


Approved for Release
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Date

DEPARTMENT OF COMMERCE
OFFICE OF HUMAN RESOURCES MANAGEMENT

HUMAN RESOURCES (HR) BULLETIN #094, FY09

SUBJECT: Fair Labor Standards Act Determination

EFFECTIVE DATE: Upon release of this HR Bulletin

EXPIRATION DATE: Effective until canceled or superseded

SUPERSEDES: N/A

BACKGROUND: In 1974, the Fair Labor Standards Act (FLSA or the Act) was amended to include employees of the Federal Government. The Act is codified as Title 29, United States Code (U.S.C.) §§ 201-219. The U.S. Office of Personnel Management (OPM) is authorized to administer the Act as it applies to Federal employees. OPM's regulations are maintained in Title 5, Code of Federal Regulations (CFR), Part 551. The Act provides for minimum standards for wages and overtime entitlement, and provides the administrative procedures by which covered work time must be compensated. As a result, effective immediately, the Office of Human Resources Management (OHRM) and the Servicing Human Resources Offices (SHROs) will document all FLSA determinations using the policies and procedures described in this Bulletin.

PURPOSE: The purpose of this HR Bulletin is to provide supplemental guidance to SHROs on determining and documenting FLSA decisions. This HR Bulletin is not intended to replace or modify any part of OPM regulations.

COVERAGE: All employees, who are not specifically excluded by another statute, are covered under FLSA. The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. All employees are presumed to be FLSA nonexempt unless it is determined that the employee meets the requirements of one or more of the exemption criteria in Title 5, CFR, Part 551 and supplemental guidance issued by OPM. The exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

POLICY: FLSA determinations are to be made based on the criteria set forth in Title 5, CFR, Part 551 and supplemental guidance issued by OPM. Other criteria, (e.g., arbitrators' decisions, Department of Labor' decisions on private sector situations, etc.) are not to be used. The method of using the presumption of nonexempt for grades GS-9 and below or using a cheat sheet to determine exemption status is not permitted. Such practices must be discontinued immediately. The designation of a position as either FLSA exempt or nonexempt depends on the duties actually performed and the amount of time spent accomplishing them. You must ensure that position descriptions (PD) are accurate and contain sufficient information on which to base the FLSA coverage determination.

The following criteria are to be used when making FLSA determinations:

Non-Exempt Determinations:

Salary-based nonexemptions (5 CFR § 551.203) apply to all employees, including supervisory employees, whose annual rate of basic pay is less than the limits set forth in the CFR. The only exceptions are if the employee is: (1) performing different work or duties for a temporary period of time on FLSA status under Title 5, CFR § 551.211; or (2) designated for the foreign exemption criteria under Title 5, CFR § 551.212; or (3) a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) under Title 5, CFR § 551.208.

Position-based nonexemptions (5 CFR § 551.204) apply to certain nonsupervisory white-collar employees or nonsupervisory employees in the Federal Wage System or in other comparable wage systems, unless subject to Title 5, CFR § 551.211 or Title 5, CFR § 551.212 as described in this Bulletin.

Exempt Determinations:

To be FLSA exempt, the duties performed by the employee must meet the executive, administrative, professional, foreign and/or special exemptions/exclusions criteria (see below). The categories are not mutually exclusive; failure to meet the criteria for exemption under one category does not preclude exemption under another category.

Executive exemptions (5 CFR § 551.205) apply to employees whose primary duty is management (as defined in 5 CFR § 551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and who: (1) customarily and regularly directs the work of two or more other employees; and (2) has the authority to hire or fire other employees (or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight).

Administrative exemptions (5 CFR § 551.206) apply to employees whose primary duties are the performance of office or non-manual work directly related to the management or general business operations (as distinguished from production functions), of the employer or the employer's customers, and whose primary duties include the exercise of judgment and independence with respect to matters of significance.

Professional exemptions (5 CFR § 551.207) apply to all employees whose primary duties must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (restricted to professions when specialized academic training is a standard prerequisite for entrance into the profession), or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Learned professional exemptions (5 CFR § 551.208) apply to all employees whose primary duties 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.

Creative professional exemptions (5 CFR § 551.209) apply to all employees whose primary duties must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, as opposed to routine mental, manual, mechanical, or physical work.

Computer employee exemptions (5 CFR § 551.210) apply to computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field who are eligible for exemptions as a professional under section 13(a)(1) and (17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

Temporary duties or the performance of different work assignments may also affect an employee's FLSA exemption status (5 CFR § 551.211). These exemptions apply only when an employee must perform work or duties that are not consistent with the employee's primary duties, and are for an extended period of more than 30 consecutive calendar days.

Foreign exemptions (5 CFR § 551.212) apply to all employees who live in or spend all of their work week in an exempt area. Exempt areas include any foreign country or U.S. territory other than the following: a state of the United States, the District of Columbia, American Samoa, Guam, Johnston Island, Commonwealth of the Northern Mariana Islands, Midway Atoll, Outer Continental Shelf Lands (as defined in the Outer Continental Shelf Lands Act, *67 Stat. 462*), Palmyra, Puerto Rico, the U.S. Virgin Islands, or Wake Island.

Availability pay exemptions (5 CFR § 551.213) apply to criminal investigators who receive availability pay under Title 5, CFR § 550.181(a).

Statutory Exclusions:

Fire protection activities and 7(k) coverage for FLSA pay and exemption determinations (5 CFR § 551.215).

Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations (5 CFR § 551.216).

MAKING A CHANGE TO A FLSA DETERMINATION: A change in FLSA determination that results from a classification review of an existing PD must be reported to OHRM, using the appropriate method, which follows.

Position Description (PD) Library:

Prior to using a PD, you must ensure that the FLSA determination is still valid and has been documented accordingly. Each FLSA determination should have the CFR reference and the primary duty that formed the basis for the determination. (Example: Exempt due to the Administrative Exemption Criteria, 5 CFR § 551.206. The primary duty that formed the basis of this exemption was overall control of the budget formulation and execution for the Department of Commerce.) If the FLSA determination is found to be incorrect, you should make the correct determination, document your decision using the attached “FLSA Determination Worksheet,” and submit it to OHRM for approval. Upon approval, OHRM will update the PD to reflect the correct FLSA determination and notify you with a confirmation notice of the change.

Position Descriptions Not in the PD Library:

Position descriptions in the PD Library do not cover every position within the Department. All PDs written and evaluated by the SHRO must be reviewed, and the FLSA determination documented, by citing the CFR reference and the primary duty that formed the basis for the determination. (Example: Exempt due to the Administrative Exemption Criteria, 5 CFR § 551.206. The primary duty that formed the basis of this exemption was overall control of the budget formulation and execution for the Department of Commerce.) If the original FLSA determination is found to be incorrect, you should make the correct determination, document your decision using the attached form, and submit a report to OHRM. The individual determinations will be added as an addendum to the evaluation statement, using the attached form. As new PDs are written, the FLSA determination should be added to the evaluation statement.

Automated Classification System (ACS):

Prior to classifying a new PD in the ACS the HR Specialist must make the FLSA determination before validating the classification of the PD. If you select a Non-exempt option a default message will appear in the “FLSA Basis” dialogue box. If you select an exempt criterion a mandatory dialogue box will appear and you must enter the basis for the FLSA determination. (Example: Exempt due to the Administrative Exemption Criteria, 5 CFR § 551.206. The primary duty that formed the basis of this exemption was overall control of the budget formulation and execution for the Department of Commerce.) Each SHRO is responsible for reviewing the FLSA determination for PDs validated by their office; if any are found to be incorrect, you should correct the determination, document your decision using the attached form, and submit it to OHRM for approval. Upon approval, OHRM will update the PD to reflect the correct FLSA determination and notify you with a confirmation notice of the change.

REFERENCES: The Fair Labor Standards Act of 1938; 29 U.S.C. §§ 201-219, Fair Labor Standards; 5 CFR Part 551, *Pay Administration Under the Fair Labor Standards Act*.

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Sample Worksheet
FLSA Determination Worksheet

Organization:

Position Description Number:

Title, Series, and Grade:

FLSA Determination:

Basis: If determined to be exempt, cite the 5 CFR Part 551 reference and the primary duties that form the basis for the determination.

HR Specialist

DATE