



Computer-Related Occupations Under the Fair Labor Standards Act (FLSA)

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Summary

The Fair Labor Standards Act (FLSA) sets minimum standards for hourly wages, overtime pay, and child labor. The FLSA requires employers to pay covered employees at least \$7.25 an hour and at least one-and-a-half times their regular hourly wage for hours worked over 40 hours a week at a given job. However, the FLSA includes a number of exemptions that exclude certain employees from the minimum wage and overtime standards of the act.

Section 13(a)(1) of the FLSA exempts from both the minimum wage and overtime pay standards of the act any person who is employed in a bona fide executive, administrative, or professional occupation (the EAP exemption). Before 1990, employees in computer-related occupations were exempt if they met the requirements of the EAP exemption.

In 1990, Congress directed the Secretary of Labor to issue regulations that would allow “computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers” to qualify as exempt executive, administrative, or professional employees under Section 13(a)(1) of the FLSA. The 1990 legislation also directed Congress to apply the EAP exemption to employees in computer-related occupations if they were paid on an hourly basis at a rate of at least six-and-a-half times the basic federal minimum wage. At the time, the federal minimum wage was \$4.25 an hour. Thus, hourly computer employees were exempt if they met the job duties test and were paid at least \$27.63 an hour. In 1992, the U.S. Department of Labor (DOL) published a final rule that implemented the 1990 legislation. The regulations treated computer employees as professional employees under the EAP exemption.

In 1996, Congress amended the FLSA to add a specific exemption for computer employees. The amendments fixed the minimum hourly wage for computer professionals at \$27.63 an hour and included in statute much of the regulatory language from the 1992 regulations that defined the primary duties of computer professionals.

In 2004, DOL issued new regulations that revised the salary and duties tests for the EAP exemption. The regulations also simplified the duties test for computer professionals to reflect the 1996 amendments to the FLSA. Under the 2004 regulations, whether they are paid by the hour (at a minimum rate of \$27.63) or the week (at a minimum rate of \$455), computer professionals are exempt from the minimum wage and overtime standards of the FLSA if they meet the job duties test provided in regulations.

Employees in certain computer-related occupations are not exempt and must be paid at least the minimum wage and time-and-a-half for overtime. The exemption for workers in computer occupations does not include employees engaged in the manufacture or repair of computer hardware. Employees whose work is highly dependent on the use of computers but who are not engaged primarily in computer systems analysis, programming, or other similarly skilled computer occupations are not exempt. Depending on their job duties, Information Technology (IT) Support Specialists may not be exempt from the minimum wage and overtime standards of the FLSA.

In recent Congresses, legislation has been introduced that would expand the statutory exemption for computer employees to include workers whose job duties include network or database analysis and workers who manage or train employees who qualify for the exemption.

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The Fair Labor Standards Act (FLSA) sets minimum standards for hourly wages, overtime pay, and child labor.¹ The FLSA requires employers to pay covered employees at least \$7.25 an hour.² The act also requires employers to pay covered workers at least one-and-a-half times their regular hourly wage for hours worked over 40 hours a week at a given job.

The FLSA includes a number of exemptions that exclude certain employees from the minimum wage and overtime standards of the act. Exemptions apply to higher-paid professional and other employees, employees who may not work a fixed schedule from week to week, and employees whose work hours may be difficult for employers to monitor. In both 1990 and 1996, Congress amended the FLSA to exempt certain computer-related occupations from the minimum wage and overtime standards of the act.

Under current law, computer systems analysts, programmers, software engineers, and similarly skilled computer employees are exempt from both the minimum wage and overtime requirements of the FLSA. Computer professionals are exempt if they meet a job duties test and are paid a salary of at least \$455 a week or a wage of at least \$27.63 an hour.

Given recent interest in potential changes to the FLSA affecting workers in computer-related occupations, this report explains the exemption for computer employees and the regulations that implement the exemption. In addition, the report describes those computer occupations that are not exempt from either the minimum wage or overtime standards of the FLSA.

In recent Congresses, legislation has been introduced that would expand the statutory exemption for computer employees to include workers whose job duties include network or database analysis and workers who manage or train employees who qualify for the exemption. Thus, the final section of the report summarizes recent legislation to expand the exemption for employees in computer-related occupations.

Policy Objectives of a Minimum Wage and Time-and-a-Half for Overtime

Several reasons have been offered to justify a statutory minimum wage. One argument is that no worker should be paid less than a living wage. Another argument is that a fair wage should be paid to workers employed in jobs that require limited skills. A third argument for a minimum wage is that it can increase the purchasing power of low-wage workers and, therefore, raise aggregate demand for goods and services and reduce unemployment. In opposing a minimum wage, others argue that it diminishes the employment opportunities of less-skilled workers and does little to raise the incomes of low-income families—because many low-wage workers do not live in low-income families or because many low-income families do not have earners.³

¹ The FLSA, as amended, is located at 29 U.S.C. §§201-219.

² The FLSA has lower minimum wage rates for tipped employees; new hires under the age of 20; full-time students who work in retail or service establishments, agriculture, or institutions of higher education; high school students who are at least 16 and enrolled in a vocational education program; and handicapped persons. Several states have minimum wage rates that are higher than the basic federal minimum wage of \$7.25. If a state minimum wage is higher than the federal wage, the higher state wage applies.

³ See CRS Report RL30927, *The Federal Minimum Wage: The Issue of Indexation*, by Gerald Mayer.

Requiring employers to pay time-and-a-half for overtime has two policy objectives. First, time-and-a-half is intended to reduce involuntary unemployment. It is argued that paying more for overtime hours can shorten the workweek and increase overall employment. The second reason for overtime pay is to reduce overwork. During debate over the FLSA, proponents argued that some employees work overly long hours, which is harmful to individual health and public safety. Opponents of overtime pay argue that it does not increase employment and amounts to government interference in labor markets.⁴

The FLSA Exemption for Professional Employees

When the Fair Labor Standards Act (P.L. 75-718) was enacted in 1938, Section 13(a)(1) provided an exemption, from both the minimum wage and overtime sections of the act, for bona fide executive, administrative, and professional employees (the EAP exemption). The act did not define the terms executive, administrative, or professional employee. Instead, the law stated that the terms would be defined in regulations issued by the administrator of the newly created Wage and Hour Division (WHD) of DOL.⁵ Under regulations issued by the administrator, executive, administrative, and professional employees were exempt if they met both a salary test and a job duties test.⁶

Employees in computer occupations may be exempt from the minimum wage and overtime standards of the FLSA under the EAP exemption. In addition, in 1990 Congress amended the FLSA to exempt certain employees in computer-related occupations. Regulations that implemented the 1990 amendments treated computer employees as professional employees. Professional employees include the traditional professions of law and medicine, but they also include engineers, accountants, nurses, social workers, and others.⁷

During hearings and debate before the FLSA was passed in 1938, very little was said about the reasons for the exemption for professional employees.⁸ The exemption had its roots in the National Industrial Relations Act of 1933 (NIRA, P.L. 73-67).⁹ In addition to funding public

⁴ See CRS Report RL32349, *The "White-Collar" Exemptions to Overtime Pay Under Current and Proposed Regulations: An Economic Analysis*, by Gerald Mayer. For a discussion of whether time spent using personal data assistants (PDAs) and smart phones beyond the 40-hour workweek is eligible for overtime pay, see CRS Report R41993, *The Fair Labor Standards Act, Overtime Compensation, and Personal Data Assistants*, by Jon O. Shimabukuro.

⁵ The Fair Labor Standards Amendments of 1961 (P.L. 87-30) changed the reference to the administrator of the WHD to the Secretary of the U.S. Department of Labor.

⁶ U.S. Department of Labor, Wage and Hour Division, "Defining and Delimiting the Terms 'Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman,'" *Federal Register*, vol. 5, October 15, 1940, pp. 4077-4078.

⁷ Bureau of National Affairs, *Wage and Hour Cases, January 1939-April 1946* (Washington, DC: Bureau of National Affairs, 1947), p. 441; Bureau of National Affairs, *Wage and Hour Cases, April 1946-April 1961* (Washington, DC: Bureau of National Affairs, 1963), p. 447; Bureau of National Affairs, *Wage and Hour Cases, 2005-2010* (Washington, DC: Bureau of National Affairs, 2011), p. 175.

⁸ Eric Linder, *Time and a Half's the American Way: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004* (Iowa City: F&P Press, 2004), pp. 385-386. (Hereafter cited as Linder, *Time and a Half's the American Way*.)

⁹ John S. Forsythe, "Legislative History of the Fair Labor Standards Act," *Law and Contemporary Problems*, Summer 1939, p. 464. In 1935, the U.S. Supreme Court declared that the NIRA was unconstitutional.

works projects, the NIRA allowed industries to establish “codes of fair competition.”¹⁰ Many of these codes excluded professional employees from any minimum wage and overtime pay requirements.¹¹

Despite limited congressional discussion of the reasons for the professional exemption, two explanations are often given. The most common justification for the exemption is that, compared to less-skilled workers, professional employees are better able to bargain individually over wages, hours, and working conditions.¹² A second explanation is that professional employees may not work a fixed schedule. They may be called on to work evenings or weekends. In addition, if they travel it may be difficult for employers to monitor the total number of hours worked.¹³

The 1990 Amendments to the FLSA

The remainder of this report describes amendments to the FLSA and regulations that affect employees in computer-related occupations. After a review of these amendments, the report summarizes legislative proposals in recent Congresses that would expand the exemption for computer employees.

With the development of computer technology and the growth of computer-related occupations, Congress amended the FLSA to exempt certain employees in computer-related occupations. In 1990, Congress directed the Secretary of Labor to include certain computer employees in the EAP exemption. The 1990 amendments (P.L. 101-583)¹⁴ stated that the Secretary of Labor must issue regulations that would allow “computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under Section 13(a)(1)” of the FLSA.¹⁵

P.L. 101-583 also directed Congress to apply the EAP exemption to employees in computer-related occupations if they were paid on an hourly basis at a rate of at least six-and-a-half times the basic federal minimum wage. At the time, the federal minimum wage was \$4.25 an hour. Thus, hourly computer employees were exempt if they met the job duties test and were paid at least \$27.63 an hour.¹⁶

¹⁰ U.S. Congress, House of Representatives, Committee on Ways and Means, *The National Recovery Administration: Message from the President of the United States*, House Document 158, 75th Cong., 1st Sess., (Washington, DC: U.S. Government Print. Office, 1937), p. 1; Leverett S. Lyon et al., *The National Recovery Administration: An Analysis and Appraisal* (New York: Da Capo Press, 1972) (reprint of a 1935 edition published by the Brookings Institution), pp. 8-9.

¹¹ Linder, *Time and a Half's the American Way*, pp. 260-261.

¹² Peter D. DeChiara, “Rethinking The Managerial-Professional Exemption of The Fair Labor Standards Act,” *American University Law Review*, vol. 53, 1993, p. 165.

¹³ *Ibid.*, p. 182.

¹⁴ The title of P.L. 101-583 (S. 2930) is “a bill to eliminate ‘substantial documentary evidence’ requirement for minimum wage determination for American Samoa.”

¹⁵ U.S. Department of Labor, Wage and Hour Division, “Computer Employees Professional Exemption,” *Field Assistance Bulletin No. 2006-3*, December 14, 2006, available at http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2006_3.pdf, p. 1.

¹⁶ *Ibid.*, p. 1.

Regulations in Effect Before the 1990 Amendments to the FLSA

Before the 1990 amendments to the FLSA, DOL regulations explained why certain employees in computer-related occupations were not exempt as “learned professionals.” The regulations stated that learned professionals require “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.” The regulations said that an academic degree, as opposed to just a high school education, was the best evidence of professional training. The regulations added that the areas where the professional exemption may apply were expanding. As knowledge is developed, academic degrees are offered in new fields and employees who are trained in these fields may be exempt as learned professionals. The regulations said that computer programmers and systems analysts were not learned professionals because there were no universally accepted academic requirements for employment in these occupations.¹⁷

At the time of the 1990 amendments to the FLSA, the EAP exemption applied to employees who met either a “long” or a “short” test. Under both tests, an employee had to be paid a salary and not an hourly wage. Salaried workers had to be paid their full salary for any week in which they worked, regardless of the number of days or hours they worked.¹⁸

Under the long test, an exempt professional employee had to be paid between \$170 and \$249.99 a week. The employee’s primary duty had to consist of work that required advanced knowledge usually gained through a prolonged course of specialized instruction, that involved the consistent exercise of discretion and judgment, and that was mainly intellectual in character.¹⁹

Under the short test, exempt professional employees were paid at least \$250 a week. Their primary duty included work that required the consistent exercise of discretion and judgment.²⁰ (See the **Appendix** for the relevant parts of the long and short tests in effect before the 1990 amendments to the FLSA.²¹)

¹⁷ 29 C.F.R. §541.302 (July 1, 1990 ed.). DOL reached a similar conclusion from testimony provided at a hearing on February 2, 1971. The purpose of the hearing was to determine, among other things, the treatment of computer-related occupations under the exemption for executive, administrative, and professional employees. In response to testimony, DOL said “at the present time the computer sciences are not generally recognized by colleges and universities as a bona fide academic discipline with standardized licensing, certification, or registration procedures.” U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Terms ‘Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools) or in the Capacity of Outside Salesman,’” *Federal Register*, vol. 36, December 2, 1971, p. 22977.

¹⁸ 29 C.F.R. §541.118 (July 1, 1990 ed.).

¹⁹ 29 C.F.R. §541.3 (July 1, 1990 ed.). According to regulations, time is an effective guide in determining an employee’s primary duty. Primary duty “means the major part, or over 50 percent, of the employee’s time.” But, time alone may not be the sole test. Other factors may include the frequency with which an employee exercises discretion. 29 C.F.R. §541.103 (July 1, 1990 ed.).

²⁰ 29 C.F.R. 541.118 (July 1, 1990 ed.).

²¹ The regulations that implemented the 1938 act defined a professional employee as someone whose job was predominantly intellectual in character, required educational training in a “specially organized body of knowledge,” and involved the consistent exercise of discretion and judgment. Frank E. Cooper, “The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation,” *Law and Contemporary Problems*, Summer 1939, p. 348.

Regulations that Implemented the 1990 Amendments to the FLSA

In 1992, DOL published a final rule that implemented the 1990 amendments to the FLSA.²² The regulations treated computer employees as professional employees under the EAP exemption. The 1992 regulations stated that professional employees included highly skilled workers employed as computer systems analysts, computer programmers, and software engineers, or in other skilled computer occupations. Regulations added language to exempt hourly employees who were paid at least \$27.63 an hour. The weekly salary test for computer professionals remained the same as under prior regulations: between \$170 and \$249.99 under the long test and at least \$250 under the short test. Finally, the regulations added language that detailed the primary duties of computer professionals.

The 1992 regulations added language to existing Code of Federal Regulations (C.F.R.) Section 541.3 and added new language to renumbered Section 541.303. Specifically, new Section 541.3(a)(4) stated that professional occupations include

Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in Section 541.303.

New language covering hourly employees was added to existing Section 541.3(e). Revised Section 541.3(e) stated:

That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 times the minimum wage provided by Section 6 of the Act.

Finally, the 1992 regulations included language that described the primary duties of computer professionals. The relevant parts of renumbered Section 541.303 were as follows:

Computer related occupations under P.L. 101-583.

(a) Pursuant to P.L. 101-583, enacted November 15, 1990, Section 541.3(a)(4) provides that computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field are eligible for exemption as professionals under Section 13(a)(1) of the Act. Employees who qualify for this exemption are highly-skilled in computer systems analysis, programming, or related work in software functions. Employees who perform these types of work have varied job titles. Included among the more common job titles are computer programmer, systems analyst, computer systems analyst, computer programmer analyst, applications programmer, applications systems analyst, applications systems analyst/programmer, software engineer, software specialist, systems engineer, and systems specialist. These job titles are illustrative only and the list is not intended to be all-inclusive. Further, because of the wide variety of job titles applied to

²² U.S. Department of Labor, Wage and Hour Division, "Fair Labor Standard Act; Computer-Related Occupations; Exemption from Minimum Wage and Overtime Compensation Requirements; Final Rule," *Federal Register*, vol. 57, October 9, 1992, pp. 46742-46745.

computer systems analysis and programming work, job titles alone are not determinative of the applicability of this exemption.

(b) To be considered for exemption under Section 541.3(a)(4), an employee's primary duty must consist of one or more of the following:

(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) The exemption provided by Section 541.3(a)(4) applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience in the field. While such employees commonly have a bachelor's or higher degree, no particular academic degree is required for this exemption, nor are there any requirements for licensure or certification, as is required for the exemption for the learned professions.

The 1992 final rule summarized responses to the proposed regulations. Several individuals commented that the 1990 amendments would deprive them of overtime pay. These individuals said that they were employed as computer systems analysts, programmers, and engineers and that they were generally employed by service contractors and were paid by the hour. Others commented that the minimum hourly wage to qualify for exemption was too high; that is, it should be less than six-and-a-half times the minimum wage of \$4.25.²³

The 1996 Amendments to the FLSA

In 1996, Congress amended the FLSA to add a specific statutory exemption for computer professionals. P.L. 104-188 added Section 13(a)(17) to the FLSA.²⁴ The 1996 amendments fixed the minimum hourly wage for computer professionals paid on an hourly basis at \$27.63 an hour. The amendments also included in statute much of the regulatory language from the 1992 regulations that defined the primary duties of computer professionals.

²³ Ibid., p. 46743.

²⁴ The title of P.L. 104-188 (H.R. 3448) is the Small Business Job Protection Act of 1996.

Under Section 13(a)(17) of the FLSA, the following employees are exempt from the minimum wage and overtime standards of the act:

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) 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;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), or (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

The 2004 Regulations for Computer Professionals

After the 1996 amendments to the FLSA, DOL did not revise the regulations for computer professionals until 2004. A rule issued in 2004 revised the regulations that implement the EAP exemption. Instead of long and short tests, under the 2004 regulations professional employees are exempt if they are paid at least \$455 a week (up from \$170 under the long test and \$250 under the short test).²⁵ As provided in the 1996 amendments to the FLSA, computer professionals paid by the hour are exempt if they meet the duties test and their hourly wage is at least \$27.63.

The 2004 regulations combined language that had been in C.F.R. Sections 541.3(a)(4) and 541.303.²⁶ The revised duties test removed the requirement that exempt computer employees must consistently exercise discretion and independent judgment.

Whether exempt under Section 13(a)(1) or Section 13(a)(17) of the FLSA, the 2004 regulations state that computer systems analysts, computer programmers, software engineers, and other

²⁵ The minimum weekly salary of \$455 may be paid in periods longer than a week (e.g., \$910 biweekly or \$1,971.66 a month); 29 C.F.R. §541.600(b). The \$455 minimum weekly salary amount cannot include the value of employer-provided room or board; 29 C.F.R. §541.606.

Professional employees may be exempt if they are paid on a fee, rather than a salary, basis. For example, an employee may be paid an agreed sum for a single job regardless of the time required to complete the job. To determine whether the fee payment meets the minimum amount of salary required for exemption, the fee must equal at least \$455 per week if the employee worked 40 hours; 29 C.F.R. §541.605(a)-(b).

²⁶ The regulatory language for computer employees is now at 29 C.F.R. §§541.400-402. U.S. Department of Labor, Wage and Hour Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," *Federal Register*, vol. 69, April 23, 2004, p. 22267.

similarly skilled computer workers are exempt from the minimum wage and overtime standards of the FLSA if they meet the weekly or hourly test and their primary duty consists of²⁷

- (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, 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.²⁸

Nonexempt Employees in Computer-Related Occupations

Regulations that implemented the 1990 amendments to the FLSA identified certain computer-related occupations that are not exempt from the minimum wage and overtime standards of the FLSA. The 2004 regulations clarified the job duties of nonexempt computer employees.

According to the 2004 regulations, employees in computer-related occupations are exempt from the minimum wage and overtime standards of the FLSA if they meet both the job duties test and are paid a salary of at least \$455 a week or a wage of at least \$27.63 an hour. Job titles do not determine if a computer employee is exempt. Skilled computer workers are not necessarily exempt.

According to the 2004 regulations, the following computer employees are not exempt:

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 identified in §541.400(b), are also not exempt computer professionals.²⁹

In 2006, the Wage and Hour Division (WHD) of DOL issued an opinion letter in which it concluded that Information Technology (IT) Support Specialists are not exempt from the minimum wage and overtime standards of the FLSA. As described by the employer who requested the opinion, the primary duty of IT Support Specialists is to install, configure, test, and

²⁷ According to the 2004 regulations, “The term ‘primary duty’ means the principal, main, major or most important duty that the employee performs.... 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”; 29 C.F.R. §541.700(a).

²⁸ 29 C.F.R. §541.400(a)-(b).

²⁹ 29 C.F.R. §541.401.

troubleshoot computer applications, networks, and hardware. Based on the job duties provided by the employer, WHD concluded that IT Support Specialists are not exempt as computer professionals.³⁰

Legislation

The remainder of this report summarizes legislation, beginning with the 112th Congress, to amend Section 13(a)(17) of the FLSA. The section ends with legislation from the 106th Congress, when the House of Representatives passed legislation that would have amended Section 13(a)(17). The measure was not considered in the Senate.

112th Congress

In the 112th Congress, Senator Kay Hagan introduced S. 1747, the Computer Professionals Update Act. S. 1747 would amend Section 13(a)(17) of the FLSA to cover any employee working in a computer or IT occupation. Administrators would be included in computer- and IT-related occupations. The job duties test would be expanded to include employees whose primary duty includes the application of network or database analysis techniques. The duties test would include employees who direct the work, train, or lead teams of employees who meet the modified job duties test. As amended, Section 13(a)(17) would apply to employees in computer- and IT-related occupations who are paid on an hourly basis at a rate of at least \$27.63 an hour and employees who are paid on a salary basis as provided in regulations (currently, \$455 a week).

S. 1747 would amend 13(a)(17) of the FLSA to exempt

(17) any employee working in a computer or information technology occupation (including, but not limited to, work related to computers, information systems, components, networks, software, hardware, databases, security, internet, intranet, or websites) as an analyst, programmer, engineer, designer, developer, administrator, or other similarly skilled worker, whose primary duty is—

(A) the application of systems, network or database analysis techniques and procedures, including consulting with users, to determine or modify hardware, software, network, database, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, securing, configuration, integration, debugging, modification of computer or information technology, or enabling continuity of systems and applications;

³⁰ The employer also asked if IT Support Specialists qualified for the administrative exemption under Section 13(a)(1). An employee may qualify for the administrative exemption if they are paid a salary of at least \$455 a week and their 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” and their primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance”; 29. C.F.R. §541.200. WHD concluded that, based on the information presented by the employer, IT Support Specialists did not qualify for the administrative exemption. U.S. Department of Labor, Wage and Hour Division, *Information Technology (IT) Support Specialist Under Sections 13(a)(1) and 13(a)(17)*, Opinion Letter FLSA2006-42, October 26, 2006, available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_10_26_42_FLSA.pdf, pp. 1-2, 5-6.

(C) directing the work of individuals performing duties described in subparagraph (A) or (B), including training such individuals or leading teams performing such duties; or

(D) a combination of duties described in subparagraphs (A), (B), and (C), the performance of which requires the same level of skill;

who is compensated at an hourly rate of not less than \$27.63 an hour or who is paid on a salary basis at a salary level as set forth by the Department of Labor in part 541 of title 29, Code of Federal Regulations. An employee described in this paragraph shall be considered an employee in a professional capacity pursuant to paragraph (1).

108th Congress

Senator Lindsey Graham introduced S. 495 (“a bill to amend the Fair Labor Standards Act of 1938 to clarify the exemption from the minimum wage and overtime compensation requirements of that Act for certain computer professionals”). A companion bill, H.R. 1996, was introduced in the House by Representative Joe Wilson.

S. 495 would have amended the FLSA to extend the exemption for employees in computer-related occupations to include network and database analysts, designers, and developers. The legislation would have modified the job duties test to include employees whose primary duty was the application of network or database analysis techniques and procedures. Computer employees would have been exempt if their primary duty was to configure, integrate, or secure or resolve problems for computer systems, networks, databases, or programs. Employees whose primary duty was to manage or train employees who met the modified job duties test would have been exempt.

S. 495/H.R. 1996 would have amended 13(a)(17) of the FLSA to exempt

(17)(A) any employee who is a computer systems, network, or database analyst, designer, developer, programmer, software engineer, or other similarly skilled worker—

(i) whose primary duty is—

(I) the application of systems or network or database analysis techniques and procedures, including consulting with users, to determine hardware, software, systems, network, or database specifications (including functional specifications);

(II) the design, configuration, development, integration, documentation, analysis, creation, testing, securing, or modification of, or problem resolution for, computer systems, networks, databases, or programs, including prototypes, based on and related to user, system, network, or database specifications, including design specifications and machine operating systems;

(III) the management or training of employees performing duties described in subclause (I) or (II); or

(IV) a combination of duties described in subclauses (I), (II), or (III) the performance of which requires the same level of skills; and

(ii) who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

(B) In this paragraph, the term ‘network’ includes the Internet and Intranet networks and the world wide web.

(C) For the purposes of this Act, an employee who meets the exemption provided by this paragraph shall be considered an employee in a professional capacity under paragraph (1).

107th Congress

Representative Robert Andrews introduced H.R. 1545 (“a bill to amend the Fair Labor Standards Act of 1938 to clarify the exemption from the minimum wage and overtime compensation requirements of that Act for certain computer professionals”). Similar language was included in H.R. 546, a bill introduced by Representative Jack Quinn. The latter bill was titled the Small Business Tax Fairness Act of 2001.

H.R. 1545/H.R. 546 would have amended the FLSA to extend the exemption for employees in computer-related occupations to include network and database analysts, designers, and developers. Both bills would have extended the exemption for employees in computer-related occupations to include network and database analysts, designers, and developers. The legislation would have modified the job duties test to include employees whose primary duty was the application of network or database analysis techniques and procedures. Computer employees would have been exempt if their primary duty was to configure, integrate, or secure or resolve problems for computer systems, networks, databases, or programs. Employees would have been exempt if their primary duty was to manage or train employees who met the modified job duties test.

H.R. 1545 and Section 603 of H.R. 546 would have amended Section 13(a)(17) to exempt

(17) any employee who is a computer systems, network, or database analyst, designer, developer, programmer, software engineer, or other similarly skilled worker—

(A) whose primary duty is—

(i) the application of systems or network or database analysis techniques and procedures, including consulting with users, to determine hardware, software, systems, network, or database specifications (including functional specifications);

(ii) the design, configuration, development, integration, documentation, analysis, creation, testing, securing, or modification of, or problem resolution for, computer systems, networks, databases, or programs, including prototypes, based on and related to user, system, network, or database specifications, including design specifications and machine operating systems;

(iii) the management or training of employees performing duties described in clause (i) or (ii); or

(iv) a combination of duties described in clauses (i), (ii), or (iii) the performance of which requires the same level of skills; and

(B) who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

For purposes of this paragraph, the term ‘network’ includes the Internet and intranet networks and the world wide web. An employee who meets the exemption provided by this paragraph shall be considered an employee in a professional capacity pursuant to paragraph (1).

106th Congress

In the 106th Congress, the House approved legislation that would have amended Section 13(a)(17) of the FLSA. The Senate did not consider the measure.

Representative Robert Andrews introduced H.R. 3038 (“a bill to amend the Fair Labor Standards Act of 1938 to clarify the exemption from the minimum wage and overtime compensation requirements of that Act for certain computer professionals”). Representative John Shimkus introduced H.R. 3846 (“a bill to amend the Fair Labor Standards Act of 1938 to increase the minimum wage, and for other purposes”). H.R. 3846 was passed by the House and appended to H.R. 3081, the Small Business Tax Fairness Act of 2000. H.R. 3081 was sponsored by Representative Rick Lazio. H.R. 3081 passed the House, but the Senate did not take up the bill.

H.R. 3846, as added to H.R. 3081 (as §603) would have amended Section 13(a)(17) to exempt

(17) any employee who is a computer systems, network, or database analyst, designer, developer, programmer, software engineer, or other similarly skilled worker—

(A) whose primary duty is—

(i) the application of systems or network or database analysis techniques and procedures, including consulting with users, to determine hardware, software, systems, network, or database specifications (including functional specifications);

(ii) the design, configuration, development, integration, documentation, analysis, creation, testing, securing, or modification of, or problem resolution for, computer systems, networks, databases, or programs, including prototypes, based on and related to user, system, network, or database specifications, including design specifications and machine operating systems;

(iii) the management or training of employees performing duties described in clause (i) or (ii); or

(iv) a combination of duties described in clauses (i), (ii), or (iii) the performance of which requires the same level of skills; and

(B) who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

For purposes of paragraph (17), the term ‘network’ includes the Internet and intranet networks and the world wide web. An employee who meets the exemption provided by paragraph (17) shall be considered an employee in a professional capacity pursuant to paragraph (1).

Appendix. Regulations for Professional Employees in Effect Before the 1990 Amendments to the FLSA

In 1990, Congress directed the Secretary of Labor to issue regulations that would exempt certain employees in computer-related occupations from the minimum wage and overtime standards of the FLSA. At the time, under Section 13(a)(1), executive, administrative, or professional employees were exempt if they met either a long or a short test.

Long Test

Under the long test, an exempt professional employee was paid between \$170 and \$249.99 a week. Under the long test, a professional employee was an employee

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week....

Short Test

Under the short test, an exempt professional employee was paid at least \$250 a week. Under the short test, a professional employee was an employee whose occupation “includes work requiring the consistent exercise of discretion and judgment or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor...”³¹

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³¹ 29 C.F.R. §541.3 (July 1, 1990 ed.).