

12 DEPARTMENT OF LABOR

170 BUREAU OF LABOR STANDARDS

Chapter 16: RULES GOVERNING DEFINITIONS FOR EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME

Summary: The purpose of this Chapter is to define the "executive", "administrative" and "professional" minimum wage and overtime exemptions allowed for individuals who are paid on a salary basis pursuant to 26 MRSA Sec. 663 (K) and to preserve permissible deductions from salary, safe harbor, window of correction provisions and special provisions for public employees provided in federal regulations promulgated under the Fair Labor Standards Act.

I. Intent and Interpretation

- A. It is the intent of these rules that any employee in a position who had the right to overtime under the U. S. Department of Labor regulations at 29 C. F. R. Part 541 in effect on August 22, 2004 will maintain that right under these rules.
- B. Unless expressly provided herein, the Department, in interpreting and enforcing 26 M.R.S.A. § 664(3), will be guided by the federal regulations (29 C.F.R. Part 541 in effect on August 22, 2004) and any interpretive materials produced or used by the U.S. Department of Labor in association with these regulations. To the extent these rules conflict with the federal regulations referenced above, these rules govern.

II. Definitions

For the purpose of these regulations, the following terms will be construed as follows:

- A. "Administrative": In order for an individual to be considered a bona fide administrative worker, the employee's primary duty must consist of either (1) the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or (2) the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein, and (3) where the performance of such primary duty customarily and regularly includes the exercise of discretion and independent judgment.
- B. "Bona fide" means authentic or genuine.
- C. "Executive": In order for an individual to be considered a bona fide executive, the employee's primary duty must consist of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other full-time (or equivalent) employees therein.

- D. "Primary Duty" means, as a general rule, the activities in which an employee spends the major part, or over 50 percent of his or her time. A determination of whether an employee has exempting activities as his or her primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of those duties is a useful guide in determining the primary duty of an employee. [As an example, an employee who spends over 50 percent of his or her time in management would have management as his or her primary duty.] Time alone, however, is not the sole test. Some other pertinent factors are the relative importance of the exempting duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed.
- E. "Professional" In order for an individual to be considered a bona fide professional, the employee's primary duty must consist of the performance of work (1) requiring knowledge of an advanced type in a field of science or learning, or (2) work as a teacher in the activity of imparting knowledge, or (3) requiring invention, imagination, or talent in a recognized field of artistic endeavor, where the performance of such primary duty customarily and regularly includes the exercise of discretion and independent judgment.
- F. "Salaried employee" means an employee who receives a predetermined fixed amount of wages that is no less than the amount required by 26 MRSA Sec. 663 (K) which is paid on a weekly or less frequent basis. Commissions or bonuses may not be used in determining the individual's predetermined amount of wages. Subject to the following exceptions, a salaried employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. The prohibition against deductions from pay for a salaried employee is subject to the following exceptions:
1. Deductions from pay may be made when a salaried employee is absent from work for one or more full days for personal reasons, other than sickness or disability. [Example: if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.]
 2. Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. [Example: if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences

after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided in accordance with State workers' compensation law.]

3. An employer may not make deductions from pay for absences of a salaried employee occasioned by jury duty, attendance as a witness or temporary military leave. However, the employer may offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.
4. Deductions from pay of salaried employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.
5. Deductions from pay of salaried employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. [Example: an employer may suspend a salaried employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend a salaried employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.]
6. An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. Employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.
7. An employer is not required to pay the full salary for weeks in which a salaried employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. [Example: if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.]
8. When calculating the amount of a deduction from pay allowed under paragraph (1)-(7) above, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (4) may be made in any amount.

A salaried employee will be considered to be paid on a "salary basis." Additional compensation besides the salary (minimum guarantee plus extras) is not inconsistent with

the salary basis of payment. Such arrangements are subject to the exceptions in paragraphs 1 through 8 above.

III. Fee Basis Payment

The requirements for exemption as a professional or administrative employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

- A. The adequacy of a fee payment. In determining whether payment is at the rate consistent with these rules, the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee payment by determining whether the payment is at a rate that would amount to at least that set in 26 MRSA Sec. 663 (K) if 40 hours were worked.

IV. Effect of Improper Deductions from Salary

An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

- A. If the facts demonstrate that the employer has an actual practice of making improper deductions, then the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. [Example: if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.]
- B. Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

- C. If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in paragraph IV (A) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, then such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, then the exemption is lost during the time period in which the improper deductions were made for employees in the same job classifications working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

This section shall not be construed in an unduly technical manner so as to defeat the exemption.

V. Employees of Public Agencies

An employee of a public agency who otherwise meets the salary basis requirements of sections II and III of these rules shall not be disqualified from exemption as an administrative, executive, professional or computer professional employee on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

- A. Permission for its use has not been sought or has been sought and denied;
- B. Accrued leave has been exhausted; or
- C. The employee chooses to use leave without pay.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

VI. Special Cases

- A. **Highly Skilled Computer Employees.** 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 are exempt as professionals where the employee's primary duty involves;
 - 1. The application of systems analysis techniques and procedures, including consulting with users, to determine software, hardware, or system functional specifications,

2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on or 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.
- B. Teachers. An employee whose primary duty consists of work as a teacher in the activity of imparting knowledge is exempted if the individual is both employed and engaged as a teacher. The primary duty of an employee exempted as a teacher must be that of activity in the field of teaching. Mere certification by the State or employment in a school will not suffice to qualify an individual for exemption within the scope these rules if the individual is not in fact both employed and engaged as a teacher.
- C. Licensed Practical Nurses. Licensed practical nurses do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into the occupation.
- D. Trainees. The executive, administrative, professional, and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, or computer employee.
- E. Public Safety & Health Workers. Exemptions in this chapter do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who's primary duty consists of work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.
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STATUTORY AUTHORITY: 26 M.R.S.A. §663(K)

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CORRECTIONS:

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