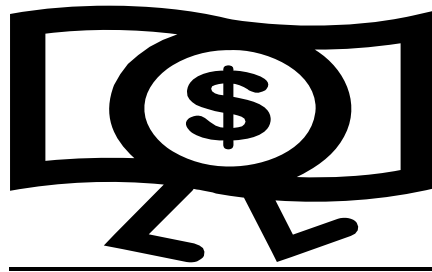


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FLSA Pitfalls: Common Problems And Practical Solutions



Presented By: Alberto Peña
Albert.Pena@rampage-sa.com

Denton, Navarro, Rocha & Bernal
A Professional Corporation
2517 N. Main, San Antonio, Texas 78212
210.227.3243 Phone / 210-225-4481 Facsimile

Introduction

The Fair Labor Standards Act (“Act” or “FLSA”), was enacted in 1938, to protect all covered workers from substandard wages and oppressive working hours, “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers.”¹

Unfortunately, this lofty goal has been overshadowed by cost of litigating these claims and the penalty for violations. The recent judgment against the City of Houston for 2800 paramedics overtime pay in the amount of **\$78 MILLION** reflects the necessity for care in calculating and paying statutory overtime pay.

Determining The Regular Rate of Pay

The regular rate of pay is the rate used to calculate the overtime pay. It must include all “remuneration for employment paid to, or on behalf of the employee,…”² Only those types of compensation specifically described in Section 207(e)(1) through 207(e)(7) can be excluded in the “regular rate of pay.” The list of exclusions in Section 207(e) is exclusive.³

Examples of compensation included in the regular rate of pay include:

1. Longevity pay;⁴
2. Educational attainment pay;⁵
3. Shift commander pay; and⁶
4. Shift differential pay.⁷

Examples of compensation not *deemed* to be included in the regular rate of pay include:

1. Gifts and amounts not measured by hours worked, productivity or efficiency;⁸
2. Discretionary bonus;⁹
3. Non-work pay (sick leave, vacation pay, holiday pay); and¹⁰
4. Bonus for absence of medical claims and non-use of sick leave.¹¹

¹ *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed. 2d 641 (1981).

² 29 U.S.C. § 207(e).

³ *Featsent v. City of Youngstown*, 70 F.3d 900, 905 (6th Cir. 1995).

⁴ *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995), *compare to*, *Moreau v. Klevenhagen*, 956 F.2d. 516 (5th Cir. 1992), *aff'd*, 508 U.S. 22 (1993) (not included if not required by ordinance or collective bargaining agreement).

⁵ *O'Brien v. City of Agawam*, 350 F.3d 279 (1st Cir. 2003).

⁶ *Wheeler v. Hampton Township*, 399 F.3d 238 (3rd Cir. 2005).

⁷ *O'Brian v. City of Agawam*, 350 F. 3d 379 (1st Cir. 2003).

⁸ 29 U.S.C. § 207(e)(1).

⁹ 29 U.S.C. § 207(e)(3)(a).

¹⁰ 29 U.S.C. § 207(e).

¹¹ *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995).

Emerging Issues

The inclusion of payments for accrued sick leave prior to termination of employment in the calculation of the regular rate of pay has been litigated with contrary results.

Police officers sued the City of Youngstown, Ohio for improperly excluding remuneration for shift differentials, hazardous duty pay, longevity pay, awards for non-use of sick leave, and bonuses for the absence of medical claims and education degrees in computing overtime under the FLSA. The District Court held that, as a matter of law, the FLSA requires shift differentials, hazardous duty pay, and nondiscretionary bonuses to be included in the computation of the basic rate. In addition, it found that, because the longevity payments are made pursuant to both a City Ordinance and a Collective Bargaining Agreement (“CBA”), they were nondiscretionary bonuses that had to be included in the regular rate for calculation of overtime compensation.

On appeal, the Sixth Circuit Court found that the bonus for absence of medical claims and for non-use of sick leave were unrelated to the police officers’ compensation for services and hours of service. The fact that they are nondiscretionary (the CBA designates not only under what conditions the payments are to be made, but also their amounts) was considered irrelevant to the determination of whether they may be excluded from the regular rate under Section 207(e)(2).¹² Accordingly, as these bonuses were not paid in recognition of services and similar to payments made when no work was performed due to illness, the Court held the bonuses for absence of medical claims and non-use of sick leave may be excluded from the regular rate.¹³

Then again, the U.S. District Court for the Western District of Missouri, Central Division found the City’s sick leave buy back program pursuant to a City Ordinance not excludable from the regular rate of pay as a discretionary bonus under Section 207(e)(2). The District Court found that the fact payment was mandatory and the amount fixed under the City Ordinance made the payment a nondiscretionary bonus. The Court also found the payment to be retroactive pay for having been present to work steadily similar to an attendance bonus, and thus compensation for services rendered. The Court also relied on a February 24, 1986 DOL Opinion Letter finding a similar sick leave sell back program as remuneration includable in the regular rate of pay. The Court noted that 29 C.F.R. § 548.3(e), permitted an employer upon agreement or understanding with the employee to exclude certain incidental payments having a trivial effect on the overtime compensation due (not affecting total earnings by more than 50 cents a week).¹⁴

¹² See 29 U.S.C. § 207(e)(2).

¹³ *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995)

¹⁴ *Acton v. City of Columbia Missouri*, 2004 WL 2152297 (W.D. Missouri 2004).

Premium Payments Creditable Against Liability

Ordinarily, the only credits that an employer is allowed against liability under the FLSA are those specifically provided in the Act. These include the credits under Section 207 (h) for the premium payments made which qualify for exclusion from remuneration under Section 207(e)(5) through Section 207(e)(7). These are the extra premium portion of the hourly payment which are ***not required*** to be included in total salary used in calculating the “regular rate of pay”.

Section 207(e)(5) through Section 207(e)(7)

Section 207(e) of the Act states:

As used in this section the “regular rate” at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

.....

Section 207(e)(5) of the Act states:

Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be.¹⁵

Section 207(e)(6) of the Act states:

Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days;¹⁶

¹⁵ [discussed in §§ 778.201, 778.202]. *See Nolan v. City of Chicago*, 125 F.Supp.2d 324 (N.D. Ill. 2000) where CBA provided for payment at time and one half for hours worked in excess of regular hours, city was entitled to credit for these overtime payment even if payment actually made was less that time and one half due to City’s failure to include duty availability allowance in calculation of regular rate of pay; *See also, Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995).

¹⁶ [discussed in §§ 778.203, 778.205, and 778.206]. *See Howard v. City of Springfield, Illinois*, 274 F.3d 1141 (7th Cir. 2001) where payments under the CBA for work on regular days off at rate that equaled time and one half rate for non-overtime hours on regular days entitled city to credit for premium portion of pay. *See also Nolan v. City of Chicago* at 331.

Section 207(e)(7) of the Act states:

Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek;¹⁷

Section 207(h) of the Act states:

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

Only the statutory exclusions are authorized. It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined. 29 C.F.R. § 778.201(c) provides that Section 207(h) of the Act specifically states that the extra compensation provided by these three types of payments may be credited toward overtime compensation due under Section 207(a) for work in excess of the applicable maximum hours standard. **No other types of remuneration for employment may be so credited.**

Credits for Prepayments

In addition to these statutory credits, the Fifth Circuit has also recognized a credit for overpayments made in a work period that exceeds the amount owed for the hours actually worked in that same work period. In *Singer v. City of Waco*¹⁸, the City prepaid firefighters by overpaying them for more hours than the actual hours worked in certain work periods, resulting in overpayments the City could use as credit against its overtime liability in other work periods. This occurred because the City paid firefighters every 14 day pay period (120/120/96 recurring hours on a 14 day work period) resulting in small underpayments in 120 hour work periods and overpayment in the 96 hour work period. The Fifth Circuit Court also found that the credits under Section 207(e)(5),(6), and (7) did not apply because the District Court included the overpayments in determining the regular rate of pay and did not treat the overpayments as “overtime premium”.¹⁹

¹⁷ [discussed in §§ 778.201 and 778.206].

¹⁸ *Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003).

¹⁹ See also DOL Letter Ruling October 7, 1995 and DOL Letter Ruling dated January 7, 2005 (FLSA 2005-3) describing a prepayment plan.

On the other hand, in *Wheeler v. Hampton Township*,²⁰ a suit by police officers for overtime pay, the Third Circuit Court held that employer was **not** entitled to credit for contractually including holiday pay, vacation pay, and other non-work time pay as part of employee's regular pay in the CBA, for the purpose of calculating overtime (which pays could have been excluded under 207(e)(2) in total remuneration for calculating the regular rate of pay), in order to offset its liability for failing to include longevity pay, educational incentive pay, and senior officer pay, in total remuneration for the regular rate of pay calculation. In contrast, *Abbey v. City of Jackson*, a suit by firefighters for overtime pay for minimum manning hours (extra shifts) which were overtime hours worked in excess of 212 hours, the District Court allowed credit for premium overtime compensation (computed as if working a 40 hour work week) over the normal overtime rate.²¹

When Overtime is Due

Ordinarily, although there is not specific statutory provision stating when overtime pay must be paid, the regulations provide that overtime pay must be paid in the pay period following the work period in which the overtime is worked or the next pay period that overtime pay can be determined.²² However, in *Singer*, the Court found that the method of pay used by the City was a prepayment, and thus not a "late" payment of overtime, allowing the City to use any excess "prepayment" as offsets against any liability in any subsequent work period.²³

The New Exemption Regulations

Effective August 23, 2004, the Department of Labor released new regulations defining executive, administrative, professional, outside sales, and computer professional exemptions under The Fair Labor Standards Act. These regulations are contained in 29 C.F.R. § 541.

Exemption for Executive Employees

The exemption for executive employees has increased the threshold salary from \$ 155 per week (\$ 8,060 per year) to \$ 455 per week (\$23,660 per year). The *primary duties* test emphasis is on the principal (i.e. most important) character of the job,²⁴ and now includes the requirement that the employee have the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees, are *given particular weight*.

²⁰ *Wheeler v. Hampton Township*, 339 F. 3d 238 (3rd Cir. 2005).

²¹ *Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995).

²² 29 C.F.R. § 778.106.

²³ *Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003).

²⁴ The amount of time spent performing the primary duty is a guide; 29 C.F.R. § 541.700.

Primary duty under 29 C.F.R. § 541.700 is determined on the facts of each case with major emphasis on the character of the job as a whole. Factors to consider are:

1. relative importance of exempt duties with other types of duties;
2. amount of time spent on exempt duties (50% sufficient, but not required);
3. relative freedom from direct supervision; and
4. relationship of salary and wages paid to other employees for the nonexempt work performed by the employees.

Particular weight under 29 C.F.R. § 541.105 include factors as, *but is not limited to*:

1. part of the employees job duties;
2. frequency suggestions are made or requested; and
3. frequency suggestions are relied on.

Exemption for Administrative Employees

The exemption for administrative employees also requires the same salary level threshold and uses a *primary duty*, which consists of:

1. the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and
2. which includes work requiring the exercise of *discretion and independent judgment with respect to matters of significance*.

The exercise of 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. *Matters of significance* requirement refers to the level of importance or consequence of the work performed.

DOL Opinion Letter dated January 7, 2005 (FLSA 2005-2) applying the above principles to junior claims adjuster for a state agency administering a workers' compensation program, found that the adjuster was not exempt under the administrative exemption because they did not exercise discretion and independent judgment. This opinion found that the adjusters were applying "*skills and knowledge in applying well-established techniques, procedures or specific standards described in manuals or other sources,*" as they did not make determinations of coverage or liability, negotiate or make settlements of disputed claims, or make recommendations regarding litigation.

Exemption for Professional Employees

The exemption for professional employees also uses the same salary level threshold.

The primary duty required is the performance of work:

1. requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (learned professional); **or**
2. requiring invention, imagination, originality, or talent in a recognized field of artistic or *creative* endeavor (creative professional).

DOL Opinion Letter dated January 7, 2005 (FLSA 2005-9) applying the tests to a paralegal employed for 22 years, who a four year degree, a paralegal certificate, and attended CLE courses found that the learned professional exemption did not apply because an advanced specialized academic degree is not a standard prerequisite for entry into the field. The standard educational requirement for entry into the field is a two-year associate degree from a community college or equivalent institution. However, if the person had an advanced specialized degree in another professional field and applied that advanced knowledge in that degree in the performance of their paralegal duties, the learned professional exemption would have applied.

Salary Deductions Permitted under New Regulations

The following salary deductions are permitted under the regulations:

1. For absences for a full day for personal reasons other than sickness or disability;
2. For absences for a full day occasioned by sickness or disability in accordance with a bona fide plan, policy, or practice providing wage replacement benefits;
3. To offset jury duty or witness fees or military pay received by the employee;
4. For penalties imposed in good faith for infractions of safety rules of major importance;
5. For hours not worked in the first or last work week of employment;
6. For hours taken as unpaid leave under FMLA.²⁵

²⁵ 29 C.F.R. § 541.602.

A new permissible deduction under the new regulations is:²⁶

7. For unpaid disciplinary suspension of one or more full days imposed in good faith for infractions of *serious* workplace conduct rules²⁷ pursuant to a written policy that is generally applicable to all employees. The written policy must place employees on notice that particular types of misconduct could result in an unpaid disciplinary suspension.²⁸

Inclusion of Paramedics under § 207(k)
As Fire Protection Personal under § 203(y)

FLSA has a partial overtime exemption for employees “engaged in fire protection activities,” entitling such employees to overtime pay when they work excess hours in a 7-28 work period.²⁹ FLSA exemptions “are to be narrowly construed against the employers seeking to assert them.”³⁰ In 1999, Congress amended FLSA and added § 203(y) in order to clarify the definition of “employee in fire protection activities.”³¹

Section 203(y) reads:

“Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who

- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; **and**
- (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.³²

²⁶ 29 C.F.R. § 541.602.

²⁷ i.e. sexual harassment, workplace violence, drug or alcohol violations or of state or federal laws, or other similar misconduct.

²⁸ See 69 Fed. Reg. 22177 (April 23, 2004) (for application of off site conduct if rule covers such conduct).

²⁹ 29 U.S.C. § 207(k); 29 C.F.R. § 553.230.

³⁰ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456 (1960).

³¹ 29 U.S.C. § 203(y); 145 CONG. REC. H11,499 (1999).

³² 29 U.S.C. § 203(y).

The amendment requires that in order to qualify as an “employee in fire protection activities,” an employee must be a firefighter, paramedics, or other specified employee who is:

1. employed by a fire department of a municipality, county , fire district, or state;
2. trained in fire suppression;
3. has the legal authority to engage in fire suppression;
4. has the responsibility to engage in fire suppression; **and**
5. engaged in the prevention, control, and extinguishment of fires **or** response to emergency situations where life, property, or the environment is at risk.³³

The Responsibility Element

In *Weaver v. City & County of San Francisco*, seventy (70) firefighters employed as H-3 firefighters by the defendant sued for overtime pay under FLSA.³⁴ Both parties agreed that the plaintiffs were paramedics who were trained in fire suppression, had the legal authority to engage in fire suppression, were employed by municipal fire department, and responded to emergency situations. The dispute centered on whether they had the “responsibility” to engage in fire suppression. A decision was rendered in favor of the City and County because the paramedics had the “responsibility” to engage in fire suppression as part of their job if requested by his employer. The paramedics were dual trained and were required to wear turnout gear, were issued breathing apparatus, and had been ordered to engage in fire suppression by the incident commander. The Court disagreed with the plaintiffs’ contention that they were “responsible” only if they actually performed firefighting while assigned to the ambulances. It was determined that the interpretation of “responsible” (which meant that they engaged in fire suppression when requested) was consistent with the plain meaning of the word, in accord with the 203(y) statutory framework (engage or respond), did not render the meaning of “authority” meaningless and was consistent with legislative intent.

Further, the Court found that the number of fires to which ambulances responded and the frequency H-3 employees assigned to ambulance engaged in fire suppression did not control whether the plaintiffs are “responsible” for fire suppression.³⁵ In addition, the Court noted a statement by Representative Boehner in the Congressional Record that the amendment “would ensure that firefighters who are cross-trained as emergency medical technicians, HAZMAT responders, and search and rescue specialists, would be covered by the exemption even though they may not spend all of their time performing activities directly related to fire protection.”³⁶ Further, the sponsor of the legislation, Representative Ehrlich, discussed his dissatisfaction with recent civil suits where “fire department paramedics trained to fight fires” prevailed because more than twenty percent of their time was spent responding to medical emergency calls rather

³³ 29 U.S.C. § 203(y).

³⁴ *Weaver v. City & County of San Francisco*, 2004 WL 422626 (N.D.Cal. 2004) (No. C-03 01589).

³⁵ *Id.*

³⁶ 145 CONG. REC. H11,500 (1999) (statement of Rep. Boehner).

than fighting fires.³⁷ These statements reveal a congressional intent to include (within FLSA’s overtime exemption) dual function paramedic firefighters who respond to emergency medical calls and have the responsibility to engage in fire suppression.

In *Cleveland v. Los Angeles*, the facts were distinguishable as the plaintiffs were not equipped with breathing apparatus or “turnout” gear and there was no evidence that such employees were ever ordered to perform fire suppression activities.³⁸ Judge Consuelo B. Marshall held that dual role firefighter paramedics did not have the “responsibility” to engage in fire suppression.³⁹

With regard to similar issues raised in *Rooker v. City and County of San Francisco*, the Court denied any barr based on collateral or judicial estoppel as requested by the defendant as the case was settled after the court denied both parties summary judgment motions.⁴⁰ Judge Walker in the *Rooker/Weaver* litigation only found that the completion of H-3 firefighter academy qualified H-3 employees as “trained in fire suppression”.

The effect of 203(y) on Section 553.215 (Ambulance and Rescue Service Employees)

In *Vela*, the Fifth Circuit, in discussing the retroactively of the 1999 amendment adding 29 U.S.C. § 203 (y), stated as follows:

Moreover, § 203(y) dispenses with the rescue training and **regularity** requirements for exemption of EMS workers under the pre amendment regulations.⁴¹

The Court determined that the City failed to meet the “regularity” prong of the § 553.215 two-part test, appeared to agree that even if the two part test was met, the EMS worker could still qualify for overtime compensation under the 40 hour standard if he spent more than 20% of his working time engaged in nonexempt activities. The Court found it unnecessary to make that decision.⁴²

³⁷ *Id.*

³⁸ *Cleveland v. City of Los Angeles*, No. 99-9175 at 12 (C.D. Cal. July 3, 2002), *appeal docketed*, No. 03-55505 (9th Cir. March 26, 2003).

³⁹ *Id.* at 23-24.

⁴⁰ *Rooker v. City and County of San Francisco*, No. C-99-1095 (N.D. Cal March 2, 2001).

⁴¹ *Vela v. City of Houston*, 276 F.3d 659, 674 (5th Cir. 2001); *See also* 145 CONG. REC. at H11,500 (1999) (statement of Rep. Boehner).

⁴² *Vela v. City of Houston*, 276 F.3d 659 at 672 n.18 (5th Cir. 2001).

Private Settlements

Ordinarily, a settlement between an employee and employer for compensation due for violation of the FLSA requires either a DOL supervised settlement under 29 U.S.C. § 216 (c) or a stipulated judgment in a lawsuit where the court makes a finding of fairness.⁴³

Recently, the U.S. District Court for the Western District of Texas, San Antonio Division, approved a private settlement agreement of a FLSA claim for overtime benefits. In *Martinez v. Bohls Bearing Equipment Co.*, Judge Rodriguez held that a release of rights under the FLSA is enforceable where there is a bona fide dispute as the amount of hours worked or compensation due. Plaintiff, employed as a warehouseman and driver, sued for additional compensation for work on Saturdays. The District Court found that at the time the compromise agreement was executed, there existed a dispute as to liability as the employee, although claiming to be owed additional overtime pay over the settlement amount, failed to offer evidence of the amount paid each pay period and his actual rate of pay was disputed.⁴⁴

Department of Labor Websites

For additional help, DOL has established an online service to assist with:

1. overtime exemptions at www.dol.gov/elaw/overtime.htm;
2. hours worked at www.dol.gov/elaws/esa/flsa/hoursworked/default.asp;; and
3. FLSA at www.dol.gov/elaws/flsa/htm.
4. DOL Opinion letters at www.dol.gov/esa/whd/opinion/flsa.htm.

⁴³ *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 114 (1946).

⁴⁴ *Martinez v. Bohls Bearing Equipment Co.*, 361 F.Supp.2d 608 (W.D. Tex. 2005).

NEW STANDARD TESTS

Executive Exemption Test

Salary \$455 per week
Duties: <u>Management</u> Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; <u>Supervision</u> Who customarily and regularly directs the work of two or more other employees; and <u>Authority</u> Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Administrative Exemption Test

Salary \$455 per week
<u>Management Related Office Work</u> Primary duty consists of the performance of office or non-manual work directly related to management or general business operations of the employer or the employer's customers; and <u>Discretion</u> Whose primary duty includes the exercise of discretion and independent judgment with respect to <u>matters of significance.</u>

Professional Exemption Test – “Learned Professionals”

Salary \$455 per week
Duties: <u>Intellectual Work</u> Primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character and which <u>Discretion</u> Includes work requiring the consistent exercise of discretion and judgment) <u>Specific Field</u> Work in a field of science or learning customarily. <u>Prolonged Specialized Instruction</u> Knowledge acquired by a prolonged course of specialized intellectual instruction.

Professional Exemption Test – “Creative Professionals”

Salary \$455 per week
<u>Work Type</u> Primary duty is the performance of work requiring invention, imagination, originality or talent. <u>Recognized Field</u> Work in a recognized field of artistic or creative endeavor.