
Coates' Canons Blog: The FLSA's Professional Exemption – Part 2: The Computer Professional

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This is the final post in my series about exemptions to the Fair Labor Standards Act's requirement that employees be paid a premium time-and-one-half overtime wage for hours over 40 in a workweek. There are three types of exemptions: the executive exemption (discussed here), the administrative exemption (discussed here and here) and the professional exemption. The professional exemption has several distinct tests (not of all of which are relevant to local government). In my last blog post (here), I discussed the learned professional exemption in detail. In this post, I look at the exemption for computer professionals.

Salaried or Hourly?

The exemption for the computer professional is different from all the other exemptions in that it does **not** require that the employee be paid on a salary basis (see my blog post on the salary basis test here). Instead, a position may be paid either on a salary basis or on an hourly basis, provided that the hourly rate is a minimum of \$27.63 per hour. Like all other exempt employees, however, a computer professional paid on a salary basis will have to earn a minimum of \$684 per week. For the hourly rate and salary basis provisions of the regulation, see here.

The Computer Professional Duties Test

The primary duty test for the computer professional requires that an employee's work focus on:

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 these duties, requiring the same level of skills.

As explained in earlier posts about the executive and administrative duties tests, "primary duty" means "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a) says:

Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Educational Requirements

Unlike the learned professional exemption, a person holding a position that is exempt as a computer professional is not required to have any particular degree. Employees frequently have a bachelor's degree or more advanced degree because the level of expertise and skill required to do the work covered by this exemption is generally gained through education. But the requisite expertise may be acquired through a combination of education and experience or through experience alone.

Positions That Typically Satisfy the Computer Professional Exemption

The computer professional exemption is available for information technology directors, provided that their actual job duties satisfy the primary duties test, and for systems analysts, programmers and software developers. The regulations note that many systems analysts and computer programmers will have additional responsibilities that qualify them for the general administrative exemption, and some of the lead people in those areas will likely have management and supervisory responsibilities that qualify them for the executive exemption, as well.

Positions That Do Not Qualify for the Computer Professional Exemption

The regulations expressly exclude those involved in the operation, manufacture, repair or maintenance of computer hardware and related equipment from qualifying for the computer professional exemption, as they do those whose work is dependent upon the use of computers and computer software, such as draftsmen and those working with computer-assisted design (CAD) software.

Exempt or Nonexempt?

Local government employers trying to determine whether a particular position is exempt as a computer professional should keep in mind a pair of distinctions. The first is between highly specialized knowledge in computer systems analysis, computer programming and software engineering, on the one hand, and highly specialized knowledge about computers and software on the other. The second distinction is between designing, creating and modifying computer systems and programs and identifying the computer needs and solutions of a department or unit of government. In both instances, the former are knowledge and skills needed to perform work qualifying for the computer professional exemption, while the latter are not.

For more information on this aspect of the FLSA and on all other FLSA issues, see my publication, *A Comprehensive Guide to the Fair Labor Standards Act for Public Employers*.

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