

FLSA's Computer Professional Exemption

Do I have to pay OT to IT department?

 By Tyler J. Volm



With the increasing digitization of most businesses, many companies now maintain a robust information technology department. Certain computer professionals may qualify for a useful exemption to the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).

This article will explore the requirements of this exemption and examine where the Department of Labor's Wage and Hour Division (WHD) and federal courts have come down regarding whether certain duties of information technology employees qualify for the exemption.

This article is limited to the exemption under the FLSA, so, as with many employment issues, employers should also review state law, which may have different wage and hour exemptions. Remember that when state law differs from federal law, the employer must comply with the standard that provides the most protection to the employee (i.e. the standard under which the employee is more likely to be paid overtime and less likely to qualify for the exemption).

The Basics - Salary and Duties Test

The exemption is limited to system analysts, programmers, software engineers, and other similarly skilled workers in the computer field'.

To qualify, the employee must be currently paid a salary of not less than \$455 per week or paid an hourly rate of not less than \$27.63 an hour and the employee must have primary duties consisting 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.

The regulations specifically exclude employees engaged in computer manufacture and repair, and also employees whose work is highly dependent on, or facilitated by, the use of computers and computer software programs (e.g. engineers, drafters, and others skilled in computer-aided design and software) unless these employees are also primarily engaged in computer systems analysis, programming, or other duties discussed above.

The regulations also indicate that in certain circumstances computer professionals may also qualify for the executive or administrative exemptions of the FLSA. If their primary duties include “planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer’s customers,” the employees may qualify for one of these other exemptions to the FLSA minimum wage and overtime requirements, even if they do not qualify for the computer professional exemption.

Although, they are generally considered to have a certain level of expertise in their field, computer professionals do not have to obtain any “particular academic degree” or certification to qualify for the exemption under the FLSA. Because the salary test is fairly straightforward, the rest of this article will explore guidance from the Wage and Hour Division (WHD) and courts regarding which duties will qualify the employee for the exemption.

Guidance from the United States Department of Labor’s Wage and Hour Division

Citing to the regulations, the WHD’s Fact Sheet 17E states that the exemption does not apply to “employees engaged in the manufacture or repair of computer hardware and related equipment,” nor does it apply to those employees “whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs.” Rather, the employee must be engaged in one of the four primary duties outlined above.

The WHD reminds us that “primary duty” means “the principal, main, major, or most important duty that the employee performs” and that “job titles do not determine exempt status.”

In a 2001 opinion letter, the WHD suggested that a system engineer who provided support services to local businesses and designed computer solutions for his clients was not exempt. His primary duties included analyzing current equipment and software, identifying equipment and software needs, determining a scope of work for implementation and integration of the old system with the new, and providing continued hardware and software support following implementation. The WHD noted that the employee was identifying computer solutions based on the client’s needs, not designing, creating, or modifying any systems or programs.

In a 2006 opinion letter, the WHD reiterated that an IT support specialist who spends a majority of his or her time analyzing, troubleshooting, and resolving complex problems with business applications, networking, and hardware would not qualify for the exemption. Primary duties included installing, configuring, testing, and troubleshooting computer applications, networks, and hardware, which do not fall within the four categories of exempt duties contemplated by the exemption.

Guidance from the Courts

In *Bohn v. Park City Group, Inc.*, the Tenth Circuit was interpreting what was a relatively new exemption at the time. The employee

was hired as a “documenter at the documentation project manager level.” He worked on a team of employees that included two testers and three programmers. The court explained that its understanding of documentation could deal with the “internal documentation process involved in programming and/or systems analysis, requiring knowledge of the system architecture, programming logic and language necessary to manipulate the internal operation of the computer itself.”

The court found that the term “documentation” is “also used to refer to the writing of manuals for end-users, which would not necessarily involve the same type of highly developed computer skills.”

Exemption Inapplicable

In *Martin v. Indiana Michigan Power Co.*, the Sixth Circuit held that an IT support specialist did not qualify for the exemption where his primary duties were to install, upgrade, and maintain computer workstation software, install hardware and cable for the company’s local area network, and troubleshoot problems in response to employee calls to the company’s IT help desk. Interpreting the regulations in place at the time, the court emphasized that the employee must perform “theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering”, and not merely maintain “highly specialized knowledge of computers and software.”

The plaintiff did not perform any computer programming, software engineering, or systems analysis, which the court explained, “involves making actual, analytical decisions about how (the employer’s) computer network should function.” Rather, the employee performed all of his tasks to predetermined specifications in the system design created by others.

Similarly, the District of Columbia court in *Hunter v. Sprint Corp.* held that a technically proficient help desk employee performing limited modifications to computer software did not qualify for the exemption, since his primary duty was customer service.

Exemption Applicable

In *Bagwell v. Florida Broadband, LLC*, a court in Florida found the exemption applicable to an employee responsible for developing, improving, and maintaining a company’s network system. Tasks included writing specifications, specifying protocols, maintaining network availability and security, and interacting with clients regarding design and technical specifications and vendors regarding materials and pricing. The employee also scheduled surveys, installations, and maintenance, kept detailed records on the network, and evaluated emerging technologies.

These tasks indicated to the court that the employee was involved in the design, development, and analysis of the computer system or program based on and related to user or system design specification. The employee was also applying systems analysis techniques and procedures, including consulting with users to determine specifications.

In *Bergquist v. Fidelity Information Services, Inc.*, a different Florida court held that the exemption applied to a computer programmer responsible for designing programs, assisting the business analyst with technical details of computer programs, and working on a project team to research and design pieces that would be integrated into other systems. The employee’s job description included researching and analyzing data processing practices and procedures, and developing solutions and recommendations for improvement; completing complex programming assignments by defining specifications, writing new or modified code, and testing the code to verify the program; advising



client personnel on software conversion and installation activities; and preparing user, operations, and systems manuals. Because plaintiff's duties largely mirrored the job description, the court found the exemption applicable.

In *Pellerin v. Xspedius Management Co.*, a Louisiana court held that the employee qualified for the exemption where his primary duties were developing, analyzing, creating, testing, and modifying computer programs based on user specifications.

The employee was responsible for debugging programs, and performing maintenance and support work for pre-existing software applications (including adding additional input fields and changing the codes on reports). Although, by working with pre-existing software applications, the court found that the enhancements generated by the

operate properly. After writing the complex code, the employee would then test and analyze the code to ensure that it was working properly

Penalties for Non-compliance

FLSA exemptions are construed narrowly, and the burden is on the employer to prove that the exemption is applicable. If the employer erroneously categorizes the employee as exempt (under this exemption or any other) and it is later determined that the employee does not meet the exemption's qualifications, then the employer is liable for a pay back with interest, penalties, and a plaintiff's attorney fees and costs. If, after reviewing the guidance above, the employer is still uncertain about the applicability of the exemption, consult legal counsel or consider writing to WHD and seeking a formal opinion letter.

Conclusion

In most cases, the exemption will apply if the employee's primary duties involve the theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering, especially if those duties involve making actual, analytical decisions about how the employer's computer network should function. Conversely, if the employee is merely performing help desk functions based on predetermined specifications in the employer's computer network that was created by others (absent extensive modifications to that system) then the employee likely does not qualify for the exemption.

As technology continues to advance at a rapid rate and employee duties adapt to keep pace, employers must regularly re-evaluate whether the exemption remains applicable. When hiring new IT employees or crafting job descriptions, consider whether the employee's primary duties qualify for this exemption based on the guidance discussed above, and be sure to also check for a more restrictive state law. **L&C**

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employee were sufficient computer programming tasks to qualify for the exemption.

In *Bobadilla v. MDRC*, the employee's primary duties included a combination of those duties contemplated by §213(a)(17). Although, the employee contended that he spent most of his time performing help desk functions, the New York court found that his value to the company came largely from his sophisticated knowledge of computing that went beyond the normal skillset of a help desk employee. Network analysis, design, configuration, and modification were important parts of his position, and these are the types of duties that characterize the employees exempted under the FLSA.

In *Curry v. Matividad Medical Center*, a California court found that the plaintiff's duties and responsibilities were similar to those found to be exempt in *Bobadilla*, including hardware and software procurement, server and network infrastructure maintenance provisioning, research into the feasibility and compatibility of certain computer-related projects, building servers, installing equipment, administering implementation of different computer programs, and providing support services to lower level technicians. Overall, the court found that the employee was hired to design, implement, and maintain the company's information systems' infrastructure and all associated equipment, data, related software and applications.

In *Medepalli v. Maximus, Inc.*, a different California court granted summary judgment in favor of the employer, finding that an employee who spent ninety percent of his time developing computer code for business applications used by the company and its clients was exempt, and that this intricate work required Medepalli to use his intellectual skills to develop computer code so that the software program would

Id.

29 C.F.R. §541.401.

29 C.F.R. §541.402; See also *Harber v. HEBCO, Inc.*, 146 P.3d 876 (Okla. Ct. App. 2006); *Hef-felfinger v. Electronic Data Systems Corp.*, 492 Fed.Appx. 710 (9th Cir. 2012).

29 C.F.R. §541.303(c).

http://www.dol.gov/wbd/overtime/f17e_computer.pdf

WH Op. Letter (May 11, 2001).

WH Admin. Op. FLSA2006-42 (Oct. 26, 2006)

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