Making a FLSA Exemption Status Determination: A Work Aid

An FPMI Solutions, Inc. White Paper

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“I have a passion and desire for winning customer trust and intimacy, thought leadership, proven processes, strategic investments, human capital bench strength, flawless performance, and discriminating solutions.”
The intent of this document is to help you thoroughly understand and effectively use the FLSA Exemption Status Determination process. The following features will help guide you through the process:

**Links**
Text highlighted in blue indicates links to additional information online. Click the text to view those websites.

**Icons**
To help you navigate your way through the information in this Work Aid, the following icons may appear throughout:

- **Remember**
- **Tech Talk**
- **Helpful Hint**
- **Caution!**
- **Update** 
  (from previous versions of this document, if any)

**Source**
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Prepare

1. Gather Reference Material
   - 5 CFR Part 551
   - OPM Classification Standard
   - Agency Guidance

2. Gather Position Material
   - Position Description
   - Evaluation Statement

   Verify accuracy of PD through interviews with Managers and SMEs.

   Carefully read verified PD and Position Classification Evaluation Statement. Underline key sentences and words.

   Determine whether primary duty tests are met.

   Summarize criteria as evidence.

   Evaluate currency and accuracy of PD and evaluation statement.

   Review general principles of the FLSA exemption determination.


   Develop conclusion based on exemption criteria.

   Use FLSA evaluation statement to support exemption status conclusion.

   Review to confirm duties are being performed.
Analyze

1. Determine whether primary duty tests are obviously not met.

2. Summarize the criteria for which you must identify evidence.

3. Evaluate the currency and accuracy of the PD and the evaluation statement.

4. Review the General Principles of FLSA exemption determinations. (§551.202)

5. In all exemption determinations, the agency must observe the following principles:

   (a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions of this subpart, and such supplemental interpretations or instructions issued by OPM. The agency must designate an employee FLSA exempt when the agency correctly determines that the employee meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM.

   (b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

   (c) The burden of proof rests with the agency that asserts the exemption.

   (d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.

   (e) While established position descriptions and titles may assist in making initial FLSA exemption determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed.
performed by the employee.

(f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. Employees who perform a combination of exempt duties set forth in this regulation may also qualify for exemption. For example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. Work that is exempt under one section of this part will not defeat the exemption under any other section.

(g) Failure to meet the criteria for exemption under what might appear to be the most obvious criteria does not preclude exemption under another category.

For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative criteria may be performing exempt executive work.

(h) Although it is normally feasible and more convenient to identify a single exemption category, this is not always appropriate. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee’s primary duty may involve two categories which are intermingled and difficult to segregate. This does not preclude designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria. The agency is responsible for showing and documenting that the work as a whole clearly meets one or more of the exemption criteria.

6. Review the salary-based non-exemption (§551.203). In the Federal Government, this rarely, if ever, will be an issue. However, the criteria are:

(a) An employee, including a supervisory employee, whose annual rate of basic pay is less than $23,660 is nonexempt, unless:

(1) The employee is subject to §551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status); or

(2) The employee is subject to §551.212 (Foreign
exemption criteria); or

(3) The employee is a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) of §551.208.

(b) For the purpose of this section, “rate of basic pay” means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart F, special rate supplement under 5 CFR part 530, subpart C, or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind, such as premium payments, differentials, and allowances.

7. Review the nonexemption of certain employees (§551.204).

(a) Certain nonsupervisory white collar employees are FLSA nonexempt (unless the employees are subject to §551.211 - Effect of performing different work or duties for a temporary period of time on FLSA exemption status or §551.212 - Foreign exemption criteria), because they do not fit any of the exemption categories. They include:

(1) Employees in equipment operating and protective occupations, and most clerical occupations;

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

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

(b) Nonsupervisory employees in the Federal Wage System or in other comparable wage systems are
nonexempt, unless the employees are subject to §551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status) or §551.212 (Foreign exemption criteria).

8. Review the requirements for executive, administrative and professional exemptions based on the criteria from 5 CFR 551 as stated below.

**Executive Exemption Criteria (§551.205)**

(a) An executive employee is an employee whose primary duty is management (as defined in §551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and who:

(1) **Customarily and regularly directs** the work of two or more other employees. However, an employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager’s absence does not meet this requirement. In addition, hours worked by an employee cannot be credited more than once for different executives. This takes into consideration those organizations that use matrix management—a system of “shared” leadership where supervision cuts across product and service lines in terms of accessing activities and advising top management on business operations, but where the supervisor/leader does not have the operating authority over all employees. Thus, a shared responsibility for the supervision of the same two employees in the same recognized organizational unit does not satisfy this requirement. However, a full-time employee who works 4 hours for one supervisor and 4 hours for a different supervisor will be credited as a half-time employee for both supervisors; and

(2) **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.

(b) **Particular weight.** Criteria to determine whether an employee’s suggestions and recommendations are given particular weight by higher-level management include, but are not limited to: whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and
recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. Particular weight does not include consideration of an occasional suggestion with regard to the change in status of a coworker. An employee’s suggestions and recommendations may still be deemed to have particular weight even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

**Administrative Exemption Criteria (§551.206)**

An *administrative employee* is an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations, as distinguished from production functions, of the employer or the employer’s customers and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term “matters of significance” refers to the level of importance or consequence of the work performed.

(b) The phrase *discretion and independent judgment* must be applied in light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

1. Has authority to formulate, affect, interpret, or implement management policies or operating practices;
2. Carries out major assignments in conducting the operations of the organization;
3. Performs work that affects the organization’s operations to a substantial degree, even if the employee’s assignments
are related to operation of a particular segment of the organization;

(4) Has authority to commit the employer in matters that have significant financial impact;

(5) Has authority to waive or deviate from established policies and procedures without prior approval;

(6) Has authority to negotiate and bind the organization on significant matters;

(7) Provides consultation or expert advice to management;

(8) Is involved in planning long- or short-term organizational objectives;

(9) Investigates and resolves matters of significance on behalf of management; and

(10) Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee’s decisions or recommendations are reviewed at a higher level. Thus, the term discretion and independent judgment does not require that decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

(d) An organization’s workload may make it necessary to employ a number of employees to perform the same or similar work.

The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of
significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

(f) The use of manuals, guidelines, or other established procedures containing or relating 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 does not preclude exemption. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee’s exemption status. However, employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances will be nonexempt.

(g) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee’s neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

(h) Employees in certain occupations typically assist and support line managers and assume facets of the overall management function. Neither the location of the work nor the number of employees performing the same or similar work turns such work into a production function. For example, independent agencies or agency components often provide centralized human resources, information systems, procurement and acquisition, or financial management services as support services to other agencies or agency components. However, this does not change the inherent administrative nature of the work performed to line or production work. Similarly, employees who develop, interpret, and oversee
agency or government-wide policy are performing management support functions. Some of these activities may be performed by employees who would otherwise qualify under another exemption. Depending upon the purpose of the work and the organizational context, work in certain occupations may be either exempt or nonexempt.

For example, criminal investigators who perform work directly related to the internal management of the agency and typically would be expected to provide recommendations of great significance based on the analysis of investigative findings would likely be considered as performing a staff function. In contrast, the performance of investigative and inspectional work to confirm whether specific regulatory requirements have been met for an investigative/inspectional component of any agency would likely be considered as performing a line rather than a staff function.

(i) An employee who leads a team of other employees assigned to complete major projects (such as acquisitions; negotiating real estate transactions or collective bargaining agreements; designing and implementing productivity improvements; oversight, compliance, or program reviews; investigations) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team. An example is a lead auditor who oversees an audit team in an auditing agency and who is assigned responsibility for leading a major audit requiring the use of substantial agency resources. This auditor is responsible for proposing the parameters of the audit and developing a plan of action and milestones to accomplish the audit. Included in the plan are the methodologies to be used, the staff and other resources required to conduct the audit, proposed staff member assignments, etc. When conducting the audit, the lead auditor makes on-site decisions and/or proposes major changes to managers on matters of significance in accomplishing the audit, including deviations from established policies and practices of the agency.

(j) An executive assistant or administrative assistant to a high level manager or senior executive generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.
(k) Human resources employees who formulate, interpret or implement human resources management policies generally meet the duties requirements for the administrative exemption. In addition, when interviewing and screening functions are performed by the human resources employee who makes the hiring decision or makes recommendations for hiring from a pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee’s exempt functions.

(l) Management analysts who study the operations of an organization and propose changes in the organization, program analysts who study program operations and propose changes to the program, and other management advisors generally meet the duties requirements for the administrative exemption.

(m) Acquisition employees with authority to bind the organization to significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with higher management officials when making a commitment.

(n) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

Professional Exemption Criteria (§551.207)

To qualify for the professional exemption, an employee’s primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Learned professionals, creative professionals, and computer employees are described in §§551.208, 551.209, and 551.210, respectively.
Learned Professionals (§551.208)

(a) To qualify for the learned professional exemption, an employee’s primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The work must include the following three elements:

(1) The employee must perform work requiring advanced knowledge. Work requiring advanced knowledge is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level;

(2) The advanced knowledge must be in a field of science or learning which includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction which restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.

However, the word “customarily” means that the exemption is appropriate for employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is appropriate in unusual cases where a lawyer has not gone to law school, or a chemist does
not possess a degree in chemistry. However, the learned professional exemption is not applicable to occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The position of Engineering Technician is an example of such an occupation where the employee collects, observes, tests and records factual scientific data within the oversight of professional engineers, and performs work using knowledge acquired through on-the-job and classroom training rather than by acquiring the knowledge through prolonged academic study.

(b) Expansion of professional exemption. The areas in which the professional exemption may be applicable are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in this section also may be created in the future. Such organizations may develop similar, specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

(c) Practice of law.

(1) This exemption applies to an employee in a professional legal position requiring admission to the bar and involved in preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; rendering legal advice and services; preparing interpretive and administrative orders, rules, or regulations; drafting, negotiating, or examining contracts or other legal documents; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; and drafting and reviewing decisions for consideration and adoption by agency officials.
(2) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(d) Practice of medicine.

(1) An employee who holds a valid license or certificate permitting the practice of medicine or any of its branches and is actually engaged in the practice of the profession is exempt. The exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term “physicians” includes medical doctors, including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(2) An employee who holds the required academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession is exempt. Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(3) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(e) Accounting. Certified public accountants generally meet the duties requirements for the learned professional exemption. An employee performing similar professional work in a position with a positive educational requirement and requiring the application of accounting theories, concepts, principles, and standards may qualify as an exempt learned professional.

However, accounting clerks and technicians and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(f) Engineering. Engineers generally meet the duties requirements for the learned professional exemption. Professional engineering work typically involves the application of a knowledge of such engineering fundamentals as the strength and strain analysis of engineering materials and structures, the physical and chemical characteristics of engineering materials such as elastic limits,
maximum unit stresses, coefficients of expansion, workability, hardness, tendency to fatigue, resistance to corrosion, engineering adaptability, and engineering methods of construction and processing.

Exempt professional engineering work includes equivalent work performed in any of the specialized branches of engineering (e.g., electrical, mechanical, or materials engineering). On unusual occasions, engineering technicians performing work comparable to that performed by professional engineers on the basis of advanced knowledge may also be exempt. In such instances, the employee actually is performing the work of an occupation that generally requires a specialized academic degree and is performing substantially the same work as the degreed employee, but has gained the same advanced knowledge through a combination of work experience and intellectual instruction which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

(g) *Architecture.* Architects generally meet the duties requirements for the learned knowledge of architectural principles, theories, concepts, methods, and techniques; a creative and artistic sense; and an understanding and skill to use pertinent aspects of the construction industry, as well as engineering and the physical sciences related to the design and construction of new, or the improvement of existing, buildings.

(h) *Teachers.* A teacher is any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.

1. A teacher performs exempt work when serving, for example, as a regular academic teacher; teacher of kindergarten or nursery school pupils; teacher of gifted or disabled children; teacher of skilled and semi-skilled trades and occupations; teacher engaged in automobile driving instruction; aircraft flight instructor; home economics teacher; or vocal or instrumental music instructor.

A faculty member who is engaged as a teacher but also spends a considerable amount of time in extracurricular activities such as coaching athletic teams or acting as a moderator or advisor in such areas as drama, speech, debate, or journalism is engaged in teaching. Such activities are a recognized part of an
educational establishment’s responsibility in contributing to the educational development of the student. An instructor in an institution of higher education or another educational establishment whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge is also an exempt teacher.

(2) The possession of an elementary or secondary teacher’s certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by appropriate certifying entities. However, a teacher’s certificate is not generally necessary for post-secondary educational establishments.

(3) Exempt teachers do not include teachers of skilled and semi-skilled trade, craft, and laboring occupations when the paramount knowledge is the knowledge of and the ability to perform the trade, craft, or laboring occupation. Conversely, if the primary requirement of the post-secondary education instructor is the ability to instruct, as opposed to knowledge of and ability to perform a trade, craft, or laboring occupation, then the position may be exempt.

(4) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(i) Medical technologists. Registered or certified medical technologists who have successfully completed 3 academic years of pre-professional study in an accredited college or university, plus a 4th year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association, generally meet the duties requirements for the learned professional exemption.

(j) Nurses. Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(k) Dental hygienists. Dental hygienists who have successfully
completed 4 academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(l) *Physician assistants.* Physician assistants who have successfully completed 4 academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants, generally meet the duties requirements for the learned professional exemption.

(m) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced, specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general 4-year advanced degrees, most specialized paralegal programs are 2-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is applicable to paralegals who possess advanced, specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. In addition, a paralegal who fails to meet the professional exemption criteria may be performing exempt administrative work, e.g., overseeing a full range of support services for a large legal office.

**Creative Professionals (§551.209)**

(a) To qualify for the creative professional exemption, an employee’s primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. The work performed must be “in a recognized field of artistic or creative endeavor,” including such fields as music, writing, acting, and the graphic arts. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of “invention, imagination, originality, or talent” distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention,
imagination, originality, or talent exercised by the employee. Determination of exempt creative professional status must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; and writers who choose their own subjects and hand in a finished piece of work to their employers. This requirement generally is not met by a person who is employed as a retoucher of photographs, since such work is not properly described as creative in character.

(b) Federal employees engaged in the work of newspapers, magazines, television, or other media are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. For example, employees who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Employees also do not qualify as exempt creative professionals if their work product is subject to substantial control by the organization.

However, when the work requires invention, imagination, originality, or talent, as opposed to work which depends primarily on intelligence, diligence, and accuracy, such employees may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator. Work that does not fully meet the creative professional exemption criteria does not preclude exemption under another exemption category. For example, public affairs work under control of the organization that does not meet the creative professional exemption may meet the administrative exemption.

Computer Employees (§551.210)

(a) Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.
(b) The exemption in section 13(a)(1) of the Act applies to any computer employee whose annual remuneration exceeds the salary-based nonexemption prescribed in §551.203. The exemption in section 13(a)(17) applies to any computer employee compensated on an hourly basis at a rate of basic pay (as defined in §551.203(b)) not less than $27.63 an hour. In addition, these exemptions apply only to computer employees whose primary duties consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) Computer manufacture and repair. The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations as identified in paragraph (b) of this section, are also not exempt computer professionals.

(d) Executive and administrative computer employees. Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under this subpart. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the organization or the organization’s
customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized organizational unit, and whose recommendations regarding the hiring, firing, advancement, promotion, or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption. Alternatively, a senior or lead computer programmer who leads a team of other employees assigned to complete a major project that is directly related to the management or general business operations of the employer or the employer’s customers generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

**Foreign Exemption Criteria (§551.212)**

*Foreign exemption* means a provision of the Act under which the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area.

(a) *Application.* When the foreign exemption applies, the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area. When an employee meets one of the two criteria in paragraph (b) of this section, the foreign exemption applies until the employee spends any hours of work in any nonexempt area as defined in §551.104.

(b) *Foreign exemption applies.* If an employee meets one of the two following criteria, the employee is subject to the foreign exemption of the Act and the minimum wage, overtime, and child labor provisions of the Act do not apply:

(1) The employee is permanently stationed in an exempt area and spends all hours of work in a given workweek in one or more exempt areas; or

(2) The employee is not permanently stationed in an exempt area, but spends all hours of work in a given workweek in one or more exempt areas.

(c) *Foreign exemption does not apply.* For any given workweek, the minimum wage, overtime, and child labor
provisions of the Act apply to an employee permanently stationed in an exempt area who spends any hours of work in any nonexempt area. For that workweek, the employee is not subject to the foreign exemption, and the agency must determine the exemption status of such an employee as described in paragraphs (c)(1) and (c)(2) of this section.

The foreign exemption does not resume until the employee again meets one of the criteria in paragraph (b) of this section.

(1) *Same duties.* If the duties performed during that workweek are consistent with the primary duties of the employee’s official position, the agency must designate the employee the same FLSA exemption status as if the employee were permanently stationed in any nonexempt area.

(2) *Different duties.* If the duties performed during that workweek are not consistent with the primary duties of the employee’s official position:

   (i) The agency must first designate the employee the same FLSA exemption status as the employee would have been designated based on the duties included in the employee’s official position if the employee was permanently stationed in any nonexempt area; and

   (ii) The agency must determine the employee’s exemption status for that workweek by applying §551.211.

(d) *Resumption of foreign exemption.* When an employee returns to any exempt area from performing any hours of work in any nonexempt area, the employee is not subject to the foreign exemption until the employee meets one of the criteria in paragraph (b) of this section.

*Exemption of Employees Receiving Availability Pay (§551.213)*

The following employees are exempt from the hours of work and overtime pay provisions of the Act:

(a) A criminal investigator receiving availability pay under §550.181(a) of this chapter, as provided in 29 U.S.C. 213(a)(16));
(b) A pilot employed by U.S. Customs and Border Protection or its successor who is a law enforcement officer as defined in section 5541(3) of title 5, United States Code, and who receives availability pay under section 5545a(i) of title 5, United States Code.

**Statutory Exclusion (§551.214)**

A customs officer who receives overtime pay under subsection (a) or premium pay under subsection (b) of 19 U.S.C. 267 and under 19 CFR 24.16 for time worked may not receive pay or other compensation for that work under any other provision of law.

**Fire Protection Activities and 7(K) Coverage for FLSA Pay and Exemption Determinations (§551.215)**

(a) The Office of Personnel Management may determine that the provisions of section 7(k) of the Act apply to certain categories of fire protection employees based on appropriate factors, such as the type of premium payments they receive (see §551.501(a)(1) and (5) and §551.541).

(b) *Fire protection activities.* Fire protection activities involve the performance of functions directly concerned with the response to and the control and extinguishment of fires; or performance of inspection of facilities and equipment for the primary purpose of reducing or eliminating fire hazards by trained firefighters eligible for reassignment to fire control and suppression or prevention duties; or provision of the primary (*i.e.*, the first called) rescue and ambulance service in connection with fire protection functions.

(c) *Engaged in fire protection activities.* (1) An employee (including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker) is considered engaged in fire protection activities for the purpose of determining possible application of section 7(k) of the Act as provided for in §551.501(a)(1) and (5) and §551.541 if the employee:

   (i) Is trained in fire suppression, has authority and responsibility to engage in fire suppression, and is employed by an organization with fire suppression as a primary mission; and
(ii) Is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

(2) Subject to the requirements of paragraph (c)(1) of this section, the following types of employees are engaged in fire protection activities for the purpose of determining possible application of section 7(k) of the Act:

(i) Employees in positions properly classified in the Fire Protection and Prevention series, including any qualified firefighter who is assigned to perform support functions (e.g., communications or dispatching functions, equipment maintenance or repair) or who is transferred to an administrative or supervisory position within the fire protection activity, except when such administrative or supervisory work exempts the employee under executive, administrative, and professional considerations;

(ii) Employees in positions properly classified in other series, such as Forestry Technician, for whom fire protection functions constitute substantially full-time assignments throughout the year, or for the duration of a specified fire season within the year;

(iii) Temporary employees hired solely to perform fire suppression work on an as-needed basis;

(iv) Members of rescue and ambulance crews with fire suppression training, authority, and responsibility, who are part of a fire suppression organization, as described in paragraph (c)(1)(i) of this section; and

(v) Any other employee in any workweek in which the employee performs fire control or suppression work for 80 percent or more of the total hours worked.

(d) Not engaged in fire protection activities. Examples of types of employees who are not engaged in fire protection activities for the purpose of applying section 7(k) of the Act (as provided for in §551.501(a)(1) and (5) and §551.541) include the following:

(1) Professional engineers, engineering technicians, and similar employees involved in fire protection research or in the design and development of fire protection and prevention equipment and materials;
(2) Employees who perform functions that support fire protection activities but who are not trained, qualified firefighters eligible for reassignment to fire control and suppression or prevention duties. Supporting functions (such as maintenance of fire apparatus, equipment, alarm systems, etc., or communications and dispatching work or preparation of records and reports) are included when performed by firefighters but are not included when performed by mechanics, communications systems and radio operators, clerks, or other employees;

(3) Employees whose primary duties are not related to fire protection but who perform fire control or suppression work on an as needed basis, provided that the fire control or suppression work constitutes less than 80 percent of the employees’ hours of work within any workweek; and

(4) Employees on rescue and ambulance crews who:

   (i) Are not trained in fire suppression;

   (ii) Do not have fire suppression authority and responsibility; or

   (iii) Are employed by an organization, such as a hospital, that does not have fire suppression as a primary mission.

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**Law Enforcement Activities and 7(K) Coverage for FLSA Pay and Exemption Determinations (§551.216)**

(a) The Office of Personnel Management may determine that the provisions of section 7(k) of the Act apply to certain categories of law enforcement employees based on appropriate factors, such as the type of premium payments they receive (see §551.501(a)(1) and (5) and §551.541).

(b) Law enforcement activities. Law enforcement activities involve work directly and primarily concerned with:

   (1) Patrol and control functions that include patrolling an area to enforce law and order and to protect the lives, property, and civil rights of individuals through the prevention and detection of criminal acts; responding to complaints, violations, accidents, and emergencies; investigating for clues at the scene of a crime, interviewing witnesses, and evaluating evidence to locate suspects; and apprehending and arresting persons.
suspected of, or wanted for, criminal violations under a statutorily prescribed arrest authority;

(2) Executing the orders of a Federal court, including serving civil writs and criminal warrants issued by Federal courts; tracing and arresting persons wanted by warrants; and seizing and disposing of property under court orders;

(3) Planning and conducting investigations relating to alleged or suspected violations of criminal laws, including the arrest of suspected or wanted persons under a statutorily prescribed arrest authority;

(4) Security functions in a correctional institution involving direct custody and safeguarding of inmates charged with or convicted of violations of criminal laws; or

(5) Rescue and ambulance functions that provide the primary (i.e., the first called) service in connection with law enforcement activities described above.

(c) Engaged in law enforcement activities. The following employees are engaged in law enforcement activities for the purpose of determining possible application of section 7(k) of the Act as provided for in §551.501(a)(1) and (5) and §551.541:

(1) Employees in positions properly classified in the Police series, and employees in positions that would be otherwise classifiable in that series if covered by classification criteria of chapter 51 of title 5, U.S. Code;

(2) Employees in positions properly classified as Border Patrol Agents, Customs Patrol Officers, and other employees whose primary duties involve similar patrol and control functions performed for the purpose of detecting and apprehending persons suspected of violating criminal laws;

(3) Employees in positions properly classified in the U.S. Marshal series;

(4) Employees in positions properly classified in the Criminal Investigating series, and other employees performing criminal investigation as their primary duty, except as provided for in §551.213 (Exemption of employees receiving availability pay);

(5) Employees in positions properly classified in the Correctional Officer series, Guard series, or other series, whose primary duty is to maintain custody of inmates of a
correctional institution; and

(6) Employees on rescue and ambulance crews that provide the primary service in connection with law enforcement functions, provided that crew members have received intensive training in specialized rescue and first aid procedures applicable to law enforcement emergencies (e.g., gunshot wounds, riot and accident victims) and the crew responds to actual or potential law enforcement emergencies on a regular and recurring basis.

(d) Not engaged in law enforcement activities. The following employees are not engaged in law enforcement activities for the purpose of pay under section 7(k) of the Act as provided for in §551.501(a)(1) and (5) and §551.541:

(1) Employees whose primary duties concern the protection of Government property from hazards such as sabotage, espionage, theft, fire, or accidental or willful damage and in so doing, control the movement of persons and protect the lives and property of persons on Government property (e.g., guards or other employees performing similar functions);

(2) Employees who perform work concerned with the determination of the applicability of or compliance with laws and regulations when the duties primarily involve:

   (i) Examining or inspecting products, premises, property, or papers of persons or firms to enforce or obtain compliance with laws and regulations (e.g., immigration and customs examining or inspecting; mine safety and health examining or inspecting; alcohol, tobacco and firearms examining or inspecting; plant protection and quarantine examining or inspecting); or

   (ii) Planning and conducting investigations covering the character, practices, suitability or qualifications of persons or organizations seeking, claiming or receiving Federal benefits, permits, or employment (e.g., general investigations work);

(3) Employees who work within correctional institutions but who do not have direct custody and safeguarding of inmates as their primary duty; and

(4) Members of rescue or ambulance crews providing services with law enforcement activities only in unusual situations (e.g., primary crews are unavailable or an emergency situation requires additional crews than the primary service).
Conclude

1. Based upon all of the information you have gathered and analyzed, develop your conclusion supported by specific reference to the exemption criteria found in 5 CFR 551.

2. Use the FLSA Evaluation Statement located in Appendix A to support the exemption status conclusion.

3. Review the FLSA Evaluation Statement to confirm that the FLSA exemption status determination you made is fully supported by the duties the employee is actually performing.

**FLSA Evaluation Statement**

The FLSA Evaluation Statement needs to include the following information:

1. Identification of Position – Position title, pay plan, occupational code, grade, and date of statement.
2. Current FLSA determination.
3. Brief analysis of the primary duty on which the new FLSA determination is based.
4. Reasons to sustain or change the current FLSA determination, including the specific reference to the section of 5 CFR 551 which supports the conclusion made.
5. Conclusion regarding new FLSA determination.