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## EXEMPTIONS FROM THE FAIR LABOR STANDARDS ACT MINIMUM WAGE AND OVERTIME REQUIREMENTS

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The attached checklists are provided as aids for your use in determining whether an employee is “exempt” or “non-exempt” under the Fair Labor Standards Act (the “Act” or “FLSA”). **Caution:** These Checklists can only be one part of the determination of whether an employee is exempt. Exemptions are based on actual job duties, and the Act has very specific regulations that should be consulted for particular concerns. **Note:** These Checklists have been prepared based on the revised regulations in Part 541 of title 29 of the Code of Federal Regulations. These regulations will become effective August 23, 2004. It is possible that Congress may modify the regulations prior to, or immediately following, the effective date. Any user of these Checklists should determine their accuracy as of the effective date.

**Coverage of The Act.** The Fair Labor Standards Act sets minimum wage, overtime pay, equal pay, recordkeeping, and child labor standards for workers who are covered by and are not exempt from the Act.<sup>1,2</sup> Certain employees, by virtue of their occupations, are exempt from the minimum wage and overtime provisions of the Act, although such exempt employees are subject to the equal pay and some recordkeeping requirements of the Act.<sup>3</sup>

**Major or “White Collar” Exemptions.** The major exemptions provided by the Act are the executive, administrative, professional, and outside sales exemptions.<sup>4</sup> In

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<sup>1</sup> Individuals not covered by the Act include independent contractors, volunteers, and student interns. See 29 U.S.C. §§203(e)(1); 203(b). Also, the Act is not applicable to American employees in foreign countries even though the employees are American and the employer is an American entity. 29 U.S.C. §213(f); Department of Labor, Field Operations Handbook, §10c13.

<sup>2</sup> Although generally federal wage and hour law controls over particular state laws, individual state laws should always be consulted for particular issues. The employee is entitled to receive the more beneficial treatment, whether under state or federal law.

<sup>3</sup> 29 C.F.R. §516.3.

<sup>4</sup> 29 C.F.R. Part 541.

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addition, certain computer professionals are also exempt from the minimum wage and overtime provisions of the Act. The exemptions are based on the specific job duties of the employee and are not dependent upon job titles.

**Salary Basis.** In general, in order to be an exempt employee under the Act, the employee must be paid on a salary, not hourly, basis.<sup>5</sup> If the payment on a salary basis requirement is not satisfied, an employee cannot be considered exempt and must be paid overtime. The exempt employee must receive a full salary for any week in which he performs work unless one of the seven exceptions delineated in the regulations apply.<sup>6</sup>

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<sup>5</sup> Computer professionals who receive at least \$27.63 per hour may be paid on an hourly rather than salary basis (Small Business Job Protection Act of 1996).

<sup>6</sup> The seven exceptions delineated in the regulations are:

- 1 - Absence from work for one or more full days for personal reasons, other than sickness or disability;
- 2 - Absence from work for one or more full days due to sickness or disability if deductions are made under a bona fide plan, policy or practice which provides wage replacement benefits for these types of absences;
- 3 - To offset any amounts received as payment for jury fees, witness fees, or military pay;
- 4 - Penalties imposed in good faith for violating safety rules of "major significance";
- 5 - Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules – e.g. harassment;
- 6 - Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment; and
- 7 - Unpaid leave taken pursuant to the Family and Medical Leave Act.

29 C.F.R. §541.602(b).

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## EXECUTIVE EXEMPTION CHECKLIST

**Caution:** Use of this Checklist can only be a part of the determination of whether an employee is exempt under the Fair Labor Standards Act. The employee's actual job duties must be reviewed and the determination made on a case-by-case basis. **Note:** This Checklist is based on regulations in 29 C.F.R. Part 541 which are to become effective August 23, 2004. Verification that regulations are effective as written as of April, 2004 is urged.

### Compensation:

\_\_\_\_\_ Employee is paid at least \$455/week (approximately \$23,660/year), or employee earns at least \$100,000 annually and customarily and regularly performs at least one of the exempt duties.

\_\_\_\_\_ Employee is paid on "salary basis."

\_\_\_\_\_ Paid established salary each pay period regardless of number of hours worked.

\_\_\_\_\_ No reduction in salary for variances in the quality or quantity of work.

\_\_\_\_\_ No reduction in salary for absences of less than one day.

**Note:** See seven exceptions to "no docking" rule in 29 C.F.R. §541.602(b).

### Duties:

\_\_\_\_\_ Employee's primary duty is management of the enterprise or a customarily recognized department or subdivision.

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\_\_\_\_\_ Employee customarily and regularly directs the work of two or more other employees.

\_\_\_\_\_ Employee has the authority to hire or fire other employees or employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status are given particular weight.

**Note: The executive exemption may also apply to bona fide owners of at least twenty percent (20%) of the equity in a business who are also actively engaged in the management of the enterprise.**

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## ADMINISTRATIVE EXEMPTION CHECKLIST

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### Compensation:

\_\_\_\_\_ Employee is paid at least \$455/week (approximately \$23,660/year), or employee earns at least \$100,000 annually and customarily and regularly performs at least one of the exempt duties.

\_\_\_\_\_ Employee is paid on "salary basis."

\_\_\_\_\_ Paid established salary each pay period regardless of number of hours worked.

\_\_\_\_\_ No reduction in salary for variances in the quality or quantity of work.

\_\_\_\_\_ No reduction in salary for absences of less than one day.

**Note:** See seven exceptions to "no docking" rule in 29 C.F.R. §541.602(b).

### Duties:

\_\_\_\_\_ Employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

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\_\_\_\_\_ Employee's primary duty includes work requiring the exercise of discretion and independent judgment with respect to matters of significance.

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## PROFESSIONAL EXEMPTION CHECKLIST

**Caution:** Use of this Checklist can only be a part of the determination of whether an employee is exempt under the Fair Labor Standards Act. The employee's actual job duties must be reviewed and the determination made on a case-by-case basis. **Note:** This Checklist is based on regulations in 29 C.F.R. Part 541 which are to become effective August 23, 2004. Verification that regulations are effective as written as of April, 2004 is urged.

### Compensation:

\_\_\_\_\_ Employee is paid at least \$455/week (approximately \$23,660/year), or employee earns at least \$100,000 annually and customarily and regularly performs at least one of the exempt duties.

\_\_\_\_\_ Employee is paid on "salary basis." (a lawyer or physician actually engaged in practicing the profession is excepted from the salary requirement.)

\_\_\_\_\_ Paid established salary each pay period regardless of number of hours worked.

\_\_\_\_\_ No reduction in salary for variances in the quality or quantity of work.

\_\_\_\_\_ No pay reduction in sales for absences of less than one day.

**Note: See seven exceptions to "no docking" rule in 29 C.F.R. §541.602(b).**

### Duties of the Learned Professional:

\_\_\_\_\_ Primary duty is performance of work requiring advanced knowledge

\_\_\_\_\_ The advanced knowledge must be in a field of science or learning

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\_\_\_\_\_ The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

## Duties of the Creative Professional:

\_\_\_\_\_ The employee's primary duty is performance of work requiring invention, imagination, originality or talent in a recognized field of artist or creative endeavor