

**FAIR LABOR STANDARDS ACT EXEMPTIONS FOR FEDERAL EMPLOYEES**

Melissa Baumann

**The Fair Labor Standards Act Exemptions**

The Fair Labor Standards Act (FLSA) is a hallmark piece of New Deal legislation enacted to regulate minimum wages and the length of the workday with the goal of maintaining “the minimum standard of living necessary for health, efficiency, and general wellbeing of workers (29 USC 202).” Upon full implementation of the FLSA, a minimum wage level was set (29 USC 206) and employers were required to pay employees “time and a half” whenever the employees worked more than 40 hours in a week (29 USC 207). To implement the FLSA, the Wage and Hours Division of the Department of Labor was created and vested with the authority to promulgate regulations implementing the provisions of the FLSA (29 USC 204).

As with any good law, Congress also felt a need to create exceptions to the law: In this case, *bona fide* executive, administrative, and professional employees were exempted from the coverage of the wages and hours provisions of the FLSA (29 USC 212(a)(1)). The task of delimiting the types of employees who meet these exemptions was given to the Wage and Hours Division of the DOL, and the regulations are published at 29 CFR 541.

First, to be exempt under the DOL exemption regulations, an employee must be paid on a salary basis. This means that he or she receives a predetermined amount of compensation, without regard to the quantity and quality of the work, and without reductions for absences of less than one week (29 CFR 541.118, 541.212, 541.312).

Second, the employee must earn a minimum of \$155/week (\$170 for professionals) (29 CFR 541.115, 541.211, 541.311). Third, the employee must pass the appropriate test

to determine if he or she is a *bona fide* executive, administrative, or professional employee. For each category of exemptions, there is a long test and a short test related to the type of work that the employee performs and the level of responsibility that the employee has in the workplace. Which test is used is determined by the salary of the employee: those who earn between \$155 and \$250 per week (\$170 and \$250 for professionals) are tested using the long tests, while those earning more than \$250 per week are tested against the short tests. The short tests originally were intended to be used with “highly compensated” employees. However, the salary amounts in the regulations have not been increased since 1975 and they have become obsolete. Thus, almost all employees are tested under the short tests described below.

*Executive Short Test:* To meet the short test for an executive employee, the employee must have a primary duty of managing the enterprise in which he or she is employed or a recognized subdivision of the enterprise and customarily and regularly direct the work of at least two other employees. (29 CFR 541.119).

*Administrative Short Test:* The administrative exemption short test requires that the employee’s primary duty consist of office or non-manual work directly related to the management policies or general business operations of the employer or the employer’s customers and include work requiring the exercise of discretion and independent judgement (29 CFR 541.214)

*Professional Short Test:* The professional short exemption test requires that the primary duty consist of teaching, an artistic endeavor or work requiring knowledge of an advanced field of science or learning. In addition the employee’s work must consistently require the exercise of discretion and judgement (29 CFR 541.315).

## **FLSA for Federal Government Employees**

When the FLSA was passed in 1938, it excluded public sector workers, including Federal government employees, from coverage. Statutes and regulations pertaining to the administration of wages and hours for Federal government employees were covered in 5 USC 55 and 5 CFR 550, respectively. In 1974, the FLSA was amended to extend coverage to employees of the Federal Government. Concerns about conflicts and confusion between FLSA regulations and Civil Service regulations led to a compromise where the Civil Service Commission, rather than DOL, was given responsibility for implementation of regulations for Federal employees. (In 1978, this responsibility was transferred to the Office of Personnel Management upon the passage of the Civil Service Reform Act.) Thus, the regulations which implement the FLSA for non-Federal employees are found in the DOL regulations at 29 CFR 541, while the FLSA regulations that apply to Federal employees are found at 5 CFR 551.

## **Confusion in Federal Employee Exemptions**

Application of exemptions for Federal employees has been an area of confusion since the employees first came under the Act's coverage. A portion of the confusion is simply the result of having two sets of regulations implementing the FLSA: those that apply to the private sector and those that apply to the Federal government. The second source of confusion lies in conflicting interpretations that have been put forth by the Civil Service Commission and subsequently the Office of Personnel Management. These conflicts particularly pertain to the exemption status of higher graded technical staff (typically at the GS-10 through GS-12 level). The earliest guidance was an attachment to FPM Letter 551-7 in July 1975, and subsequently followed by FPM bulletin 551-15 in

1983. Bulletin 551-15 stated that *all* properly classified GS-11 and higher positions were presumed to be exempt from FLSA. In 1986, OPM codified its direction to agencies to specifically to presume that all positions properly classified at the GS-11 or higher level were exempt from the FLSA (*5 C.F.R. 551.203 (1986)*). The relationship between the FLSA, the DOL regulations, and the OPM regulations led to several lawsuits claiming that the OPM regulations were improper because they were more restrictive in applying FLSA than the DOL regulations. These cases were consolidated into a single case, which overturned OPM's regulations (*AFGE et al. v. OPM, 821 F.2d 761, Court of Appeals for D.C. Cir. (1987)*). It is important to note that in this case, the court agreed that the DOL regulations were controlling, and OPM, while implementing regulations for Federal employees, could not exempt more employees than would generally be exempt under the DOL regulations.

Despite new guidance from OPM (*5 CFR 551.202(e)(2)*), the early guidance and regulations which incorrectly assumed that all GS-11 and higher positions were exempt from FLSA have remained in agency institutional and personal memories. Some agencies' personnel guidance still erroneously use arbitrary grade-level cutoffs for determining whether employees should be considered exempt or non-exempt from the FLSA (*USDA Research, Education and Economics P&P 402.3 (1997)*<sup>1</sup> and *USDA Agricultural Market Service Premium Pay User's Guide (1995)*<sup>2</sup>). Even in agencies where there is no written guidance regarding grade-level cutoffs for FLSA coverage, there is often an assumption that all positions graded higher than a GS-9 are exempt from FLSA.

The rest of this paper will examine how exemptions from FLSA should be determined for government employees, with specific focus on the administrative and professional exemptions.

## **General Principles in determining FLSA Exemption Status**

The DOL regulations for exemptions for Federal employees are contained in 5 CFR 551.201-551.208. While the DOL regulations include two tests for determining exemption status, depending upon salary level, there is only one type of test for each of the exemptions for Federal employees. The Federal employee exemption tests are more similar to the DOL short test, and they are applied to all employees above GS-4 regardless of salary level. In addition, the requirement that employees be paid on a salaried basis to be exempt is not used in for Federal employees: It is considered that government accountability to taxpayers requires that government employees' pay be docked when they work less than 40 hours in a week. In 1992, following an amendment to the FLSA, DOL changed regulations to permit deductions from pay for employees of public agencies if there is a "pay system... established pursuant to principles of public accountability.... (29CFR541.5d)"

When evaluating a position for exemption status, the following general principles must be followed:

- Each employee is presumed to be non-exempt unless it is determined that the employee's duties clearly fit the exemption criteria. (5 CFR 551.202(a))
- If there is reasonable doubt as to whether an employee meets exemption criteria, the employee should be designated non-exempt. (5 CFR 551.202(d))

- Exemptions must be narrowly applied and the agency claiming exemption has the burden of proof that an employee meets the criteria for exemption. (5 *CFR* 551.202(b) and (c) and *Corning Glass Works v. Brennan*, 417 U.S. 188, (1974), *Smith et al. v. Porter et al.*, 143 F.2d 292, Ct. of Appeals for 8<sup>th</sup> Circuit (1944))
- Whether an employee is **exempt** is determined by the employee's actual work activities, not by the employer's characterization of those activities through a job title or job description. *Goldstein v. Dabanian*, 291 F.2d 208, 209 (3d Cir.), cert. denied, 368 U.S. 928, (1961).
- Non-supervisory GS employees in 1) equipment operating and protective operations, 2) clerical positions, 3) GS-9 and lower technician positions, and 4) occupations requiring highly specialized technical skills that can be only acquired through job training and experience are non-exempt from FLSA unless they meet the administrative exemption. (5 *CFR* 551.202(e))
- Employees who are classified GS-4 or below are non-exempt. (5 *CFR* 551.203(a))
- Employees who are classified at the GS-5/6 level who spend more than 20-percent of their time on duties that are non-exempt are non-exempt, even if some of their duties meet the test for exempt work. (5 *CFR* 551.203(b))
- Wage grade employees, unless they are supervisors, are non-exempt. (5 *CFR* 551.204)
- Exemption determinations must look at all exemption criteria, and a combination of criteria may be used to exempt an employee. (5 *CFR* 551.202(f))

Although OPM has stated, “ The exemption status of Federal employees is determined solely by reference to the regulations contained in 5 Code of Federal

Regulations (CFR) Part 551. Legal decisions and guidance applied to non-Federal employees cannot be used to determine the exemption status of Federal employees.” (*OPM Decision No. F-0856-12-01, 1999*)<sup>3</sup>, this is not borne out by the decisions of courts in their evaluations of the exemption status of Federal employees and of OPM decisions. In fact, Congressional discussion of the subject of OPM jurisdiction explicitly stated, “It is the intent of the Committee that the Commission<sup>4</sup> will administer the provisions of the law in such a manner as to assure consistency with the meaning scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy.” (*H. Rep. No. 93-913, 93<sup>rd</sup> Congress, 2<sup>nd</sup> Sess., reprinted in 1974 U.S. Cong. & Ad. News, 2811, 1837.*) While DOL regulations are not directly applicable to Federal employees, OPM regulations cannot be in conflict with DOL regulations and rulings. A careful reading of the full DOL regulations, and decisions interpreting those regulations, is an invaluable tool to understand the definition of terms and concepts used in the OPM FLSA regulations, and the courts often cite DOL regulations in the evaluation of Federal employee exemption cases.

## **Executive Exemption**

The executive exemption under the OPM regulations is very similar to the short test for executive exemption under DOL regulations. The executive exemption test requires that an employee’s primary duty is the management of a Federal agency or subdivision (including the lowest recognized organizational unit with a continuing function) and that the employee regularly supervises at least two employees. In performing these duties the employee must customarily and regularly exercise discretion and independent judgement

in such activities as work planning and organization, work assignment direction, employee review and evaluation and other aspects of management of subordinates (*5 CFR 551.205*).

In interpreting this test, the area that has created the most controversy for government employees is the definition of the “lowest recognized organizational unit with a continuing function.” In cases ranging from Convoy Commanders who transported nuclear materials around the country (*Baca v. United States, 29 Fed. Cl. 354, (1993)*) to Supervisor Border Patrol Agents (*Adams et al. v. United States, 44 Fed. Cl. 772, (1999)*) and Cook Foremen at Federal prisons (*Amos v. United States, 13 Cl. Ct. 442, (1987)*) this definition has been probed. Decisions in these cases hinged upon whether the employees under consideration supervised a unit with a continuing function. Employees who exercised the full range of supervisory duties over the organizational unit they supervised, even if the makeup of the unit was fluid, were found to be exempt. However, those supervisors who were assigned to a particular shift with a different group of employees each day, were found not to meet the test: The group assigned during the shift was not a recognizable organizational unit.

## **Professional Exemption**

The professional exemption is an area that has been particularly difficult for government agencies to discern and consistently apply to Federal employees, largely because of the co-existence of technical and professional positions that are paid at the same rate. Employees with high school education and technical expertise are able to advance to pay grades that correspond to pay grades typical of entry-level doctorate positions. For example, a civil engineering technician, originally hired at a GS-5 level, may attain a GS-11 position after 10-15 years of experience. However, for a new employee with little or

not job experience, a doctorate degree or three years of graduate work leading toward a doctorate, is required to attain a GS-11 grade (*OPM Handbook on Qualification Standards for GS Positions*)<sup>5</sup>. Although these two employees would generally be classified in different job titles and series, it is not uncommon for their job duties to overlap. A close look at the actual duties of the technician is necessary to determine the exemption status.

The OPM regulations for professional exemption status (*5 CFR 551.207(a)*) are similar to the DOL short test as employees must meet the *primary duty* and *discretion and independent judgment* tests described in the DOL professional exemption short test (*29 CFR 541.315*). However, in addition, Federal employees must meet the *intellectual and varied work test*, which is only used in the long test under DOL regulations.

***Primary duty test.*** An employee's position meets the primary duty test (*5 CFR 551.207(a)*) when the employee's primary duty consists of:

1. Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or
2. Work in a recognized field of artistic endeavor that is original or creative in nature...; or
3. Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field.... (See *5 CFR 551.207(a)(3)* for full description of type of duties for which this exemption can be applied.)

The primary duty that causes the vast majority of the confusion in government jobs is the "learned professional" primary duty, as there are few artistic professionals and the definition of teacher is fairly clear. Most often this confusion arises because employees

who do not have higher degrees may meet this test through experience, training, and the performance of *bona fide* professional-type duties. A further understanding of how this exemption was meant to be applied can be gained from reviewing the DOL regulations for learned professional exemptions (*29 CFR 541.301(d)*). The DOL regulations interpret the term *customarily* to imply “that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training.” This interpretation is clear that it should be a fairly rare case when an employee who has not completed a specialized course of academic training meets the learned professional test. Although the DOL regulations recognize that the number of areas where employees may become specialized enough to meet the professional exemption, they also recognize that “just as an excellent legal stenographer is not a lawyer, these technical specialists must be more than highly skilled technicians.... The professional person... attains his status after a prolonged course of specialized intellectual instruction and study.” (*29 CFR 541.301(3)(2)*)

Finally, in applying the learned professional exemption, it should be recognized that the attainment of a higher degree does not necessarily mean that an employee is employed in a position that requires and utilizes his or her intellectual training. Confusion in this instance is far less likely in the Federal government than in private sector due to the position classification system. Government positions designated as “professional” have a “positive education requirement” that employees generally will need to have advanced

educational study to be able to obtain a position. Thus the duties and the educational requirement are linked in the classifications standards for Federal positions, and employees who are in jobs that are classified as “professional” are assigned professional duties (see “A Word Of Caution” below).

In applying the *primary duty* test to Federal employees, OPM looks very closely at the actual duties of the person in the position. Although two employees could have identical position descriptions, differences in their day-to-day duties could result in different FLSA exemption status. Higher-graded technicians are often the subject of disputes over FLSA status. OPM has determined that such a technician may meet the *primary duty* test if their duties include design, creative, and development work, outside the scope of standard guidelines and procedures (*OPM decision F-0856-11-03, 2001*), and the agency can show that their work involves knowledge of theoretical principles and related fields. Employees whose duties are largely based on evaluating situations and applying standard criteria, even if skill is needed in applying those criteria, are non-exempt. Examples of duties that were determined to be non-exempt include:

- Electronics Technician, GS-11 who provides technical advice, assistance, and instructions related to repair of electronic warfare/communication equipment on F-14 aircraft. The technician was responsible for providing technical support and training to sailors for about 80% of his time. However, he was not authorized to deviate from established guidance when training or providing service. OPM found that while he applied basic principles and in-depth knowledge attained from experience, he did not apply theoretical knowledge nor was he involved in creating new developments in the electronics field. (*OPM Decision F-0856-11-02, 2000*)

- Civil Engineering Technician, GS-11 whose duties were to serve as a work leader and team member in work related to road management. These duties included conducting traffic counts, data entry, reviewing surface replacement projects, and conducting inventories on roads to determine work that needs to be done and to prepare the plans and contracts. He also served as contracting officer's representative 5% of his time. OPM found that he failed the *primary duty* test because his duties involved the application of standards, but he did not develop the standards. When guidelines were inadequate or when there was a need for significant deviations from accepted procedures he referred the situation to his supervisor. Although he had taken training courses related to his work (Road Design, INFRA data, and Contract Officer Representative), these are training courses, not the type of intellectual study that would be necessary for a professional in the field of engineering. (*OPM Decision F-802-11-05, 2001*)
- Technicians, GS-11, who perform technical tasks relating to the proper design, repair, testing, and overhaul of naval ship systems, equipment, and ships. Their duties included preparing drawings and schematics used in installing and reconfiguring equipment on navy vessels. The work was accomplished by consulting standard texts, guides, and established formulas. The district court determined that the work of these technicians did not require an advanced course of study, but rather was practical and learned through on-the-job training. In addition, the court determined that they were non-exempt because the work, although it required specialized training, did not involve theoretical knowledge of the specialty or knowledge of related disciplines and new

developments in the field (*Palardy v. Horner*, 711 F. Supp. 667, US District Court, Massachusetts, (1989)).

- A private sector electrical designer whose primary duties were the design of electrical systems for construction projects. The employee was responsible for using architectural drawings and other information to draft a plan of the building's electrical system. The employee had taken high school and junior college courses in architectural drafting, but never studied electrical engineering or received a college degree or certificate. The court determined that his duties and the coursework he had taken did not fall under the fields that require "knowledge of an advanced type in a field of science or learning customarily acquired through a prolonged course of specialized intellectual instruction..." The court recognized that while his work was advanced, it was not advanced in a field of science or learning, but rather in the area of mechanical arts (*Silvius v. Metro Design*, 1992 U.S. Dist. Lexis 2682, Dist. Court for No. Illinois, Eastern Division (1992)).
- Environmental specialist in employed in the private sector whose primary duty was to oversee the transfer, packaging, and transport of radioactive waste including providing training to other employees working in this area, selecting the transporter and the waste processing facility, type and method of packaging, preparing shipping documents, inspecting the shipment, writing and revising procedures for handling and processing radioactive materials, and performing benchmarking by obtaining information from other nuclear facilities about their procedures for handling nuclear materials. He obtained an Associates of Applied Science Degree in nuclear power technology, and took several training courses in nuclear safety. The court determined that his training

background did not meet the requirements for a “prolonged course of specialized intellectual instruction” and he was not found to be an exempt professional. (*Shaefer Indiana Michigan Power Co., 197 F. Supp. 2d 935, Dist. Ct. for Western MI, Southern Division (2002)*)

In contrast, a GS-11 Electronics Technician whose primary duty involved providing technical advice, instruction, and assistance related to “a group of loosely defined navigational systems on the S-3 aircraft” was determined to be exempt. Her duties included directing and monitoring techniques and procedures used by personnel operating, installing, and repairing the systems. She reviewed technical data and revised procedures to meet Navy requirements and developed new procedures. OPM found that her duties required theoretical knowledge about the fields of electricity, electronics, and physics sufficient to be comparable to professional work. Her independence in developing solutions to problems and training others to resolve the problems went beyond that of a typical technician-type position. (*OPM Decision F-0856-11-03, 2001*).

Finally, it should be noted that OPM will not find an employee who is in a professional position (generally the two-grade interval series) to be exempt. If the position meets the classification requirements to be a professional position, it already has duties assigned that make it a non-exempt position. If an employee chooses to argue that their duties do not meet the primary duties required for an exemption, they are also arguing that they are not doing work that is in their position description: To sustain an exemption, they will need to be reassigned to a position that is not a professional position. OPM has repeatedly taken the position that if an employee is in a professional position, they are in a

position that is non-exempt, and they must be doing non-exempt work. (*OPM Decision F-0855-12-02, (1999)*)

***Intellectual and varied work test.*** To meet this test the employee's work must be “predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.” (*5 CFR 206(b)*). The interpretation of this test often lies in the creativity and innovation that an employee must apply to his or her work situation. In the technician cases discussed above under the primary duty test, all employees also failed the *intellectual and varied work* test because in the course of their work they did not create innovative techniques and procedures (*OPM Decision No. F-0856-11-02*) and the work was based on standardized procedures and precedents (*OPM Decision No. F-802-11-05*). Specific criteria were selected and applied to the work being done, but no new techniques, methods, or procedures were developed. The DOL regulations defining the *intellectual and varied work* test state that the test applies to the type of thinking which must be performed by the employee. Although an employee may do repeated tasks as part of his or her job duties, the type of interpretation and analysis of those tasks is what separates a technician from a professional 29 CFR 541.306).

***Discretion and independent judgment test.*** An employee who meets this test “frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.” (*5 CFR 206(c)*). Work that meets this test involves discretion and independent judgement in the professional sense, including interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. Skill in applying standardized techniques and

knowledge of established procedures, including appropriate criteria for application of these techniques or procedures, is not sufficient. The ability to work independently with little day-to-day supervision may not meet the test, if the employee has little or no discretion with respect to procedures to do the work.

A particularly good example of how this is applied is the case of trainers for space flight simulation at a government contractor .” (*Hasop et al. v. Rockwell Space Operations Company*, 867 F. Supp. 1287, Dist. Court for S. Texas, Galveston Division (1994)). The trainers’ primary duties were developing the outlines for simulated missions, running the console during the simulated missions, troubleshooting equipment problems during simulations, providing feedback to mission control personnel on how they handled situations during the simulation, and writing workbooks and technical guides to train mission control personnel for upcoming missions. The trainers were required to have bachelor’s degrees in engineering, math, computer science, or physics or equivalent experience, and they went through intensive in-house training for up to a year to learn the duties of their position. The court determined that they met the *primary duty* test, but they did not meet the *discretion and independent judgment* test. Because the employees did not have discretion to make “basic decisions that affect the fundamental operation of the enterprise in question without seeking guidance from superiors as a matter of course” they did not exercise sufficient discretion and independent judgment to be exempt from FLSA.

In applying these exemptions, it must be noted that *all three* tests must be met for an employee to be exempt from FLSA. Thus, an employee who is in a “professional” series (such as an engineer or a chemist) whose work assignment does not involve intellectual and varied work would not be exempt from FLSA. Conversely, a physical

science technician whose work is independent, varied, and intellectual and who is given wide discretion in technical matters may be found to be exempt from FLSA.

## Administrative Exemption

The administrative exemption is used when an employee serves as an advisor or assistant to management, representative of management, or a specialist in a management or general business function or supporting service. As with the professional exemption, to meet the administrative exemption, employees must meet each of 3 tests: the *primary duty test*, the *non-manual work test*, and the *discretion and independent judgment test* (5 CFR 551.206).

**Primary duty test** The primary duty test is met if the employee's work--

1. Significantly affects the formulation or execution of management programs or policies; or
2. Involves management or general business functions or supporting services of substantial importance to the organization serviced; or
3. Involves substantial participation in the executive or administrative functions of a management official.

A key to interpret the first provision of the *primary duty test* is to understand the definition of *affect*: “To have an influence on: bring about a change in. (*American Heritage Dictionary, Houghton Mifflin Co. 1980*).” Thus, employees who are responsible for developing and changing policies and management programs are considered ones who are exempt from FLSA under this provision.

The second type of *primary duty* which meets this test is the provision of support services which are “of substantial importance” to the Agency. This test refers to work which is related to the general management, business, or supporting services for the Agency, such as those provided by management consultants, systems analysts, personnel

or financial management, negotiators on behalf of the agency, and procurement. For example, a computer specialist who provided computer system support to management of his agency was found to meet this exemption, as the agency based many decisions regarding computer systems on the employees' advice. In this way, the employee was serving as a consultant to management (*OPM Decision F-334-12-01, 2002*), and was considered to be exempt.

The third test applies to employees who work closely with an administrative or executive official and who participate in portions of the managerial or administrative functions of a supervisor whose scope of responsibility is so great that the supervisor cannot personally attend to all aspects of the work. For an employee to meet this exemption, he or she must have knowledge of the policies, plans, and views of the supervisor and must be delegated or exercise substantial authority to act for the supervisor (*OPM Decision F334-12-01, 2002*).

In evaluating primary duties with respect to the administrative exemption, it is not uncommon to run into the question of whether employees are involved in "administrative work" or "production work." The so-called staff-production dichotomy in an executive agency whose primary function involves paper-pushing is much harder to delineate than in an industrial setting where there is, in fact, production of goods. For example, in an arbitration case for IRS, Revenue Officers, GS-10, were found to be "production" employees in carrying out the mission and day-to-day operations of the agency (Arbitration decision reviewed by FLRA at *46 FLRA No. 97, (1992)*), as opposed to "staff" employees whose duties are involved in the administrative operations and management of the agency.

A second case involving the staff-production dichotomy involves the work of border patrol agents (*Adam v. United States*, 26 Cl. Ct. 782 (1992)). In this case, the court found that GS-11 border patrol agents were not administrative employees because they were not enforcing the administrative policies of the Immigration and Naturalization Service. Rather they were involved in law enforcement duties related to ensuring compliance with the nation's immigration laws.

***Non-manual work test*** The second administrative exemption test requires that the employee perform office or other predominantly non-manual work which is--

1. Intellectual and varied in nature; or
2. Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

First, it is important to recognize that this test specifically applies to office-type work, and the DOL regulations specifically state that this requirement restricts the exemption to "white-collar" workers (29 CFR 541.203(a)). Employees who regularly use tools, instruments, machinery, or other equipment are not *bona fide* administrative employees under this test. The first type of non-manual work meeting exemption is intellectual and varied work, which is defined similarly to the way it is defined in the professional exemption test. The border patrol agents described above were not found to meet this test.

The second type of non-manual work that meets this test is work that is specialized and technical. Generally, this type of work requires specialized knowledge of a complex subject. Specialized training and on-the-job experience generally is required to learn the principles, techniques, and procedures associated with the technical field. Many of the technicians described under the professional exemption were found to meet this part of the

administrative exemption, although they did not meet the other tests required to show an administrative exemption.

***Discretion and independent judgment test*** To meet this test, the employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work. An employee who typically will pass this test is one who has the authority to make independent choice, without supervision, in matter of significance (29 CFR 541.207). The exercise of discretion and independent judgment is not to be confused with application of skill in selecting techniques or procedures to do accomplish ones work. It is recognized that every employee's work involves discretion and independent judgment to some extent: a truck driver may select the route that he or she will use to make deliveries, but this would hardly be considered a "matter of significance." (*Connell v. Delaware Aircraft Industries, 55 A.2d 637 Sup. Ct. of Delaware (1947)*) Rather, decisions that relate to "matters of significance" generally pertain to formulation of management policy and to committing the Agency to a course of action, especially related to financial matters. In some cases, an administrative assistant to an executive or administrative official may meet this exemption, if he or she has independent authority to conduct a portion of the business for which the official would normally be responsible (29 CFR 541.207, *Walling v. Sterling Ice and Cold Storage, 69 F. Supp. 669 US Dist Ct for Colorado, (1947)*).

## **Appealing FLSA exemptions**

For Federal employees, the method of challenging the agency's determination of FLSA exemption status depends upon whether there is a negotiated grievance procedure (NGP), and whether FLSA is excluded from the NGP. Employees who are not in a

bargaining unit, may appeal the determination to the their Agency and/or OPM ([www.opm.gov/flsa/how.asp](http://www.opm.gov/flsa/how.asp)). Employees who are in a bargaining unit and covered by a collective bargaining agreement may only appeal to OPM if FLSA determinations are excluded from the NGP. If FLSA determinations are not excluded, the grievance procedure must be used for resolving the determination. For Forest Service employees, FLSA appeals are excluded from the NGP, and employees may file administrative appeals with the Forest Service or OPM, or both.

The question of whether employees may file a civil suit in the Federal Claims Court is an evolving question. Prior to 1994, the Federal Service Labor Management Relations Statute (FSLMRS, *5 USC 71*) required that the grievance procedures be the “exclusive procedures for resolving grievances which fall under its coverage (*5 USC 7121(a), 1982*).” Exceptions were made only for EEO complaints and appeals to the Merit Systems Protection Board. As a result, employees were not permitted to bring suit with respect to FLSA claims, unless FLSA claims were specifically excluded from the NGP (*Carter v. Gibbs, 909 F.2d 1452, U.S. Court of Appeals for Fed Cir., (1990)*).

Amendments to the FSLRMS in 1994 added the word “administrative” to the citation above, so that grievance procedures were to be the “exclusive *administrative* procedures for resolving grievances which fall under its coverage (*5 USC 7121(a), 1994*).” The Federal Claims Court subsequently ruled that this change meant that employees were no longer barred from suing the government over FLSA status, even if FLSA was not exempt from the NGP (*Abramson v. United States, 42 Fed. Cl. 621, (1998)* and *Abbott v. United States 47 Fed. Cl. 582, (2000)*). In this decision, the court relied on the distinction between administrative and judicial appeals, thus determining that employees’ judicial

appeal rights are not negated by the exclusion of other administrative appeals. However, another judge within the Federal Claims court has disagreed with this ruling (*O'Connor et al. v. United States*, 50 Fed. Cl. 285, (2001)), and held that even the amended FSLMRS intended to exclude judicial appeals of FLSA, if FLSA appeals were not excluded from the NGP. Recently this decision was overturned on appeal (*O'Conner et al. v. United States*, 308 F.3d 1233, US Ct. of Appeals for Fed. Cir., Rehearing and Rehearing En Banc denied Feb. 7, 2003), so Federal employees may file a suit in Federal Claims Court even if they have a NGP which includes FLSA.

In the Forest Service, the Master Agreement excludes FLSA from the negotiated grievance procedure, so employees may seek remedy either through the OPM appeals process or through the courts but not via grievance.

## **A Word of Caution**

During OPM review of FLSA status, OPM reviews the position description and may look to see if the duties seem to be properly classified. In several cases reviewed for this paper, OPM stated that it appeared that the person's duties were not commensurate with their classification. Certainly, positions are graded higher when the employees have more independence in conducting the work, selecting procedures, and evaluating outcomes. However, as employees take on more independent work and are (hopefully) promoted, they may also be taking on duties that will lead to a determination that the employee is exempt from FLSA. In most instances, the higher pay associated with the higher grade will be more valuable to the employee, unless there is a large amount of overtime.<sup>6</sup>

The tension between the classification of the position and the FLSA status can be seen in the classification standards for Engineering Technicians (GS-802) (<http://www.opm.gov/fedclass/html/gsseries.asp>). In order for a position to be classified as a GS-11 the employee must have (1) demonstrated ability to interpret, select, adapt, and apply many guidelines, precedents, and engineering principles and practices which relate to the area of specialization; and (2) some knowledge of related scientific and engineering fields. Positions graded at this level do work on project of a conventional nature which require interpretation and adaptation of background data relevant to the project. Specifically, “ingenuity and creative thinking are required in devising new ways of accomplishing objectives, and in adapting existing equipment or current techniques to new uses.” Frequently, duties that meet the standards to be classified as a GS-11 will also meet the *primary duty, intellectual and varied work, and discretion and independent judgement* tests under the professional exemption.

In contrast, the classification standard for a GS-9 technician in the same series requires that the employee apply “a considerable number of different basic, but established methods, procedures, and techniques.” This description leads to an FLSA status of exempt, and the OPM regulations for FLSA indicate that most technician work at the GS-9 level is exempt under the professional exemptions (*5 CFR 551.301(e)(2)*).

Thus, employees should be cautious in requesting an FLSA status review, lest they be successful in showing that they should be FLSA non-exempt, only to find that at the next position description review their position is downgraded.

## Changes To the FLSA Regulations

On March 31, 2003, the Department of Labor released new draft regulations for determining exemptions under the Fair Labor Standards Act (*Federal Register, Vol. 68, No. 61, p. 15560-15597, 2003*). These regulations apply to private sector employees, but the Office of Personnel Management is already considering changing Federal employee regulations so they remain parallel to the regulations for the private sector (*Government Executive online, March 28, 2003. <http://www.govexec.com/dailyfed/0303/032803b1.htm>*).

The DOL-proposed changes are intended to simplify application of the regulations, and in many ways they succeed at this goal. The reorganization of the regulations and the reduction in areas where information was repetitive will make the regulations considerably easier to understand. However, the substantive changes in the regulations spell disaster, especially for employees in the types of positions discussed previously.

The new regulations eliminate the short and long tests for the private sector, and instead replace them with a three-level system:

- Employees who earn less than \$425/week (\$22,100/year) are generally non-exempt;
- Employees who earn more than \$65,000/year are considered highly compensated and are exempt if they perform any duties which fall within the executive, administrative, or professional exemptions; and
- Employees whose pay rates fall between those levels must pass several tests to be found exempt.

The regulations for Federal employees have never been based on salary levels, so this change may have little effect on Federal employees. However, OPM has previously

determined that employees at GS-4<sup>7</sup> and below were non-exempt. These employees currently make more than \$425/week, and could potentially be subjected to the exemption tests under the new regulations. At the other end of the pay range, the \$65,000 salary level falls in the middle of the GS-12 pay rates. GS-12 employees seem to be the highest graded employees who have been found to be non-exempt, so it is not likely that this salary cutoff will affect the Federal employees.

Proposed changes in the tests for determining exemption status are more likely to have a significant impact on Federal employees, especially the types of employees discussed and used as examples in this paper. Under the proposed regulations, the tests that are applied to employees whose pay falls between \$425/week and \$65,000/year are based on the previous short tests, with some significant changes. The most troubling of these changes is the removal of the “discretion and independent judgement” test from both the administrative and professional exemption tests. The executive exemption is little changed from the short test, and changes actually serve to make the DOL regulations more similar to the current OPM regulations.

The current administrative exemption short test requires employees to meet the *primary duty test* and customarily and regularly exercise *discretion and independent judgement*. Under the proposed regulations, the primary duty test is unchanged, but the discretion and independent judgement test has been replaced by the requirement that the employee “hold a position of responsibility” either performing work of substantial importance or performing work requiring a high level of skill or training. DOL states that this change is necessary because in the modern workplace standard procedures and manuals are necessary for quality assurance purposes. For Federal employees, this change

would significantly affect the skilled employees who are non-professional positions. The definition of work of substantial importance includes such activities as providing advice to management on purchases, leading a team to complete a major project, or performing duties that are important to the employer's customers. Federal employees in technical positions are likely to be involved in both advising on purchases of equipment they use in their work and in leading teams to complete work. The deletion of the requirement that employees exercise discretion and independent judgement will exempt those employees under the FLSA, where they previously were not.

The changes under the professional exemption are the most substantive with respect to the impact they are likely to have on Federal employees. First, the new regulations significantly increase the possibility that an employee may achieve professional status through experience and on-the-job training. Where the current regulations clearly indicate that being found exempt under the professional exemption without an advanced degree was to be exception, rather than the rule, the proposed regulations turn this around. Current regulations cite examples of the occasional lawyer who did not go to law school or scientists who achieve professional status without a degree as how the exemption is to be applied. In contrast, the new regulations (*proposed at 29 CFR 541.300*) open up the possibility that a combination of experience and education might be a method of attaining professional status under the FLSA exemptions. The new regulations include training such as attending a technical college or community college, or in the armed forces as education that might help to qualify an employees for the professional exemption. Considering that the current regulations were drafted at a time when far fewer employees achieved bachelor's degrees, the change now to include non-degreed "professionals" is a substantial

expansion beyond the original regulations. For Federal employees, it is likely to mean that many more technicians and employees in lower-graded professional positions will be found exempt.

The final major change under the professional exemption is the deletion of the “discretion and independent judgment” test completely. This has the potential to change the exemption status of large numbers of government employees in the technical fields, as these employees have experience that could potentially be considered professional. However, with government regulations and delegations of authority, these employees do not have the ability to independently make decisions about the work being done. The technicians who were discussed under the professional exemption previously might all be considered exempt if this change is made to the OPM exemption regulations.

## Appendix A – Overtime Regulations for Federal GS Employees

Prior to 1974, when the Fair Labor Standards Act (FLSA) was amended to include Federal employees, Federal employee overtime was determined by the regulations in 5 CFR 550. When the FLSA was amended, overtime provisions for Federal employees who are non-exempt from FLSA were changed, and they can now be found at 5 CFR 551.

### *Title 5 Overtime (FLSA Exempt Employees)*

The regulations covering exempt employees (*5 CFR 550*) are often referred to as Title 5 overtime. Key areas where these regulations differ from FLSA regulations are:

- Overtime can only be paid when it is part of the employee's regularly scheduled workweek or when an employee is "ordered an approved" by an authorized official in writing to work overtime (*5 CFR 550.111*). This means that an employee may not voluntarily work extra hours and then expect to be paid for them, after the fact. If an employee who is exempt from FLSA wishes to be compensated for working overtime hours, he or she must have advanced approval for such overtime.
- There is an hourly limitation placed on the overtime amounts that employees who are FLSA-exempt may earn. Employees who are paid at a rate below that of the GS-10, Step 1 rate are paid straight "time and a half" similar to those who are covered by the FLSA. However, those whose base rate is equal to or higher than the GS-10, Step 1 rate, may not earn more than 1.5 times the base rate of the GS-10-1 (*5 CFR 550.113*)<sup>8</sup>. At current pay rates, all employees at GS-12-6 and will make less than their regular hourly rate if they work overtime.

- Except during emergency situations, employees who are exempt may not earn more in a biweekly pay period than the basic pay of a GS-15-10 or ES-V (5 *CFR* 550.106).
- Employees who earn more than the base rate of a GS-10, Step 10 may be required by the Agency to earn compensatory time, rather than overtime pay (5 *CFR* 550.114).
- Employees may not be compensated for travel outside their regularly scheduled administrative workweek, unless they are performing work while travelling, are travelling under arduous conditions, or are travelling to/from an event for which the government did not have administrative control (5 *CFR* 550.112 (g)).
- Claims for back wages due under Title 5 overtime allow back pay for 6 years.

A recent case by attorneys at the Department of Justice (DOJ) shines some light on what might be considered “ordered and approved: with respect for overtime compensation for exempt employees (*John Doe et al. v. United States, Fed. Cl., (2002)*)<sup>9</sup>. The attorneys were told that their work would require extra hours, but they could not expect to earn overtime. However, the employees were required to keep track of all of their hours in an Agency log (for billing purposes), but their timesheets showed only 40 hours of work per week. Management throughout all levels of DOJ was aware that the attorneys were not able to complete their work assignments and caseloads within a 40-hour week: The DOJ employee’s manual states that attorneys “should expect to work in excess of regular hours without overtime premium pay; A task group was convened in 1994 specifically to look at overtime concerns within DOJ; The task group reported the unpaid overtime put in by the attorneys was necessary to accomplish the Agency’s mission while remaining within the budget allocated by Congress; and additional hours were used as a basis for evaluations,

promotions, and awards. Relying on other cases which had awarded Federal employees overtime pay when it was clear that they had been compelled, induced, expected, or otherwise pressured into working overtime hours,<sup>10</sup> the Federal Claims court ruled that the circumstances of this case indicated that the attorneys were entitled to overtime pay, even though they had not explicitly been ordered to work overtime. While the circumstances of this case are somewhat out of the ordinary, there certainly are situations where employees work extra hours with a reasonable belief that there will be adverse consequences to their work position if they do not.

*FLSA Overtime (Non-exempt employees)*

For employees who are covered by the FLSA (non-exempt employees), the regulations are at 5 CFR 551:

- Employees must be paid full “time and a half” when they work more than 8 hours in a day or 40 hours in a week (*5 CFR 551.501*).
- When employees work flexible schedules, overtime over 8 hours per day or 40 hours per week must be officially ordered. On compressed work schedules, overtime is defined as any hours in a day above an employee’s regular work schedule or more than 40 hours in a week. (*5 USC 6121*).
- All hours that an employee is working for the agency are considered to be hours worked, including time when employees are “suffered and permitted” to work (*5 CFR 551.401*).
- Employees may elect to earn compensatory time rather than overtime, but management may not require compensatory time (*5 CFR 551.531*).

- If employees are called in to work outside of their regular schedule, they are entitled to record at least 2 hours of work for the callback (*5 CFR 401(e)*).
- Compensation for travel time for non-exempt employees is more liberal, and employees are compensated for travel on non-workdays.
- Claims for back wages due under FLSA overtime allow back pay for 2 years if the violation is not willful and 3 years if it is.

#### *Differences Between Title 5 and FLSA overtime*

There is still much confusion about the provisions of each regulation and how they apply to government employees. A recent article in the St. Thomas Law Review<sup>11</sup> highlights this confusion. The author describes the situation of a non-supervisory GS-13-1 employee who the author states is non-exempt from FLSA, yet is still subject to the overtime capped rate of a GS-10-1. This situation existed prior to the 1974 inclusion of Federal employees in FLSA coverage. However, it no longer exists. Employees who are properly exempted from FLSA have their overtime capped. But those who are not exempt are able to earn a full 1.5 times their base pay. The determination of who earns what when on overtime is one of the areas that causes much confusion.

Another area of confusion is how employees get approval to be paid for overtime. For exempt employees, Title 5 overtime provisions are clear: orders and approval for overtime must be granted to the employee *in writing* by an authorized official. Prior to 1974, all Federal employees were subject to this requirement, and agencies still attempt to enforce requirements that all employees be ordered to work overtime. However, for employees who are not exempt from FLSA and who are not on flexible or compressed work schedules, this requirement is inappropriate. Employees who more than 8 hours a

day or 40 hours a week, and are not ordered to stop doing so, must be paid overtime for the time that they are performing work. For employees who work flexible work schedules, OPM requires that the employee's extra hours be approved in advance because of the challenge of monitoring the work hours of an employee who may not have a regular schedule. However, even in this situation, if the employee is clearly working more than 40 hours per week, or working during time when they are clearly not being paid (e.g. working through their lunch period), they may be able to claim back overtime pay.

## Endnotes

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- 1 Available online at <http://www.afm.ars.usda.gov/ppweb/402-03.htm>
- 2 Available online at <http://aphisweb.aphis.usda.gov/mb/mrphr/301toc.html>
- 3 All OPM Decisions on FLSA can be found at: <http://www.opm.gov/flsa/table.asp>
- 4 Civil Service Commission, which was later replaced by the Office of Personnel Management.
- 5 <http://www.opm.gov/qualifications/sec-i/s1-a.htm>.
- 6 An employee paid at the GS-9-Step 5 rate would need to work nearly 220 hours of overtime before his or her salary reached the level of a GS-11-Step 5.
- 7 Pay rates for Federal employees can be found at <http://www.opm.gov/oca/payrates/index.asp>. The pay rates quoted here correspond to the “rest of US” locality pay. Specific locations where locality pay is higher may be slightly different.
- 8 Fire fighters are not limited to earning 1.5 times the base pay of a GS-10-1. (*5 CFR 113(e)(2)*).
- 9 I was unable to find a proper citation for this. It is available on the Court of Federal Claims website at:  
  
<http://www.uscfc.uscourts.gov/Opinions/Hodges/02/HODGES.Doe.pdf>
- 10 *Anderson v. United States* 136 Ct. Cl. 365 (1956), *Albright v. United States* 161 Ct. Cl. 356 (1963), *Adams v. United States* 162 Ct. Cl. 766 (1963), *Byrnes v. United States* 163 Ct. Cl. 167 (1963). *Rapp v. United States* 167 Ct. Cl. 852 (1964), *Anderson v. United States* 201 Ct. Cl. 660 (1973), *Manning v. United States*, 10 Cl. Ct. 651 (1986).
- 11 Lacy, Aaron D. **2002**. “The Disenfranchisement of the Federal Employee: Why the Federal Government Does not Follow the Fair Labor Standards Act.” 15 St. Thomas Law Rev. 403.