



## Department of Energy

Washington, DC 20585

April 27, 2010

MEMORANDUM FOR HUMAN RESOURCES DIRECTORS

FROM:

  
SARAH J. BONILLA, DIRECTOR  
OFFICE OF THE CHIEF HUMAN CAPITAL OFFICER

SUBJECT:

**GUIDANCE MEMORANDUM #8:**  
DOE FAIR LABOR STANDARDS ACT (FLSA)  
EXEMPT OR NON-EXEMPT STATUS DETERMINATION

This memorandum provides guidance on determining an employee's FLSA status within the Department.

The Department of Labor (DOL) issued the final revision of the Fair Labor Standards Act (FLSA), August 23, 2004, governing overtime eligibility for "white-collar" workers under the FLSA. Title 5 of the Code of Federal Regulations (5 CFR), Part 551 (Pay Administration under the Fair Labor Standards Act), contains the regulations, criteria, and conditions set forth by the Office of Personnel Management (OPM) with the terms of the FLSA, which are consistent with DOL's exemption criteria and must be read in conjunction with the FLSA.

### **Definitions:**

**FLSA Exempt:** Employees not covered by the minimum wage and overtime provisions of the FLSA.

**FLSA Nonexempt:** Employees covered by the minimum wage and overtime provisions of the FLSA.

### **Other References:**

The Fair Labor Standards Act (FLSA), <http://www.dol.gov/compliance/laws/comp-flsa.htm>, provides criteria for employers to use in determining which employees are subject to or exempt from the overtime provisions of the Act.

The U.S. Department of Labor Employment Standards Administration Wage and Hour Division developed fact sheets, <http://www.dol.gov/esa/whd/regs/compliance/fairpay/>, which may be used as a reference when making FLSA determinations.

The following link, <http://www.dol.gov/elaws/overtime.htm>, provides an overview of FLSA, general guidance for making FLSA determinations and an occupational index to help users determine where to begin their analysis of exempt versus nonexempt status determinations.

**Non-Exempt Status Determination and criteria:**



An employee, including a supervisor whose annual rate of basic pay is less than \$23,660 is non exempt except as provided in 5 CFR 551.230 (1), (2), and (3).

This chart is a summary of requirements for non-exempt duties and functions:

Category	FLSA Determination	FLSA Status	Notes
Equipment Operating and Protective Occupations	All nonsupervisory grade levels	Non-exempt	Reference 5 CFR 551.204(a)(1)
Clerical	All nonsupervisory grade levels	Non-exempt	Reference 5 CFR 551.204(a)(1). In addition, reference, 5 CFR 551.206(j), states, "An executive assistant or someone who provides administrative assistance to a high level manager or SES..." <b>may</b> be exempt under the administrative exemption criteria.
Technician	Nonsupervisory GS-08 and below positions	Non-exempt	In addition, 5 CFR 551.204(a)(2) states that "... <b>many, but not all,</b> technical work at the GS-09 or above..." may be non-exempt". Also cross reference 5 CFR 551.208(f), which states, "...On <i>unusual</i> occasions, engineering technicians performing work comparable to that performed by professional engineers on the basis of advanced knowledge through work experience and intellectual instruction may also be exempt...".
Aircraft Operations Series	All nonsupervisory grade levels performing technical work	Non-exempt	Reference 5 CFR 551.204(a)(3)

Federal Wage System or other comparable wage systems	All nonsupervisory employees assigned to wage grade (WG), wage leaders (WL), and wage board (WB) positions.  Foreman I, II, or III positions whose primary duties consist of supervision of subordinate employees and who meets all the FLSA executive exemption criteria in 5 CFR 551.205, are also considered "exempt".	Non-exempt	Reference 5 CFR 551.204(b).
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**FLSA Exemption Criteria:**

Each employee is presumed to be FLSA nonexempt unless a determination is made that the employee clearly meets the requirements of one or more of the exemption criteria.

Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption. Such exemption criteria(s) include executive, administrative, professional, creative professional, computer, foreign, etc.

Burden of proof for exemption rests with the HQ Elements or field offices. Therefore it is imperative that the duties and criteria of exempt designations are clearly annotated in the position description.

If there is reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.

To be FLSA exempt, the actual duties performed by the employee must meet the administrative, executive, professional (e.g., learned professional and creative professional.), or computer employees exemption criteria. These categories are not mutually exclusive; failure to meet the criteria for exemption under one category does not preclude exemption under another category.

Temporary work or duties may affect FLSA exemption status when an employee must perform work or duties that are not consistent with the employee's primary duties for more than 30 consecutive calendar days.(OPM "30-day test" - 5 CFR 551.211).

**Sample FLSA Exemption Tests Worksheet**

The employee must meet all of the requirements of one of the exemption tests as outlined below to be eligible for exemption under the FLSA. For positions in which the FLSA determination is exempt, a detailed rationale must be documented and filed with the original position description.

FLSA Exemption Tests Worksheet

- |  |  |
|--|--|
| <input type="checkbox"/> Administrative        | <input type="checkbox"/> Executive             |
| <input type="checkbox"/> Learned Professional  | <input type="checkbox"/> Creative Professional |
| <input type="checkbox"/> Computer Professional |  |

**Administrative Exemption:**

Requirement for Exemption	Does employee meet the requirement?	Describe how employee meets the requirement
<b>Salary</b> \$455/week	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>Duties</b> <ul style="list-style-type: none"> <li>• Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and</li> <li>• Exercises discretion and independent judgment with respect to matters of significance</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

**Executive Exemption:**

Requirement for Exemption	Does employee meet the requirement?	Describe how employee meets the requirement
<b>Salary</b> \$455/week	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>Duties</b> <ul style="list-style-type: none"> <li>• Primary duty of managing the enterprise or a recognized department of subdivision;</li> <li>• Customarily and regularly directs the work of two or more other employees</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

- (or their equivalent); and
- Has the authority to hire or fire other employees (or whose recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight)

### Learned Professional Exemption:

Requirement for Exemption	Does employee meet the requirement?	Describe how employee meets the requirement
<b>Salary</b> \$455/week	[ ] Yes [ ] No	
<b>Duties</b> <ul style="list-style-type: none"> <li>• Primary duty of the performance of work requiring advanced knowledge, defined as work, which is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment;</li> <li>• Advanced knowledge must be in a field of science or learning; and</li> <li>• Advance knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction</li> </ul>	[ ] Yes [ ] No	

### Creative Professional Exemption:

Requirement for Exemption	Does employee meet the requirement?	Describe how employee meets the requirement
<b>Salary</b> \$455/week	[ ] Yes [ ] No	
<b>Duties</b> <ul style="list-style-type: none"> <li>• Primary duty of the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic endeavor</li> </ul>	[ ] Yes [ ] No	

## Computer Employees Exemption

Requirement for Exemption	Does employee meet the requirement?	Describe how employee meets the requirement
<b>Salary</b> \$455/week or \$27.63/hour	[ ] Yes [ ] No	
<b>Duties</b> Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the following duties:	[ ] Yes [ ] No	
<ul style="list-style-type: none"><li>• A. Application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional applications, <b>OR</b></li><li>• B. 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, <b>OR</b></li><li>• C. Design, documentation, testing, creation, or modification of computer programs related to machine operating systems, <b>OR</b></li><li>• D. A combination of duties described in (A), (B), (C), the performance of which requires the same level of skills</li></ul>		

If you have questions or need clarification, please contact either Vivian Clark at 202-586-2167, e-mail address [Vivian.Clark@hq.doe.gov](mailto:Vivian.Clark@hq.doe.gov); or Joyce Hayes at 202-586-3270, e-mail address [Joyce.Hayes@hq.doe.gov](mailto:Joyce.Hayes@hq.doe.gov).