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## Coates' Canons Blog: The FLSA's Professional Duties Test – Part 1

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### The FLSA's Professional Duties Test – Part 1

The Fair Labor Standards Act (FLSA) generally requires that employers pay employees a time-and-half premium wage for hours worked past 40 in a workweek. Many employees are not entitled to this premium overtime pay, however, because they are “exempt.” In previous blog posts [here](#), [here](#) and [here](#), I have discussed two of the three kinds of exemptions from overtime pay – the executive exemption and the administrative exemption. This post introduces the professional exemption, the last of the three. The professional duties exemption involves not one kind of exemption but is actually several exemptions gathered together in one name. It will take me two posts to cover them all, this post and one more to come. That last one will be my last post in this series on FLSA exemptions.

#### Background

Under the FLSA, every position is non-exempt (and thus entitled to overtime pay) unless it satisfies the following three requirements:

- the employee is paid on a salary-basis, which means that the employee receives the same wages from pay period to pay period and that there are no changes to that amount based on variations in quality or quantity of work (the “salary basis test”); and
- the employee is paid at least \$455 per week (the “salary threshold test”), and
- the position's duties satisfy either the executive, administrative or professional duties tests set forth in United States Department of Labor regulations (the “duties tests”).

The general requirements for satisfying the professional duties test are set out in the U.S. Department of Labor's regulations at **29 CFR § 541.300**. These requirements apply to all of the subcategories of the professional exemption: the learned professional, the creative professional, the teaching professional and the computer professional. To qualify as an exempt professional, an employee must have a primary duty of performing work that requires:

- knowledge of an advanced type in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction; or
- invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

In subsequent sections, the regulations set out more specific requirements for each category of exempt professional. Because public school teachers and creative professionals such as actors, musicians, painters and novelists are not positions generally found in city or county government, I will not discuss these duties tests on this blog. Readers may find the regulations governing the exemptions for teacher and creative professionals [here](#) and [here](#).

#### Duties Test for the Learned Professional Exemption:

The test for the learned professional exemption is set out in the U.S. Department of Labor's FLSA regulations at **29 CFR § 541.301**. To qualify for this 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. This primary duty test includes three elements:

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- the employee must perform work requiring advanced knowledge;
  - the advanced knowledge must be in a field of science or learning; and
  - the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

In most cases, this means a graduate degree. A bachelor's degree will not usually suffice except with respect to a nursing degree that leads to a RN license or an engineering degree.

Let's break this test down.

### ***Advanced Knowledge***

"Work requiring advanced knowledge" means work that is predominantly intellectual in character. It is further defined as work that "includes work requiring the consistent exercise of discretion and judgment," and is contrasted with performance of routine mental, manual, mechanical or physical work. To quote the rule directly, "an employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances."

### ***A Field of Science or Learning***

The regulations define fields of science or learning as including the study of law, medicine, teaching, accounting, actuarial science, engineering, architecture, pharmacy, and the physical, chemical and biological sciences.

### ***A Prolonged Course of Specialized Intellectual Instruction***

This generally means a graduate degree of some kind. In most cases, a bachelor's degree does not suffice to meet this requirement as the regulations instruct that the exemption "is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field."

The learned professional exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. Nevertheless, employees who work in fields where specialized academic training is a standard requirement but who do not have the requisite degree may qualify for the exemption if they have obtained similar knowledge through a combination of work experience and intellectual instruction. For example, a certified public accountant would qualify for the professional exemption. Accountants who are not CPAs but whose job duties require knowledge that is the same as that acquired by a CPA would probably qualify for the professional exemption.

It is important to note that a position may qualify for the professional exemption only if it **requires** the person to have advanced knowledge in a field of science or learning acquired by prolonged course of specialized instruction. If the person in the position possesses an advanced degree, but the position does not require the person to have such a degree, it will not qualify for the professional exemption.

Two local government positions where this issue frequently arises are those of planner and social services caseworker. A planning department position that requires a job applicant to have a master's degree in planning in order to even be considered for the position will qualify for the professional exemption. A planning position in which a master's degree is a preferred qualification, but where applicants with bachelor's degrees will be considered will not qualify for the professional exemption.

Similarly, a social services position that requires a master's degree in social work will satisfy the professional duties test. A position that requires either a bachelor's degree or a master's degree in social work will not qualify for the exemption.

### ***Some Examples of Local Government Positions Likely to Satisfy the Learned Professional Duties Test***

Certain local government positions will automatically satisfy the learned professional test: city and county attorneys, physicians and licensed pharmacists on the staff of county health departments, and city and county engineers. At **29 CFR § 541.301**, the Department of Labor sets out some examples of occupations whose typical primary duties make them likely to satisfy the learned professional test. For local governments, these occupations are most likely found in the health

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sciences field, and include registered nurses, medical technologists, dental hygienists and physician assistants.

#### *Registered Nurses But Not Licensed Practical Nurses*

The regulations recognize registered nurses as learned professionals on the basis that registration by the appropriate state examining board (here the North Carolina Board of Nursing) attests to their having completed the requisite advanced study. The rule makes the position of licensed practical nurses (LPNs) clear: LPNs 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.” Although LPNs must also be licensed by the state, typical LPN training is a one-year post-high school course of study, usually in a community or technical college. Registered nurses, by contrast, must have completed a minimum 2-3 year academic course of study; some will have completed a 4-5 year program.

#### *Medical Technologists, Dental Hygienists and Physician Assistants*

The regulations explicitly recognize dental hygienists and physician assistants, like registered or certified medical technologists, as likely to meet the requirement for the professional exemption if their training satisfies specific criteria set out **here**.

#### *Paralegals Unlikely to Satisfy the Professional Duties Test*

The Department of Labor has provided examples of occupations whose primary duties make them unlikely to satisfy the new learned professional test. For public employers, the most relevant example is that of the paralegal supporting the work of in-house or staff attorneys. Paralegals and legal assistants do not qualify because they are generally not required to have an advanced, specialized academic degree to work in the field.

In my next blog post, I will discuss the exemption for computer professionals. This test is one that causes considerable confusion and merits a separate post.

## Links

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