

Chapter 22

EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, AND OUTSIDE SALESPERSON
EXEMPTIONS - FLSA SEC 13(a)(1)

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Chapter 22

EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, AND OUTSIDE SALESMAN - FLSA
SEC 13(a)(1)

22a GENERAL CONSIDERATIONS

22a00 Regulations and Interpretations 541. The terms "executive", "administrative", "professional", and "outside salesman" are defined in Reg 541, Subpart A, Wage-Hour interpretations of the terms in Reg 541, Subpart A, are contained in the Reg 541, Subpart B.

22a01 Exemption period. The Sec 13(a)(1) exemptions are applied on the basis that each w/v constitutes a separate period of exemption. However, certain of the tests are so worded that a determination of exemption must be made by considering the conditions of employment over a more extended period. For example, an employee may be paid the salary required during certain w/v's, but an analysis of his pay over a longer period may reveal that he is not actually compensated "on a salary basis". In other situations, investigation may disclose that a supervisor does not "customarily and regularly" direct the work of two or more employees in his department, despite the fact that he may in particular w/v's have more than one employee under his supervision. It must always be kept in mind, however, that a change in an employee's duties, responsibility, or salary (even though temporary) may bring a change in exemption status.

22a03 Enforcement policy in Reg 541.602 not limited to "main" store employees. The enforcement policy set out in Reg 541.602 is not limited in application to executive and administrative employees in the "main" store of a multi-unit enterprise. Where an executive or administrative employee who works in a branch store otherwise meets all of the requirements, the enforcement policy shall be applied.

22b SALARY BASIS

22b00 Salary reduction as result of reduced workweek. A reduction in salary to not less than the applicable minimum salary because of a reduction in the normal scheduled w/w is permissible and will not defeat the exemption, provided that the reduction in salary is a bona fide reduction which is not designed to circumvent the salary basis requirement.

22b01 Extra compensation paid for OT. Extra compensation may be paid for OT to an exempt employee on any basis. The OT payment need not be at time and one-half, but may be at straight time, or flat sum, or on any other basis.

22b02 Salaries paid by joint employers. When an otherwise exempt employee is jointly employed by two or more employers (see IB 791), each of whom pays him on a salary basis as defined in Reg 541, his salaries may be combined for purposes of meeting the minimum salary requirement.

22b03 Computation of a salary on an hourly rate basis. An employee whose salary is computed on an hourly rate basis will be considered as employed "on a salary basis" if he is guaranteed a salary which is at least equal to the salary prescribed by Reg 541 and if there is a reasonable relationship between the hourly rate, the regular or normal working hours and the amount of the weekly guarantee. The "reasonable relationship" test will be met if the weekly guarantee is roughly equivalent to the employee's earnings at the assigned hourly rate for his normal w/w.

22b04 Offsetting subsistence allowance paid military personnel. Military subsistence allowances may not be included in the amounts offset against the salary required by Reg 541 since such payments constitute payment for board, lodging, or other facilities. (However, see Reg 541.118(a)(4) regarding military pay.)

22b05 Deduction of extra compensation paid for extended workweek. (a) Extra compensation paid to an exempt employee on a scheduled extended w/w may be deducted from his pay if the employee fails to work the full extended w/w schedule. Since the payment of extra compensation is an addition to, rather than a part of an employee's predetermined salary, the deduction of all or part of this additional amount, when an exempt employee fails to work the full extended w/w schedule, will not be a deduction from the employee's predetermined salary.

(b) An extended w/w schedule is a definite schedule of hours longer than the regular w/w for a temporary period, usually a month or more, with OT generally paid for the extra hours or days worked. For example, an employee on an eight-hour day, five-day week schedule may work five days of nine hours each or six days of eight hours. A change in the w/w which is intended to be or is in fact permanent is not an extended w/w as herein used.

(c) Where an extended w/w has been in effect for some time, the CO shall bring to the employer's attention the fact that the extended w/w schedule may actually represent the regular schedule for the employee and the "OT" paid is part of the employee's predetermined salary. However, no other action shall be taken by the CO.

22b06 Deductions for infraction of security regulations. Deductions or penalties imposed on employees for infraction of security regulations required by a government agency will not defeat the exemption.

22b07 Deductions for disability insurance benefit payments. (a) When an insurance plan is bona fide, compliance with its terms is compliance with the salary basis of payment even though a waiting period in excess of one or more days is required before the employee becomes eligible for inclusion in the insurance plan, or there is a waiting period for each illness before benefits are paid.

(b) The fact that the employee receives no pay for some period during an illness, or that the employee's leave pay is less than his predetermined salary will not defeat the salary basis requirement, so long as the plan is a bona fide insurance plan.

22b08 Deductions for board, lodging, and other facilities. (a) Deduction for such purposes may be made without causing loss of exemption under Reg 541, provided the remaining portion of the salary is paid free and clear, and it meets the appropriate minimum salary test.

(b) Reg 541.117(c) provides in part that "the regulations in Subpart A of this part do not prohibit the sale of such facilities to executives on a cash basis if they are negotiated in the same manner as similar transactions with other persons". This principle does not apply in situations where the required \$125 per week salary for an otherwise exempt apartment house manager is made up in part by housing furnished and the nature of the job requires him to reside on the premises. In such cases, the housing facility may be treated as part of the salary only to the extent that any deduction (as set out in (a) above) does not reduce the actual cash amount paid below the \$125 per week salary required for exemption. For example, if the agreed salary for an apartment house manager is \$135 per week, no more than \$10 can be deducted from his pay for the apartment in which he lives on the premises. Also, a separate transaction in which the apartment house manager pays the employer an amount as rent so as to reduce the employee's salary below that required by the regulations would make the exemption inapplicable. However, the usual Sec 3(m) rules will apply with respect to statutory "wages" in the case of an apartment house manager or any other employee who does not qualify for exemption under Reg 541.

22b09 Application of Reg 541.5a to TV film and videotape production employees. Reg 541.5a provides an exception to the salary requirements for otherwise exempt executive, administrative, and professional employees in the motion picture producing industry. This special proviso is also applicable to such employees of producers of television films and videotapes. (See also Reg 541.601.)

FIELD OPERATIONS HANDBOOK - 2/12/81

SEE INSERT #1603

The following SUPERSEDES FOH 22b12 and 22b13:

22b12 Revised salary tests and their effective dates

- (a) On 1/13/81 revisions to amend the salary tests of Reg 541 were published in the Federal Register. These revisions apply to Subpart A--General Regulations and are reflected in the following tables:

	<u>Executive and Administrative</u>	<u>Professional</u>	<u>"Upset" Salary Test</u>
Present Salary Test	\$155	\$170	\$250
Effective 2/13/81	\$225	\$250	\$320
Effective 2/13/83	\$250	\$280	\$345

For employees in Puerto Rico, the Virgin Islands or American Samoa, the corresponding tests are:

Present Salary Test	\$130	\$150	\$200
Effective 2/13/81	\$180	\$225	\$260
Effective 2/13/83	\$200	\$250	\$285

The special compensation test (see Reg 541.5a and 541.601) for employees in the motion picture industry will be \$320 per week beginning 2/13/81 and \$345 per week beginning 2/13/83.

- (b) The effective date of the revised salary tests for the Reg 541 exemption is 2/13/81. In administering these revised regulations, Wage-Hour will consider them applicable to employees paid weekly salaries for the first w/w beginning on or after 2/13/81. For employees paid salaries for pay periods of longer than a week (monthly, semi-monthly, biweekly) the revised salary tests shall be considered applicable for the first such pay period beginning on or after 2/13/81.

FIELD OPERATIONS HANDBOOK - 2/5/81

The following applies to FOH 22b12 on FOH Insert #1598:

The new higher salary tests of Reg 541, transmitted to you on FOH Insert #1598, were to have gone into effect on 2/13/81. They will not go into effect on that date.

Consequently, former Sec 22b13 is hereby reinstated.

-0-

NOTE: THIS INSERT IS REISSUED TO CORRECT THE INSERT NUMBER, WHICH SHOULD BE 1603 INSTEAD OF 1602. PLEASE CORRECT YOUR ENTRY ON FORM WH-100 ACCORDINGLY.

FIELD OPERATIONS HANDBOOK - 9/7/84

ADD the following new Sec to text and Table of Contents:

22b14 Deductions for cash register shortages

Deductions from an otherwise exempt employee's salary may not be made for cash register shortages. Deductions may be made only for the reasons stated in Reg 541.118(a). An employer may not artificially divide a salary into two parts and subject one part to deductions for cash register shortages. For example, a salary of \$200 per week may not be divided into \$155 (the guaranteed minimum) and an additional \$45 which is made subject to deductions not permitted under Reg 541.118(a).

FIELD OPERATIONS HANDBOOK - 8/28/87

ADD the following new sec to text:

22b15 Salary basis of payment for State and local government employees

- (a) Provided the conditions in (b) are met, WH will not deny an exemption under sec 13(a)(1) to an otherwise exempt State or local government employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or due to illness, because such employee does not have, or has exhausted, available paid leave for such absence(s).
- (b) This enforcement policy will apply only where the public agency can show that an applicable State or local law or ordinance in effect prior to 4/15/86 (the effective date of the 1985 FLSA Amendments) prohibits payments for such absences if the employees have exhausted their available paid leave.
- (c) This enforcement policy is not intended to affect employees' rights under FLSA sec 16(b).

22b11 Annual salary earned in a shorter period. Certain employment such as that provided by schools does not normally constitute twelve months of work each year. For the convenience of the employees, the salary earned during the duty months is often paid in equal monthly installments throughout the year. If the minimum salary requirement for exemption under Reg 541 is met considering the period of time the employee is actually employed the fact that he draws less than the required amount prorated over a longer period will not disqualify him for the exemption. For example, a cafeteria supervisor in a school (with respect to whose employment there is a salary test for exemption) is paid \$7,000 for a 10-month contract and thus earns \$700 per month during his duty period but draws only \$583.33 per month over the full year. The salary test under Reg 541.1(f) would be met in this case.

22b12 Effective date of revised salary tests for the executive, administrative, and professional exemptions pursuant to Reg 541. The effective date of the revised salary tests for the Reg 541 exemption is 4/1/75. In administering these revised regulations, Wage-Hour will consider them applicable to employees paid weekly salaries for the first w/w beginning on or after 4/1/75. For employees paid salaries for pay periods of longer than a week (monthly, semi-monthly, biweekly) the revised salary tests shall be considered applicable for the first such pay period beginning on or after 4/1/75.

22b13 Salary tests. The present salary tests have been in effect since 4/11/75 and, consequently, many employees who now meet the salary tests, including the upset salary, may not meet one or more other tests for exemption. Thus, it will be necessary to carefully review the exempt status of employees for whom exemption is claimed, including relatively highly paid employees, and pay closer attention to the duties, responsibilities, and other criteria.

SEE
INSERTS
 #1598
 +
 #1603

22b14 - SEE INSERT #1689

22b15 - SEE INSERT #1753

22c OTHER CRITERIA

~~SEE 22c00 Supervision of two or more other employees. If an employee super-
 vises one employee and on fairly frequent occasions, as the need arises,
 INSERT supervises additional temporary employees, he meets Reg 541.1(b) in those
 #1677 weeks when he supervises more than one employee. However, if he occasionally
 supervises more than one employee, he does not qualify for exemption even
 in those weeks when he supervises two or more employees, unless there is
 a change of status as when he acts as foreman during the latter's vacation.~~

22c01 Sole charge of establishment. (a) Employees whose duties involve establishing and supervising offices in cities where their employer has been engaged to conduct a survey, publish a city directory, or do similar work may be in sole charge of an independent establishment as defined in Reg 541.1(e). The fact that the locations are established for relatively short periods and are only temporary does not diminish the fact that when such an office is functioning it has a fixed location and is geographically separated from other property of the employer.

(b) For purposes of the "sole charge" exception, the premises of a customer being serviced by an independent contractor would not constitute "an independent establishment or a physically separated branch establishment" of the contractor pursuant to Reg 541.113. This would be the case where any independent contractor (guard service, janitorial firm, accounting firm, etc.) performs a service or activity on the premises of a client or customer who has contracted to have such a function performed on their premises.

~~SEE 22c02 Primary duty. Reg 541.103 provides that the 50% test is not a hard
 INSERT and fast rule but rather a flexible rule of thumb. In some cases an exempt
 #1627 employee may spend less than 50% of his time in managerial duties but still
 have management as his primary duty. This is of significance with respect
 to an employee to whom the limitation on nonexempt work does not apply (for
 22c03 example, an employee in charge of a separate branch or one who is paid at
 or above the special proviso for high salaried employees).~~

SEE 22d SPECIFIC OCCUPATIONS - 541.1, 541.2, 541.3

~~INSERT 22d01 Auto damage appraisers. Appraisers whose functions are to inspect
 #1620 damaged motor vehicles in order to estimate the cost of the necessary
 repairs, and who also reached an "agreed" price with the repair shop on
 the cost of repairs, do not customarily and regularly exercise discretion
 and independent judgment as required by Reg 541.2. Their work consists
 essentially of the determination of facts, and in making their estimates
 they are guided primarily by their skill and experience and by written
 manuals of established labor and material costs. However, there may be
 sufficient elements in the job to permit the application of the upset
 salary rule.~~

22c04
 SEE
 INSERT
 #1833

22d02 Die, jig, and fixture designers. Die, jig, and fixture designers apply specialized skills acquired by experience and do not exercise the discretion and independent judgment required for administrative employees.

FIELD OPERATIONS HANDBOOK - 4/18/84

The following SUPERSEDES FOH 22c00:

22c00 Supervision of two or more other employees

- (a) If an employee supervises one permanent employee and, on fairly frequent occasions, as the need arises, supervises additional temporary employees, the test in Reg 541.1(b) is met in those weeks when he or she supervises two or more employees for a total of 80 hours of work.
- (b) Two full-time employees or the equivalent within the meaning of Reg 541.105(a) is generally considered to mean 80 hours of work by subordinate employees. In other words, the total number of hours worked by subordinate employees in a w/w must equal 80 in order to constitute the equivalent of two full-time employees. Unusual circumstances might occasionally justify lower standards. For example, firms in some industries such as banking and insurance have standard w/w's of 35 or 37½ hours for their full-time employees. Where such is the case, supervision of employees working a total of 70-75 hours in a w/w may constitute the equivalent of two full-time employees.
- (c) However, if the employee supervises two or more employees only on rare occasions, he or she does not qualify for exemption even in those w/w's when two or more employees are supervised, unless there is a change of status as when the employee acts for his/her supervisor during the latter's vacation.
- (d) The determination as to whether an employee customarily and regularly supervises other employees within the meaning of Reg 541.1(b) depends on all the facts and circumstances. In certain instances, a supervisor (i.e., a district sales manager) may not work at the same time or within the same establishment as his/her subordinates. Such a supervisor may satisfy the criteria of 541.1(b), provided the supervisor does in fact customarily and regularly direct the subordinate employees' work.

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FIELD OPERATIONS HANDBOOK - 4/20/82

The following SUPERSEDES FOH 22c02:

22c02 Primary duty

- (a) Reg 541.103 provides that the 50% test is not a hard-and-fast rule but rather a flexible rule of thumb. In many cases an exempt employee may spend less than 50% of his time in managerial duties but still have management as his primary duty.

Where an employee is in charge of an establishment, or a customarily recognized department thereof, during his tour of duty, and satisfies the "other pertinent factors" set out in Sec 541.103, he will be considered to have management as his primary duty. Those factors are the following:

- (1) Relative importance of managerial duties as compared with other types of duties.
- (2) Frequency with which the employee exercises discretionary powers.
- (3) Relative freedom from supervision.
- (4) Relationship between employee's salary and wages paid other employees for the kind of work performed by the supervisor.

The fact that an employer has well-defined operating policies and also specifies tasks to be performed by managers in great detail will not necessarily diminish their managerial status.

- (b) For example, management personnel in small retail or service establishments who are in charge of the establishment during their tour of duty and are paid substantially higher wages than their subordinates will typically meet the primary duty test.

FIELD OPERATIONS HANDBOOK - 7/9/81

Add the following new Sec to text and Table of Contents:

22c03 Primary duty during a strike period

During a strike, highly paid executive, administrative, and professional employees often perform the work of nonexempt rank and file employees. This raises a question as to their exemption status under Reg 541. The "primary duty" test does not expressly apply on a w/w basis. Thus it is unlike the 20 percent and 40 percent tolerances for nonexempt work, which do expressly apply on a w/w basis. On the basis of this distinction, the Court held in Marshall v. Western Union Telegraph Co., 24 WH Cases 704 (C.A. 3, 1980), which involved a three-month strike, that the primary duty requirement in the short test could not be applied on a w/w basis, or over any specific timeframe, until such time as Reg 541 is amended to specify a timeframe. On the basis of this ruling and until further notice, Wage-Hour will, on a nationwide basis, deem the primary duty test to be satisfied during a strike period, provided that the otherwise exempt employee who takes on rank and file work during that period (1) satisfied the primary duty test prior to the strike and (2) is paid no less than the upset salary during the strike.

FIELD OPERATIONS HANDBOOK - 5/22/95

ADD the following new Sec to text and Table of Contents:

22c04 Professional or occupational licenses.

The possession by an employee of a license to practice a certain profession or occupation may be considered along with other criteria in determining the exempt status of such employee. However, the possession of a license permitting an employee to perform duties which would meet the tests of an exempt employee pursuant to Reg 541 does not make that employee exempt. In order for an employee to meet the duties tests under Reg 541, the employee must actually perform exempt duties.

22d03 Dispatchers - Reg 541.1. When making a determination of the status of dispatchers employed by bus companies and trucking concerns, Reg 541.105(b) and 541.107 should be considered. It may be that the dispatcher has as his primary duty the routing of drivers and trucks as a routine duty performed for the executive who is actually managing the department. It is possible, however, for a dispatcher to be exempt as an executive employee where the facts show that his primary duty is the management of the terminal or a subdivision thereof and he meets all other requirements of Reg 541.1.

22d04 Dispatchers - Reg 541.2. (a) As pointed out in Reg 541.207(c), the exercise of discretion and independent judgment is different from the application of skills and procedures. Dispatchers who apply their knowledge in following prescribed procedures and techniques are not exercising discretion and independent judgment within the meaning of the Reg. The exempt status of individual dispatchers will depend upon the facts in each case. In this connection, the possible application of the upset-salary rule should not be overlooked.

(b) Truck dispatchers' duties of routing trucks and assigning drivers are, for the most part, dependent upon their knowledge of types of trucks required for various kinds of goods, their knowledge of the city and suburbs, and their knowledge of the locations of various factories and buildings. Such duties do not ordinarily involve discretion and independent judgment at the level contemplated by the Reg. However, where the company does not operate over regular routes, or where there is a choice between using the company's own trucks or a contract carrier's trucks or where dispatchers handle emergency situations, there may be the exercise of discretion and independent judgment.

(c) Bus dispatchers' duties ordinarily include assigning drivers and routing buses over predetermined routes, calling out bus arrivals and departures, furnishing information to bus passengers, collecting and recording cash fares turned in by bus drivers, and maintaining and filling out various detailed forms and records. This work consists of the application of skills and procedures based upon the dispatchers' knowledge gained by experience and reference to routes assigned by the various public utility commissions. They also determine the need for extra buses, decide whether to cancel runs and take actions on accident reports. The latter duties may on certain occasions require the use of discretion and independent judgment but such occasions ordinarily arise only infrequently. Typically, bus dispatchers performing the above duties do not qualify for exemption as administrative employees.

22d05 Exempt and nonexempt drafting when performed by a professional employee. (a) Drafting performed by a bona fide professional employee in connection with his own engineering work is considered to be an essential part of, and necessarily incident to his professional

engineering work. Such drafting, regardless of how routine or the amount of time thus spent is exempt work so long as the drafting work relates to the development and execution of his own professional work.

(b) Routine drafting done in connection with the professional work of someone else is non-exempt work.

22d06 Junior geophysicists. Junior geophysicists are usually not exempt under Reg. 541.3. Employees in this occupation normally spend over 20% of their time "running the horizon", performing routine surveying work, making weekly reports of the group, and making tracings and drawings.

22d07 News editors in a broadcasting company. (a) Such duties as analysis of the station's news presentations in order to improve news coverage, deciding what features should be highlighted by special programs, and other similar duties are administrative functions.

(b) Non-exempt work includes routine announcing, the announcing of straight news, coverage of events as a news reporter, and the routine editing and rewriting of news stories received from direct sources and news and radio wires. However, the upset salary test should not be overlooked.

22d08 Technical writers. Technical writers who translate scientific or engineering data into instruction form, when the work requires knowledge of a type commensurate with a professional education, are performing work of a professional nature.

22d09 Photogrammetry - Stereotopographer. (a) The job of compiling maps by use of Kelsh and Multiplex instruments is not true professional work since

(1) The requisite knowledge is not of an advanced type. Stereo-plotters are generally trained through an apprenticeship program.

(2) Specialized intellectual instruction is provided in the field of photogrammetry, but the goal of this instruction is not to train operators. It is not necessary for an instrument operator to be educated in the theory of photogrammetry.

(3) The training period is not prolonged to the same extent as medical, legal, or engineering education and the skill is acquired through practice rather than intellectual exercise.

(4) Although an operator is required to exercise discretion and judgment, the work is essentially mechanical and routine.

22d10 Field representatives. Field representative, product consultant, service and sales engineer, factory representative and similar titles are frequently given to employees who visit their employers' customers for the purpose of advising them on the use or acquisition of their employers' products. Where their duties involve a comparison and evaluation of alternative courses of conduct with respect to matters of significance, as, for example, a determination as to the product best suited to the customers' needs or recommendations regarding alternative uses for particular products, their work normally calls for the exercise of independent judgment and discretion within the meaning of Reg 541. On the other hand, advising customers as to the operation, maintenance, and repair of their employers' products is work which calls for the application of skill in applying techniques based on experience rather than the exercise of the requisite independent judgment and discretion in matters of significance.

22d11 Executive secretaries. Duties of an exempt executive secretary are distinguished from those of the usual "private secretary" in that they customarily and regularly involve the exercise of discretion and independent judgment in matters of significance rather than adherence to prescribed procedures or specific instructions. Such employees may, for example, arrange interviews and meetings, and handle interviews and meetings themselves where in their judgment the executive's attention is not required. They may also, in connection with the responsibility for replying to correspondence, make the decision as to whether they should answer the executive's correspondence themselves, prepare a reply for the executive's signature, or route it to someone else for handling.

22d12 Display advertising installers. An employee who installs advertising matter in the sales establishments of his employer's customers, checks the employer's product in the customer's sales establishment for established quality standards, and checks the customer's inventory for purposes of assuring adequate supplies of his employer's goods on hand for sale is ordinarily performing specialized work along standardized lines involving well-established techniques and procedures rather than work which involves the exercise of discretion and independent judgment.

22d13 Port stewards, inventory and receiving clerks. An employee who inspects and checks inventories of materials and supplies, and also checks and examines the articles themselves as they are received in order to make sure that both as to quantity and quality sufficient materials and supplies are on hand for proper operation, or in the case of a port steward to be certain that the ship is properly outfitted for its voyage, is performing work in accordance with objective standards which requires skill and experience rather than the exercise of discretion and independent judgment.

22d14 Oil well logging and core analysis crews. A field employee engaged in furnishing well logging and core analysis service to oil well drilling

companies who on the basis of his tests, exercises considerable discretion and independent judgment in recommending the suspension, commencement, or continuation of drilling operations may qualify as an administrative employee. The professional exemption is not usually applicable to this type of employee.

22d15 Nurses. The Sec 13(a)(1) exemption for professional employees may be applicable to nurses provided all tests of Reg 541.3 are met (see Reg 541.302(e)(1)). However, it should be noted that the exception from the salary or fee requirements (see Reg 541.314) does not apply to nurses as they are not engaged in the "practice of medicine or any of its branches" within the meaning of Reg 541.3(e).

22d16 Pharmacists. The Sec 13(a)(1) exemption for professional employees may be applicable to pharmacists provided all tests of Reg 541.3 are met. However, it should be noted that the exception from the salary or fee requirements (see Reg 541.314) does not apply to pharmacists as they are not engaged in the "practice of medicine or any of its branches" within the meaning of Reg 541.3(e).

22d17 Foreign physicians and surgeons. A foreign physician or surgeon may qualify for exemption as a professional employee if he meets all the pertinent tests relating to duties and responsibilities (see Reg 541.3). A foreign license and the standard ECFMG certificate from the Educational Council for Foreign Medical Graduates are regarded as a "valid license or certificate" for purposes of the proviso in Reg 541.3(e).

22d18 School librarian. (a) A school librarian whose typical duties are to run a school library, stock the library, keep a budget on the library books, instruct the students in library procedure, as well as to spend considerable time in assisting teachers and students in research and the composition of reading lists to meet the reading levels of various classes, may qualify for exemption as "academic administrative personnel". See Reg 541.201(c) and 541.202(e).

(b) A school librarian may also instruct and tutor students in the use of the library. Such instruction and tutoring is not considered to be "teaching" within the intent of Reg 541.302(g)(2) but is merely a necessary incident to the normal duties of a librarian.

22d19. Flight instructors. (a) A flight instructor may qualify for exemption as a teacher under Reg 541.3(a)(3) if (1) he is certified in accordance with Part 61 of the Federal Aviation Reg (14 CFR Part 61), and (2) is engaged and employed as an instructor by a flight school approved by the FAA under FAA Reg 14, CFR Part 141. A flight school which is approved under FAA Reg, Part 141, would constitute an "educational establishment" pursuant to Reg 541.215.

(b) Although there is no salary requirement for exemption as a teacher, a flight instructor must, however, meet the 20% limitation on the performance of nonexempt work. Wage-Hour will consider exempt activities to include, among other things, all student flight instruction including related ground training such as the maintenance of an airplane engine, instruction in FAA regulations, navigation, meteorology, radio procedure, maintenance of student progress and accomplishment records, scheduling of students and aircraft used for instruction, as well as maintaining liaison with the FAA for current teaching techniques and requirements. Also considered as an exempt activity would be the performance of minor repairs on aircraft the instructor uses in training.

22d20. Teachers and academic administrative personnel in Job Corps centers. A Job Corps center which provides basic educational instruction and vocational training, as well as training in personal care, to enable academically deficient enrollees to be self-supporting, (see FOH 10b22) is considered an "other educational establishment or institution" (see Reg 541.215) for purposes of the Sec 13(a)(1) exemption. Consequently, teachers or academic administrative personnel employed by such centers may qualify for the exemption for teachers and academic administrative personnel under Sec 13(a)(1), provided all the tests are met.

22d21 Other occupations. Amendments to Part 541 (29 CFR) dated 5/7/73 make reference to numerous job titles not appearing in the "Occupational Index" in Reg 541. These job titles which will be incorporated into the Index in the next amendment to the Regulations are listed below for easy reference:

Assistant supervisor	541.105
Branch manager	541.113
Buyer	541.105
Chiropodist	541.314
District manager	541.113
Floorman, sales person	541.108
Laboratory assistant	541.306, 541.307
Laboratory technicians	541.306, 541.308
Manager	541.108
Medical technologist	541.302
Nurse	541.302
Practitioner	541.302, 541.314

Programmer	541.103
Salesman, outside	541.600
Systems analyst	541.205, 541.207, 541.302
Teacher	541.2, 541.3, 541.56, 541.314
Trainee, Programmer	541.207
Working foreman	541.105

22d22 Preschool "teachers". (a) While preschools in most cases engage in some educational activities for the children attending, preschool employees whose primary duty is to care for the physical needs of the children would ordinarily not meet the requirements for exemption as teachers under Reg 541. Generally such employees do not meet the Reg 541.3(b), (c), and (d). This is true even though the term "kindergarten" may be applied to the ordinary day care center. However, bona fide teachers in a kindergarten are still considered exempt under the same conditions as a teacher in an elementary or secondary school.

(b) Work which can be performed by employees with education and training below the college level would not be work of a bona fide professional level within the meaning of Reg 541.3. Such work, even though basically teaching or instructing, could not, pursuant to the exemption, meet the requirement for the consistent exercise of discretion and judgment nor would it be predominantly intellectual and varied in character.

22d23 Physician assistants.

- (a) A physician assistant may qualify for exemption under Reg 541.3 under the following conditions:
- (1) The physician assistant functions in material support of a licensed physician and performs tasks or combinations of tasks traditionally performed by the physician himself; and
 - (2) is engaged in direct patient contact or performs tasks well-defined by statute or recognized custom of medical practice such as -
 - a. performs initial and periodic physical examinations, mental status examinations, and medical history examinations;
 - b. makes appropriate records of findings during examinations to be reviewed and countersigned by the supervising physician;
 - c. prepares narrative summaries on patients' conditions when they are admitted for medical or psychiatric services or discharged following medical or psychiatric services;
 - d. orders and interprets laboratory studies and x-ray examinations to determine treatment, orders medication and other forms of treatment ordered by the physician, starts intravenous procedures;
 - e. writes orders to increase, decrease, or change medication (subject to checking and signing by physician);
 - f. assists with diagnosing and treating endocrine, cardiovascular, respiratory, digestive, hematological, and infectious congenital disease;
 - g. follows the progress of patients and makes changes in examination or treatment;
 - h. applies local anesthetic, examines and cleans wounds, incises, and drains abscesses, and sutures;
 - i. makes rounds in an infirmary or medical-surgical ward alone or with a physician;
 - j. conducts individual and group psychotherapy, psychodrama, and therapeutic listening sessions, counsels with patients and relatives on various physical and mental problems;
 - k. confers with physicians, psychologists, and other professional staff about patients' mental and physical conditions;
 - L. may supervise professional and non-professional personnel; and
 - m. performs related duties as delegated and required by the supervisory physician and the practice setting ; and
 - (3) has successfully completed 3 academic years of preprofessional study in an accredited college or university (or has had 2000 hours of patient care experience in a military or civilian occupation such as laboratory technology, nursing, psychology, biology, or related

activity) plus not less than one year of professional course work in a medical school or hospital;
and

- (4) is compensated for his or her services on a salary basis of not less than \$250 a week, exclusive of board, lodging, or other facilities.

22d24 Dental hygienists.

- (a) Dental hygienists do not ordinarily qualify under Reg 541.3 since the job does not generally meet the tests in 541.3(a)(1), 541.3(b), and 541.3(c). In the usual circumstances a dental hygienist is a highly technical specialist.
- (b) A dental hygienist who has completed four academic years of preprofessional and professional study in an accredited university or college recognized by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association will be considered as meeting Reg 541.3(a)(1). In such case, the determination of exempt status will be made on an individual basis, and depends upon whether the hygienist meets all of the other tests in Reg 541.3.

22d25 Systems Analysts/Computer Programmers.

- (a) Systems analysts, computer analysts, and others, who design a system of programs, develop methods and systems for resolving computer problems or determine how a problem can be processed so that a solution can be worked out on a computer, exercise the necessary discretion and independent judgment for the administrative exemption.
- (b) Individuals who are involved in program implementation, debugging, coding, updating, or who otherwise work on programs previously designed by others, are applying acquired skills rather than exercising discretion and independent judgment. These employees are sometimes called "computer programmers". This is clearly mechanical work and nondiscretionary in nature, and nonexempt.
- (c) However, the performance of the activities described in (b) above during the initial development stage of the program by the individuals who designed the system or program will be considered work "directly and closely related" to their administrative work, and thus exempt.

22d26 Application of Reg 541.3 to certain workers employed in computer-related occupations.

- (a) Public Law 101-583 required the issuance of regulations creating an exemption for certain computer systems analysts, computer programmers, software engineers, and other similarly skilled employees in the computer field, enabling them to qualify for exemption under FLSA Sec 13(a)(1). An interim final rule, published in the Federal Register on 2/27/91, with an effective date of 3/29/91, added Reg 541.5c which exempted workers in the affected computer-related occupations who met the new specified duties tests and whose regular rate of pay, regardless of whether paid on a salary basis or on an hourly basis, was in excess of 6½ times the MW. Workers in the computer field paid on a salary basis at an amount equal to or less than 6½ times the MW could not qualify under the new exemption but continued to be eligible for exemption if they met the existing duties and responsibilities tests prescribed for the executive or administrative exemption. Workers paid on an hourly basis at rates equal to or less than 6½ times the MW continued to be ineligible for exemption under either the interim final rule or the previously existing rules.

- (b) The final rule for computer-related occupations was published in the Federal Register on 10/9/92 and became effective on 11/9/92. The new rule deleted Reg 541.5c and adopted new exemption criteria in Reg 541.3 to permit the specified computer-related occupations to qualify for exemption as professional employees. The final rule provides that the statutory exemption is not limited to employees whose pay exceeds 6½ times the MW. This significant revision is the result of public comments in the rulemaking record and a reexamination of the statute and its legislative history, including additional information from the Congressional sponsors of the measure. (See also FOH 52L06.)
- (c) The exemption in Reg 541.3 is defined more fully in Subpart B - Interpretations, under a new Reg 541.303, and, among other changes, Reg 541.312 is revised to permit an exception from the "paid on a salary basis" requirements of Reg 541.118 for those computer professional employees who are paid on an hourly basis at a rate in excess of 6½ times the MW.
- (d) Under the final rule, a worker paid a "salary" of \$170 per week or more, but less than \$250, and who meets the following duties tests may qualify for exemption as a professional employee:
- (1) a primary duty involving work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field;
 - (2) work that requires the consistent exercise of discretion and judgment in its performance;
 - (3) work that is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
 - (4) not more than 20 percent of hours worked in the workweek are devoted to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) above.
- (e) An employee paid \$250 or more per week on a salary basis may qualify for exemption under a "short" test of duties: (1) primary duty consisting of work identified in item (d)(1) above, and (2) work requiring the exercise of discretion and independent judgment.
- (f) Hourly paid workers whose regular rate of pay is greater than 6½ times the MW may also qualify under the new professional exemption if they meet the "short" test of duties described in item (e) above.
- (g) The new rule defines primary duty as one or more of the following:
- (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
 - (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
 - (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

- (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.
- (h) Unlike the exemption for the learned professions, no particular academic degree is required for this exemption, nor are there any requirements for licensure or certification.
- (i) The exemption does not include employees who operate computers, employees in the manufacture, repair, or maintenance of computer hardware, or employees whose work may be highly dependent upon the use of computers, e.g., engineers, drafters, designers, etc.
- (j) Employees in computer-related occupations who qualify under the new exemption may also qualify for exemption under Regs 541.1 or 541.2 provided they meet the existing duties and responsibilities tests. (See also FOH 22d25.)
- (k) Employees in the computer field who are paid on an hourly basis and whose rate of pay is equal to or less than 6½ times the MW continue to be ineligible for exemption. (However, see FOH 52L00.)

22d27 - SEE INSERT #1834

FIELD OPERATIONS HANDBOOK - 5/22/95

ADD the following new Sec to text and Table of Contents:

22d27 Paralegals.

- (a) Paralegals generally perform a variety of tasks, including legal research, interviewing clients and potential witnesses and drafting legal documents. Although, absent the availability of a paralegal, these tasks would be performed by an attorney, the performance of such duties by a paralegal does not make them "professional" employees within the meaning of Reg 541. These tasks require the use of skills and the following of specific procedures rather than the exercise of discretion and independent judgement as contemplated by the requirements in Reg 541 for exempt "administrative" or "professional" employees and can be performed by employees with education and training below the college level. Furthermore, these skills are performed under the direction of an attorney who has the sole legal and professional responsibility to practice law and represent the client.
- (b) To be exempt under Reg 541.3(a)(1) professionals must perform work 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. Generally, this has been defined to mean at least a baccalaureate degree or its equivalent. Educational programs leading to paralegal certificates or degrees are generally of short duration, 2 years or less, which does not qualify as a prolonged course of study as contemplated under the professional exemption.

22e OUTSIDE SALESMEN -- 541.5

22e00 Nonexempt work test. The rule that nonexempt work may not exceed 20% of the hours worked in the workweek by nonexempt employees of the employer applies only to full-time employees. The maximum amount of nonexempt work permitted for part-time employees is 20% of their own hours worked in the workweek. (See Reg. 541.507.)

22e01 Outside sales from hand trucks, push carts or other vehicles. Employees who are engaged away from their employer's establishment, such as on the streets or in factories or office buildings, to make sales of food products or other items from hand trucks, push carts or other vehicles are making "outside sales" for purposes of Reg. 541.5. On the other hand, an employee is not engaged in making "outside sales" if his duty is simply to drive a mobile unit to supply other employees of his employer with the merchandise to be sold by them.

22e02 Finance company employees obtaining or soliciting mortgages. Employees of a finance company which is engaged primarily in servicing mortgages and takes mortgages in its own name may be exempt as outside salesmen, if they are customarily and regularly engaged away from their employer's place of business in obtaining mortgages from brokers and individuals. Such soliciting is exempt work under Reg. 541.5(a)(2). Work incidental to the employee's obtaining the mortgage, such as obtaining credit information from the mortgagor, before and after the sale would qualify as exempt work if done with respect to his own sales. Telephone solicitation, obtaining credit and other information with respect to sales made by others, and other work not incidental to his own outside sales would not be exempt work.

22e03 Copywriting, layout, and display work by newspaper advertising salesmen. Layout and display work or copywriting prior to, or during the making of a sale by an outside newspaper advertising salesman or space salesman, when such work is performed as a part of his sales effort, is work which is incidental to, and in conjunction with the making of the sale and so is exempt under Reg. 541.5(2)(b).

22e04 Soliciting business through a dealer. An employee whose duty is to convince a dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k). An example is merchant's contact men employed

by finance companies who call at the place of business of retail merchants dealing in furniture or appliances and bring to the merchant's attention the finance service that the finance company is prepared to offer to any of the merchant's customers who are in need of money for purchases, and who lay the groundwork for a continuing relationship between the finance company and the merchant. The finance man deals with the merchant and the merchant with his customers. The finance man is not exempt under Reg. 541.5, since he does not obtain orders or contracts from either the customers or the merchant.

22e05 Industrial insurance agents. Industrial insurance agents, sometimes called "debit men", call on persons to solicit insurance contracts and, once the contracts have been secured, they call on the insured to collect the premium and thus obtain a renewal of the policy. This renewal work is done on policies originally sold by the agents as well as on policies sold by other agents. Industrial insurance agents engaged in this activity are considered to meet all of the requirements of the outside salesman definition contained in Reg. 541.5, and thus qualify for the exemption.

22e06 Real estate salesmen. (a) The definition of an exempt "outside salesman" in Reg. 541.5 requires that such an employee be employed for the purpose of, and be customarily and regularly engaged in making "sales" within the meaning of Sec. 3(k) of the Act or in obtaining certain orders or contracts for the use of facilities. Real estate salesmen will generally meet this test, since "sales" under Sec. 3(k) of the Act include contracts to sell.

(b) An "outside salesman" must be customarily and regularly engaged "away from his employer's place or places of business" in making such sales. Real estate salesmen typically are required, as a customary and regular part of their employment, to spend whatever time is necessary at the site of property to be sold and in visiting prospects at the latter's homes and offices as a part of their sales effort. Most of them must leave whatever place of business of the employer they use as headquarters in order to perform these tasks.

(c) Real estate salesmen stationed in a model home on a tract from which parcels of real property are being sold with or without improvements, leaving the model home for such purposes, customarily and regularly, would meet the requirement of the definition, so far as making sales "away from" the employer's place of business is concerned. This is true even though all of the property shown to prospects by the salesman is within the tract on which the model home is located. Further, not every home called a "model home" would be a place of business of the employer. One which is in the nature of an "open house" to which a salesman is assigned to meet prospects who may buy that house or another similar one on the tract may more properly be viewed as analogous to the hotel sample room of a traveling salesman referred to in Reg. 541.502(b) than to an actual place of business of the employer.

Transitory assignments of salesmen permanently headquartered at an office of the employer who are sent to a "model home" or other location at a tract where it will be their duty to engage in sales efforts with respect to real estate on the tract would not defeat an otherwise applicable exemption. The salesman would ordinarily be considered to be engaged in such work "away from" the employer's place of business. On the other hand, when for purposes of convenience a "model home" on a real estate development is maintained on a relatively permanent basis as an office of the employer, staffed with necessary personnel for making sales, salesmen who do not customarily and regularly leave this headquarters as a part of their sales efforts would be "inside" rather than "outside" salesmen just as they would be if confined to such inside work in any other office maintained by the employer. For example, certain land or "homesites" are sold in this manner. Prospects are contacted by someone other than the land sales office salesmen and brought to the site where they usually are given a tour of the premises, meal, film or some other type of presentation showing reasons why they should purchase land at the site. The land office salesmen will attempt to "close" the agreement to purchase with the prospects. The salesmen do not customarily and regularly leave the site. In the case of real estate salesmen, however, this would appear to be the unusual, rather than the usual, case. So long as a salesman customarily and regularly goes to the site of the property or to prospects as a part of making his sales, this requirement for "outside" sales work would be met. Moreover, time spent on return to the model home or other headquarters to conclude a sales transaction or to continue sales effort with the prospect would be deemed part of the salesman's outside sales activity.

- (d) See FOH 59c01 for the WH position concerning the applicability of Sec 13(a)(1) for outside salespersons to employees who sell lots at campgrounds.
- (e) Certain activities performed by real estate salesmen in the employer's place of business may be exempt work if the activities performed are in conjunction with and in furtherance of their outside sales work. In this connection, the following activities may be exempt:
 - (1) Bringing a multiple listing book up to date.
 - (2) Calling prospects with whom the salesman has been dealing during his outside sales activity.
 - (3) Dictating or writing letters to such prospects.
 - (4) Talking to such prospects in the office about their particular transactions.
 - (5) Calling a list of prospective buyers or sellers of homes with whom the salesman has had no prior contact.

- (6) Preparing a contract and other forms required for a sale negotiated during the salesman's outside sales activity.
- (7) Talking to a "walk-in" prospect with whom he has had no prior contact and showing him photographs and discussing terms on specific houses, if such activity results in subsequent outside sales activity with the prospect.

22e07 Timeshare salespersons at condominium resorts or campgrounds

See 59c01 for the WH position concerning the applicability of Sec 13(a)(1) for outside salespersons to employees who sell timeshares (i.e., intervals or memberships) at condominium resorts or campgrounds.