



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE: ES.A.9.3	EXEMPTION FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR <u>EXECUTIVE</u> POSITIONS	NUMBER:
CHAPTER:	RCW.49.46.010(3)(c) , RCW 49.46.130(2)(a) WAC 296-128-510	ISSUED: 6/24/2005 REVISED: 7/15/2014 SEE ALSO: ES.A.9.2 and ES.A.9.4 – 8, ES.A.8.1 and ES.A.8.2 , ES.A.9.1 , ES.A.10.1 , ES.A.10.2 , and ES.A.10.3

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EXECUTIVE (WAC 296-128-510)

1. On August 23, 2004, the U.S. Department of Labor published revised regulations for the “white collar” overtime exempt regulations, including executive, administrative, professional, and outside sales positions. The State regulation on the executive job classification has not changed. The federal regulations, and existing state regulations, affect *white-collar employees only (executive, administrative, professional, outside sales)*.

Employers must comply with both state and federal overtime regulations. Where differences exist between Washington State and new federal overtime regulations, an employer must follow the regulation that is most favorable to the worker. The following chart is designed to provide a summarized analysis of both state and federal regulations for the executive exemption. Greater details of the state executive exemption follow this chart. For more specific information on federal regulations, check with the U.S. Department of Labor at their toll free # 1-866-487-9243 or their website at <http://www.dol.gov/whd/regs/compliance/fairpay/> or with a qualified consultant, to determine how changes in federal overtime requirements affect the specific circumstances.

Executive

Requirements under state regulations	Requirements under new federal regulations	Differences between state and federal regulations
<p>Must meet all three parts of the test in the state regulation to be exempt from overtime pay:</p> <ol style="list-style-type: none"> 1) Meets minimum salary requirement of not less than \$250 per week 2) Primary duty is managing the enterprise, or a customarily recognized department or subdivision thereof 3) Customarily and regularly directs the work of two or more other employees 	<p>Must meet all four parts of the test in the federal regulation to be exempt from overtime pay:</p> <ol style="list-style-type: none"> 1) Meets minimum salary requirement of not less than \$455/wk; 2) Primary duty is managing the enterprise, or a customarily recognized department or subdivision of it; 3) Customarily and regularly directs the work of two or more employees or their equivalent; 4) Has authority or input that is given particular weight over hiring and firing, promoting, or demoting employees. 	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p> <p>Also, state rules have a less stringent three-part executive short test.</p>

The new federal regulations provide that executive, administrative, or professional workers are also exempt from overtime pay if they are earning more than \$100,000 per year as long as they perform at least one duty in an executive, administrative, or professional function job. State regulations contain no similar provision. Executive workers must meet all of the state requirements for the exemption to apply.

The new federal regulations allow an employer to impose *unpaid* disciplinary suspensions of *one or more full days* for workplace-conduct rule infractions for exempt workers. Washington State allows an *unpaid* disciplinary suspension in increments of less than one week *only* for violations of safety rules of major significance. Unpaid disciplinary suspensions for non-major safety violations cannot be in less than full-week increments.

2. Reliance On Pre-August 23, 2004 Federal Interpretation. Prior to August 23, 2004, state and federal “white collar” exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

3. Short Test Proviso for Executive Employees. The executive exemption contains a special proviso in the latter part of [WAC 296-128-510\(6\)](#) after the word “Provided” for employees who are compensated on a salary basis at a rate of at least \$250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption will be deemed to be met by an employee who 1) receives the \$250 per week in salary, 2) his or her primary duty consists of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision of the enterprise, and 3) includes the customary and regular direction of the work of two or more employees. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under the long test.

4. How to Determine Whether Management Is the Primary Duty. A determination of whether an employee has management as the primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his or her time in management would have management as the primary duty.

Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his/her time in managerial duties, he/she might nevertheless have management as the primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his/her relative freedom from supervision, and the relationship between his/her salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his/her time in production or sales work. While engaged in such work he/she supervises other employees, directs the work of warehouse and delivery employees, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. The individual will be considered to have management as the primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programmers and who performs the more complex or responsible jobs in programming will be considered to have management as the primary duty.

5. True Emergencies Are Not Considered When Determining the Primary Duty. Under certain occasional emergency conditions, work that is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work. This means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a real emergency will not, because of the performance of such emergency work, lose the exemption.

Bona fide executives include among their responsibilities the safety of the employees under their supervision, the preservation and protection of the merchandise, machinery or other property of the department or subdivision in their charge from damage due to unforeseen circumstances, and the prevention of widespread breakdown in production, sales, or service operations. Consequently, when conditions beyond control arise which threaten the safety of the employees, or a cessation of operations, or serious damage to the employer's property, any manual or other normally nonexempt work performed in an effort to prevent such results is considered exempt work.

This is not applicable, however, to nonexempt work arising out of occurrences that are within the manager's control or which can be reasonably anticipated in the normal course of business. Recurring breakdowns of equipment or disarrays requiring frequent attention such as constantly straightening merchandise that has been disarranged is not exempt work. A few examples include a manager of a retail store is performing non-exempt work when he or she waits on a special or impatient customer for fear of loss of sales or customer's goodwill, or working behind the sales counter during a sale or special holidays, or a production manager relieving nonexempt workers during their vacation periods.

6. How to Determine Whether Work Is Management. Management includes the exercise of control, direction and authority over the workflow and/or work force. These duties may include, but are not limited to, selecting, and training employees; setting and adjusting pay rates and work hours; and assigning, directing and evaluating work. In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions that are easily recognized as within the scope of the exemption. For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his or her department or the supervision of those employees: interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the employees and the property.

7. How to Identify A Department or Subdivision. The employee's managerial duties must be performed with respect to the enterprise in which he/she is employed or a customarily recognized department or subdivision thereof. The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of workers assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. In order properly to classify an individual as an executive he/she must be more than merely a supervisor of two or more employees; nor is it sufficient that he/she merely participates in the management of the unit. The executive must have as a continuing function the management of a unit with permanent status or functions performed by the employees in that unit.

In most cases, it can be clearly determined whether an individual is in charge of a customarily recognized department or subdivision of a department. For example, where an enterprise comprises more than one establishment, the employee in charge of each establishment may be considered in charge of a subdivision of the enterprise. Questions arise principally in cases involving supervisors who work outside the employer's establishment, move from place to place, or have different subordinates at different times.

In such instances, in determining whether the employee is in charge of a recognized unit with a continuing function, the unit supervised need not be physically within the employer's establishment and may move from place to place, and that continuity of the same subordinate personnel is not absolutely essential to the existence of a recognized unit with a continuing function, although in the ordinary case a fixed location and continuity of personnel are both helpful in establishing the existence of such a unit. The following examples will illustrate these points.

An individual may be in charge of a certain type of construction work at different locations, and may even hire most of his/her workforce at these locations. The mere fact that he or she moves his or her location would not invalidate the exemption if there were other factors that show that he/she is actually in charge of a recognized unit with a continuing function in the organization.

Nor will an otherwise exempt employee lose the exemption merely because he/she draws the employees under his/her supervision from a pool, if other factors are present which indicate that he/she is in charge of a recognized unit with a continuing function. For instance, if this employee is in charge of the unit which has the continuing responsibility for making all installations for the employer, or all installations in a particular city or a designated portion of a city, he or she would be in charge of a department or subdivision despite the fact that the subordinates are drawn from a pool of available employees.

However, a supervisor is not exempt who is drawn from a pool of supervisors who supervise employees assigned to him/her from a pool and who is assigned a job or series of jobs from day to day or week to week. Such an employee is not in charge of a recognized unit with a continuing function.

8. How to Determine Whether the Executive Directs Other Employees. Executive employees customarily and regularly direct the work of two or more employees in the enterprise, or in a recognized department or subdivision of the enterprise. An employee will qualify as an executive only if he or she customarily and regularly supervises at least two full-time employees or the equivalent. For example, if the executive supervises one full-time and two part-time employees of whom one works morning and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met. The employees supervised must be employed in the department that the executive is managing. In a retail store, there may be a general manager and two assistant managers. Assuming that they meet all the other qualifications and particularly that they are not working supervisors, they should qualify for the exemption.

A small department in a plant or in an office is usually supervised by one person. Any attempt to classify one of the other workers in the department as an executive merely by giving them a title such as assistant supervisor will almost inevitably fail as there will not be sufficient true supervisory or other managerial work to keep two persons occupied. It is incorrect to assume that in a large department that the supervision cannot be distributed among two or three employees, conceivably among more; for example, in a large shoe department in a retail store which has separate sections for men's, women's, and children's shoes. In such instances, assuming that the other tests are met, especially the test concerning the performance of nonexempt work, each such employee customarily and regularly directs the work of two or more other employees.

An employee who merely assists the manager or buyer of a particular department and supervises two or more employees only in the actual manager's or buyer's absence, however, does not meet this requirement. A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee customarily and regularly directs the work of two or more employees therein.

9. How to Determine If A Working Supervisor Is An Executive. The term "working supervisor" should not be construed to mean only one who performs work similar to that performed by his or her subordinates. One type of working supervisor most commonly found in industry works alongside his or her subordinates. Such employees, sometimes known as crew leaders, perform the same kind of work as that performed by their subordinates, and also carry on supervisory functions. The work of the same nature as that performed by the crew leader's subordinates must be counted as nonexempt work.

If the crew leader or working supervisor performed substantially more of the same work as those in his/her crew than in supervisory functions, the exemption would not apply.

Another type of crew leader or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his own subordinates, consists of ordinary production work or other routine, recurrent, repetitive tasks which are a regular part of his or her duties. Such an employee is in effect holding a dual job. The nonsupervisory duties in such instances are unrelated to anything he or she must do to supervise employees or manage the department. They are, in many instances, mere fill-in tasks performed because the job does not involve sufficient executive duties to occupy an employee's full time. In other instances the nonsupervisory, nonmanagerial duties may be the principal ones and the supervisory or managerial duties are subordinate and are assigned to the particular employee because it is more convenient to rest the responsibility for the first line of supervision in the hands of the person who performs these other duties.

Typical of employees in dual jobs that may involve a substantial amount of nonexempt work are working supervisors or crew leaders who perform clerical work other than the maintenance of the time and production records of their subordinates; for example, the working supervisor of the shipping room who makes out the bills of lading and other shipping records, the warehouse supervisor who also acts as inventory clerk, the head shipper who also has charge of a finished goods stock room, assisting in placing goods on shelves and keeping perpetual inventory records, or the office manager, head bookkeeper, or chief clerk who performs routine bookkeeping. There is no doubt that the head bookkeeper, for example, who spends a substantial amount of time keeping books of the same general nature as those kept by the other bookkeepers, even though the working supervisor's books are confidential in nature or cover different transactions from the books maintained by the under bookkeepers, is not primarily an executive employee and should not be so considered.

10. Trainees Are Not Executives. The exemption does not include employees training to become executives and not actually performing the duties of an executive. However, a bona fide executive employee does not lose his or her exempt status merely by undergoing further training for the job performed.