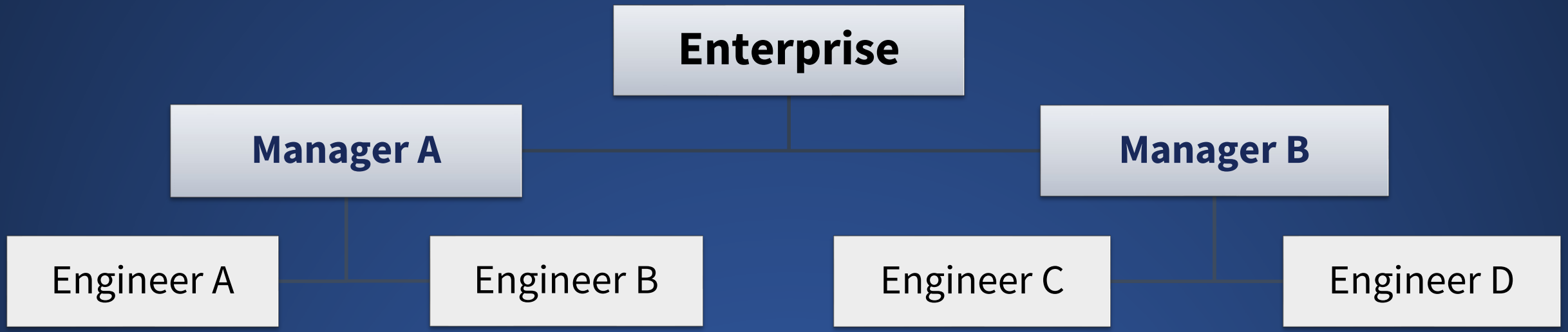
- Deduction for a partial-day absence to attend a parent-teacher conference
- Deduction of a day of pay because the employer was closed due to inclement weather
- Deduction of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty
- Deduction for a two-day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences



Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption:
  - During the time period in which improper deductions were made
  - For employees in the same job classifications
  - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee

Example Effect of Improper Deductions



If Manager A has docked the pay of Engineer A on each of 12 days when Engineer A arrived late for work during the last 3 months, then the exemption could be lost for Engineer A and Engineer B during those 3 months, but it would not be lost for Engineers C and D.

Actual Practice

Factors 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 both the employees whose salaries were improperly reduced and the managers responsible
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions

Safe Harbor

- **The exemption will not be lost if the employer:**
    1. Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
    2. Reimburses employees for any improper deductions; and
    3. Makes a good faith commitment to comply in the future
- **Unless** the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints

Clearly Communicated Policy

Best evidence of a clearly communicated policy is a written policy 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

Publishing the policy on the employer's Intranet

Payroll Practices

Payroll Practices that DO NOT Violate the Salary Basis Test

- Taking deductions from exempt employees' accrued leave accounts
- Requiring exempt employees to keep track of and record their hours worked
- Requiring exempt employees to work a specified schedule
- Implementing bona fide, across-the-board schedule changes

Additional Compensation

An employer may provide compensation in addition to the $684 minimum guaranteed weekly salary, such as:

- Commissions
- Bonuses
- Additional pay based on hours worked beyond the normal workweek

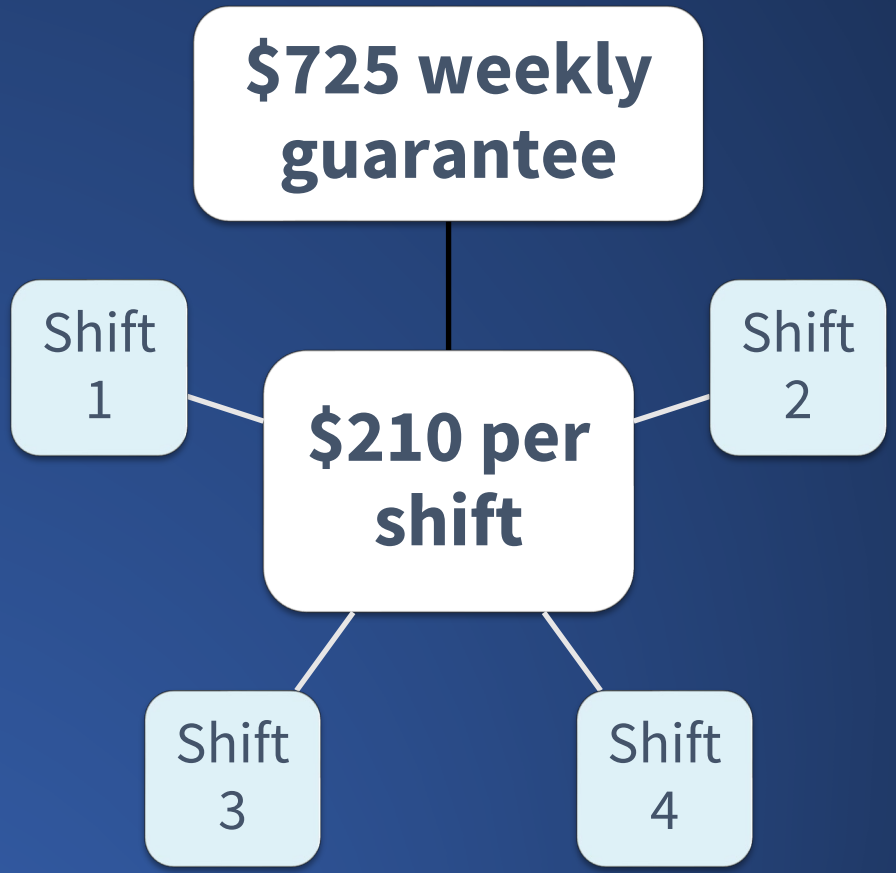
Hourly, Daily, or Shift Basis

The regulations also allow an employee's earnings to be computed on an hourly, daily or shift basis, if the employer:

- Guarantees at least $684 per week paid on a salary basis, regardless of the number of hours, days of shifts worked; and
- A reasonable relationship exists between the guaranteed amount and the amount actually earned

Reasonable Relationship

- "Reasonable relationship" means 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
- For example, an exempt employee guaranteed at least $725 per week and who normally works four or five shifts each week may be paid $210 per shift without violating the salary basis requirement



Fee Basis

- Administrative and professional employees also may be paid on a “fee basis”
- An employee is paid on a “fee basis” if the employee is paid an agreed sum for completing a single job, regardless of the time required to complete the work
- Payment on a “fee basis” is not available for a series of non-unique jobs repeated an indefinite number of times for which payment on an identical basis is made over and over again

Fee Basis Examples

A fee payment meets the minimum salary level required for exemption if, based on the time worked to complete the job, the fee is at a rate that would amount to at least $684 per week if the employee worked 40 hours

Example:

- An artist is paid $350 to paint a portrait that took 20 hours to complete, the equivalent of $17.50 per hour
- Because working 40 hours at this $17.50 per hour rate would yield the artist $700, the fee payment meets the salary requirements for exemption

No Salary Requirements

Salary level and **salary basis** tests do **not** apply to:

- Outside Sales Employees
- Doctors
- Lawyers
- Teachers
- Certain computer-related occupations paid at least $27.63 per hour

Review

Minimum Salary Level

$684 per week

Highly Compensated Level

$107,432 per year

Salary Basis: A predetermined amount paid for every week in which the employee performs any work, which is not subject to reduction because of variations in the quality or quantity of work performed

The salary level and salary basis tests do not apply to outside sales employees, doctors, lawyers, teachers, and certain computer-related occupations paid at least $27.63 per hour

Job Duties

Primary Duty Concept

The principal, main, major or most important duty that the employee performs

Factors include, but are not limited to:

- Relative importance of the exempt duties
- Amount of time spent performing exempt work
- Relative freedom from direct supervision
- Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work

Primary Duty

- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement
- However, the regulations do not ***require*** that exempt employees spend more than 50% of time performing exempt work

Executive

Executive Duties

1) **Primary duty** is **management** of the enterprise or of a customarily recognized department or subdivision;
2) **Customarily and regularly directs the work** of **two or more** other employees; and
3) **Authority to hire or fire** other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given *particular weight*

Management Duties

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Maintaining production or sales records
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work among employees

Management

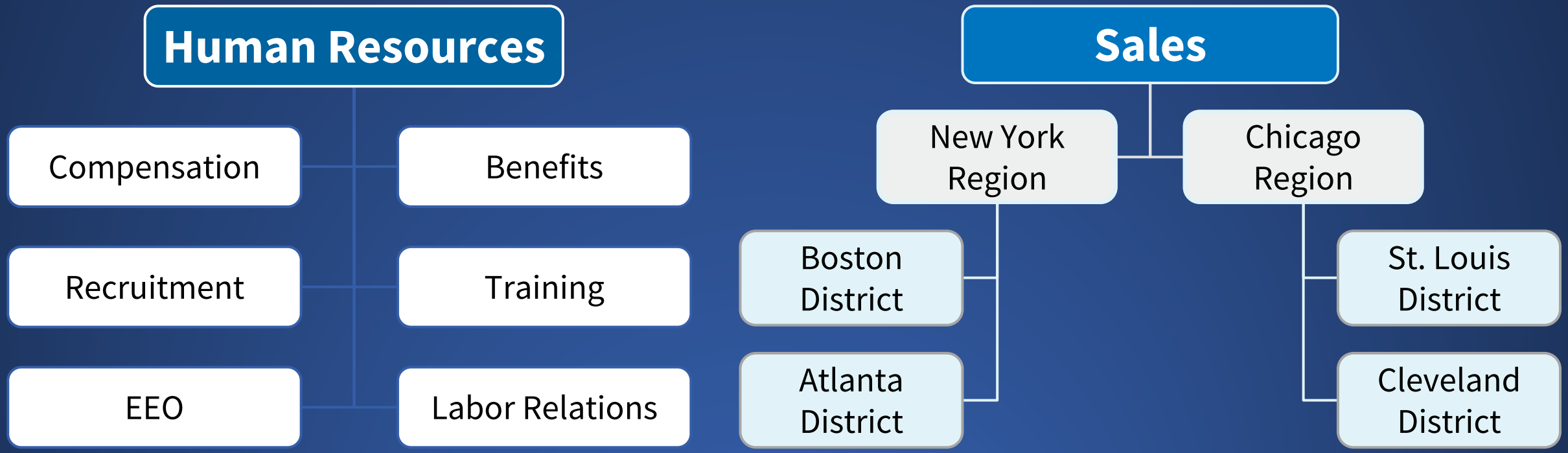
- Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used; or the merchandise to be bought, stocked and sold
- Providing for the safety and security of employees or property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

Department or Subdivision

- A “customarily recognized department or subdivision” must have a permanent status and continuing function
  - Need not be physically within the employer’s establishment, and may move from place to place
  - Continuity of the same subordinate personnel is not essential to the existence of a recognized unit.
  - The employee in charge of each branch establishment is in charge of a recognized subdivision
- Does not include a mere collection of employees assigned from time to time to a specific job

Department or Subdivision Example

Examples of customarily recognized departments or subdivisions include:



Customarily and Regularly

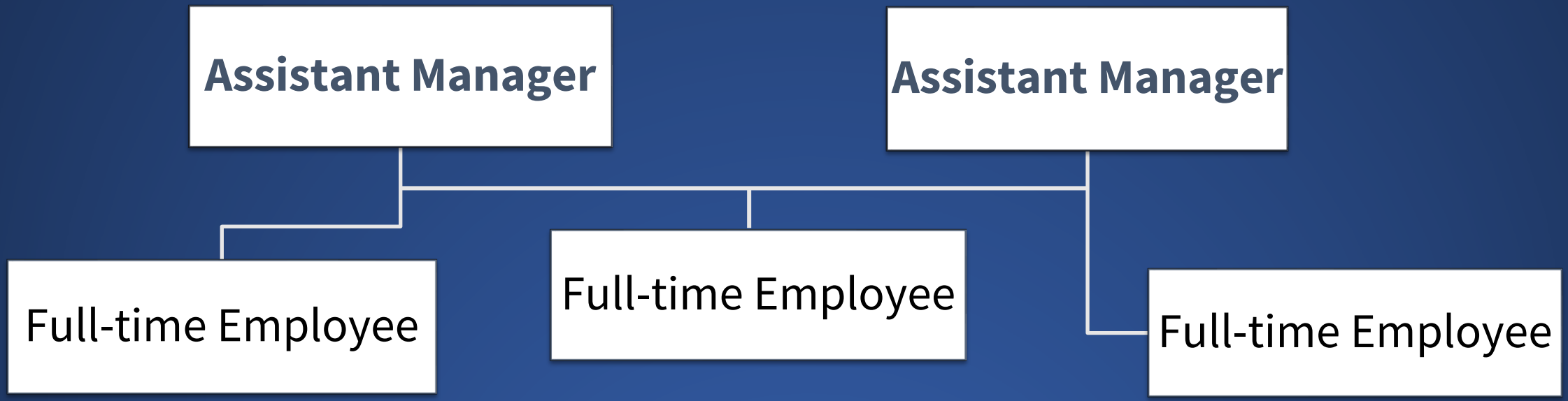
- A frequency that must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every workweek
- Does not include isolated or one-time tasks

Two or More

- The phrase “two or more other employees” means two full-time employees or the equivalent
- Full-time generally means 40 hours per week
- The supervision of the same employees can be distributed among two or more exempt executives, but the hours worked by an employee cannot be credited more than once

Staffing Meets the "Two or More" Requirement

Staffing Does Not Meet the “Two or More”



Particular Weight Factors

Factors include, but are not limited to:

- Whether it is part of the employee's job duties to make suggestions and recommendations
- The frequency with which suggestions and recommendations are made or requested
- The frequency with which the employee's suggestions and recommendations are relied upon

Particular Weight

- Suggestions and recommendations may be reviewed by a higher-level manager
- The exempt executive need not have authority to make the ultimate decision
- Making an occasional suggestion regarding a change in status of a co-worker does not meet the “particular weight” standard

Concurrent Duties

- Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption
- Exempt executives generally decide when to perform nonexempt duties and remain responsible for the success or failure of business operations
- Nonexempt employees generally are directed by a supervisor to perform the exempt work or perform the exempt work for defined time periods

20% Owner Executives

- The executive exemption also includes employees who:
  - own at least a bona fide 20-percent equity interest in the enterprise; and
  - are actively engaged in management of the enterprise
- The salary level and salary basis requirements do not apply to 20% owner executives

Administrative

Administrative Duties

- **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
- Primary duty includes the exercise of **discretion and independent judgment** with respect to matters of significance

Management or General Business Operations

- Refers to the type of work performed by the employee
- Work must be directly related to assisting with the running or servicing of the business
- Does not include working on a manufacturing production line or selling a product in a retail or service establishment

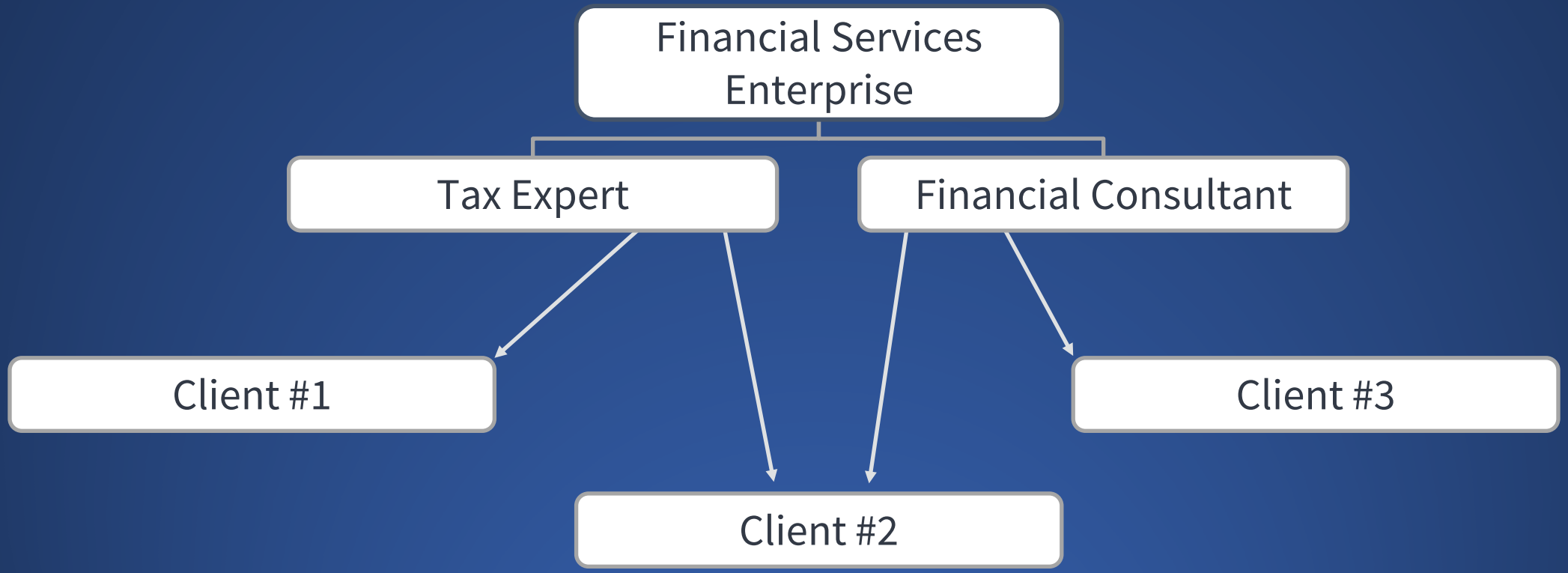
Management or General Business Operations Examples

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing

- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

Employer's Customers

Employees acting as advisors or consultants to clients or customers:



Discretion and Independent Judgment

- The comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered
- Must be exercised with respect to “matters of significance,” which refers to the level of importance or consequence of the work performed
- Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed

Discretion and Independent Judgment Factors

Factors 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
- Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business

Discretion and Independent Judgment: Additional Factors

Factors include, but are not limited to:

- 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 on significant matters
- Whether the employee provides consultation or expert advice to management

Discretion and Independent Judgment: More Factors

Factors include, but are not limited to:

- 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
- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances

Discretion and Independent Judgement Does Not Include

- Applying well-established techniques, procedures or specific standards described in manuals or other sources
- Clerical or secretarial work
- Recording or tabulating data
- Performing mechanical, repetitive, recurrent or routine work

Use of Manuals

- Exempt employees may use manuals, guidelines or other established procedures if they:
  - contain or relate to highly technical, scientific, legal, financial or other similarly complex matters
  - can be understood or interpreted only by those with advanced or specialized knowledge or skills
- Employees are not exempt if they use manuals to apply well-established techniques or procedures within closely prescribed limits

Insurance Claims Adjusters

Exempt status depends on actual job duties

May be exempt if duties include:

- 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
- Making recommendations regarding litigation

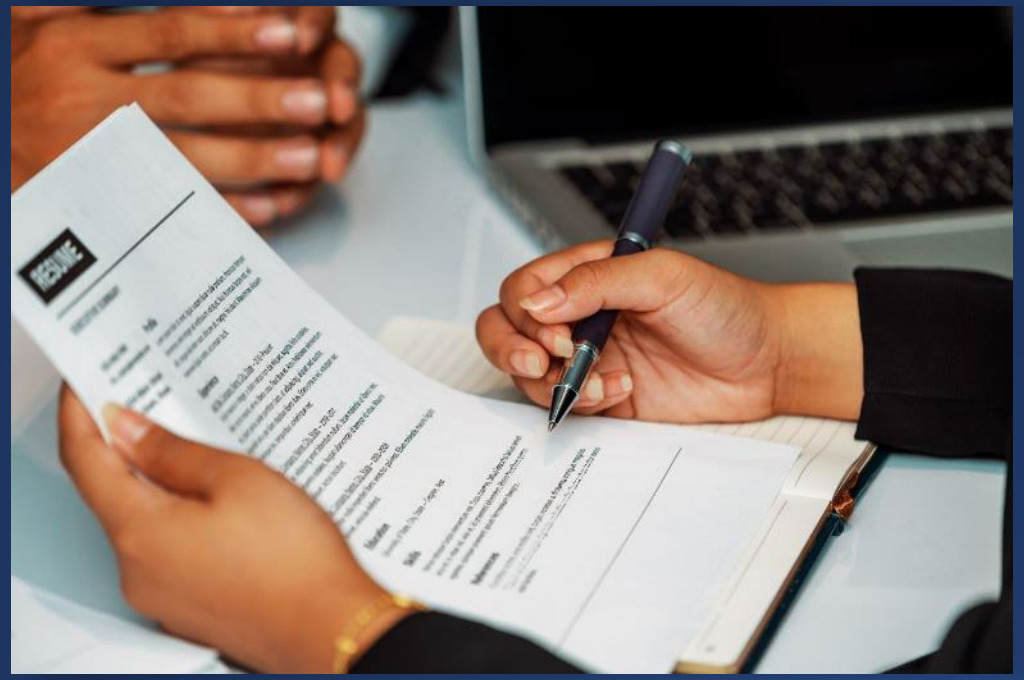
Financial Services

May be exempt if duties include:

- 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
- Marketing, servicing or promoting the employer's financial products

An employee whose primary duty is selling financial products does not qualify for the administrative exemption.

Human Resources



- Human resource managers who formulate, interpret or implement employment policies generally meet the administrative duties requirements
- Personnel clerks who “screen” applicants to obtain data regarding minimum qualifications and fitness for employment generally are not exempt administrative employees

Other Exempt Positions

- An employee who leads a team of other employees assigned to complete major projects
- Executive assistant or administrative assistant to a business owner or senior executive of a large business who has been delegated authority regarding matters of significance
- Management consultants who study the operations of a business and propose changes in organization

Non-Exempt Positions

- Ordinary inspection work involving well-established techniques and procedures
- Examiners and graders who perform work involving comparison of products with established standards
- Comparison shoppers who merely report the prices at a competitor's store
- Public sector inspectors or investigators

Review Primary Duty

- Primary duty of 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Learned Professional

Professional Exemption: Learned Professional

The employee's <u>primary duty</u> 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

Advanced Knowledge

- Predominantly intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances
- **Not** work involving routine mental, manual, mechanical, or physical work
- **Cannot** be attained at the high school level or by experience

Field of Science or Learning

Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Prolonged Course of Specialized Intellectual Instruction

- Specialized academic training is a prerequisite for entering the profession
- Best evidence that an employee meets this requirement is possession of the appropriate academic degree

Prolonged Course of Specialized Intellectual Instruction Is Not:

- The learned professional exemption is **not** available for occupations that may be performed with:
  - Only the general knowledge acquired by an academic degree in any field
  - Knowledge acquired through an apprenticeship
  - Training in the performance of routine mental, manual, mechanical or physical processes
- The exemption also **does not** apply to occupations in which most employees acquire skill by experience

Customarily

Exemption is also available to employees in learned professions who:

- Have substantially the same knowledge level and
- Perform substantially the same work as the degreed professionals,
- But attained the advanced knowledge through a combination of work experience and intellectual instruction

Examples:

- Lawyer who did not attend law school
- Chemist who does not have a chemistry degree

Doctors

The learned professional exemption applies to any employee who holds a valid license or certificate permitting the practice of medicine

- Osteopathic physicians
- Podiatrists
- Dentists
- Optometrists

The exemption is also available to an employee who holds the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program

Nurses

Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption

- Many registered nurses, however, are paid by the hour, not on a salary basis, and thus are entitled to overtime pay

Licensed practical nurses generally **do not** qualify as exempt learned professionals

Other Medical Professions

Registered or certified medical technologists

- 3 years of pre-professional study in an accredited college or university, plus 1 year of professional study in an accredited school of medical technology

Dental hygienists

- 4 years of pre-professional and professional study in an accredited college or university

Certified physician assistants

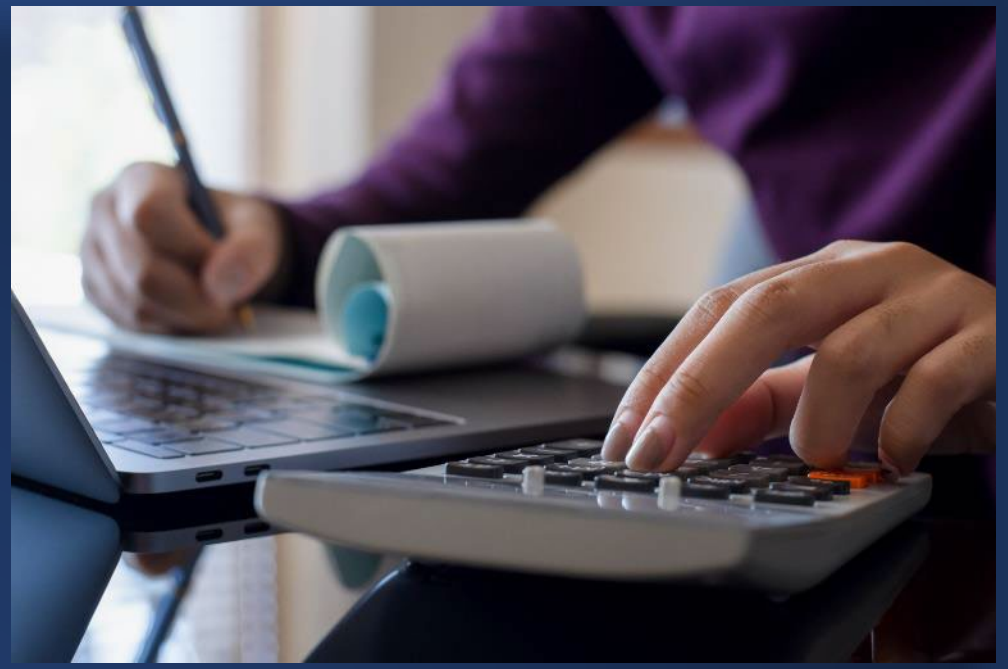
- 4 years of pre-professional and professional study, including graduation from an accredited physician assistant program

Other Exempt Professions

- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Athletic trainers
- Licensed funeral directors or embalmers

Other Nonexempt Professions

- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians



Creative Professional

Creative Professional Duties

The 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

Recognized Field of Artistic or Creative Endeavor

Music

- Musicians, composers, conductors, soloists

Writing

- Essayists, novelists, short-story writers, play writers
- Screen play writers who choose their own subjects
- Responsible writing positions in advertising agencies

Acting

Graphic Arts

- Painters, photographers, cartoonists

Invention, Imagination, Originality or Talent

- A creative professional must perform work requiring invention, imagination, originality or talent
- Creative professional work **does not** include:
  - Work that primarily depends on intelligence, diligence and accuracy
  - Work that can be produced by a person with general manual ability and training
- Exempt status is determined on a case-by-case basis, depending on the extent of the invention, imagination, originality or talent exercised

Creative Professionals: Journalists

Journalists may be exempt if they:

- Perform on-air in radio or television
- Conduct investigative interviews
- Analyze or interpret public events
- Write editorials, opinion columns or commentary

Employees of newspapers, magazines, television and other media are <u>not exempt</u> if they:

- Collect, organize and record information that is routine or public
- Do not contribute a unique interpretation or analysis
- Their work product is subject to substantial control

Review Professional Exemptions

Learned Professional

- Primary duty of 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

Creative Professional

- Primary duty of the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

For More Information

- **Field Operations Handbook**
  - Executive, Administrative, Professional, Computer, and Outside Sales Exemptions
  - Newspaper and Other Communications Exemptions
- 2019 Overtime Final Rule
- Overtime Pay
- Fact Sheet Series 17

Thank you!

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