

S.C. Association of Counties

Fair Labor Standards Act (FLSA)

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FLSA

- Fair Labor Standards Act (FLSA).
 - What is a work week?
 - Classification – Exempt v. Non-exempt.
 - “Salary Basis”
 - What is “compensable” time?
 - Compensatory Time.

FLSA

➤ Workweek

➤ S.C. Reg. § 19-707.02

➤ (E) Workweek is **seven consecutive** 24-hour periods, i.e., 168 consecutive hours **designated by the employing agency**.

➤ Exception - In the case of law enforcement personnel or fire protection and emergency medical personnel, these categories of employees have work schedules **up to 28 consecutive** 24-hour periods, designated by the employing agency.

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- Fair Labor Standards Act (FLSA).
 - Classification
 - “Exempt” status requires:
 - Minimum salary (\$35,568 annually, \$684 per week) (Under 2024 regulation, raises to \$43,888 by July 1, 2024, \$58,656 by Jan. 1, 2025, automatically set every three years thereafter, July 1, 2027 – BUT WAIT).
 - Payment on “Salary Basis.”
 - Meet standards of Executive, Administrative, Professional, or Creative/Artistic exemptions.
 - Teachers, Lawyers, and Doctors are not subject to minimum salary or “salary basis”

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➤ Classification

➤ S.C. Reg. § 19-707.02

➤ (D) It is the responsibility of the **agency head** or his designee to determine whether an **exemption** is applicable to a particular employee.

➤ Most common:

- Executive
- Administrative
- Professional
- Others (highly compensated, computer professional, outside sales)

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➤ Exemption – Executive.

- Must be compensated on a **salary** basis;
- **Primary duty** must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Must customarily and regularly direct the work of at least **two or more other full-time employees** or their equivalent; and
- Must have the authority to **hire or fire** other employees, or the employee's suggestions and **recommendations** as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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➤ Exemption – Administrative.

- Must be compensated on a **salary** basis;
- **Primary duty** must be 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
- The employee's primary duty includes the **exercise of discretion and independent judgment** with respect to matters of significance.
- Examples: HR Director, Comptroller, PR, CIO

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- Exemption – Learned Professional.
 - Must be compensated on a **salary** basis;
 - **Primary duty** must be the **performance of work requiring advanced knowledge**, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
 - The advanced knowledge must be in a **field of science or learning**; and
 - The advanced knowledge must **be customarily acquired by a prolonged course of specialized intellectual instruction**.

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- Fair Labor Standards Act (FLSA).
 - Classification
 - Police Officer/Detective v. Police Sergeant.
 - HR Specialist v. HR Manager.
 - Accountant v. Payables Clerk.
 - Lawyer v. Paralegal.
 - Registered Nurse v. LPN.
 - License Inspector/Investigator v. Supervisor.

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➤ Salary Basis.

- **General Rule:** an exempt employee must receive the full salary for any week in which the employee performs work, regardless of the number of days or hours worked.
- **Acceptable deductions:**
 - Absent from work for one or more full days for personal reasons **other** than sickness or disability;
 - Absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;

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➤ Salary Basis.

➤ Acceptable deductions (Cont.):

- Offset amounts employees receive as jury or witness fees, or for military pay;
- Penalties imposed in good faith for infractions of safety rules of major significance;
- Unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.
- Initial or terminal week of employment
- Unpaid leave under the **Family and Medical Leave Act.**

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➤ “Salary Basis” and 29 CFR § 541.170(a):

- **Salary basis is NOT compromised** where a **public** employee is paid according to an “established” pay system, where:
 - the employee accrues PTO/annual/sick leave, and
 - the employee’s pay is reduced (i.e., LWOP) for absences for personal reasons, illness, or injury of **less than one work-day** when accrued leave is not used by an employee because:
 - (1) Permission for its use has not been sought or has been sought and denied;
 - (2) Accrued leave has been exhausted; or
 - (3) The employee chooses to use leave without pay.

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- “Salary Basis” and Furloughs.
 - 29 CFR § 541.170(b):
 - 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.

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- What Time is “Compensable”?
 - On-call Time?
 - Travel Time?
 - Commuting Time?
 - Volunteering?
 - How do you report “time worked”?

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➤ Compensatory Time.

- Additional Leave = one and one-half hours for every overtime hour worked by non-exempt personnel.
- Limits: 240 hours (civilian)/480 hours (law enforcement).
- Must be paid at termination.
- No time kept “off books.”
- Time cards are TRULY important.

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➤ Compensatory Time.

- For exempt personnel? S.C. Reg. § 19-707.02(K) –
- “If allowed by an agency’s overtime policy, exempt employees may receive compensatory time for hours worked in excess of 40 in the workweek. **If granted**, compensatory time must not be at a rate greater than **one hour of compensatory time for each hour worked** in excess of 40 in the workweek.”
- Exempt employees CANNOT be paid overtime.

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- New Pay Floor? Not So Fast –
 - *State of Texas, et al. v. USDOL, et al.*, 2024 WL 3240618 (E.D. Tex. June 28, 2024).
 - Did USDOL exceed its authority to “define and delimit employees based on the ‘capacity’ in which they are employed” in defining the terms of the EAP exemption ?
 - On June 28, 2024, a federal court in Texas issued a preliminary injunction preventing USDOL from implementing the new regulation “pending further order of this Court.”
 - Injunction applied only to Texas state employees.

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- How did that happen?
 - “Salary” is different from “Duty.”
 - 29 USC § 213 (a)(1) exempts “any employee employed in a bona fide executive, administrative, or professional capacity...as such terms are defined and delimited from time to time by regulations of the Secretary.”
 - No *Chevron* deference.
 - No mention of *Chevron* deference to USDOL (requiring Courts to defer to agency interpretation of ambiguous statute)
 - *Chevron* doctrine actually overruled in *Loper Bright Enterprises v. Raimondo*, -- U.S. --, 144 S.Ct. 2244, 219 L.Ed.2d 832 (June 28, 2024).

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- How did that happen?
 - Texas argued that the “plain language of EAP exemption is clear” and limits Secretary’s regulatory authority.
 - “The plain meaning of makes clear that the proper inquiry into whether someone works in an executive, administrative, and professional capacity **must turn on that person’s function and duties.**”
 - “Glaring absent from these definitions is any mention of salary.”

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➤ How did that happen?

- “By any measure, a salary requirement that effectively displaces the only EAP Exemption test authorized by the statutory text, i.e., the duties test, flatly contravenes the Department’s authority under the FLSA.”
- So why have a salary limitation at all? “[A]ny salary test must be limited to a ‘modest’ role as compared to the statutorily-authorized duties test, serving **only** as a proxy to ‘screen[] out the obviously non-exempt employees.’ ”

FLSA

➤ How did that happen?

- **BOTTOM LINE** – “In sum, since the EAP Exemption requires that exemption status turn on duties – not salary – and the 2024 Rule’s changes make salary predominate over duties for millions of employees, the changes exceed the authority delegated by Congress to define and delimit the relevant terms.”
- **AND THEN** –

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- What happened next?
 - *State of Texas, et al. v. USDOL, et al.*, 2024 WL 4806268 (E.D. Texas November 15, 2024).
 - Texas's case combined with cases brought by other parties challenging the regulation.
 - “[T]he Department’s 2024 Rule contemplates sweeping changes to the EAP Exemption regulatory framework, designed on their face to effectively displace the FLSA’s duties test with a predominate – if not exclusive – salary-level test.”
 - Vacated the regulation with **nationwide** effect.

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➤ Now what?

- *State of Texas, et al. v. USDOL, et al.*, 2024 WL 4806268 (E.D. Texas November 15, 2024).
- The decision could be appealed, to the Fifth Circuit, but that may not be likely, given the incoming administration's previous actions.
- As of now, the salary threshold set by the 2019 regulation – \$35,568 per year, or \$683 per week – is the current standard.
- Trump administration may propose increase similar to 2019 Rule.