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MEMORANDUM FOR REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: PAUL DECAMP
Administrator

SUBJECT: Computer Employees Professional Exemption

This memorandum provides guidance regarding the minimum wage and overtime
exemption for certain employees in the computer field under sections 13(a)(1) and
13(a)(17) of the Fair Labor Standards Act (FLSA) and 29 C.F.R. §§ 541.400-.402.

Sections 13(a)(1) and 13(a)(17) of the FLSA provide an exemption for computer systems
analysts, computer programmers, software engineers, and other similarly skilled workers
in the computer field who meet certain tests regarding their job duties and who are
compensated either on a salary basis at a rate not less than $455 per week or on an hourly
basis at a rate not less than $27.63 per hour. *See* 29 C.F.R. §§ 541.400(a), 541.400(b).
For this exemption to apply, an employee's specific job duties must meet the
requirements specified in the regulations. *See* 29 C.F.R. § 541.400(b).

"Computer Employees" were first included in the regulations as a result of the 1990
enactment by Congress of Public Law 101-583, which directed the Department to treat
specified computer employees as exempt under section 13(a)(1) of the FLSA whether
paid on a salary basis (similar to exempt executive, administrative, or professional
employees) or an hourly basis if they were compensated at a rate of not less than 6-1/2
times the minimum wage. Specifically, Public Law 101-583 states that:

> [T]he Secretary of Labor shall promulgate regulations that permit
> computer systems analysts, computer programmers, software
> engineers, and other similarly skilled professional workers as
> defined in such regulations to qualify as exempt executive,
> administrative, or professional employees under section 13(a)(1) of
> the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)). Such
> regulations shall provide that if such employees are paid on an
> hourly basis they shall be exempt only if their hourly rate of pay is
> at least 6 1/2 times greater than the applicable minimum wage rate
> under section 6 of such Act (29 U.S.C. 206).

Pub. L. No. 101-583, §2, 104 Stat. 2871 (1990).

The Department issued final regulations addressing this statutory amendment in 1992. Consistent with the legislative directive as well as clarifying comments received during the rulemaking from the main Congressional sponsors of the legislation, the regulations treated computer employees (both salaried and hourly) as a class of "professionals" under 29 C.F.R. § 541.3. That is, employees whose primary duty was "highly-specialized" computer work as described in section 541.3(a)(4) were exempt like other professionals under 13(a)(1) of the FLSA if they met all other elements of the test (including salary basis) contained in 29 C.F.R § 541.3(b)-(e). The regulations made clear, however, that computer employees specifically could also be paid on an hourly basis and still be exempt under 13(a)(1): "*Provided further*, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2 times the minimum wage provided by section 6 of the Act." *See* 57 Fed. Reg. 46,472, 46,744 (Oct. 9, 1992) (prior version of 29 C.F.R. § 541.3).

In 1996, Congress amended the FLSA to include a specific statutory exemption in section 13(a)(17) entitled "Computer Professionals." *See* Pub. L. No. 104-188, § 2105, 110 Stat. 1755, 1929 (1996). This amendment changed the computer employee exemption in two ways. First, it froze—at $27.63 per hour—the hourly rate at which exempt computer employees needed to be paid ($27.63 represented the former $4.25 federal minimum wage rate multiplied by 6-1/2) and thereby eliminated any link between the minimum wage and the computer employee exemption. Second, Congress simplified the "duties test" for computer employees by codifying most, but not all, of the language in the Department's existing regulations concerning computer employees. *Compare* 57 Fed. Reg. at 46,744 (29 C.F.R. §§ 541.3(a)(4), 541.303) *with* 29 U.S.C. § 213(a)(17)(A)-(D) (1996).

Although Congress revised the hourly pay rate requirement, Congress specifically did *not* repeal Public Law 101-583, which exempts computer employees under section 13(a)(1). *See* 69 Fed. Reg. 22,122, 22,159 (Apr. 23, 2004) ("[T]he original 1990 statute was not repealed by the 1996 amendment."). Congress considered computer employees covered by the section 13(a)(17) exemption to be "Computer Professionals" and thus exempt under section 13(a)(1) just as they had been before section 13(a)(17) was enacted. This understanding is reflected in the language used in the Conference Report on Public Law 104-188, which specifically notes that the bill "maintain[s] current law." *See* H.R. Conf. Rep. No. 104-737, at 359 (Aug. 1, 1996), *reprinted in* 1996 U.S.C.C.A.N. 1677, 1851.

The Department did not revise its computer employee regulations again until the overtime security regulations of 2004. As part of the 2004 revisions, the Department "consolidated all of the regulatory guidance on the computer occupations exemption into a new regulatory Subpart E, . . . [which sought to] collect[] into one place the substance of the original 1990 statutory enactment, the 1992 final regulations, and the 1996 statutory enactment." 69 Fed. Reg. at 22,158. The newly-promulgated regulations consolidated and simplified the computer employee exemption with one duties test, which conforms to the 1996 statutory duties test.

In pertinent part, the current regulations explain the interaction between sections 13(a)(1) and 13(a)(17) as follows:

> (a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption *as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act.* * * *
>
> (b) The section 13(a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week . . . and the section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:
>
>> (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;
>>
>> (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.

29 C.F.R. § 541.400(a)-(b) (emphasis added).

In issuing this regulation, the Department did not intend to create a dichotomy between computer employees who are exempt under section 13(a)(1) and computer employees who are exempt under section 13(a)(17). Rather, it is the Department's view that a computer employee who is paid on an hourly basis at a rate of not less than $27.63 per hour and meets the duties test (as set out above) continues to qualify as an exempt computer professional employee under *both* section 13(a)(1) and section 13(a)(17) of the FLSA, consistent with the congressional intent to maintain the prior law recognizing such an employee as an exempt professional. As noted in the preamble to the 2004 regulations and discussed above, Congress never repealed Public Law 101-583, which continues to exempt computer employees under section 13(a)(1). The 1996 amendment merely created an additional, express statutory basis for the computer employee exemption with

a few changes noted above; it did not eliminate the traditional exemption of computer professionals under section 13(a)(1) and 29 C.F.R. Part 541.

Conversely, section 13(a)(17) specifically exempts "any employee . . . *who, in the case of an employee who is compensated on an hourly basis*, is compensated at a rate of not less than $27.63 an hour." 29 U.S.C. § 213(a)(17) (emphasis added). Section 13(a)(17) by its own terms does not exclude employees paid on the traditional salary basis from the section 13(a)(17) exemption, but rather states that in the event that someone is paid on an hourly basis, that employee must be paid not less than $27.63 per hour to be exempt as a computer professional. Accordingly, the language of section 13(a)(17) and the legislative history suggest that if an employee is paid on a salary basis (at a rate not less than $455 per week) and meets the duties test, the employee would qualify as an exempt computer professional under that section also. *See Pellerin v. Xspedius Mgmt. Co. of Shreveport LLC*, 432 F. Supp. 2d 657, 665 n.9 (W.D. La. 2006) ("we read that last clause [in 13(a)(17)] as imposing an additional requirement only for those employed on an hourly basis"). Moreover, as noted in *Pellerin*, such an interpretation is supported by comments from legislators who drafted similar language in 1990 that resulted in the 1992 computer employee rule. *See* 432 F. Supp. 2d at 655 n.9 (citing 57 Fed. Reg. at 46,743).

Finally, in addition to being paid at least $455 on a salary basis or $27.63 on an hourly basis, in order to qualify for the computer employee exemption an employee must have job duties that meet the duties test prescribed in 29 C.F.R. § 541.400(b). The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption. *See* 29 C.F.R. § 541.401.