



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE:	EXEMPTION FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR <u>PROFESSIONAL POSITIONS</u>	NUMBER: ES.A.9.5
CHAPTER:	RCW.49.46.010(3)(c) , RCW 49.46.130(2)(a) , WAC 296-128-530	ISSUED: 6/24/2005 REVISED: 7/15/2014 SEE ALSO: ES.A.9.2 - 4 and ES.A.9.6 – 8, WAC 296-128-530 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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PROFESSIONAL ([WAC 296-128-530](#))

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 professional exemption 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 professional exemption. Greater details of the state professional 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 at 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.

Professional

Requirements under state regulations	Requirements under new federal regulations	Differences between state and federal regulations
<p>Must meet all parts of this four-part test in the state regulation:</p> <ol style="list-style-type: none"> 1) Meets minimum salary or fee basis payment of not less than \$250/wk; 2) Primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, or 3) Primary duty consists of work requiring invention, imagination, or talent in a recognized field of artistic endeavor 4) Work must require the consistent exercise of discretion and judgment. 	<p>Must meet all parts of this four-part test in the federal regulations:</p> <ol style="list-style-type: none"> 1) Meets minimum salary or fee requirement of not less than \$455/wk; 2) 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; 3) Advanced knowledge must be in a field of science or learning, and; 4) Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p> <p>Washington does not specifically split professional into learned and creative subdivisions, but there is little difference in application.</p>
<p>Employees classified as “creative professional.” Examples may include: music, writing, acting and graphic arts, composers, conductors, soloists, painters, cartoonists, essayists, novelists, short-story writers, screenplay writers, responsible writing positions in advertising agencies, certain journalists.</p>	<p>Must meet all parts of this two-part test in the federal regulation:</p> <ol style="list-style-type: none"> 1) Meets minimum salary or fee requirement of \$455/wk; 2) Primary work requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p>
<p>“Computer-related professional” comparison is in Policy ES.A.9.6</p>		<p>It may be possible that a computer professional employee paid on a salary basis may be exempt under the professional exemption. See ES.A.9.6 paragraph number 4.</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. Professional 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. The Job Duties Determine Who Meets the Professional Exemption. A person who is employed in a bona fide professional capacity is exempt from the payment of minimum wage and overtime wages.

Certain workers are considered to be professionals according to industry practice or company standard. However, that consideration does not automatically determine the professional exemption in [WAC 296-128-530](#). It is the duties required of the job, not the employee’s expertise or title that determines whether the exemption applies. Even though workers may be technically expert, knowledgeable in their field, experienced from many years in the industry, and perform their work to an excellent standard, the job duties must meet the requirements of [WAC 296-128-530](#) to be exempt from payment of minimum wage and overtime.

4. Professional Employees Must be Compensated on a Salary or Fee Basis. In order to qualify for the professional exemption, the employee must meet the duties and must be compensated on a salary or fee basis. This standard also provides for application of a short test and a long test. See [ES.A.9.8](#) Fee Basis and [ES.A.9.1](#) Questions and Answers About Salary Basis.

5. Lawyers, Doctors and Dentists are Exempt Professionals. An employee who has a valid license to practice law, medicine, including residents and interns, or dentistry **and** who actually practices in his or her field is an exempt professional regardless if paid on a salary, hourly, or fee basis. If an individual meets these criteria no further analysis is required. If they hold the degree but do not practice within their licensed profession, the appropriate short or long test must be satisfied for the exemption to apply.

6. Special Short Test Proviso. Employees are considered exempt if they meet the duties and salary test. The salary test is met if they are compensated on a salary or fee basis of \$250 per week or its equivalent and meet the duties test; the duties test is met if their primary duty is work requiring knowledge of an advanced type in a field or science or learning, and it is work that requires the consistent exercise of discretion and judgment, or their primary duty is work which requires invention, imagination or talent in a recognized field of artistic endeavor. If an employee qualifies for exemption under the short test proviso, it is not necessary to test the employee's qualifications in detail under the long test.

A prime characteristic of professional work is the fact that the employee does apply his or her special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

7. Trainees. The exemption for professional employees does not apply to workers in training for these positions and not actually performing the duties of a full-fledged professional

employee. However, a bona fide professional employee does not lose his or her exempt status merely by undergoing further training for the job performed.

8. Learned Professions Require Knowledge of An Advance Type In a Field of Science or Learning. The learned professions are those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study that is different from a general academic education, from an apprenticeship, from training in the performance of routine mental, manual, or physical processes. Generally speaking, it must be knowledge that cannot be attained at the high school level.

The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional chemist who is not the possessor of a degree in chemistry, or law, because they have obtained status that is equal to a degreed professional, whose attainments and word are the same but did not graduate from a college or university or law school. It does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions might qualify for exemption under the executive or administrative regulations or under the alternative paragraph of the professional definition applicable to the artistic fields.

Generally speaking the requisite knowledge which meet the requirement for a prolonged course of specialized intellectual instruction and study include nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The professional must be able to use the advanced knowledge gained in the job performed.

The typical symbol of the professional training and the best evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is standard. In the case of registered or certified medical technologists, successful completion of three academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Typical Learned Professions include:

8.1 Registered nurses have traditionally been recognized as professional employees. Although, in some cases, the course of study has become shortened, but more concentrated, nurses who are registered by the appropriate State examining board will continue to be recognized as having met the professional requirement.

8.2 Many accountants are exempt as professional employees, regardless of whether they are employed by public accounting firms or by other types of enterprises. Some accountants may qualify for exemption as bona fide administrative employees. However, exemption of accountants, as in the case of other occupational groups, must be determined on the basis of the individual employee's duties and the other criteria in the regulations. Certified public accountants who meet the salary requirement of the regulations will, except in

unusual cases, meet the requirements of the professional exemption. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of professional employee.

Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work that is not an essential part of and necessarily incident to any professional work which they may do. Such accountants are not normally exempt when the majority of their work is routine work. The professional exemption is determined on the basis of the individual employee's duties, which must include the consistent exercise of discretion and judgment. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

8.3 Teaching and Related Professions. Teaching, instructing or lecturing with the result of imparting knowledge is work subject to the professional exemption.

The primary duty of an employee as a teacher must be that of activity in the field of teaching. The exemption is also met if the teacher has satisfied the educational requirements of the Office of Superintendent of Public Instruction and has been granted the right to teach in public or private schools. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption if the individual is not in fact both certified and engaged as a teacher.

Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers', teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

8.4 Artistic Professions. This is work that is original and creative in nature, and work that requires invention, imagination, or talent and discriminating skills in a recognized field of artistic endeavor. This is professional work that requires the individual to be original in the particular artistic field and express creative powers to achieve such results. This is distinguished from work that can be produced by a person with general manual or intellectual ability and training. The result of work that is original and creative in nature depends on and varies according to the intention, imagination and talent of the employee.

The exemption may be met if the work is in a recognized field of artistic endeavor. This includes such fields as music, writing, the theater, and graphic arts.

Musicians, composers, conductors, and soloists who are engaged in original and creative work within the sense of this definition. In graphic arts the requirement is, generally speaking, met by painters who at most are given the subject matter of their painting. The exemption is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. The exemption would not normally be met by a person who is employed as a copyist, or as an animator of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

In the field of writing, essayists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work meet the definition. The exemption would generally be met persons holding the more responsible writing positions in advertising agencies.

Another requirement is that the employee be engaged in work the result of which depends primarily on the invention, imagination, or talent of the employee. A person employed as an actor, or a singer, or a violinist, or a short-story writer easily meets this requirement.

8.5 Radio and Television. There is considerable variation in the type of work performed by various announcers, ranging from predominantly routine to predominantly exempt work. The wide variation in earnings as between individual announcers, from the highly paid name announcer on a national network who is greatly in demand by sponsors to the staff announcer paid a comparatively small salary in a small station, indicates not only great differences in personality, voice and manner, but also in some inherent special ability or talent which, while extremely difficult to define, is nevertheless real.

The duties which many announcers are called upon to perform include: Functioning as a master of ceremonies; playing dramatic, comedy, or straight parts in a program; interviewing; conducting farm, fashion, and home economics programs; covering public events, such as sports programs, in which the announcer may be required to ad lib and describe current changing events; and acting as narrator and commentator. Such work is generally exempt. Work such as giving station identification and time signals, announcing the names of programs, and similar routine work is nonexempt work. In the field of radio entertainment as in other fields of artistic endeavor, the status of an employee as a bona fide professional is in large part dependent upon whether his duties are original and creative in character, and whether they require invention, imagination or talent. The determination of whether a particular announcer is exempt as a professional employee must be based upon his or her individual duties and the amount of exempt and nonexempt work performed, as well as compensation paid.

8.6 Journalism. The field of journalism also employs exempt as well as nonexempt employees under the same or similar job titles. Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements for exemption as professional employees of the learned type. Exemption for newspaper writers as professional employees is normally available only under the provisions for the artistic type. Newspaper writing of the exempt

type must, therefore, be predominantly original and creative in character. Only writing that is analytical, interpretative or highly individualized is considered to be creative in nature. The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work. Newspaper writers commonly performing work that is original and creative are editorial writers, columnists, critics, and top-flight writers of analytical and interpretative articles.

In the case of newspaper employees the distinction here is similar to the distinction observed in connection with the requirement that the work be original and creative in character. The majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on invention, imagination, or talent.

The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character and must be considered as nonexempt work. A reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite employee or other editorial employees for story preparation. Such work is nonexempt work. Reporters covering a police beat, or sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature.

Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional work, however, need not be counted as nonexempt work. If a dramatic critic interviews an actor or actress and writes a story around the interview, the work of interviewing and writing the story would be exempt work. However, a dramatic critic who is assigned to cover a routine news event such as a fire or a convention would be doing nonexempt work since covering the fire or the convention would not be necessary and incident to his or her work as a dramatic critic.

9. Exercise of Discretion and Judgment. A professional must perform work requiring the consistent exercise of discretion and judgment. Work that requires discretion and independent judgment is work that is not ordinary or routine in nature.

In general, the exercise of "discretion and independent judgment" implies that the person applies their advanced knowledge gained from their course of study to the particular circumstances. A professional employee must perform work that requires the consistent exercise of discretion and judgment. A prime characteristic of professional work is the fact that the employee does apply his or her special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

Work that exercises discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. This is different from use of skill in applying techniques, procedures or specific standards or from freedom to make decisions independently on matters of little consequence. Tasks that are comparatively routine in nature can involve the exercise of discretion and judgment if the person who actually makes the ultimate decisions is doing them.

There are duties that are an essential part of and necessarily incident to professional work. This includes menial tasks that must be performed in order for a professional to complete his or her job and which are essential to the successful completion of the job. An example could include menial tasks in conjunction with a chemist's experiments, despite the fact that identical tasks can and are performed by lab assistants.

10. Application of “Short Test” vs. Long Test. If employees do not meet all of the short test requirements, or hold licenses to practice law, medicine, or dentistry and do not practice in their field as outlined in section 5, all of the long test requirements must be met.