

TECHNICAL ASSISTANCE – FLSA

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INTRODUCTION

The Fair Labor Standards Act (FLSA) was passed by Congress in 1938 to establish a minimum wage, overtime compensation standards, record keeping requirements, child labor provisions, and other regulations that affect employers and labor. The law was enacted to meet the economic and social problems of that era. The intent of the law was to make overtime compensation expensive in order to open up more employment opportunities to the working population. In 1985, the U.S. Supreme Court mandated the application of the Act to all state and local governments. Congress delayed the effective date of the Act as it applied to state and local governments to April 15, 1986.

The U.S. Department of Labor (DOL) is authorized to investigate any alleged violations and generally enforce the FLSA. DOL has the power to initiate court action against violators and penalties that can include jail terms, payment of double back pay, fines, and attorney fees.

In general, FLSA **requires** compliance with the following:

- Payment of the federal minimum wage (the higher of the federal or Colorado minimum wage is applied to the state personnel system);
- Overtime pay for non-exempt employees for time worked over 40 hours in a standard workweek or in excess of established work hours in adopted work periods for law enforcement and health care employees;
- Restrictions on the employment of children;
- Record keeping.

FLSA does **not** require the following:

- Payment for time not worked, e.g., vacation, holiday, or sick leave (the State has different policies for essential and non-essential employees);
- Payment for meal or rest periods;
- Pay raises or fringe benefits;
- Discharge notices, reason for discharge, or immediate payment of final wages to terminated employees;
- Severance pay.

The Department of Personnel & Administration, Division of Human Resources is responsible for consulting with departments and higher education institutions (department) on matters pertaining to the law and providing technical advice for compliance. Over the years, employees have become more knowledgeable about the regulations. It is critical that all departments comply with the law in good faith and that state supervisors are well trained in this area in order to prevent unnecessary overtime liability.

Appointing authorities or their delegates shall be responsible for approving overtime work. Departments and supervisors may control overtime by doing the following.

- Send a written announcement to all non-exempt employees that overtime work is not permitted unless authorized in advance.
- Develop a policy to ensure that employees are not interrupted during their lunch breaks (20 minutes or more). The best way to accomplish this is to have employees leave their workstations during their breaks.
- Develop a policy to ensure that employees are not allowed to start work before their regular starting time or to continue work after ending time without specific advance written approval.
- Develop a corrective and disciplinary action policy for employees who violate the rules and associated department policies. An employee may not voluntarily work overtime or waive the right to overtime compensation.
 - Employees sometimes choose to ignore overtime policies and continue working extra hours before or after regular work time. Corrective actions may be issued to these employees according to established policies. *However, the department is still liable for the overtime payment, if the unauthorized overtime work is acknowledged, witnessed, and/or proven.*
- Develop performance standards and a policy for supervisory accountability and consequences for failing to follow rule and policy.
- Require supervisors and employees to certify hours worked each week and at the end of the pay period.

Although the FLSA is a “single employer” law and statewide rules exist, each department is responsible for compliance with FLSA regulations and any liability for failure to comply rests with individual departments. DHR will serve as a resource for technical assistance, provide training, and will answer questions pertaining to FLSA and compliance requirements.

NON-COVERED PERSONS

There are two general types of persons: non-covered and covered. Non-covered persons include independent contractors, bona fide volunteers, prisoners, and certain employees, including: elected officials, their personal staffs, policy-making appointees, legal advisors, and legislative employees (except library employees). These employees, workers, and contractors are not covered under the minimum wage and overtime provisions of FLSA.

Personal staff of an elected official are employees who (1) must be appointed by and serve solely at the pleasure or discretion of an elected official, (2) must be under the direct supervision of the elected official (not an employee supervised by someone other than the elected official), (3) must have regular contact with the elected official, and (4) must not be subject to civil service laws.

Policy-making appointees are employees who have been appointed by an elected official to serve in a policy-making capacity. For example, executive directors appointed by the governor are policy-making appointees.

Legal advisors are employees who serve as legal advisors to an elected official. They must deal with highly confidential and sensitive legal work, give advice directly to an elected official, or be personally accountable to the elected official.

Legislative employees are employees who work in the legislative branch of the State. This includes all service employees in the state legislature, except employees of legislative branch libraries.

Independent Contractors. There are three key determining factors when qualifying an individual as an independent contractor: degree of employer's control over the work, financial control, and the nature of the relationship (see technical assistance, *Independent Contractor*, on DHR web).

When considering the utilization of contractors, be aware that employing a former state employee or a former state temporary employee on a personal service contract could violate state law. C.R.S. 24-18-201 prohibits a former employee from being retained via a personal services contract within six months of termination to perform the *same or similar* duties. If a department hires laid-off employees within six months of their termination to perform the *same or similar* work performed prior to lay-off, they cannot be considered independent contractors. These individuals could be eligible for state benefits and could have standing to pursue legal action against the State.

C.R.S. 24-50-507 prohibits employees from accepting any direct or indirect personal benefit from a contracting department. In other words, an employee cannot obtain a contract with the State to perform work in which he or she has a direct interest because of potential conflict of interest.

Prisoners (inmates) who are required to work for the State are not covered employees. They do not need to be paid minimum wage. When counting the number of employees supervised by a state employee, prisoners working for the employee must be excluded for FLSA purposes.

Bona Fide Volunteers are individuals who perform services for the State for civic, charitable, or humanitarian reasons. They volunteer to render their services without promise, expectation, or receipt of compensation. These volunteers are not covered employees under the FLSA. Departments must have written agreements with volunteers that clearly define these expectations.

State Employees Volunteering Services to the State. Departments cannot allow their overtime-eligible employees to perform volunteer work in addition to their standard work hours, without compensation, if they are performing the same type of work for which they are employed. For example, when an administrative assistant volunteers to teach meat cutting at a community college, this voluntary work is different from the employee's primary duty, so the time working at the community college does not have to be added to work hours for the purpose of overtime compensation. However, if the same administrative assistant volunteers to type a report for the Dean's office at a community college, the time must be added to the employee's regular work hours. This type of volunteer work is closely related to the employee's primary

duty. It does not matter if the employee performs the volunteer work for a different department; all departments are considered to be one employer under the FLSA. Law enforcement has a special exemption to volunteer requirements. Please contact DHR for more information.

Trainees or Interns are not employees under FLSA if **all** of the following criteria are met.

- The training, even though it may include actual operation of the State's equipment, is similar to that which would be given in a vocational school.
- The training is for the benefit of the trainees or students.
- The trainees or students do not displace regular employees, but work under close supervision.
- A department that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, the operations may even be impeded.
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
- A department and trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Even if a department chooses to compensate the trainees or students, if the above criteria are met, the trainees or students are not state employees, and are not covered under FLSA. On the other hand, if a department benefits from the services provided by the trainees, the trainees may become "employees" under FLSA. Be very careful not to confuse "training a trainee" with "receiving services from a trainee."

FLSA REQUIREMENTS

Minimum Wage – The FLSA requires employees to be paid at least federal minimum wage. However, Colorado constitution was amended effective January 1, 2007, to adjust the Colorado minimum wage annually for inflation. The State is required to pay the higher of the federal or state minimum wage. . Employees cannot be paid below the minimum wage.

Hours Worked - The FLSA requires non-exempt employees to be compensated for any time worked over 40 hours in a week and receive at least one and one-half times their regular rates of pay for those overtime hours. Exceptions are outlined under "Special Situations" in this document.

Work hours mean when employees are "suffered or permitted to work" for departments. If a non-exempt employee performs work on his or her own volition, and is permitted to perform it, the time is work time and must be paid. Even if an employee voluntarily stays late to complete a project, the additional work time must be compensated. Sometimes, supervisors are not aware of voluntary extra work being performed by employees; however, as long as there is evidence that the work was done, it must be compensated. Departments should consider internal policies that prohibit "unauthorized" overtime work, including procedures for corrective actions for violations of such policies.

Waiting Time - Waiting time is considered time worked depending upon the circumstances. For example, when an administrative assistant reads a book while waiting for copies to be made, the employee is considered working. Alternatively, consider a bus driver who takes students to a college game leaving at 6:00 a.m. and arriving at 12:00 noon. Then, the driver is completely relieved of *all* duty until 6:00 p.m. to pick up the students for the return trip. The idle time from 12:00 noon to 6:00 p.m. is not work time.

Waiting time is work time when the period of waiting is unpredictable, short in duration, and employees are unable to use the time effectively for their own purposes. If an employee is working, the waiting time is considered work time.

Waiting time is not work time when employees are completely relieved from duty and the waiting period is long enough to enable them to use the time effectively for their own purposes. In order to be considered completely relieved from duty, employees must be told in advance that they may leave the job and that they will not have to return until a specified hour. Determining if the waiting time is long enough to enable employees to use the time effectively for their own purposes depends upon all of the facts and circumstances.

The U.S. Supreme Court has ruled that waiting time before the beginning of a shift is preliminary work and non-compensable activity. However, waiting time spent “donning” (putting on gear) or “doffing” (taking off gear) is part of an employee’s principal activity and is compensable. Departments must review each individual case to determine if waiting time is work time.

On-Call – An employee who is required to remain on-call on the employer's premises, or must be so close that the time cannot effectively be used for his or her own purposes, is working while “on call.” On the other hand, an employee who is permitted to leave the premises and is merely required to leave word where they may be reached, or be available by phone or pager, is not working while on call. When evaluating whether or not on-call time is work time, departments must examine employees’ opportunities to pursue personal interests. Departments can do the following to reduce the chance that on-call time will be considered work time.

- Provide on-call employees with beepers, pagers, or cellular phones.
- Allow employees to handle calls over the phone as opposed to requiring their physical return to work.
- Allow a reasonable period of time to respond.
- Allow employees to decline a certain number of calls or to swap calls with other employees.
- Allow employees to freely use the time for their own personal purposes.
- Allow employees to trade on-call assignments with others.
- Provide employees with as much notice of their on-call duty as possible.

See *Technical Assistance - Shift, On Call and Call Back* for information.

Break and Meal Periods - Breaks are not mandatory, e.g., employees are not entitled to two 15-minute breaks each day. Breaks of short duration, when allowed, are considered work time. Supervisors have the discretion to allow or not allow breaks for their employees. Bona fide meal

periods are discretionary (typically 20 minutes or more) and generally need not be compensated, if an employee is completely relieved from duty. As part of sound business practice it is strongly recommended employees are granted breaks and meal periods to rest and regenerate.

Meeting and Training Time - Attendance at lectures, meetings, training programs, and similar activities is not counted as work time if all of the following four criteria are met: (1) attendance is outside normal work hours, (2) attendance is voluntary, (3) is not job related, and (4) no other work is concurrently performed. Whether or not a department pays for the training is immaterial.

Mandatory training or meetings are work time. Training is job related if it is designed to make employees perform their current jobs more effectively, as opposed to preparing them for a different job or a new or additional skill. Voluntary training during normal work hours is work time. It is recommended that time taken for voluntary training during normal work hours be pre-approved to enable supervisors to manage work-loads.

Travel Time - Travel time is compensable depending upon the nature of the travel.

- **Home-to-work travel.** Traveling from home before the regular workday begins and returning home at the end of the workday is ordinary home-to-work travel, and is not considered work time, even when a state vehicle is used. If an employee is required to work at home first and then travel to an office, the travel time is considered work time.
- **Special one-day assignment in another city.** An employee who normally works at a fixed location, but travels to a different city for a work-related assignment and then returns home the same day, is considered working while traveling. The department may deduct the time that the employee would normally spend commuting to the regular work site. If the employee is completely relieved from duty during the meal break, that time does not have to be paid.
- **Travel that is all in the day's work.** Time spent traveling by an employee as part of their principal activity, such as travel from job site to job site during the workday, is work time. Home to the first job site is not work time. When the distance between home to the first job site is substantially longer than the usual home-to-work travel, the department may exercise its discretion in allowing some of the travel time to be work time.
- **Travel away from the home community.** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is work time when it cuts across the employee's normal workday. The paid time includes not only hours worked on regular working days during normal working hours but also travel time during corresponding hours on non-working days, and any other hours that an employee actually performs work for the State. The time spent by an employee who travels *outside regular working hours* as a passenger on public transportation, such as an airplane, train, etc., may be considered work time. Department's have the discretion to include this type of travel time in the count of work hours.

EMPLOYEES UNDER FLSA

Covered employees under the FLSA include Exempt, Non-Exempt, and Special categories. Within the state personnel system, covered employees include exempt, non-exempt, law enforcement, and health care employees (also see the *Special Situations* section in this document).

- A. Exempt Employees** meet the criteria that exempt them from the minimum wage and overtime compensation provisions of the FLSA. The four exemption categories that apply to state employees are Executive, Administrative, Professional, and Computer Professional. Departments and employees should always closely check the exact terms and conditions of an exemption in light of the employee's actual duties in order to determine the exemption status for each individual position. The ultimate burden of supporting the actual application of an exemption rests on the employer. An exempt employee is not eligible for overtime compensation provided that the **salary test** (detail follows) is met for these employees. Job classifications do not determine the FLSA status. Actual job duties determine if a particular position is exempt or non-exempt.
- B. Non-Exempt Employees** do not meet the criteria for any of the exemption categories and are eligible for overtime under FLSA. **All hourly** employees (regardless of pay levels and employment status) are non-exempt and are automatically eligible for overtime compensation of job responsibilities. Exceptions are medical doctors, attorneys, teachers, and employees in computer-related occupations that receive an hourly rate higher than \$27.63. Minimum wage and overtime compensation must be paid to non-exempt employees under FLSA provisions. Part-time non-exempt employees do not earn overtime unless they work more than 40 hours in a designated workweek.

EXEMPTION

Some employees are exempt from the overtime pay provisions, some from both minimum wage and overtime pay provisions, and some from the child labor provisions of the FLSA. Exemptions are typically applied on an individual workweek. Employees performing exempt and non-exempt duties in the same workweek are normally not exempt in that particular workweek, especially when the majority of time is spent on non-exempt duties.

Salary Test – An exempt employee is paid a predetermined amount (an amount constituting all or part of the compensation) on a pre-determined basis. Exempt employees cannot earn less than \$23,660 per year or \$455 per week. Outside sales employees, teachers, lawyers and medical doctors are the exception. Computer employees must be paid at least \$455 per week on a salary basis or an hourly basis at a rate not less than \$27.63. An exempt employee does not have to be paid for any workweek in which no work is performed; however, no deductions may be made if the employee is ready, willing, and able to work. The following are some situations when salary may be reduced without losing exempt status.

- *Partial-Day Absence Pay Reduction* – The FLSA allows special provisions for public employers to reduce exempt employees' pay when they absent themselves from work.

As a public employer, the State has a pay system established by statute pursuant to principles of public accountability. Under the system, employees accrue personal paid leave. Departments may reduce the pay of exempt employees for absences of less than one workday. This can happen when an employee does not use accrued leave because (1) permission for its use has not been sought or has been sought and denied, (2) accrued leave has been exhausted or (3) the employee chooses to use unpaid leave.

- Deductions from an exempt employee's pay for absences due to a budget-required furlough are allowed except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

A department may reduce an exempt employee's pay without losing the employee's exemption status when:

- An employee is on leave that was not requested or was denied and accrued leave is not used, accrued leave is exhausted, the absence is covered by Family and Medical Leave, or for voluntary furlough;
- An employee violates a workplace rule of major significance. A workplace rule of major significance includes only those relating to the prevention of serious danger to the facility, or other employees, such as improperly securing inmates within a correctional facility, workplace harassment, discrimination, dress and grooming, computer usage, substance abuse, workplace violence;
- Designated raters fail to timely evaluate an employee as required in Chapter 6 of the Director's Rules and statute.

Suspension (unpaid leave) for less than one day will change an exempt employee's status to non-exempt for that week.

Executive Exemption – This exemption is applicable to employees who have management as their primary duty. They direct the work of two or more full-time employees and have the authority to hire and fire or make recommendations regarding decisions affecting the employment status of others. The employees regularly exercise a high degree of independent judgment in their work and receive a salary that meets the requirements of the exemption.

In addition, the "primary duty" criterion of management should constitute at least 50 percent of the employee's time. In a few cases, the 50 percent rule may not apply. For example, although an executive exempt employee is not spending more than 50 percent of time in managerial duties, the employee might nevertheless have management as the primary duty if other pertinent factors support such a conclusion.

Management duties may include:

- Interviewing and selecting employees;
- Training and coaching employees;
- Setting and adjusting employees' rates of pay and hours of work;
- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;

- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- Handling employee complaints and grievances;
- Disciplining employees;
- Planning the work of employees;
- Determining the techniques to be used;
- Apportioning the work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;
- Providing for the safety and security of the employees or the property;
- Planning and controlling the budget; and,
- Monitoring or implementing legal compliance measures.

This is not an exhaustive list. There are other possible activities that could be considered management, e.g., planning meetings and the materials, planning and conducting marketing activities, investigating or addressing personnel matters. This does not mean that these activities, by themselves, constitute the executive exemption. All job duties must be considered in totality.

Administrative Exemption – This exemption is applicable to employees who perform office or non-manual work that is directly related to the management policies or general business operations of their employer or their employer's customers. Or, the employees perform such functions in the administration of an educational establishment. The employees regularly exercise discretion and judgment in their work. They assist a proprietor or executive by performing specialized or technical work, or execute special assignments. Some examples may be fully operational specialists or staff authorities like tax experts, insurance experts, compensation and job evaluation specialists, investment consultants, and statisticians. In addition, the employees receive a salary that meets the requirements of the exemption and do not devote more than 40 percent of their time to work other than as stated above.

Of all the exemption categories, the administrative exemption is the most difficult to interpret and apply. It is important for a department to carefully consider the criteria needed to designate an employee in this category. The key requirement for the administrative exemption is that the employee's primary work is *directly* related to management policies or general business operations. An employee who is primarily involved in carrying out the day-to-day operations of a department, instead of overall business or policy management, is performing "production work" only; therefore, the administrative exemption does not apply. Pay level is not the determining factor for exemption designation. Some state positions may receive a relatively high rate of pay; however, due to the day-to-day work duties (e.g., investigation at a regulatory division), these types of job assignments would be considered "production work" rather than "administrative work."

Professional Exemption - This is applicable to employees who perform work requiring advanced knowledge and education, work in an artistic field that is original and creative, or work as a teacher. The employees perform work which is intellectual and varied in character and the accomplishment of which cannot be standardized as to time. The employees must be paid on a

salary basis that meets the “salary test” (except doctors, lawyers, teachers, and certain computer occupations who receive an hourly rate exceeding \$27.63).

Computer Professional Exemption – This applies to computer professionals who have primary duties in one or more of the following:

- Applying systems analysis techniques and procedures;
- Designing computer systems based on, and related to, user specifications;
- Creating or modifying computer programs based on, and related to, system design specifications;
- Creating or modifying computer programs related to machine operating systems; or,
- A combination of the above duties, requiring the same skill level and who must exercise discretion and make independent judgments on a regular basis.

Computer systems analysts, computer programmers, software engineers, and other similarly skilled employees who are paid at a regular hourly rate *exceeding* \$27.63 are exempt from the minimum wage and overtime requirements of the FLSA. On the other hand, computer-related occupation employees who are paid at an hourly rate *equal to or below* \$27.63 are not exempt.

Outside Salesman – This applies to individuals who have primary duties in the following.

- Customarily and regularly engaged away from the department’s place of business for making sales, obtaining orders or contracts for services that will be paid by a client or customer; and
- Non-exempt work performed is incidental (e.g., deliveries and collections) and does not exceed 20 percent of the hours worked in a workweek.

Departments are required to review all individual positions to determine their exemption status. Overtime exemption designation must be entered into the state employee data system (CPPS) as either N (non-exempt - eligible for overtime compensation) or E (exempt - not eligible for overtime compensation). A default value of N is entered into the system if a department fails to complete the record, which makes that employee eligible for overtime compensation.

DETERMINING WORKWEEK

Regular Workweek - The workweek includes all time during which an employee is required to be on the employer's premises, on duty, or at a prescribed work place. Under FLSA, a workweek for non-exempt employees is a "fixed and regularly recurring period of 168 hours - seven consecutive 24-hour periods." It may begin on any day of the week *and at any hour of the day*. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act.

The standard workweek for all full-time employees is 40 hours as established by rule. Under the principles of public accountability, public employees are held to a higher level of responsibility under the public trust and the demand for effective and efficient use of public funds to serve the

public’s interests. Citizens can expect full-time exempt employees to work the equivalent of the standard 40-hour workweek at a minimum. Public employers should not pay employees for time not worked (or on paid leave) or risk violating the principles of accountability. For exempt employees, the expectation is they will work the hours required to get the job accomplished without additional compensation, even if that exceeds 40 hours a week.

It is recognized that there are occasions when an exempt employee will go above and beyond to accomplish a task or project that may have required extraordinary hours exceeding the standard expectation. The federal regulations and state rules contemplate that employees will use earned leave for time off but appointing authorities may substitute an incentive reward, approve and adjust leave requests, or approve flexible schedules based on individual circumstances.

Granting time off for extra hours worked is permitted without jeopardizing exempt status as long as it is treated more as an occasional incentive under Director’s rule. Time off for extra hours worked should not be done on an hour-for-hour and regular basis. In order to preserve the exempt status, there should be no expectation that extra hours can be regularly taken on an equivalent hour-for-hour basis or as compensatory time. Compensatory time is only granted to non-exempt employees who are eligible for overtime. If appointing authorities want to grant paid leave in recognition of exceptional effort, administrative leave is more appropriate. Granting of administrative leave or adjustments of schedules are subject to appointing authority approval and employees cannot unilaterally decide to alter their set work schedules or take leave without prior approval (see technical assistance on *Time Off*).

Flexible Work Schedule - Departments have discretion to designate an individualized workweek for each employee to accommodate any flexible work schedule. The designation of a specialized workweek should be done on a permanent basis; employees should be notified of such designation; and such designation should be filed in the employee’s official personnel file. Departments cannot arbitrarily designate employees’ workweeks to circumvent any overtime liability.

The following examples illustrate how different workweeks may be defined and how work hours must be calculated for purposes of overtime hours.

Example 1 – Regular Workweek and Overtime Work

The workweek begins at 12:01 a.m. Saturday and ends the following Friday at midnight (12:00 a.m.). No overtime work has occurred for these two workweeks for both Employee A and B.

	First Week							Second Week						
	SA	SU	M	T	W	TH	F	SA	SU	M	T	W	TH	F
A			8	8	8	8	8			8	8	8	8	8
B			10	10	10	10			10		10	10		10

Employee C worked 10 hours of overtime during the first week. Work hours **cannot** be averaged across workweeks.

	First Week							Second Week						
	SA	SU	M	T	W	TH	F	SA	SU	M	T	W	TH	F
C			10	10	10	10	10					10	10	10

Example 2 – Flexible Workweek and Overtime Work

The workweek begins at 12:01 p.m. Friday and ends the following Friday noon (12:00 p.m.). No overtime work has occurred for these two workweeks because Employee A works for 40 hours up to noon Friday, and 40 hours the second week.

	First Week							Second Week						
	SA	SU	M	T	W	TH	F	SA	SU	M	T	W	TH	F
A			9	9	9	9	4/5			9	9	9	8	

Employee B works 38 hours during the first week, and works 42 hours during the second week. Consequently, the employee earns two hours of overtime during the second week. This can happen if the employee comes to work at 10:00 a.m. and works for nine hours on Friday of the first week. Two hours are credited toward the first week, and seven hours are credited toward the second week.

	First Week							Second Week						
	SA	SU	M	T	W	TH	F	SA	SU	M	T	W	TH	F
B			9	9	9	9	2/7		9	9	9	8		

VII. Overtime Hour Calculation

Paid leave (e.g., holidays, personal paid leave) is not required to be counted when calculating overtime, except for essential positions per state statute. Under Rule 3-37, “Essential, non-exempt positions, as designated by a department head, shall have paid leave counted as work time.” Per statute, these employees perform “...essential law enforcement, highway maintenance, and other support services directly necessary for the health, safety, and welfare of patients, residents, and inmates...” (24-50-104.5(1), C.R.S.). For example, positions required to be on duty to perform emergency services without delay or interruption may be designated as essential. Calculation of overtime hours and compensation for essential employees may be complicated depending on the types of leave involved. Several examples of overtime situations for essential employees are illustrated below.

Overtime Calculation for Essential Employees

	Work Hours	Annual Leave	Sick Leave	Holiday Hours	Comp Hours off	Leave Without Pay	Total Work Hours for OT ^{*1}	Overtime Pay
Case 1	32	8		8	2		48	8
Case 2	32	8				8	40	0
Case 3	32		8	8		8	48	8
Case 4	32					16	32	0

^{*1} Total hours for overtime purposes for essential employees include all paid time (e.g., work hours, holidays, paid leave), excluding compensatory time and unpaid leave. Compensatory time is not paid leave and has already been counted for overtime purposes; consequently, it is not included in the overtime work hours count.

OVERTIME COMPENSATION

Cash Payment – For overtime compensation calculation, work hours cannot be averaged across two or more workweeks (there is an exception for health care and law enforcement partial exemption status). Overtime work must be paid at a rate of one and one-half times the regular hourly rate for each hour worked over 40 hours during the employee's designated workweek. If an employee works in two or more non-exempt positions with different rates of pay, the regular rate for the week, for purposes of calculating overtime, is the average of the rates. Employees **cannot** waive their rights under FLSA. For example, non-exempt employees cannot opt to have overtime compensation paid at a rate lower than the required one and one-half rate. The hourly rate for overtime compensation must include applicable premium pay such as shift differential and on-call pay.

Compensatory Time – Compensatory time is allowed for public sector employees and must be accumulated at a rate of not less than one and one-half hours of compensatory time for each hour of overtime work. According to Rule 3-28(B), appointing authorities must ensure that compensatory time is scheduled as soon as practical. Compensatory time shall not exceed 240 hours (or 480 hours for law enforcement) and any additional overtime must be paid at the next regular pay period. Departments can place additional limits on the accrual or payment of compensatory time provided a policy is created and clearly communicated to employees in advance. For example, departments may require employees to take accumulated compensatory time within a specified time frame or require that a certain amount of accrued hours above a specified limit be paid in cash. Compensatory time is part of employees' wage earnings. Employees who agree to use compensatory time for overtime payment are entitled to use this time as if using their cash compensation.

Compensatory Time Agreement – For employees hired before April 15, 1986, compensatory time agreements are not needed provided that the department had a regular practice of granting compensatory time off in lieu of overtime pay. Departments must reach compensatory time

agreements for employees hired on and after April 15, 1986. Federal regulations allow compensatory time to be a condition of employment for new hires.

The U.S. Supreme Court’s decision in June 2000 gave supervisors the authority to schedule employees’ compensatory time off; however, employees must be able to use the compensatory time for their own personal purposes. When an employee requests compensatory time off, it must be approved unless it imposes an unreasonable burden on the work unit’s ability to provide acceptable levels and quality of service. Inconvenience to the department is not a sufficient reason for denying a request for compensatory time off.

SPECIAL SITUATIONS

State law enforcement employees – The employees in law enforcement occupations are governed by the 7(k) exemption for overtime computation. Instead of a seven-day, 40-hour workweek, a special overtime standard has been established. The special standard allows the employer to establish a work period of from seven to 28 days. No overtime compensation is required until the number of hours worked exceeds the following maximum work hour limits. Law enforcement employees, including some correctional employees, must meet **all** of the following criteria to be eligible for the 7(k) exemption.

- Be a uniformed or plainclothes employee engaged in law enforcement activity.
- Have authority to enforce laws designed to protect public safety and property, detecting and preventing crimes as part of their primary job.
- Have the power to arrest.
- Have undergone specialized training dealing with law enforcement.

Work Period (Consecutive Work Days)	Maximum Work Hours (Limit)
28	171
27	165
26	159
25	153
24	147
23	141
22	134
21	128
20	122
19	116
18	110
17	104
16	98
15	92
14	86
13	79
12	73

11	67
10	61
9	55
8	49
7	43

Departments may designate their law enforcement positions as 7(k) exempt, provided that the criteria listed above are met. The work periods for 7(k) exempt employees cannot be less than seven nor more than 28 consecutive days. Individual employees may have varying work periods. An established work period may not be changed unless the change is intended to be permanent and is not designed to evade the overtime requirements of the Act.

Law enforcement employees who are in attendance at a training facility are not considered to be on duty during the time they are not in class or at a training session, if they are free to use the time for personal use.

Hospital and Nursing Home Employees – There is a partial exemption under the FLSA for employees working in hospitals and nursing homes that offer residential care. Hospital and nursing home employees at departments providing residential care (state hospitals, nursing homes, mental institutions, and regional centers) are included in the partial exemption. Departments not offering residential care must calculate overtime using a seven-day, 40-hour workweek. The partial exemption allows overtime to be calculated on a 14-day period (as opposed to seven days) if all of the following conditions are met.

- Employees are paid overtime if they work more than eight hours per day.
- Hours worked exceeding 80 hours over a 14-day period are paid overtime.
- There is an agreement or understanding, preferably in writing, between employees and the employer, for using the 14-day period for overtime purposes.

The department must establish the exemption designation and schedule and notify employees of the schedule change.

Remember, if a 14-day period is designated for an employee who qualifies for the health care category, overtime needs to be paid not only after more than 80 total hours in a 14-day period, but also after more than eight hours in a day.

Dual Employment - A non-exempt employee who accepts additional hours of paid employment with another department, regardless of rate of pay, is entitled to overtime compensation for any time worked over 40 hours in a seven-day period, when hours worked in the two departments are combined. In a dual employment situation, the following considerations are critical.

- The State is one employer.
- Work time from both primary and secondary employment (e.g., concerts, sports events, contractual lecturer/instructor) must be combined for overtime compensation purposes unless the following criteria are met:

- the secondary employment is in a different occupational category from the employee’s primary employment;
- the secondary employment is sporadic, infrequent, irregular, or occurring in scattered instances; and,
- the secondary employment is done on a voluntary basis.

The regular rate for the week that the employee works for two different departments is the weighted average of the two rates. That is, total earnings are computed at the agreed upon rates, to include compensation during the workweek, and are then divided by the total number of hours worked at all jobs (see the following illustration). Or, the employee and employers may reach an agreement on a regular pay rate to be used for overtime compensation.

Dual Employment – Weighted Hourly Rate Calculation			
Department	Hourly Rate	Hours Worked	Straight Pay to employee
A	\$12.00	30	\$360.00
B	\$15.00	20	\$300.00

Total hours worked	50
Total earnings in a week	\$660.00
Hourly Rate for the week (total earnings/total hours)	\$13.20
Overtime hours (number of hours over 40)	10
Overtime dollars owed to the employee (hourly rate x # of overtime hours x .5)	\$66.00

If a state employee is hired as a leased worker through a multi-employee contractor or company (e.g., a temporary employment agency) to work for a different department doing a different type of work from the primary job, the secondary employment does not qualify for “dual employment.” The employee is considered to be working for two independent employers, and the time worked for the two employers does not have to be combined for the purpose of overtime compensation consideration. However, any overtime performed by the leased worker must be accurately reported to the company for FLSA purposes.

CHILD LABOR

The FLSA child labor provisions are designed to protect the educational opportunities of youth and prohibit their employment in jobs and under conditions detrimental to their health or safety. The child labor provisions include some restrictions on hours of work for youth under 16 years of age and lists hazardous occupations too dangerous for young workers to perform.

The **hour limitations** provided by the US Department of Labor are as follows.

- Youths 18 or older may perform any job, whether hazardous or not, for unlimited hours, in accordance with minimum wage and overtime requirements.
- Youths 16 and 17 years old may perform any non-hazardous job, for unlimited hours.
- Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs up to
 - 3 hours on a school day
 - 18 hours in a school week
 - 8 hours on a non-school day
 - 40 hours in a non-school week

In addition, work must be performed between the hours of 7:00 a.m. and 7:00 p.m., except from June 1 through Labor Day, when evening hours are extended to 9:00 p.m.

RECORD KEEPING REQUIREMENTS

Employers are required to keep records for both *non-exempt and exempt* employees under FLSA regulations. Records for non-exempt employees differ from exempt employees.

Non-exempt employees

- Name, home address, social security number (and date of birth if under 19);
- Gender and occupation;
- Time of day and day of the week the employee's workweek (or work period) begins and ends;
- Hours worked each workday and total hours worked each workweek (or work period);
- Regular hourly pay for any week in which overtime was worked;
- Total daily or weekly straight time earnings;
- Total overtime or compensatory time earned, used or compensated in cash for the workweek (or work period);
- Additions or deductions from wages paid each pay period;
- Total amount of wages paid each pay period;
- Date payment is made and the pay period covered.

Exempt employees

- Name, home address, social security number (and date of birth if under 19);
- Gender and occupation;
- Time of day and day of the week the employee's workweek begins;
- The basis on which wages are paid to the employee, in sufficient detail to permit calculation for each pay period of the employee's total compensation for employment including fringe benefits.

Note: Timesheets are not required under federal regulations for exempt employees. Employers can require exempt employees to record and track hours, and require a specified work schedule without affecting the exemption status. If departments require exempt employees to keep timesheets, it is not necessary to keep the same detailed time sheets as non exempt employees unless otherwise required by law. For example using a leave tracking system whereby exempt

employees confirm their work schedules and request leave is sufficient. On the other hand, grant-funded programs receiving federal funds may specify detailed tracking of time in order to receive those funds.

Records may be kept on paper, microfilm, or electronically, as long as they are accessible and reproducible. *Time records shall be retained for at least three years.* The records must be made available to the US DOL Administrator of the Wage and Hour Division (or a duly authorized representative) within 72 hours of a request. Finally, each department is required to display the US DOL Wage and Hour Division's minimum wage poster that briefly outlines FLSA requirements.

Pursuant to Rule 3-36, all time worked by a non-exempt employee must be recorded on a daily basis. Overtime is calculated based on the total time worked in a standard workweek or designated work period. As such, employees and supervisors are accountable for tracking and certifying hours worked on a weekly basis. Corrections to timesheets should be made as soon as errors are detected and within the same pay period, and no later than two weeks following the pay period in which the time was worked. However, because the appointing authority must compensate employees for any overtime worked, errors in time keeping records detected at any time must be reconciled as soon as possible.

EMPLOYEES' RIGHT FOR OVERTIME INVESTIGATIONS

Employees who have disputes regarding overtime such as exemption designation, work hours calculation, payment of overtime compensation, or use of compensatory time may request an investigation from the State Personnel Director (Chapter 8 of Rules). Departments and employees are encouraged to informally resolve issues related to overtime work, overtime compensation, and position eligibility. However, such informal resolution does not negate an employee's right to request a Director's review.

ENFORCEMENT OF FLSA

DHR is responsible for ensuring compliance with FLSA requirements, as a single employer, and will investigate any allegations of improper application of the law in accordance with state rule and law. Departments shall provide any requested documentation when requested by the Director.

Departments are held liable for noncompliance with FLSA provisions. The Wage and Hour Division within the U.S. Department of Labor is authorized to survey departments and to investigate complaints filed with them. In addition, it can initiate legal action against employers on an employee's behalf where such violations have been found to occur. When found in noncompliance, a department could end up paying:

- Attorney's fees;
- Liquidated damages, commonly referred to as "double back pay";
- Fines (and/or jail terms depending on the severity of the violation).

If a department is given notification of an investigation by US Department of Labor, DHR must be notified in writing (electronic notification is sufficient) as soon as practical.

FREQUENTLY ASKED QUESTIONS

1. Would working supervisors or lead workers be considered exempt under the executive category?

It is important to examine the duties of supervisors or lead workers to determine if they meet the exemption criteria for executive exemption. If the majority of duties assigned to a lead worker are similar to the duties of non-exempt employees and the lead worker does not have authority over hiring and firing, it is likely that the lead worker is non-exempt.

2. What constitutes the "exercise of discretion" in tests of whether an employee is exempt or not?

Exercise of discretion or independent judgment exists if an employee makes decisions freely without needing to consult a supervisor. The work must require the employee to compare and evaluate possible courses of conduct and act or make a decision after various possibilities have been considered. This decision-making power should be real and substantial, free from immediate supervision, and exercised with regard to *matters of consequence*. All employees exercise discretion and make some independent judgment while performing their duties. The key is the "matters of consequence."

3. What is the difference between a non-covered and an exempt employee?

Provisions of the FLSA do not bind non-covered employees. Exempt employees, while covered by the FLSA, are exempt from the minimum wage and overtime provisions of the Act. Certain records are required to be kept for exempt employees, whereas there is no FLSA record-keeping requirement for non-covered employees.

4. Are employees entitled to be paid for lunchtime if they eat at their desks?

If employees choose to eat at their desks and are completely relieved from duty, then the lunchtime would not be considered work time. However, if an employee were *required* to eat at the desk, the time would be considered work time. For those non-exempt employees who voluntarily eat at their desks, and answer phones or perform other work, they are "working." Even though it is voluntary, they must be paid for the work.

5. My supervisor called me in today and said he was reassigning me to work nights and weekends. I've worked there for 13 years and I don't think this is fair.

Your supervisor has the right to assign you to work any day for any number of hours but must pay you time-and-a-half for any hours over 40 you work in a week unless you are paid on a salary basis and are exempt from overtime.

6. Must employees who come in early to work be paid for their time?

The conditions under which the employees come to work early would determine whether that time would be considered work time. If an employee comes in early and is completely relieved from duty, the time would not be considered work time. However, if the employee comes in early and begins working (e.g., pre-shift briefing), the time would be considered work time.

Note: Some preliminary or post work may be considered compensable or non-compensable work time. Please call DHR or refer to your legal counsel for assistance.

7. Is on-call time considered work time?

The issue of pay for on-call time depends largely upon the employee's freedom while on-call, including how quickly the employee is required to respond to the call. While on call, if the employee is able to use the time freely for personal purposes, the time is not compensable. However, if the employee must remain on the employer's premises or remain so close to the premises that the employee cannot use the time freely, then that time is compensable. In general, the more an employee's movement is restricted while on-call, the more likely the on-call time may be considered work time.

8. Do hours spent being treated (at the suggestion of the employer) for an on-the-job injury count as work time?

Time spent by an employee on the first day of an on-the-job injury in waiting for and receiving medical attention at the direction of the employer during the employee's normal work hours on days when the employee is working would be considered work time. Beginning with the day after the on-the-job injury, time spent receiving medical attention is not work time.

9. If an employee works 40 hours during the week, and then volunteers to help paint a state building on the weekend, would the employee be paid overtime?

If the employee truly "volunteered" to work on the weekend without contemplation of pay and if the employee's regular job assignment is **not** painting, then the time would not be compensable. Remember, an employee cannot work for the same employer (the State) as a non-paid volunteer doing the same type of work for which the employee is paid.

10. Is the time a state trooper spends in court waiting to testify considered work time?

Time spent by a state trooper waiting to testify is considered work time under the FLSA.

11. Would it be considered work time if a state trooper is off duty but responds to an emergency?

The time spent responding to an emergency when a state trooper is off duty would be considered compensable time. Generally, all time during which the employee is "suffered or permitted" to work for the employer is compensable time.

12. How are FLSA rules enforced?

DHR is responsible for ensure compliance with the FLSA requirements and will investigate and resolve any allegation of misapplication of the law. In addition, the Wage and Hour Division within the U. S. Department of Labor can initiate investigations when complaints are filed or when particular industries are targeted for investigations. The Solicitor of Labor can bring a lawsuit on an employee's behalf in appropriate cases where the Wage and Hour Division finds that FLSA violations have occurred. Additionally, the Department of Justice can criminally prosecute persons (e.g., supervisor) who commit willful violations of the Act.

13. How should an employee be compensated for a part-time job worked for another department in addition to the full-time assignment?

If the employee is a non-exempt employee, all work hours must be totaled in order to calculate overtime compensation. The regular hourly rates and the number of hours worked for two departments are used to calculate the weighted average hourly rate for the week. Or, the employee and employer may agree on a regular hourly rate for overtime compensation. The employee must be compensated one and one-half times the established hourly rate for each hour worked over 40 hours per week.

If the employee is an exempt employee, the percentage of time spent on non-exempt duties (i.e., number of hours spent on non-exempt work during a workweek divided by 40 hours) must be calculated. If the employee spends less than 80 percent of their time during the workweek on exempt duties, the employee then loses the exemption status for that workweek. The overtime compensation shall be calculated as mentioned above.

14. Who are essential employees?

Essential employees are those employees who perform law enforcement, highway maintenance, and support services directly responsible for the health, safety, and welfare of patients, residents, students, and inmates (24-50-104.5, C.R.S.). Department heads are responsible for designating whether or not an employee is essential. Remember, paid leaves of absence *must be included* for overtime work hours for essential employees.

15. How can supervisors schedule non-exempt employees' compensatory time off without violating the law?

According to the FLSA, when a non-exempt employee has accrued compensatory time and requests use of this time, the employee shall be permitted to use such time within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the department. The employee earned the compensatory time and should be able to use it for personal purposes. With the U.S. Supreme Court's decision (June 2000), supervisors may schedule employees' compensatory time off, provided that employees can use the time for their own purposes.

Supervisors may also amend employees' annual leave requests, reinstate the leave and charge the absence to accrued compensatory time. However, supervisors are advised to do so with employees' knowledge. Annual leave and compensatory time are "wages" earned by employees and may be used interchangeably. In no case should the employees forfeit their earned annual leave due to this leave request alteration.

Supervisors may consider amending a sick leave request to manage overtime liability as illustrated in the following example.

- Employee B's workweek was Saturday, January 6, 12:01 a.m. through Friday, January 12, 12:00 a.m. (midnight) - a consecutive 168 hours, 7-day week.
- Employee B worked Monday (8 hours), Tuesday (8 hours), Thursday (12 hours) and Friday (12 hours).
- Employee B was sick on Wednesday and submitted a leave request for 8 hours.
- The supervisor amends the leave request so 8 hours of sick leave is not taken (without the amendment, the employee has logged in 48 hours for the week).
- As a result, Employee B worked 40 hours and did not take any sick leave.
- Employee B earns no overtime.

16. When should an employee's position be reviewed for overtime eligibility?

All positions should be reviewed for overtime eligibility when they are created or when duties are significantly changed. To initiate the review process, appointing authorities should contact their departments' human resources offices to assure that the review is completed and that employees are informed of the results and of their appeal rights.

17. Can we reduce exempt employees' leave balances (e.g., accrued annual or sick leave) without losing their exemption status?

Yes, the U.S. Department of Labor has adopted a special rule for public sector employers to reduce exempt employees' leave balances without losing the exempt employees' exemption status. State employees are paid according to a pay system established by statute pursuant to principles of public accountability. Under the system, employees accrue annual and sick leave and are required to use the leave to cover absences for personal or health-related reasons.

18. Can we reduce exempt employees' pay for unpaid leave without losing their exemption status?

Yes, as described above, under public accountability, when accrued leave is not used by exempt employees, supervisors may reduce exempt employees' pay or place exempt employees on unpaid leave in order to reduce pay in increments of one day without losing exempt status.

19. How can I hire an exempt employee for secondary employment without losing the employee's exemption status?

Employees cannot hold both exempt and non-exempt status. Departments must carefully look at both jobs and determine what the primary responsibility of the combined jobs is. Most likely, if the employee is exempt for the primary job, the employee will be exempt for the secondary job. The same is true for an employee whose primary job is non-exempt. Even though the duties of the secondary job may be exempt work, the primary job is non-exempt; therefore, the employee is eligible for overtime in both capacities. Please refer to dual employment (page 14) on the requirements of written agreements.

20. What exemption status should I designate for temporary employees?

In general, the same exemption review process should be done for temporary positions. When temporary employees (except medical doctors, attorneys and teachers) are hired on an hourly basis, they are eligible for overtime compensation. Since temporary employees, according to the Director's Rules, do not receive holiday pay, personal paid leave benefits, and departments reduce temporary employees' pay due to absences, most temporary employees are considered non-exempt.

21. How do I calculate the overtime hourly rates if non-exempt employees are involved in some shift work during a workweek that accrues overtime work?

The proper way of calculating the overtime hourly rate under this scenario is to calculate the weighted hourly rate for the entire workweek. For example, assume a non-exempt employee's regular hourly rate is \$10.00 and the third-shift pay is \$11.00 per hour. The employee works 30 hours regular shift and 20 hours on third shift. The employee's total compensation within the week is $\$10.00 \times 30 + \$11.00 \times 20 = \$520.00$. The weighted hourly rate would be $\$520.00/50$ hours = \$10.40. The weighted hourly overtime rate would be $\$10.40 \times 1.5 = \15.60 . Remember, the overtime hourly rate needs to be calculated on a weekly basis because it is possible that employees work different shift schedules in different weeks.

22. Are departments covered under the Colorado Wage Act?

No, state government is exempt from the Colorado Wage Law, except as it applies to the minimum wage. The FLSA governs departments' wage and overtime compliance; however, in accordance with Amendment 42, Article XVIII, Section 15, of the Colorado Constitution, (effective January 1, 2007), employees covered by federal or state minimum wage laws are eligible to receive the higher minimum wage.

Every attempt is made to keep this information updated. For additional information, refer to the *State Personnel Board Rules and Director's Administrative Procedures* (rules), the Colorado State Employee's Handbook, or contact your department human resources office. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the laws and rules are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.

SAMPLE FORMS

Compensatory Time Agreement (Adapted from the Thompson Publishing Group, Inc. April 2000, Washington, D.C.)

Compensatory Time Off Agreement

In accordance with the Fair Labor Standards Act, the State of Colorado has the practice of granting non-exempt employees compensatory time off in lieu of cash for hours worked in excess of 40 hours a week. The [department] has established a policy dated _____ for compensation of overtime and a copy of the policy was provided to me on _____. I understand that the compensatory time will be granted at time and one-half for all hours worked in excess of 40 hours per week or other permissible work schedules. I further understand that the compensatory time may be limited, preserved, used, or cashed out consistent with provisions of that policy and applicable US DOL law and regulations.

I knowingly agree to the provision of time off as compensation for overtime work as a condition of my employment and consent to the use of compensatory time in accordance with the policy. I further understand that in the event any portion of the policy is interpreted to conflict with the FLSA or its regulations that the conflicting portion shall be struck and the remainder of the policy shall continue in full force and effect.

Employee Signature

Date

HR Administrator
or Supervisor

Date

Checklist for Executive Exemption “Standard” Test (Adapted from the checklist published by the Thompson Publishing Group Inc., March 2005, Washington, D.C.)

- ❑ 1. Is the employee paid \$455 or more per week in base salary?
- ❑ 2. Is the employee paid on a salary basis (not hourly)? With certain limited exceptions (“outside sales” people), he or she must:
 - Experience no reduction in salary for variations in the quality and quantity of work;
 - Receive each pay period a predetermined amount constituting all or part of his or her compensation.
- ❑ 3. Does the employee’s “primary duty” consist of managing the enterprise or a customarily recognized division or organizational unit thereof? (See the Executive Section for list of management type functions)
 - The primary duty means the principal, main, major, or most important duty that the employee performs.
 - The primary duty must be managing a customarily recognized division or organizational unit not a mere collection of employees assigned from time to time to a specific job or series of jobs.
- ❑ 4. Does the employee regularly and customarily supervise two or more employees?
 - The employee must supervise two full-time employees or the equivalent (note: the State has a different definition of supervision for job evaluation purposes so refer to state class descriptions).
 - Employees supervised must be employed in the department that the “executive” is managing.
- ❑ 5. Does the employee have the authority to hire or fire other employees, or make recommendations as to status of other employees that are given particular weight?
 - To determine whether an employee’s recommendations are given “particular weight”, factors to be considered include, but are not limited to, whether it its part of the employee’s job duties to make such recommendations; the frequency with which such recommendations are made or requested; and the frequency with which the employee’s recommendations are relied upon.

Checklist for Administrative Exemption “Standard” Test (Adapted from the checklist published by the Thompson Publishing Group Inc., March 2005, Washington, D.C.)

- 1. Is the employee paid \$455 or more per week in base salary?
- 2. Is the employee paid on a salary or fee basis (not hourly)? With certain limited exceptions (“outside sales” persons), he or she must:
 - Experience no reduction in salary for variations in the quality and quantity of the work;
 - Receive each pay period a predetermined amount constituting all or part of his or her compensation.
- 3. Does the employee’s “primary duty” consist 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?
 - The primary duty means the principal, main, major, or most important duty that the employee performs.
 - The employee should not be a “blue-collar” worker or a “production worker”(except that if the organization’s business is producing management services or other business operations for clients, then a production worker may be exempt).
- 4. Does the employee have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance?
 - Exercising “discretion and independent judgment” involves comparing and evaluating possible courses of conduct, and acting or making a decision after the various possibilities have been considered.
 - Use of manuals and standard operating procedures does not preclude exemption if the manuals contain or relate to highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills.

Checklist for “Learned” Professional Exemption “Standard” Test (Adapted from the checklist published by the Thompson Publishing Group Inc., March 2005, Washington, D.C.)

- 1. Is the employee paid on a salary or fee basis of \$455 or more per week in base salary?
 - (a) With in certain limited exceptions (“outside sales” person), he or she must:
 - Experience no reduction in salary for variations in the quality and quantity of work;
 - Receive each pay period a predetermined amount constitution all or part of his or her compensation.
 - (b) Or, is the employee in one of those professions – physicians, lawyers, teachers, and filmmaking industry employees – excepted for the salary or fee basis test? (If yes, then the \$455 minimum salary or fee does not apply.)

- 2. Does the employee’s “primary duty” consist of the performance of work that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?
 - The primary duty means the principal, main, major, or most important duty that the employee performs.
 - The employee must consistently exercise discretion and judgment, i.e., he or she must generally use his or her advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.
 - The work must be predominantly intellectual in character.

Checklist for Computer Professional Exemption

- 1. Is the employee paid on a "salary basis and paid \$455 per week. Note that this does not apply to those IT employees who are paid more than \$27.63 an hour.
 - Paid an established salary on a weekly or longer basis regardless of the number of hours worked.
 - No suspension from work and from pay for less than one whole workweek.
 - No pay reduction is made for absences caused by jury duty, service as witness, or temporary military service.

- 2. Does the employee's primary duties consist of one or more of the following?
 - (a) Applying systems analysis techniques and procedures.
 - (b) Designing computer systems based on, and related to, user specifications.
 - (c) Creating or modifying computer programs based on, and related to, system design specifications.
 - (d) Creating or modifying computer programs related to machine operating systems. or
 - (e) A combination of the duties as described, requiring the same levels of skill.

- 3. Does the work performed require consistent exercise of discretion and independent judgment?

Volunteer Status Checklist (Adapted from the checklist published by the Thompson Publishing Group Inc., March 2005, Washington, D.C.)

1. Does the individual receive any of the following?
 - a. any compensation? Yes_____ No_____
 - b. any benefits such as health insurance or PERA? Yes_____ No_____
 - c. any nominal fee such as a per call payment? Yes_____ No_____
 - d. any reimbursement for travel expenses? Yes_____ No_____

If the answer is yes to any of the above questions, please describe the nature of the compensation and the basis under which it will be paid?

2. Is the individual employed and paid to perform work for the same department? Yes_____ No_____

If the answer is yes, please describe.

3. Is the individual being paid to perform the same service they perform as an employee? Yes_____ No_____

If the answer is yes, are the services being perform in the same department? Yes_____ No_____

4. Does the individual have a civic, humanitarian, or charitable reason for volunteering? Yes_____ No_____ If yes, please describe.
-

5. Identify the department the individual currently works. _____

6. Identify the department or unit the individual wishes to volunteer. _____

7. If the individual wishes to volunteer and work within the same department, please describe the difference in the work performed.
-

8. How many hours will the individual volunteer to work? _____

9. Is there a set work schedule for the volunteer to follow? Yes_____ No_____

If yes, please describe.

**TECHNICAL ASSISTANCE
DHR APPROVAL FOR PUBLICATION**

This signature page is required for new technical assistance or when major policy revisions are made resulting from changes in law, rule, directives, or official interpretation. As of March 1, 2009, new signatures are not required for non-substantive revisions resulting from correction of errors (e.g., typographical or grammatical), updating factual information (e.g., minimum wage, statute or rule cites), or illustrative samples. Readers should always check the date on the first page to ensure they are using the most current version.

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