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**THE FLSA AT THE FRONTIER: OVERTIME EXEMPTIONS AFTER  
THE NEW REGS**

**By**

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**I. INTRODUCTION**

Effective on August 23, 2004, the Department of Labor's "new" white collar exemption regulations (also sometimes called the "541 regs" from their location in the Code of Federal Regulations at 29 C.F.R. section 541) changed long established rules governing whether executive, administrative, and professional employees were entitled to overtime compensation.

Or did they? The new regs have now been in place for nearly four years and interpretations of the new regs have emerged in the case law as well as in Opinion Letters issued by the DOL Wage and Hour Administrator. This paper will highlight some of the significant developments impacting the analysis of the new white collar exemptions.

To establish a white collar exemption under the FLSA, an employer must satisfy three tests: "(1) duties test; (2) salary level test; and (3) salary basis test." *ACS v. Detroit Edison Co.*, 444 F.3d 763, 767 (6th Cir. 2006) (quoting *Takacs v. Hahn Auto Corp.*, 246 F.3d 776, 779 (6th Cir. 2001)); *see also* 29 C.F.R. § 541.700 (2004) (duties test), 29 C.F.R. § 541.060 (2004) (salary level test), 29 C.F.R. § 541.602 (2004) (salary basis test).

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## **II. SALARY LEVEL TEST**

The white collar exemptions are subject to a salary level test. The regs have two salary level tests. The minimum salary for an exempt white collar employee is \$455/week (\$23,660/year). 29 C.F.R. § 541.600(a). Employees paid less than this are guaranteed overtime regardless of their duties or job titles. The salary level minimum is not protected against future inflation.

There is a further salary level test for “highly compensated employees.” 29 C.F.R. §541.601. This is set at \$100,000 per year. The \$100,000 may include commissions and/or nondiscretionary bonuses, but may not include credits for board, lodging, or health, pension, or fringe benefits. 29 C.F.R. § 541.601(b)(1). The \$100,000 may be pro-rated for partial years and may be assessed as to any defined 52-week period. 29 C.F.R. § 541.601(b)(3)-(4). If the total annual compensation does not equal \$100,000 at year end, the employer may make up the difference in a final payment within one month. 29 C.F.R. § 541.601(b)(2). The \$100,000 threshold is also not indexed to inflation.

The new regs specifically state that the highly compensated employee exemption is not available for workers engaged in production line work, maintenance, construction or similar occupations, or work “involving repetitive operations with their hands, physical skill and energy” no matter how highly compensated. 29 C.F.R. § 541.601(d). There remains some movement that the employee perform executive, administrative or professional duties.

## **III. SALARY BASIS TEST**

The salary basis test for the white collar exemptions requires that employees be paid a predetermined amount of compensation each pay period. 29 C.F.R. § 541.602. Such compensation cannot be reduced because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.602(a). It must be paid in full for any week in which any work is performed, but need not be paid when an employee is absent for the entire week. *Id.*

However, the regs significantly expand the “safe harbor” to lessen the risk that improper deductions from pay will destroy the FLSA exemption. Under this expanded provision, the exemption is not lost provided the employer: (1) has a clearly communicated policy (preferably one in writing, distributed to all employees) that prohibits improper pay deductions and includes a complaint mechanism; (2) reimburses employees for any improper deductions; and (3) makes a good faith commitment toward future compliance. 29 C.F.R. § 541.603(d). The safe harbor is

not available if the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. *Id.* Thus, the unauthorized, improper conduct by a supervisor or manager with respect to docking employee pay (even if such improper docking is more than an isolated or inadvertent occurrence) will not defeat the FLSA exemption, provided the employer makes the affected employee(s) whole after it learns of the improper docking and takes other corrective steps to prevent a recurrence.

If an employer has an “actual practice” of making improper deductions and cannot avail itself of the safe harbor, the regs more clearly define the extent to which the exemption will be lost. 29 C.F.R. § 541.603(b). The exemption will be lost: (1) during the time period in which the improper deductions were made; (2) for employees in the same job classification; and (3) while working for the same managers responsible for the actual improper deductions. *Id.* Factors to be considered in determining whether an actual practice exists include: the number of improper deductions made, the time period over which they occurred, the number and geographic location of managers responsible for the improper deductions, and whether the employer has a clearly communicated policy pertaining to such improper deductions. 29 C.F.R. § 541.603(a).

**\*Deductions if Performance Below Expectation:** *Baden-Winterwood v. Life Time Fitness*, 2007 WL 202906 (E.D. Ohio July 10, 2007). The plaintiffs were compensated under a corporate bonus plan in which s/he was paid a base salary and was eligible to receive monthly bonus payments based on year-to-date performance guidelines. The corporate bonus plans contained a provision that allowed the employer to make deductions from plaintiffs’ base salaries for bonus overpayments if the employee’s performance fell below a particular level. The court reviewed different interpretations of the salary basis test because the DOL changed interpretations during the relevant class period. The court found that before August 23, 2004, the relevant inquiry was articulated by the Supreme Court in *Auer v. Robbins*, 519 U.S. 451 (1997) whether there was a “significant likelihood” of improper deductions that was sufficient to cause an employee to lose his or her exemption. After the August 23, 2004 regs, the court found that the relevant inquiry was whether the “actual practice” of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The court found that the mere fact that the employer allowed the right to make deductions did not mean that it was significantly likely to do so and that the employee needed to show that s/he was

actually vulnerable to having her pay reduced. The court determined that the actual deductions that did occur in 2005 violated the salary basis test because they were penalties after their performance dropped below expectations.

**\*Required minimum hours and make-up time:** DOL opinion letter concluded that an employer's requirement that employees work either 45 or 50 hours per week, depending on whether they are officers of the company, would not result in a loss of the exemption since the employer would not dock an employee's salary if the employee failed to work the required hours. The opinion letter also concluded that an employer's requirement that exempt employees make-up work time because of personal absences of less than one day did not affect the exemption since an employee's salary would not be affected. DOL Wage & Hour Div. Op. Ltr., at 1 (Mar. 10, 2006).<sup>2</sup>

**\*Deductions for damage or loss of company equipment:** The DOL opined that deductions from the salaries of exempt employees who damage equipment violates the salary basis requirements of the FLSA and defeats the exemption because the salaries would not be "guaranteed" or paid "free and clear" as required by the regs and violate the prohibitions against reductions in compensation due to the quality of the employee's work. DOL Wage & Hour Div. Op. Ltr., at 2 (Mar. 10, 2006).

**\*Deductions from commission payments:** The DOL opined that improper deductions from an employee's guaranteed salary does not apply to additional compensation, such as commissions, which is provided to exempt employees. Thus, cash shortage deductions may be made from commissions as long as the commissions are bona fide and not merely to facilitate prohibited deductions. DOL Wage & Hour Div. Op. Ltr., at 1-2 (July 6, 2006).

#### IV. DUTIES TEST

The regs appear to exclude from the coverage of the white collar exemption, police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, park rangers, fire fighters, paramedics, EMT/ambulance personnel, investigators, inspectors, and correctional officers, regardless of rank or pay level (including probation/parole employees). 29 C.F.R. § 541.3(b)(1). The regs state that the primary duty of such employees is the public safety

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<sup>2</sup> DOL opinion letters can be found at [www.dol.gov/esa/whd/opinion/flsa\\_content.htm](http://www.dol.gov/esa/whd/opinion/flsa_content.htm)

function rather than any auxiliary executive or administrative functions. 29 C.F.R. § 541.3(b)(2)-(3).

The 541 regs also specifically exclude manual workers or other “blue collar” laborers who perform repetitive work with their hands, physical skill and energy. 29 C.F.R. § 541.3(a). Thus, non-management employees in production, maintenance and construction such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are not exempt no matter how highly paid they might be. *Id.*

**A. Administrative Exemption**

To qualify as exempt, an administrative employee’s primary duty must be 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. An administrative employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200.

In evaluating whether an employee exercises discretion/judgment, the factors to consider under section 541.202(b) of the regs include:

- 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;
- whether the employee has authority to commit the employer in matters with financial impact;
- whether the employee has authority to waive or deviate from established policies/procedures without prior approval;
- whether the employee has authority to negotiate/bind the company on significant matters;
- whether the employee provides consultation or expert advice to management;
- whether the employee is involved in short or long term business planning;
- whether the employee investigates and resolves matters of significance on behalf of management; and

- whether the employee represents the company in handling/resolving grievances or in arbitrations. 29 C.F.R. § 541.202(b).

The preamble<sup>3</sup> to the final rule states that employees who satisfy two or three of these factors generally exercise discretion and independent judgment although a case-by-case analysis is required.

The regs state that the exercise of judgment/discretion is not negated by the fact that the employee's decision-making may not be final or unlimited. 29 C.F.R. § 541.202(c). Some review by higher authority may be tolerated, even if decisions are "upon occasion" revised or reversed after review. Examples include credit managers whose decisions are reviewed by higher company officials or management consultants whose plans may be revised before being submitted to clients. 29 C.F.R. § 541.202(c). However, discretion/judgment does imply "authority to make an independent choice, free from immediate direction or supervision." *Id.*

Furthermore, discretion/judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. *See* 29 C.F.R. § 541.202(e), 29 C.F.R. § 541.704. Clerical or secretarial work is excluded, as are data tabulation and other "mechanical, repetitive, recurrent or routine work." The mere use of manuals does not preclude a finding of exempt status under section 541.704, but use of manuals may be an indicia of nonexempt status if such use suggests mere application of well-established techniques or procedures "within closely prescribed limits."

Finally, the regs discuss the meaning "matters of significance" at section 541.202(f). The mere fact that poor performance may give rise to financial losses (messenger who loses briefcase full of cash) or to other serious consequences does not suffice for this test. Another example of what is not a matter of significance is the misuse of "very expensive equipment." This portion of the regulation is consistent with prior usage.

**\*Claims Adjusters:** *In re Farmers Ins. Exch. Claims Representatives Overtime Pay Litigation*, 481 F.3d 1119 (9th Cir. 2007). Claims adjusters who handle automobile damage claims brought suit for overtime pay. The Ninth Circuit reversed a judgment of over \$53 million and held that the adjusters are exempt because they were required to: (1) use discretion to

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<sup>3</sup> 69 Fed. Reg. 22143.

determine whether the loss is covered; (2) set reserves; (3) decide who is to blame for the loss; and (4) negotiate with the insured or his lawyers.

In reaching its decision, the Ninth Circuit analyzed a 2002 DOL opinion letter [DOL Wage & Hour Div. Op. Ltr., at 3 (Nov. 19, 2002)] which did not address the administrative-production dichotomy and concluded that insurance claims adjusters have, since a 1940 DOL Report, been long recognized as performing work that is administrative in nature. The Ninth Circuit gave deference to DOL's interpretations of its own regs. In overturning the district court's decision, the Ninth Circuit found that the district court's findings tracked the language of the new section 541.203 (even though, for the most part, the employment in question pre-dated the effective date of the new regs) except that the adjusters did not make recommendations regarding litigation. The Ninth Circuit also overturned the district court's "\$3,000 in claims paid per month" rule which both sides agreed was unworkable in practice. The "\$3,000 rule" articulated by the district court found that "smaller" claims should be treated differently and the claims adjusters considered non-exempt if they spent more than 38-3/4 hours per week handling claims on which the monthly pay-out average was \$3,000 or less. The Ninth Circuit also found that the use of computer software did not eliminate the need for discretion and judgment.

**\*Claims Adjusters:** *Roe-Midgett v. CC Services, Inc.*, 512 F.3d 865 (7th Cir. 2008).

In a case involving a defendant which contracts with insurance companies to provide claims processing services, the district court concluded that the primary duties involved matters (1) "directly related to management policies or general business operations" and (2) "requiring the exercise of discretion and independent judgment." The Seventh Circuit affirmed the grant of summary judgment to the employer and analyzed the "directly related" prong which requires that the employee's duties: (1) involve the administrative operations of the business, as distinct from production or sales work; and (2) be "of substantial importance" to the business of its customers. In analyzing the "discretion and independent judgment" requirement, the court relied on new regs which explain that "insurance claims adjusters generally meet the duties requirements for the administrative exemption." Although the Seventh Circuit determined that the claims adjusters were different than other adjusters cited in DOL opinion letters and cases because they do not negotiate with the claimant's attorney or make litigation recommendations, it was not enough to take the claims adjusters outside the scope of the administrative exception. The Seventh Circuit found that the claims adjusters used their discretion and independent judgment to

make choices that impact damage estimates, settlement or other “matters of significance” because they spent most of their time in the field investigating, estimating, and settling auto damage claims up to a \$12,000 limit of authority. As in *In re Farmers*, the court found that the use of a computer did not mean a lack of independent judgment or discretion.

**\*Claims Adjusters:** The DOL opined that some claims adjusters are exempt and some are not exempt depending on their level of discretion/judgment. DOL Wage & Hour Div. Op. Ltr., at 6-7 (Aug. 20, 2005).

**\*Technical Writers:** *Renfro v. Indiana Michigan Power Co.*, 497 F.3d 573 (6th Cir. 2007). The Sixth Circuit reversed the district court’s finding and held that the technical writers’ primary duty of writing procedures on maintaining power plant equipment required discretion and independent judgment. In determining whether an employee exercises discretion or independent judgment in light of guidelines and procedures set forth by the company, the court looked at whether the guidelines or procedures allowed for deviations. The court found that the technical writers’ manual provided a guideline on developing a procedure but did not set forth strict requirements. Rather, according to the court, the manual ensured the uniformity of style and format of procedures but not their content.

**\*Mortgage Loan Officers:** The DOL has opined that salaried mortgage loan officers may be characterized as exempt administrative employees where their primary duty is to advise customers (as opposed to non-exempt loan processors or outbound sales personnel). DOL Wage & Hour Div. Op. Ltr., at 3 (Sept. 8, 2006). Mortgage personnel whose primary duty is selling mortgages will not qualify for the exemption under 29 C.F.R. § 541.203(b).

**\*Stock Brokers:** Generally, these employees will not be treated as administrative employees because they will fail the salary basis test. *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100 (S.D. Cal. 2006) (denying summary judgment to employer on stock broker overtime claims).

**\*IT Support Specialists:** The DOL opined that help desk support staff who diagnose computer related problems and close out trouble tickets are not administrative employees. DOL Wage & Hour Div. Op. Ltr., at 5 (Oct. 26, 2006). See also *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574 (6th Cir. 2004) (technical computer employee not administrative); *Turner v. Human Genome Science, Inc.*, 292 F. Supp. 2d 738 (D. Md. 2003) (computer troubleshooter not

administrative); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002) (denying summary judgment to employer for employee responsible for customers' IT operations). *But see Bagwell v. Florida Broadband, LLC*, 385 F. Supp. 2d 1316 (S.D. Fla. 2005) (employee whose primary duty was developing, improving, and maintaining the employer's computer network was an exempt administrative employee). A federal district court also denied summary judgment on the administrative exemption issue as to an IT engineer earning over \$50,000 per year. *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44 (D. D.C. 2006).

**\*Case Managers:** The DOL opined that case managers who do not personally deliver or administer services but meet and work with individuals with disabilities to assess and plan their care do not qualify for the administrative exemption and must be paid overtime. DOL Wage & Hour Div. Op. Ltr., at 2-3 (Feb. 8, 2007).

**\*School Resource Officers (SROs):** The DOL opined that SROs who plan to prevent safety and security problems and respond to disruption or criminal activity qualify for the administrative exemption because their primary duty is office or non-manual work that "includes the exercise of discretion and independent judgment with respect to matters of significance." DOL Wage & Hour Div. Op. Ltr., at 4 (Feb. 15, 2007).

**\*Copy Editors and Senior Copy Editors:** DOL opinion letter concluded that copy editors and senior copy editors who review materials used for marketing and promoting books to book club members are not exempt administrative employees. DOL Wage & Hour Div. Op. Ltr., at 4 (Dec. 21, 2006).

## **B. Executive Exemption**

The 2004 regs collapsed the former "long" and "short" tests into a new "standard test." Under the "standard test," an exempt executive is one (1) whose primary duty (§ 541.700) is management (§ 541.102) of the enterprise in which the employee is employed or of a customarily recognized department or subdivision (§ 541.103) thereof; (2) who customarily and regularly (§ 541.107) directs the work of two or more other [full time] employees [or their equivalent] (§ 541.104); and (3) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight (§ 541.105).

The primary duty definition is found at section 541.700 and lacks any bright line clarity. The time spent on exempt work remains "a useful guide." 29 C.F.R. § 541.700(b). Generally, if

an employee spends 50% of his/her time on exempt duties s/he will be found to be exempt. *Id.* an employee who works more than 50% of his/her time on nonexempt work may still be exempt if the other factors support this conclusion. *Id.* In general, the primary duty will be the employee's "principal, main, major or most important duty." 29 C.F.R. § 541.700(a). Factors to consider in determining the primary duty include:

- Relative importance of the exempt duties;
- Amount of time spent performing exempt duties;
- Relative freedom from direct supervision; and
- Relationship between the employee's salary and the wage paid to nonexempt employees. 29 C.F.R. § 541.700.

The DOL definition of "customarily and regularly" is found at section 541.701. It does not necessarily mean the majority of the work time. However, it requires exempt work to be performed "recurrently" and "every workweek." It explicitly does not include "isolated or one-time tasks."

**\*Police Sergeants:** *Mullins, et al. v. City of New York, et al.*, 523 F. Supp. 2d 339 (S.D.N.Y. 2007). Police sergeants brought suit for overtime violations. The court reviewed the primary duty, i.e. the "principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700. The court analyzed the third prong of the executive exemption test—whether an employee must "customarily and regularly direct the work of two or more other employees."

In reviewing the plaintiffs' claims, the court applied the "short test" for executive exemptions prior to August 23, 2004, and applied the new regs to the period thereafter. The court noted that police sergeants are specifically given as examples of first responders who "are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management." The court held that the plaintiffs' primary duty was management and granted defendants summary judgment to the period in which the "short test" applied. The court found that despite the fact that the plaintiffs performed many of the same law enforcement duties as their subordinates, it did not dispose of the primary duty inquiry.

The court also analyzed the final prong of the current test for claims after August 23, 2004—the authority to hire/fire or whose suggestions and recommendations as to the hiring,

firing, advancement, promotion or any other change or status of other employees are given particular weight. The court found that there were genuine issues of material fact regarding whether plaintiffs have the authority to hire or fire employees or whether their evaluations of their subordinates lead to any tangible employment action. As a result, summary judgment was denied on defendants' liability after August 23, 2004.

**\*Field Inspectors:** DOL opinion letter found that field inspectors whose primary duty is to manage districts by interviewing, hiring and training new employees qualify as exempt executive employees. DOL Wage & Hour Div. Op. Ltr., at 3 (Sept. 17, 2007). The DOL noted that the field inspectors differed from the inspectors in section 541.3(b)(2) because the field inspectors' primary duty is management of a recognized department rather than duties related to investigations.

**\*Construction Project Superintendent:** DOL opinion letter concluded that a superintendent whose primary duty is to supervise the day-to-day functions of a construction project qualifies for the executive exemption. DOL Wage & Hour Div. Op. Ltr., at 1 (Jan. 25, 2007).

**\*Store Manager Who is Not Physically Present:** The DOL opined that even when a store manager is not physically present in the store, s/he is responsible for ensuring that company policies and his/her instructions are being followed by all subordinates. The DOL relied on court decisions that held that supervisory employees may qualify for the executive exemption even when they do not physically supervise 80 employee hours per week. *See, e.g., Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th Cir. 2001); *Smith v. Heartland Auto. Serv., Inc.*, 418 F. Supp. 2d 1129, 1141 (D. Minn. 2006); *Haines v. S. Retailers, Inc.*, 939 F. Supp. 441, 446 (E.D. Va. 1996). DOL Wage & Hour Div. Op. Ltr., at 3 (Sept. 21, 2006).

### **C. Motor Carrier Act Exemption**

**\*Drivers of Medicaid patients:** *Flowers v. Regency Transp., Inc.*, 2008 WL 234364 (S.D. Miss. Jan. 25, 2008). Plaintiffs were drivers for a company that contracted with the Mississippi Division of Medicaid to provide transportation of Medicaid patients to doctors' offices, pharmacies and dialysis treatments. The contract expressly stated that "this may include transportation to and/or from locations outside of the bidder's service region and may include transports to medical providers in communities outside the state of Mississippi." On defendant's motion for summary judgment, defendant produced an affidavit from an office manager as well

as a 2004 DOL investigation report which concluded that the drivers were covered by the MCA exemption. In denying defendant's motion, the court found that the office manager did not address the number of out-of-state trips made and that the DOL report, which the court acknowledged did not warrant significant judicial deference, did not discuss the extent of out-of-state travel. The court held that exemptions are narrowly construed against the employers and that the defendants did not sustain their burden in establishing that driving in interstate commerce was a regular and expected part of an employee's duties.

**\*SAFETEA-LU Amendment:** *O'Neal v. Kilbourne Medical Labs, Inc.*, 2007 WL 956428 (E.D. Ky. Mar. 28, 2007). Plaintiff was a phlebotomist who traveled from her home in Kentucky to various locations in Kentucky, Ohio and Indiana to obtain blood samples. Defendant asserted that plaintiff fell within the MCA exemption and whether the exemption applied turned on whether defendant was a "motor private carrier," the definition of which was amended in 2005 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The court found that SAFETEA-LU did not include any language demonstrating Congressional intent to apply the amendment retroactively. Rather, because the SAFETEA-LU amendment became effective on August 10, 2005, retroactively applying it would increase the defendants' liability for past conduct or impose new duties with respect to transactions already completed. Therefore, the court held that the SAFETEA-LU amendment should not apply retroactively.

**D. Outside Sales Exemption**

An employee in the capacity of outside sales means one: (1) whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. 29 C.F.R. § 541.500(a)

**\*Sales representative for drug company:** *Menes v. Roche Labs, Inc.*, No. 2:07-cv-01444-ER-FFMx (C.D. Cal. 2008). The court granted summary judgment and determined that the plaintiff was an outside exempt salesperson. Defendant employs sales representatives to inform medical personnel about its drugs in the hope they will prescribe defendant's products to their patients. The plaintiff contended that although sales representatives do individualized promotions, they do not actually "sell" anything. In granting summary judgment, the court

applied the outside salesperson test: (1) the job was advertised as a sales position and the plaintiff was recruited based on sales experience; (2) the job entailed specialized sales training; (3) compensation was based on commissions; (4) the job entailed independently soliciting new business; (5) the plaintiff received little or no direct supervision or constant supervision in carrying out daily work tasks; and (6) the plaintiff was called a salesperson.

**\*Sales representatives for real estate company:** In two separate opinion letters, the DOL opined that salespersons who sell newly constructed homes in residential communities, and who work from model homes within the communities, are exempt outside salespersons because only the model home-sales office is considered the employer's place of business, and not the homes being sold. Because such salespeople customarily and regularly leave the model home-sales office to meet with customers and to show new homes, they are exempt, even if they remain within the boundaries of the community. DOL Wage & Hour Div. Op. Ltr., at 4-5 (Jan. 25, 2007), DOL Wage & Hour Div. Op. Ltr., at 4 (Jan. 25, 2007).

**\*Timeshare salespeople:** The DOL opined that timeshare salespeople at resort properties do not qualify for the outside sales exemption because the resort was considered the employer's place of business and employees are not "engaged away from the employer's place or places of business." DOL Wage & Hour Div. Op. Ltr., at 2-3 (Jan. 25, 2007).

#### **E. Professional Exemption**

The exemption applies to two kinds of professions: learned professionals and creative professionals. The learned professional exemption requires a primary duty in the performance of work requiring "advanced knowledge" in a "field of science or learning" customarily acquired by prolonged intellectual instruction. 29 C.F.R. § 541.301(a). This requires something more than high school and generally requires an advanced academic degree. 29 C.F.R. § 541.301(b), (d). The regs specifically exclude "mechanical arts or skilled trades." 29 C.F.R. § 541.301(c). The creative professional exemption requires that an employee's primary duty be the performance of work requiring invention, imagination, originality or talent in a recognized field or artistic or creative endeavor. 29 C.F.R. § 541.302.

The regs provide examples of professions that meet the exemption: lawyers, doctors, accountants, actuaries, architects, scientists, pharmacists, certified medical technologists,

registered nurses<sup>12</sup> (but not LPNs), dental hygienists (who have completed approved four year degree programs), teachers, physician assistants (who have completed accredited programs), executive and sous chefs (who have completed four year culinary arts programs) (but not cooks), athletic trainers (if certified and with four year degrees), licensed funeral directors and embalmers. 29 C.F.R. § 541.301(e).

**\*Respiratory Therapists (RTs):** The DOL opined that a hospital's RTs did not meet the test for the learned professional exemption because the "occupation does not require knowledge of an advanced type that is customarily acquired by a prolonged course of specialized intellectual instruction." The conclusion appears based on the fact that an Associate's Degree with the required RT training would suffice. DOL Wage & Hour Div. Op. Ltr., at 3 (July 24, 2006).

**\*Senior Legal Analysts/Paralegals:** Another DOL Opinion Letter issued the same day, confirmed that paralegals, even if skilled and knowledgeable, do not qualify for the professional exemption because they perform their duties under the direction of attorneys (who are the personnel who exercise the requisite discretionary and independent judgment). DOL Wage & Hour Div. Op. Ltr., at 3 (July 24, 2006). The opinion refers to 29 C.F.R. § 541.301(e)(7) which states that paralegals are generally not to be considered professionals, even those with four year degrees, since the typical paralegal program is a two year associate degree program from a community college.

**\*Instructors:** The DOL opined that instructors at a career school qualified as exempt teachers. DOL Wage & Hour Div. Op. Ltr., at 2 (Oct. 26, 2006). The career school in question provided technical instruction to students seeking careers as automotive, diesel, collision repair, motorcycle, and boat technicians. The instructors had to be certified to teach and had to meet minimum standards established by the Accrediting Commission of Career Colleges and Technology. As such, even though these instructors lacked a four year degree they qualified as teachers of an "educational establishment" as defined by 29 C.F.R. § 541.204(b) and as "teachers of skilled and semi-skilled trades and occupations" under 29 C.F.R. § 541.303(b).

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<sup>12</sup> However, in order to maintain the exemption, nurses must be paid on a purely fee or salary basis with no part of the compensation in the form of hourly wages. *Elwell v. Univ. Hosps. Home Care Servs.* 276 F.3d 832 (6th Cir. 2002) (approved by DOL preamble).

**\*Radiology Technologists:** The DOL opined that radiology technologists do not qualify under the professional exemption because the learned professional activity is the practice of medicine involved in analyzing and interpreting the images developed by the radiologist. DOL Wage & Hour Div. Op. Ltr., at 3-4 (Feb. 1, 2007).

**F. Computer Employee Exemption**

The regs concerning computer employees do not make substantial changes in prior law. The salary level has been increased to \$455 per week but the salutory hourly rate remains at \$27.63/hour. 29 C.F.R. § 541.400(b). The duties tests remain largely the same as before. The primary function must be computer systems analysis or programming. Section 541.400 lists employees who qualify for his exemption including computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field. Employees working with computers who otherwise meet the tests for the executive or administrative exemption may be classified as exempt in accordance with those regs.

**\*IT Support Specialists:** The DOL opined that IT support specialists who are responsible for installing, configuring, testing and troubleshooting computer applications, networks and hardware do not qualify for the computer employee exception. DOL Wage & Hour Div. Op. Ltr., at 5 (Oct. 26, 2006).

**V. DEFERENCE**

In 2007, the U.S. Supreme Court found a DOL regulation, which exempted domestic companionship services providers employed by third parties from the minimum wage and maximum hours requirements of the FLSA to be valid and binding on the court. *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007). Evelyn Coke, a domestic worker hired by a third party employer, had challenged the third-party regulation, pointing out that it fell under a section entitled “Interpretations” and had not been promulgated under typical notice and comment procedures. Moreover, another regulation, located in a section entitled “General Regulations,” defined domestic companions as employees hired by the person in whose home they work, and would have excluded from the exemption workers like Coke hired by third party companies. Taken as a whole, Coke argued, the regulation did not appear to be binding.

The Supreme Court found the DOL’s third-party regulation to be valid and binding under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Coke*, 127 S.Ct. at 2344. Even though the third-party regulation appeared to be contradicted by another

regulation, the third-party regulation was more specific than the other regulation and therefore governed. *Id.* at 2348-49. That the regulation actually adopted had not been subject to notice and comment procedures, but was adopted after a contrary proposal had undergone notice and comment, did not detract from its validity because the adopted rule was a “logical outgrowth” of the proposed rule. *Id.* at 2351. The Court also deferred to the DOL’s internally circulated “Advisory Memorandum.” *Id.* at 2349. That the Court viewed the memorandum as binding, rather than merely persuasive, suggests that the DOL’s interpretations of its own regs—whether in memoranda, opinion letters, or legal briefs—may not permit extensive room for argument.