

## Which Professional Employees Really are Exempt? Part 2 of 2

Being considered an “expert” is not enough to meet the professional exemption under the FLSA. Find out what courts have said about the “learned profession” exemption and how “creative professionals” are covered.

Last week’s E-Tips (Part I) focused on the job duties’ criteria used for the Fair Labor Standards Act’s (FLSA) “learned professional” exemption. Specifically, the E-Tips explained that the employee must (1) perform “work requiring advanced knowledge;” (2) the advanced knowledge must be in “a field of science or learning;” and (3) the advanced knowledge must be customarily acquired by a “prolonged course of specialized intellectual instruction.”

This week, the E-Tips will examine court cases and Department of Labor (DOL) opinions explaining the professional exemption and discuss how creative professionals in music, writing, acting, and the graphic arts are covered. ([Download free Hours of Work model policy, including HR best practices and legal background.](#))

### Decisions Interpreting “Learned Profession” Exemption

Court cases and DOL opinion letters provide some insight into how the exemption has been applied. For example, in a case interpreting the exempt professional regulations prior to the August 2004 changes (which included a similar definition of the professional exemption), compound pharmacists were found to be exempt professionals. In *De Jesus-Rentas v. Baxter Pharm. Servs. Corp.*, 400 F.3d 72 (1st Cir. 2005), the First Circuit found that the pharmacists were exempt because their primary duties required them to analyze, approve, and fill prescription requests and because they consistently exercised discretion and judgment in performing their duties.

Similarly, in *Piscione v. Ernst & Young*, 171 F.3d 527 (7th Cir. 1999), also decided under the old regulations, the Seventh Circuit determined that an employee who had a bachelor’s degree in mathematics, was studying to be an actuary, and kept up with his employer’s education requirements had the requisite advanced knowledge and met the professional exemption. His primary job duties, including client contact and data and problem analysis, required the use of this advanced knowledge.

Not too many cases have been decided interpreting the 2004 exemption regulations. In one example, *Chatfield v. Children's Servs.*, 555 F. Supp. 2d 532 (E.D. Pa. 2008) giving weight to DOL opinion letters, the court found that a truancy prevention case manager was an exempt, professional employee of a social service agency. The court focused on the facts that he had discretion in assessing children; social work requires advanced knowledge in a field of science or learning; and the position required specialized intellectual instruction because a bachelor's degree in social work, human services, or a related field plus three years of work experience was needed.

In contrast, the DOL in a Wage and Hour Administrative Opinion Letter, FLSA 2005-35, 10/3/05, determined that medical coding does not meet the professional exemption. Medical coders must maintain knowledge of current medical and pharmaceutical terminology, attend continuing education courses to keep their credentials and state board certification, and some may possess a B.S. degree in Health Information Management or a two year associate degree. However, the DOL determined that colleges and universities do not generally recognize medical coding as a bona fide academic discipline. It further ruled that the primary duty of a medical coder does not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

And, in *Stell v. Engineering and Fire Investigations, Inc.*, 2007 U.S. Dist. LEXIS 31882 (S.D. Tex. 2007), another case decided using the 2004 regulations, a lower district court determined that a senior project manager/mechanical engineer was not an exempt professional. Although he had a Bachelor of Science degree in mechanical engineering and was a licensed engineer with 20 years experience, his job did not require the advanced technical knowledge in engineering since he was essentially working as a property assessor, not as an engineer.

### **Creative Professionals Have Own Standard**

To qualify as an exempt creative professional, the employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Eligible fields include music, writing, acting, and the graphic arts.

The requirement of "invention, imagination, originality, or talent" is intended to distinguish the creative professions from work that primarily depends on intelligence, diligence, and accuracy. It generally will be met by actors, musicians, composers, conductors, and soloists; painters given only the subject matter of their painting; cartoonists told only the title or underlying concept of a cartoon; and persons holding the more responsible writing positions in advertising agencies. In contrast, people who are employed as copyists, animators of motion picture cartoons, or retouchers of photographs likely would not meet the creative exemption.

Journalists also may meet the duties requirements, but not if they only collect, organize, and record information that is routine or already public or if they do not contribute a unique interpretation or analysis to a news product.

### **Not All "Experts" are Exempt**

The shift of the economy from manufacturing jobs to "information providing" means that more employees are required to be "experts" at what they do. Now, staff employees who used only to provide research and support to professionals are being asked to analyze and interpret the data, too. In some cases, these employees may have become exempt professionals because of their experience, but more often they still will lack the educational background, discretion, and independent judgment required to meet the FLSA's requirements. So, you should make sure that your so-called "experts" are classified properly.

If you think you have exemption classification problems, you should fix them or you will face expensive fines and lawsuits. Under the regulations, your organization could be liable for back overtime pay of up to two years for any employee who is misclassified as exempt. And, this back pay liability can be extended to three years if you are found to have willfully (intentionally) violated the law.

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