

June 27, 2003

The Honorable Tammy McCutchen  
Administrator, Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Richard M. Brennan  
Deputy Director, Office of Enforcement Policy  
Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

RE: Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Department of Labor, Wage and Hour Division, Federal Register, Vol. 68, No. 61 (March 31, 2003).

Dear Ms. McCutchen and Mr. Brennan:

The Employment and Labor Law Committee of the American Corporate Counsel Association ("ACCA") is pleased to provide comments on the above-captioned Proposed Rule.<sup>1</sup>

ACCA is the only global bar association exclusively serving the professional needs and interests of in-house counsel to corporations and other private sector organizations. Since its founding in

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<sup>1</sup>These comments are submitted exclusively on behalf of the Employment and Labor Committee of ACCA and do not reflect the views and opinions of either the individual signatories of this letter or the business entities for whom they work.

The Committee recognizes and appreciates the insight and assistance provided by Paul Siegel, Esq. and Lee Schreter, Esq. of the Long Island, New York and Atlanta, Georgia offices, respectively, of Jackson Lewis and by David Fortney, Esq. of Fortney and Scott, in the Committee's preparation of this comment.

1982, ACCA has grown to represent more than 14,000 individual in-house counsel members who work in more than 6,000 business entities. The Employment and Labor Committee (“Committee”) is one of the largest of ACCA’s committees, with over 3,200 attorney members, most of whom manage the employment-law function of entities subject to the overtime requirements of the Fair Labor Standards Act. The Committee believes our comments provide the Department with a unique perspective regarding the fundamental issues that are the subject matter of the Proposed Rule.

Overall, we commend the Department for its singular leadership in proposing reform of the FLSA and share its assessment that renovation of rules governing overtime eligibility is long overdue. The Committee generally supports the Department’s initiative.

**Section I** of this comment outlines the legal policy principles that guided the Committee’s review of the Proposed Rule. **Section II** of this comment identifies those aspects of the Proposed Rule that we believe are both correct and sorely needed. However, we also believe that certain other issues could be problematic. Accordingly, in **Section III** of this comment we provide suggestions for further clarification or modification of the Proposed Rule. Finally, in further support of the Department’s goal to make the Proposed Rule as practical as possible for employees and employers, **Section IV** of this comment provides job duty descriptions for different categories of “knowledge” workers whose positions should be included in the final rule as examples of exempt or non-exempt positions.

## **I. Legal Policy Principles That Guided Committee Review of the Proposed Rules**

The Committee shares the Department’s assessment that the current regulation’s structure, organization and outdated position descriptions and parlance spawns undue confusion, misclassification and conflict within the Department, between employers and employees and among the Department, employers and the courts. In addition, the Committee agrees with the Department’s assessment that the current regulations’ failure to explicitly recognize and definitively classify the ever-increasing number of “knowledge” jobs in information-based workplaces unduly undermines and impedes compliance by even the best-intentioned employers seeking the advice of highly-trained compensation professionals and experienced employment lawyers.

Against that backdrop, the following legal policy principles and perspectives guided the Committee’s evaluation of the efficacy of the Proposed Rule:

- **Simplicity** – does the Proposed Rule provide plain notice of exempt and non-exempt job classifications through clearly defined, unambiguous criteria;
- **Uniformity** – will different business entities within and across industry sectors reach identical classification decisions about a given set of job duties;
- **Mutuality** - how likely is it that employers and employees will reach the same classification decision about a comparable set of job duties;

- **Transparency** – is a classification criterion susceptible to conflicting interpretations within the Department, between employers and employees and among the Department, employers and the courts; and,
- **Practicality** - does the Proposed Rule reflect the reality of the development or implementation of decision-making policies and processes and, if not, does it at least articulate a new standard and create appropriate incentives for employers to implement the desired decision-making policies and processes.

## II. Significant Aspects of the Proposed Rule That ACCA Supports<sup>2</sup>

### A. *Eliminating the Distinction Between Subpart A Regulatory tests and Subpart B Interpretations*

Current regulations contain two subparts, subpart A providing regulatory tests that define each category of Section 13 (a)(1) exempt status and subpart B, that interprets the terms used in the exemption. As presently drafted, the proposed rule eliminates the distinction between regulations and interpretations, as well as reorganizes and consolidates material relevant to each category of exemption. ACCA heartily applauds that development as an important component of regulatory simplification and urges that it be made part of any final regulation.

### B. *Eliminating Two Different Salary Level Tests Per Exemption*

Currently, two different salary levels trigger a streamlined “short” or a more detailed “long” duties test for executive, administrative and professional exempt status. As presently drafted, the proposed rule merges these two tests into a single standard duties test for each exemption. ACCA strongly supports that development and urges it be made part of any final regulation. A small change in salary, especially at the lower end of the pay scale, should not alter exempt status so dramatically.

### C. *Expanding Permissible Salary Docking to Include Exempt Employee’s Violation of Other Than Major Safety Rules*

Under current regulations, to qualify as exempt, an employee must receive each pay period a predetermined salary that is not subject to reduction because of variations in the quality or quantity of work performed. While exempt employees need not be paid for any week in which they perform no work, an employer may not suspend an exempt employee for less than a full week for disciplinary reasons, and, thereby reduce his/her pay accordingly without jeopardizing the exempt status of that worker and other similarly situated employees. Current regulations, however, permit disciplinary

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<sup>2</sup> ACCA also supports other aspects of the present draft, including creating a new computer employee exemption; eliminating discretion and independent judgment test as a criterion of the professional exemption; eliminating the primary and non-primary duties criterion of the administrative exemption; and the changes made to the outside sales employee exemption.

suspension and full-day “docking” of an exempt employee’s pay only if the employee violates a narrowly defined major safety rule.

ACCA enthusiastically endorses the present draft’s expansion of permissible full-day “dockings” to include violations of other disciplinary rules (*e.g.*, harassment or workplace violence) that are memorialized in written policies. ACCA would not object if the present draft were further modified to condition full-day docking on the employer either adopting a written policy notifying employees of the potential for a suspension without pay as a disciplinary measure or providing the employee with written notice of a finding of job-related misconduct. In any event, infrequent docking of an employee because of job-related misconduct should not result in the loss of exempt status of other employees not subject to disciplinary action; rather the disciplined employee should receive his or her own remedies under Section 16.

***D. Clarifying The Payment of Overtime to Exempt Employees and Computing Such Overtime on a Daily or Shift Basis***

The present draft also clarifies that exempt employees are permitted to receive overtime or other forms of additional compensation and participate in compensation plans that compute salary based on daily or shift rates, provided the plan contains a minimum guarantee and there is a reasonable relationship between the minimum guaranteed amount and the employee’s usual earnings for a forty (40) hour or other regular workweek. ACCA supports that clarification.

**III. Aspects of the Proposed Rule That ACCA Believes Should Be Clarified or Revised**

***A. Executive Exemption***

Under current regulations and as presently drafted, one attribute of an exempt executive employee is that the employee “customarily and regularly” directs the work or two or more other employees. ACCA believes that “customarily and regularly directing the work or two or more other employees” is the very essence of being an executive as that term is used in the FLSA. As a consequence, we recommend that the present draft be revised to define an executive exclusively in terms of whether the employee “customarily and regularly directs the work or two or more other employees” without regard to any other duties. (ACCA would, however, continue the current non-exempt status of first-level line foremen). This recommendation would all but eliminate uncertainty and litigation over executive exempt status. In the event that the Department decides not to adopt that recommendation, set forth below are revisions of the present draft that we believe are necessary to further clarify and simplify the executive exemption.

As presently drafted, the third requirement of the standard duties test would require that an executive employee "have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to hiring, firing, advancement,

promotion or any other change of status of other employees." As an initial matter, we believe the requirement that an executive have the authority to hire or fire is unduly restrictive and should be expanded to include "discipline, promote, transfer, establish base pay and/or discretionary bonus payments or otherwise evaluate an employee's performance."

Similarly, the requirement that an employee's recommendations be given "particular weight" is vague and is likely to generate still more uncertainty and litigation as employers, employees, the Department and the courts attempt to define what role a manager's recommendations or suggestions must play in order to satisfy this prong of this test. In the workplace today, many employment decisions are now reviewed, approved or modified by human resource professionals, in-house counsel, outside counsel and/or other members of a company's management as employers struggle to ensure that their employment decisions comply with an increasingly complex array of federal and state laws and avoid costly and time-consuming litigation challenging these decisions.

In light of this salutary development affecting the making and reviewing of decisions about adverse employment actions, which employers have every incentive to implement [*See, e.g. Kolstad v. American Dental Assn.*, 527 US 526 (1999)], we recommend that the latter prong be modified. We recommend that executive employees only be required to have as duties specified in an **express written** job function the "making of suggestions or recommendations as to hiring, firing, advancement, promotion, transfer, discipline, performance evaluations, base pay and/or discretionary bonus compensation, assigning work, determining hours of work, or other management functions."

## **B. *Administrative Exemption Criteria***

Currently, the primary duties of an administrative employee must be that of performing office or non-manual work directly related to management or general business operations, as well as of regularly exercising discretion and independent judgment *within the meaning of the regulation*. Uniform and consistent application of the "discretion and independent judgment" criterion has eluded the Department, employers, employees and the courts in our decades-long quest to secure regulatory compliance and enforcement consistency. ACCA understands that an individual's use of "discretion and independent judgment" is a subjective decision, which can differ between two individuals in a position with exactly the same job duties, based on the level of competence and experience. Those tensions have been exacerbated by the emergence and predominance during the past decade of "knowledge" workers who assist in the management of increasingly complex business processes across industry sectors. For those reasons, ACCA supports the Department's embrace of a "fresh-start" philosophy by "wiping-the-slate clean" and abandoning an employee's "exercise of discretion and independent judgment" as the test of the administrative exemption.

As presently drafted, the Proposed Rule replaces the “discretion and independent judgment” criterion with a “position of responsibility” criterion. The “position of responsibility” criterion is further defined, in part, as requiring “work of substantial importance.” ACCA appreciates that whatever standard is settled upon can never be fully objective, due to the very nature of this exemption determination. It is a determination based on analyzing the specifics of each job, and attempting to draw the line between “white collar” and “blue collar” positions as well as between clerical or routine administrative positions and those jobs in which the employee performs management-support functions. However, ACCA strongly believes that the proposed administrative exemption criteria have the potential to result in significant uncertainty and continued litigation. Employers often seek to foster an atmosphere and develop workplace programs emphasizing that the work of every employee involves a degree responsibility, contributes something substantially important to the success of the enterprise. Thus, it appears to us that both “white collar” and “blue collar” positions may be positions of responsibility for which work of substantial importance is being performed.

We are mindful of the challenge inherent in crafting a definition of administrative employees that meets the legal policy principles set forth above. Accordingly, ACCA recommends:

- Revising the present draft to define an administrative employee as one who: holds a position that customarily and regularly affects the management, general business operations or finances of the employer or employer’s customer by performing duties (1) involving analysis or evaluation of business considerations, or (2) requiring a high level of skill or training. The proposed revision eliminates at least some of the perceived vagueness of the present draft. Eliminating use of vague phrases such as “position of responsibility” and “performing work of substantial importance,”<sup>3</sup> focuses the exemption on its true differentiating factor - that the employee customarily and regularly affects the management, general business operations or finances of the employer or employer’s clients by performing duties that require analysis, evaluation of business considerations or similar functions (Attached Exhibit A is a renumbered present draft definition of the administrative exemption incorporating ACCA’s proposed revisions. Many of the suggested changes are identified in **boldface**.).
- Eliminating the requirement that the exempt administrative employee have office or non-manual work as a primary duty. Based on ACCA’s proposed revision of the present draft, the “office or non-manual work” requirement does not provide any pertinent additional guidance and, in fact, may result in continued confusion among, and conflicting interpretations of the administrative exemption by, the Department, the courts, employers and employees.

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<sup>3</sup> While ACCA recommends eliminating “position of responsibility” and “performing work of substantial responsibility” as tests for the administrative exemption, we believe that the discussion of what constitutes “work of substantial importance” (set forth in Section 541.203) meets our proposed revised criteria.

- Incorporating into the final rule a greater number of significantly more detailed examples of exempt or non-exempt job duties within defined job families in order to provide maximum guidance to the Department, employers, employees and the Courts. Some of the value of the examples in the present draft is undermined by the simplified description of job duties at either extreme of the duties differentiating exempt from non-exempt work. In addition, in Section IV herein ACCA submits examples of job duties for inclusion into the final rule.

**C. *Defining Impermissible “Dockings”***

Currently, the regulation states that an employee is not deemed to be paid on a salary basis, and therefore loses exempt status, if, under certain circumstances, the employer “docks” the employee—*i.e.*, makes deductions from the employee’s predetermined compensation. The regulation states that only deductions “... because of variations in the quality or quantity of the work performed ...” are impermissible.

The present draft fails to recognize that under current law and regulation not all compensation shortfalls are impermissible “dockings.” There are compensation shortfalls that can occur that are *not* because of either the quality or quantity of work performed and therefore, by definition, should not be deemed to *constitute an improper deduction*. For example, a compensation shortfall can occur if a human error is made in entering data in the payroll system and that error results in an otherwise exempt employee receiving less than the predetermined amount of compensation. This type of inadvertent shortfall should be distinguished from an intentional or deliberate reduction of an employee’s compensation, e.g. impermissible “docking” for partial days when an employee leaves early to attend a child’s soccer game, or improper disciplinary suspensions without pay for less than a week for non-serious safety violations.

- ACCA recommends that the present draft be revised to clarify that an inadvertent compensation reduction is not an impermissible docking and does not jeopardize compliance with the salary requirement for an exempt employee.

**D. *Codifying the Current Window of Correction***

The present draft [§ 541.603(a)] codifies a “window of correction” standard that significantly and unjustifiably eliminates one of the two alternative grounds for correcting improper salary docking. Under the current regulations, an employer can correct the mistake of an improper deduction and avoid FLSA liability if it pays the money it should have paid initially and promises to comply with the statute. The current regulations provide two bases for correcting improper compensation deduction, providing:

where a deduction not permitted by [the salary basis test] is inadvertent *or* is made for reasons other than lack of work, the exemption will not be

considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

*See*, current 29 C.F.R. § 541.118(a)(6) (emphasis added).

In contrast to the current regulation, the present draft states that “[i]mproper deductions that are isolated or inadvertent, however, will not result in loss of the exemption.” Proposed 29 C.F.R. § 541.603(a). The unanswered question is why the Department omitted the current basis of “reasons other than lack of work”? There is no explanation or justification in either the present draft or its preamble for this material change in the eligibility criteria for applying the correction window. The preamble simply characterizes the proposed rule as “maintain[ing] the underlying purpose of the current rule.” 68 Fed. Reg. 15572 (March 31, 2003). ACCA respectfully disagrees – the proposed rule appears to be a material change that contradicts the underlying purpose of the window of correction

It is true that there has been much litigation about whether the current regulations preserve the exemption if the improper reduction was *either* inadvertent *or* made for reasons other than lack of work, or both. However, as the Supreme Court stated, “the plain language of the regulation sets out ‘inadvertence’ and ‘made for reasons other than lack of work’ as *alternative* grounds permitting corrective action.” *Auer v. Robbins*, 519 U.S. 452, 463 (emphasis in original).

Some courts have reached the conclusion that the regulation permits employers to take corrective action only if both conditions apply. *See, e.g., Whetsel v. Network Prop. Servs.*, 246 F.3d 897 (7th Cir. 2001); *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000). That position, however, has been rejected by other courts as inconsistent with the plain language of the regulation, which clearly specifies inadvertence as one possible ground permitting corrective action. In the most recent decision on this issue, the United States Court of Appeals for the Fifth Circuit concluded that nothing in the current regulation supports a reading other than that made by the *Auer* court—i.e., “inadvertence” and “made for reasons other than lack of work” are alternative grounds permitting corrective action. *Moore v. Hannon Food Serv., Inc.* 317 F.3d 489, 497-97 (5th Cir. 2003). *See also, Davis v. City of Hollywood*, 120 F.3d 1178 (11<sup>th</sup> Cir.), *cert. den.*, 523 U.S. 1133 (1998).

- ACCA recommends that the present draft be modified to expressly include the current second alternative basis under the window of correction for deductions “made for reasons other than lack of work.” ACCA urges the Department to clearly and unambiguously state in the final rule that the regulation clearly permits employers to take corrective action when deductions were *either* isolated or inadvertent *or* made for reasons other than lack of work. Furthermore, the preamble to the final regulations should explain that employers may utilize the window of correction under either

alternative alone, in accordance with the Fifth Circuit's decision in *Moore v. Hannon Food Serv., Inc.*

- ACCA also recommends that the preamble to the final regulations explain that (1) the Department has reviewed these issues with the benefit of both the rulemaking record and the Fifth Circuit's reasoning in *Moore*, (2) the Department is changing the prior interpretation of former Section 541.118 (a)(6) advocated in *amicus curiae* briefs filed in *Klem* and other cases, and (3) neither the courts nor employers or employees should continue to rely on the interpretation included in the prior *amicus curiae* briefs.

#### ***E. Re-crafted and Expanded Safe-Harbor Criteria***

The present draft re-crafts the safe-harbor under which an impermissible deduction from pay will not jeopardize the exemption of an entire class of employees. The explanatory section of the present draft notes that an employer will not lose an otherwise valid exemption if the improper deductions are isolated or inadvertent (pursuant to factors identified in the present draft). In contrast, an employer may lose the exemption if there is a pattern and practice of improper deductions. However, if the employer has a policy or practice of not paying on a salary basis, the exemption is lost only during the time period in which the improper deductions were made for employees in the same job classifications working for the same manager responsible for the improper deduction.

The present draft also creates a new safe-harbor that the exemption will not be lost if the employer has a written policy prohibiting improper pay deductions, notifies employees of the policy and reimburses employees for any improper deduction, unless the employer repeatedly or willfully violates its own policy or continues to make deductions after receiving employee complaints.

The inter-play between subsections (a) (b) and (c) of the re-crafted safe-harbor provision is not immediately obvious to trained professionals responsible for securing compliance. Thus, for example, it appears that subsection (a) mandates the loss of an exemption for an employer engaged in a pattern and practice of not paying employees on a salary basis even though subsection (c) provides that any employer shall not lose an exemption if it has a written policy prohibiting improper pay deductions, notifies employees of the policy and reimburses employees for any improper deduction, unless the employer repeatedly or willfully violates its own policy or continues to make deductions after receiving employee complaints. It is not clear how those two sections are intended to interact. Nor it is immediately obvious whether evidence of repeated or willful violations trumps evidence of a pattern or practice of not paying employees on a salary basis, and, if so, what differentiates evidence of a pattern and practice of deductions from evidence of repeated deductions in violation of company policy. In addition, it is not clear that the use of job classification, supervisory span-of-control and duration of the improper

deductions are appropriate concepts to limit the scope of an employer's liability for improper deductions.

- ACCA would not object if the Department redesigned the safe-harbor provisions to parallel well-established and familiar legal policy principles articulated by the U.S. Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Kolstad v. American Dental Assn.*, 527 US 526 (1999) and their federal and state court progeny. Those cases require employers to do more than merely adopt and disseminate a written policy; adopting and disseminating a written policy of compliance are necessary, but not complete, preconditions for limiting an employer's liability for workplace harassment. Similarly, it may not be inappropriate to require employers to adopt proactive management practices and monitoring mechanisms as a precondition to limiting the liability resulting from improper docking of an exempt employee's pay due to other than inadvertence or reasons other than lack of work.

***F. Salary Level Test For High-Wage Employees***

ACCA believes that \$65,000 is an appropriate salary level that triggers use of a streamlined duties test. Indeed, ACCA supports the regulatory establishment of a salary level above which an employee is automatically deemed to be exempt from overtime requirements, but understands the Department's legal position to be that the statute requires exemptions to be based on some consideration of job duties in conjunction with salary. ACCA also supports indexing the \$65,000 to percentage increases in the minimum wage in order to ensure against a repeat of the decades-long administrative paralysis that resulted in near obsolescence of current FLSA regulations.

***G. Extending The High-Wage Salary Level Test to Computer Employees***

The present draft specifies \$65,000 as the salary-level that triggers use of a streamlined duties test for executive, administrative and professional employees. The present draft does not apply that concept to highly paid computer employees and, as a consequence, classification decisions of such employees regardless of salary level are made less certain and more subjective than comparable decisions for executive, administrative and professional employees. Failure to apply the high-wage salary level test to computer employees significantly compromises one goal of the present draft, which was to provide definitive guidance about the application of exemptions in the information age to 21st Century knowledge workers. ACCA recommends revising the present draft to ensure that the streamlined duties test applicable to executive, administrative and professional employees also in applied to computer employees paid a salary of no less than \$65,000.

#### ***H. Salary Level Test for Low-Wage Employees***

ACCA believes that \$22,100 per annum or \$425 per week is an appropriate salary level below which an employee is automatically non-exempt and eligible for overtime. And, consistent with the preceding paragraph, ACCA supports indexing the \$425 per week salary to percentage increases in the minimum wage.

#### **IV. Examples of 21<sup>st</sup> Century “Knowledge” Worker Job Positions To Be Included As Examples of Exempt and Non-Exempt Duties in the Final Regulation**

ACCA recommends that the final rule provide a greater number of significantly more detailed examples of exempt and non-exempt job duties in order to provide maximum guidance to the Department, employers, employees and the Courts. Accordingly, ACCA submits, as Exhibit B, a broad range of exempt and non-exempt job positions and positions within job families for inclusion in the final rule or explanatory appendix to such rule. Each position identifies the critical duties of the job and applies the appropriate exempt or non-exempt classification.

- Account Executive/Manager
- Accountant
- Analyst – Budgets & Accounting
- Analyst – Business
- Analyst – Financial
- Auditor – Corporate
- Computing Operations Specialists
- Coordinator – Construction/Material
- Customer Solutions Representative
- Drafting Technician
- Flight Captain/Pilot
- Human Resources Consultant
- Inspector – Quality Control
- Manager – Program/Contract
- Manger – Project/Product
- Network Operations Specialists
- Paralegal
- Procedure/Technical Writer
- Safety/Environmental Specialists
- Security specialists
- Technical Specialists/Scientist

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We appreciate the opportunity to comment on the Department's proposals, and would be pleased to provide additional information upon request.

Very truly yours,

Timothy Mahota, Chair, ACCA Employment and Labor Committee ("Committee")<sup>4</sup>

William Ham, Chair, Subcommittee on Policy of the Committee

Eric Reicin, Chair, Washington Metropolitan Area Employment and Labor Committee  
("WMAACCA")

Robert Gans, Chair, Subcommittee on Policy of WMAACCA

Reginald Govan, Former Vice-Chair of the Committee and former Chair, Subcommittee on Policy of  
the Committee

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<sup>4</sup> These comments are submitted exclusively on behalf of the Employment and Labor Law Committee of ACCA and do not reflect the views and opinions of either the individual signatories to this letter or the business entities with which they are affiliated.

The Committee appreciates and recognizes the insight and assistance of Paul Siegel Young, Esq. and Lee Schreter, Esq. of the Long Island, New York and Atlanta, Georgia offices, respectively, of Jackson Lewis, LLP and of David Fortney, Esq. of Fortney and Scott in the Committee's preparation of this comment.

# EXHIBIT A

## Subpart C--Administrative Employees

### Sec. 541.200 General rule for administrative employees.

- (a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee:
- (1) Compensated on a salary or fee basis at a rate of not less than \$425 per week (or \$360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
  - (2) **Who holds a position that customarily and regularly affects the management, general business operations, or finances of the employer or employer’s customers by performing duties requiring analysis or evaluation of business considerations or a high level of skill or training.**
- (b) The term “salary basis” is defined at Sec. 541.602; “fee basis” is defined at Sec. 541.605; “board, lodging or other facilities” is defined at Sec. 541.606; and “primary duty” is defined at Sec. 541.700.

### Sec. 541.201 Position that customarily and regularly affects the management, general business operations, or finances of the employer or employer’s customers by performing duties requiring analysis or evaluation of business considerations.

- (a) An employee may qualify for the administrative exemption if the employee performs work related to **affecting** the management, general business operations **or finances** of the employer's customers **by performing duties requiring analysis or evaluation of business considerations**. The phrase “related to management, general business operations, **or finances**” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work **customarily and regularly** related to administering or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product. The phrase “customarily and regularly” is defined at § **541.701 [note citation typo in DOL’s proposed regulations]**.
- (1) Work related to management, general business operations **or finances by performing duties requiring analysis or evaluation of business considerations** includes, for example, work in areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar **categories**. Some of these activities may be performed by employees who also would qualify for another exemption. For example, a tax attorney and an accountant likely are performing work

that qualifies for the professional exemption. Additionally, employees acting as advisers and consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may also be exempt.

- (2) **Duties** related to the work described above **that require performing duties requiring analysis or evaluation of business considerations can include, but are not limited to**, formulating, interpreting or implementing management policies; providing consultation or expert advice to management; making or recommending decisions that have a significant impact on general business operations or finances; analyzing and recommending changes to operating practices; planning long or short-term business objectives; analyzing data, drawing conclusions and recommending changes; handling complaints, arbitrating disputes or resolving grievances; representing the company during important contract negotiations; and work of similar impact on general business operations or finances.
- (b) This administrative exemption is not limited to employees who participate in the formulation of management policies or in the operation of the business as a whole. It includes the work of employees who carry out major assignments in conducting the operations of the business, or whose work affects general business operations to a significant degree, even though their assignments are tasks related to the operation of a particular segment of the business.
- (3) For example, an employee who is a buyer of a particular type of equipment in an industrial plant or who is an assistant buyer for a retail or service establishment may have a significant impact on the business, even though the work may be limited to purchasing for a particular department. Similarly, although comparison-shopping by an employee who merely reports findings on a competitor's prices **does not satisfy this exemption**, the buyer who evaluates such reports to set the employer's prices does perform work affecting the management, general business operations **or finances** of the employer or employer's customers.
- (4) Insurance claims adjusters also generally perform work **that satisfies the administrative exemption**, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation **or similar functions**.
- (5) An employee who **supervises** a team of other employees assigned to complete a major project for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) performs

**administratively exempt** work even if the employee does not have direct supervisory responsibility over the other employees on the team.

- (6) Other employees that perform work **customarily and regularly affecting the management, general business operations or finances of the employer or employer's customers and performing duties requiring analysis or evaluation of business considerations**, even if their decisions or recommendations are reviewed for possible modification or rejection at a higher level, include: a human resources manager who formulates employment policies; **an employee relations specialist investigating and resolving disputes**; a management consultant who studies the operations of a business and proposes change in organization; a purchasing agent who is required to consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs; or an executive or administrative assistant to a proprietor or chief executive of a business if such employee, without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers and answer correspondence.
- (c) Work affecting **the management, general business operations or finances of the employer or employer's customers, which consists of performing duties requiring analysis or evaluation of business considerations** does not include clerical or secretarial tasks, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. For example, an employee who simply tabulates data is not exempt, even if labeled as a "statistician." An example of an employee who does not perform **administratively exempt** work is a personnel clerk engaged in "screening" of applicants (collecting data and rejecting applicants who do not meet basic qualifications), but who is not involved in making the decision to hire.
- (d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative **scale and impact** does not mean that the work of each such employee is not work affecting **the management, general business operations or finances of the employer or employer's customer, which consists of performing duties requiring analysis or evaluation of business considerations**.
- (e) The work of an employee does not meet this requirement merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not perform **administratively exempt** work even though serious consequences may flow from the employee's neglect. An employee who operates very expensive equipment is not performing **administratively exempt work** merely because improper performance of the employee's duties may cause serious financial loss to the employer.

**Sec. 541.202 Position that requires a high level of skill or training.**

- (a) **An employee may also qualify for the administrative exemption if the employee customarily and regularly performs work related to the management, general business operations or finances of the employer or employer’s customer that requires a high level of skill or training.** The phrase “work requiring a high level of skill or training” means administrative work requiring specialized knowledge or abilities, or advanced training. The specialized knowledge or abilities need not be acquired through any particular course of academic training or study. Also, the high level of training required may involve advanced academic instruction or advanced on-the-job training, or a combination of both. **Years of on-the-job experience[ or certification by a training institution or school] should be a considered, but not deciding, factor in this determination.** Administrative work that satisfies the “high level of skill or training” standard includes advisory work performed for the management of the company (or for the management of the company's customers), as is typically performed by financial advisors, tax advisors, insurance experts, credit managers, employee benefits experts, human resource consultants, labor relations consultants, marketing consultants, safety directors, account executives of advertising agencies and stock brokers. Employees with a high level of skill or training also may perform special assignments, including assignments performed away from their employer's place of business if the employee serves as a field representative for the employer.
- (b) Work requiring a high level of skill or training may include work by employees who use a reference manual. The use of such a manual can require a high level of skill and training if the manual contains highly technical, scientific, legal, financial or other similarly complex information that can be interpreted properly only by those with advanced training or specialized knowledge or skills. Such manuals are used to provide guidance in addressing very difficult or novel circumstances. Thus, if an employee performs administrative work that satisfies the “high level of skill or training” standard, using this type of reference manual would not affect the employee's exempt status.
- (c) Work requiring a high level of skill or training does not include work requiring the employee simply to look up information (from a handbook, for example) to determine the correct response to an inquiry or set of circumstances. Nor does it include clerical or secretarial work, recording or tabulating data, or other mechanical, repetitive, recurrent or routine work. Employees such as inspectors, examiners and graders who use established techniques, procedures or standards to accept or reject a product do not perform work requiring a high level of skill or training, even though such employees may have some leeway in the performance of their work.