

2 SKILL BUILDER

You Be the Judge: Is This Job Exempt?

I. OBJECTIVES

- A. To help you understand the application of the Fair Labor Standards Act (FLSA).
- B. To help you understand how the law is applied in determining whether jobs are exempt or non-exempt under FLSA.

II. OUT-OF-CLASS PREPARATION TIME: 60 minutes

III. IN-CLASS TIME SUGGESTED: 45 minutes

IV. PROCEDURES

- A. Read the exercise and review the Fair Labor Standards Act excerpt pertaining to exempt status (see Exhibit 4.5).
- B. The class should be divided into groups of four students.
- C. Each group should read each of the incidents that follow and answer these questions:
 1. Analyze each case with respect to the tests that must be considered for determination of exempt status of executive, professional, or administrative jobs.
 2. If you were the judge, how would you rule? Is the job exempt or non-exempt? Why or why not?

Case 1 Harry Phipps, Senior Professional Sales Representative

Harry Phipps was employed by K & K Pharmaceutical Company as a senior professional sales representative. Phipps' position required him to travel across doctors' offices and hospitals where he promoted the benefit of K & K's drug, Provita, to the prescribing doctors. K & K used this method in the hope that when doctors realized the benefit of Provita, they would prescribe the drug for their patients.

By law, Phipps could not sell the drug directly to doctors. The company provided Phipps with a list of target doctors, and he was expected to complete ten visits per day, and each doctor had to be visited at least once a quarter. K & K left the itinerary and method of achieving the targets up to Phipps. However, they did provide Phipps with a budget for the visits. He was also given pre-approved visual aids and had received training in basic "marketing" skills, a core message about the product, and how to gauge doctor interest in the product. Each representative was expected to develop a plan for how to handle his or her territory. Phipps had to complete post-visit reports and refer back to them in planning the next visit. Being successful in the job required some creativity since doctors were extremely busy each day with their patients. Phipps cultivated relationships with their staff and used this as a means to gain access to the doctors.

Phipps earned \$66,000 annually but was not paid for overtime. He also had the use of a company car. K & K could award a bonus based on the number of actual prescriptions issued in Phipps' territory. After the completion of two months on the job, Phipps added up the time he spent in completing his work and found he was working more than 8 hours a day. He approached K & K and requested to be paid for overtime. The HR manager indicated that Phipps did not qualify for overtime because the job of senior professional sales representative is exempt under the Fair Labor Standards Act and that overtime is only available to

EXHIBIT 4.5 FLSA Wage and Hour Exemptions for Executive, Professional, Administrative, and Outside Sales People Personnel

Exemptions

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a work week. However, Section 13(a) (1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a) (1) and Section 13(a) (17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary as stipulated in the applicable section of Regulations, 29 C.R.F. Part 541.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week (or \$380 per week, if employed in American Samoa by an employer other than the Federal Government), exclusive of board, lodging, or other facilities; and
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee 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.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 (or \$380 per week, if employed in American Samoa by an employer other than the Federal Government), exclusive of board, lodging, or other facilities; and
- The employee's 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.

Professional Exemption

To qualify for the professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week (or \$380 per week, if employed in American Samoa by an employer other than the Federal Government), exclusive of board, lodging, or other facilities; and
- The employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by prolonged course of specialized intellectual instruction; or
- Require invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Outside Salespeople

The regulations under the FLSA exempt outside salespeople from both the overtime and minimum wage provisions. To be exempt, the following requirements must be met:

- 1) The employee's primary duty is:
 - a. Making sales within the meaning of Section 3(k)¹ of the Act, or
 - b. Obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and

- 2) She/he is customarily and regularly engaged way form the employer's place or places of business in performing such primary duty.
- (a) The term primary duty is defined at Section 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries, and attending sales conferences.
- (b) The requirements of Subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

¹Section 3(k) of the FLSA defines sale as including "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

Source: U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division, Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA). www.dol.gov/dol/allcfr/ESA/Title_29/Part_541/29CFR541.100.htm

non-exempt employees. Additionally, the HR manager pointed out that although a supervisor accompanied Phipps during his doctor visits on a few days each quarter, he was unsupervised 95 percent of the time. Phipps did not agree with this and argued that he had little discretion in doing his job because he had to follow company guidelines and was given a list of targeted doctors. Furthermore, since he did not work at the company's offices, he was technically an outside salesman. Phipps subsequently filed a class action suit on behalf of himself and the other senior professional sales representatives at K & K, arguing that their jobs were non-exempt.

Case 2 Cheryl Wiley, Auto Damage Adjuster

Cheryl Wiley was promoted from auto damage appraiser to auto damage adjuster after being employed with Auto Insurance for three years. In her former position as auto damage appraiser, she worked at one of Auto Insurance's drive-in locations inspecting damaged cars that remain in drivable condition. She performed this job under close supervision and all of her work had to be approved by the supervisor. The job was considered non-exempt and Wiley received overtime pay whenever she exceeded her required work hours.

In her new position as auto damage adjuster, Wiley had responsibility for "assessing, negotiating, and settling automobile damage claims." She spent a majority of her time appraising damaged vehicles and estimating repair costs, but also negotiating and settling claims with body shops over repair costs and with claimants over total loss vehicles. An auto damage adjuster had to determine how much Auto Insurance should pay to restore a vehicle to its pre-damage condition using the most economical parts available unless safety was a consideration. In assessing each vehicle, the adjuster used a software program to perform the analysis. While the software assisted with providing information on the cheapest parts and prices, the adjuster also had to make decisions not dictated by the software. For example, the adjuster had to figure out if there was pre-existing damage, interview claimants, negotiate with shops over repair times, and ensure claims were not fraudulent. All adjusters had set dollar limits on their negotiating authority. Wiley was a level 1 adjuster and had settlement authority up to \$10,000. However, she could recommend settlements in excess of her authority, but they had to be approved by her supervisor. Auto damage adjusters report to supervisors who report to auto damage managers who in turn report to auto damage directors.

In the case of total loss vehicles, Wiley had to decide whether it was economically feasible to repair a vehicle or to pay the owner its value. These decisions were more time consuming because they involved thousands of dollars in additional liability for Auto Insurance. However, Auto Insurance had set standards for determining when to declare a vehicle a total loss. In her job as auto damage adjuster, Wiley handled on average more than 1,000 claims per year, totaling \$2.5 million. About 20 percent of the yearly claims involved total loss vehicles. Wiley also worked under some supervision in the field one or two days a week at one of the drive-in locations. Wiley earned \$41,000 per year in her new position but regularly worked in excess of 40 hours per week. When she asked about being paid for overtime, she was told that unlike her prior job, the auto damage adjuster position was non-exempt. Wiley did not agree and filed a lawsuit against Auto Insurance alleging she is entitled to overtime pay because her job is primarily administrative, using well-defined guidelines and policies.

Case 3 John Krauss and National Bank

John Krauss was employed by National Bank for two years as an underwriter. As an underwriter, Krauss evaluated whether to issue loans to individual loan applicants by referring to a set of guidelines, known as the Credit Guide, provided to him by the bank. The Guide specified how underwriters should determine loan applicant characteristics such as qualifying income and credit history. It also instructed underwriters to compare such data with criteria set out in the Guide. The Guide contained standards for what qualified a loan applicant for a particular loan product. National Bank also provided supplemental guidelines and product guidelines with information specific to individual loan products. Krauss was expected to evaluate the applications using the Credit Guide and approving the loan if it met the standards set. As such, he had no interactions with applicants since this was a back-office operation. Underwriters were evaluated not by whether the approved loans were paid back, but by measuring each underwriter's productivity in terms of average of total actions per day and assessing whether the underwriters' decisions met National's Credit Guide standards.

National Bank sometimes used incentive schemes based on number of decisions made to increase underwriter performance. Underwriters at National Bank earned a salary of \$42,000 per year. To keep up with the number of applications he had to evaluate, Krauss regularly worked overtime. When he inquired about being paid for overtime, Krauss was told the underwriter position was exempt from the Fair Labor Standards Act. Krauss did not agree and felt that he was basically an administrative employee who performed work that was well-defined by the company. Subsequently, Krauss filed a lawsuit requesting that he be paid overtime for the hours he had worked in excess of the required forty for the past two years.