

## Diocese of Covington

### Policies & Procedures Manual

Section: Compliance – Payroll and Personnel

Policy: Personnel – Exempt vs. Non-exempt (FLSA)

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**NOTE:** For purposes of this policy, “**Parish**” means any parish, school or Diocesan institution of the Diocese of Covington.

Once it has been determined that a new hire is an ‘employee’ as opposed to an independent contractor, the next decision that a parish must make is whether the employee is ‘exempt’ or ‘non-exempt’ from the Fair Labor Standards Act (FLSA) regulations. (See Diocesan Personnel Policy regarding “Employee Status – Employee vs. Independent Contractor” for further details).

Most jobs are governed by the FLSA – some are not. Some jobs are excluded from FLSA coverage by statute. Other jobs, while governed by the FLSA, are considered "exempt" from the FLSA overtime rules.

#### **EXEMPT OF NON-EXEMPT**

Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay. Exempt employees are not.

Some jobs are classified as exempt by definition. For example, "outside sales" employees are exempt ("inside sales" employees are nonexempt). In a parish setting there are only two jobs that are excluded by definition, and are therefore considered “exempt.” Those two positions are “clergy” and bona fide “teachers.”

#### **CLERGY**

An employee must be an ordained member of the clergy (i.e. priest or deacon) in order to qualify for the exemption and have the salary and salary basis requirements not apply.

#### **TEACHERS**

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

For all other parish employees, however, whether they are exempt or nonexempt depends on (1) how much they are paid, (2) how they are paid, and (3) what kind of work they do.

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To be exempt an employee must (1) be paid at least \$35,568 per year (\$684 per week), and (2) be paid on a salary basis, and also (3) perform exempt job duties. These requirements are outlined in the FLSA Regulations and are promulgated by the U.S. Department of Labor. Accordingly, employees must meet all three of the following "tests" to be exempt:

1. **Salary level test** – Employees who are paid less than \$35,568 per year (\$684 per week) are, by definition within the statute, considered nonexempt employees. This test is applied on a 'hard dollar' basis and cannot be adjusted for full-time equivalency. In other words, if an employee only works one day per week, the standard is not reduced to \$7,114; i.e. 1/5 of \$35,568. The threshold remains at \$35,568 regardless of the amount of regularly scheduled time an employee works.
2. **Salary basis test** – Employees must be paid on a salary basis to be considered "exempt." Generally, an employee is paid on a salary basis if s/he has a "guaranteed minimum" amount of money s/he can count on receiving for any work week in which s/he performs "any" work. This amount need not be the entire compensation received, but there must be some amount of pay the employee can count on receiving in any work week in which s/he performs any work. Some "rules of thumb" indicating that an employee is paid on a salary basis include whether an employee's base pay is computed from an annual figure divided by the number of paydays in a year, or whether an employee's actual pay is lower in work periods when s/he works fewer than the normal number of hours. Whether an employee is paid on a salary basis is not affected by whether pay is expressed in hourly terms (as this is a fairly common requirement of many payroll computer programs), but whether the employee has a "guaranteed minimum" amount of pay s/he are paid every pay period.
3. **Duties tests** – An employee who meets both of the above two tests (salary level test and salary basis test) is only exempt if s/he also performs exempt job duties. These FLSA exemptions are limited to employees who perform relatively high-level work. Whether the duties of a particular job qualify as exempt depends on exactly what those duties are. Job titles or position descriptions are of limited usefulness in this determination. (A secretary is still a secretary even if s/he is called an "administrative assistant," and the chief executive officer is still the CEO even if s/he is called a janitor). It is the actual job tasks that must be evaluated, along with how the particular job tasks "fit" into the employer's overall operations. There are three categories of exempt job duties: Executive, Professional, and Administrative. Details of these particular exemptions follow:
  - **Executive Duties Exemption** – Job duties are exempt executive job duties if the employee:
    1. Regularly supervises two or more employees, and
    2. Has management as the primary duty of the position, and
    3. Has genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

Supervision means exactly what it implies. The supervision must be a regular part of the employee's job, and must be of other employees. Supervision of non-employees does not meet the standard. The "two employees" requirement may be met by supervising two full-

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time employees or the equivalent number of part-time employees. (Two half-time employees equal one full-time employee.)

"Mere supervision" is **not** sufficient to meet the IRS standard. In addition, the supervisory employee must have "management" as the "primary duty" of the job. The FLSA Regulations contain a list of typical management duties. These include (in addition to the supervision discussed above):

- interviewing, selecting, and training employees;
- setting rates of pay and hours of work;
- maintaining production or sales records (beyond the merely clerical);
- appraising productivity; handling employee grievances or complaints, or disciplining employees;
- determining work techniques;
- planning the work;
- apportioning work among employees;
- determining the types of equipment to be used in performing work, or materials needed;
- planning budgets for work;
- monitoring work for legal or regulatory compliance;
- providing for safety and security of the workplace.

Determining whether an employee has management as the primary duty of his/her position requires a case-by-case evaluation. A "rule of thumb" is to determine if the employee is "in charge" of a department or subdivision of the enterprise (such as a shift). One handy clue might be to ask who a telephone inquiry would be directed to if the called asked for "the boss."

The final requirement for the executive exemption is that the employee must have genuine input into personnel matters. This does not require that the employee be the final decision maker on such matters, but rather that the employee's input is given "particular weight." Usually, it will mean that making personnel recommendations is part of the employee's normal job duties, that the employee makes these kinds of recommendations frequently enough to be a "real" part of the job, and that higher management takes the employee's personnel suggestions or recommendations seriously.

- **Professional Duties Exemption** – The job duties of the traditional "learned professions" are exempt. These include lawyers, doctors, dentists, **teachers**, architects, and **clergy**. Also included are registered nurses (but not LPNs), **accountants (but not bookkeepers)**, engineers (who have engineering degrees or the equivalent and perform work of the sort usually performed by licensed professional engineers), actuaries, scientists (but not technicians), pharmacists, and other employees who perform work requiring "advanced knowledge" similar to that historically associated with the traditional learned professions.

Professionally exempt work means work which is predominantly intellectual, requires specialized education, and involves the exercise of discretion and judgment. Professionally

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exempt workers must have education beyond high school, and usually beyond college, in fields that are distinguished from (more "academic" than) the mechanical arts or skilled trades. Advanced degrees are the most common measure of this, but are not absolutely necessary if an employee has attained a similar level of advanced education through other means (and perform essentially the same kind of work as similar employees who do have advanced degrees).

Some employees may also perform "creative professional" job duties which are exempt. This classification applies to jobs such as actors, **musicians**, composers, writers, cartoonists, and some journalists. It is meant to cover employees in these kinds of jobs whose work requires invention, imagination, originality or talent; who contribute a unique interpretation or analysis.

- **Administrative Duties Exemption** – The most elusive and imprecise of the definitions of exempt job duties is for exempt "administrative" job duties. The regulatory definition provides that exempt administrative job duties are:
  - office or non-manual work which is directly related to the management or the general business operations of the employer or the employer's customers, and that
  - contain a primary component which involves the exercise of independent judgment and discretion about matters of significance.

The administrative exemption is designed for relatively high-level employees whose main job is to "keep the business running." A useful rule of thumb is to distinguish administrative employees from "operational" or "production" employees. Employees who make what the business sells are not administrative employees. Administrative employees provide "support" to the operational or production employees. They are "staff" rather than "line" employees. Examples of administrative functions include labor relations and personnel (human resources employees), payroll and finance (including budgeting and benefits management), records maintenance, accounting and tax, marketing and advertising (as differentiated from direct sales), quality control, public relations (including shareholder or investment relations, and government relations), legal and regulatory compliance, and some computer-related jobs (such as network, internet and database administration).

To be exempt under the administrative exemption, the "staff" or "support" work must be office or non-manual, and must be for matters of significance. Clerical employees perform office or non-manual support work but are not considered administratively exempt. Nor is administrative work exempt just because it is financially important, in the sense that the employer would experience financial losses if the employee fails to perform competently. Administratively exempt work typically involves the exercise of discretion and judgment, with the authority to make independent decisions on matters which affect the business as a whole or a significant part of it.

Some criteria to consider for an administrative exemption might include:

- whether the employee has the authority to formulate or interpret company policies;

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- how major the employee's assignments are in relation to the overall business operations of the enterprise (buying paper clips versus buying a fleet of delivery vehicles, for example);
- whether the employee has the authority to commit the employer in matters which have significant financial impact;
- whether the employee has the authority to deviate from company policy without prior approval.

An example of administratively exempt work could be the buyer for a department store. S/he performs office or non-manual work and is not engaged in production or sales. The job involves work which is necessary to the overall operation of the store – selecting merchandize to be ordered as inventory. It is important work, since having the right inventory (and the right amount of inventory) is crucial to the overall well-being of the store's business. It involves the exercise of a good deal of important judgment and discretion, since it is up to the buyer to select items which will sell in sufficient quantity and at sufficient margins to be profitable. Other examples of administratively exempt employees might be planners and true administrative assistants (as differentiated from secretaries with fancy titles).

Merely clerical work may be administrative, but it is not exempt. Most secretaries, for example, may accurately be said to be performing administrative work, but their jobs are not usually exempt. Similarly, filing, filling out forms and preparing routine reports, answering telephones, making travel arrangements, working on customer "help desks," and similar jobs are not likely to be high-level enough to be administratively exempt. Many clerical workers do in fact exercise some discretion and judgment in their jobs. However, to "count" the exercise of judgment and discretion must be about matters of considerable importance to the operation of the enterprise as a whole.

Routinely ordering supplies (and even selecting which vendor to buy supplies from) is not likely to be considered high enough to qualify the employee for administratively exempt status. The very nature of the administrative exemption prohibits any true and clear distinction. Some secretaries may indeed be high-level, administratively exempt employees (for example, the secretary to the CEO who really does "run his life") while some employees with fancy titles (e.g., "administrative assistant") may really be performing nonexempt clerical duties.

### **RIGHTS OF EXEMPT EMPLOYEES**

An exempt employee has virtually "no rights at all" under the FLSA overtime rules. Essentially all that an exempt employee is entitled to under the FLSA is to receive the full amount of the base salary in any work period during which s/he performs any work (less any permissible deductions). Nothing in the FLSA prohibits an employer from requiring exempt employees to "punch a clock," or work a particular schedule, or "make up" time lost due to absences. Nor does the FLSA limit the amount of work time an employer may require or expect from any employee, on any schedule. ("Mandatory overtime" is not restricted by the FLSA).

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Keep in mind that this discussion is limited to rights under the FLSA. Exempt employees may have rights under other laws or by way of employment policies or contracts.

### **RIGHTS OF NON-EXEMPT EMPLOYEES**

Nonexempt employees are entitled under the FLSA to time and one-half their "regular rate" of pay for each hour they actually work over the applicable FLSA overtime threshold in the applicable FLSA work period. Paid time off such as holidays, vacation time, sick time, etc. does not count towards the time and one-half overtime requirement.

### **DECISION TREE**

In order to assist parishes with the proper 'exempt' vs. 'non-exempt' determination for their employees, the decision tree on the next page was developed. Diocesan employees that do not qualify for "exempt" status must be paid on an hourly basis to ensure proper compliance with all overtime and minimum wage regulations.

Parishes with questions on whether a particular employee/position falls within one of the 'duties' exemptions should contact the Finance Office for assistance. As mentioned above and in the regulations, these decisions are often required to be done on a 'case by case' basis and will require an up to date job description in order to properly classify an employee.

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Exempt vs. Non-exempt Employees

Decision Tree

