

# Fair Labor Standards Act: Coverage Fact Sheet

MSO-98-1  
June 1998

## Office of Personnel Management Authority

Section 3(e)(2) of the Fair Labor Standards Act of 1938 (the Act or FLSA), as amended, sections 201 *et seq.* of title 29, United States Code, authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section. Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act for all such employees, except for those who are employed by the Library of Congress, United States Postal Service, Postal Rate Commission, Tennessee Valley Authority, U.S. House of Representatives, U.S. Senate, Capitol Guide Service, Capitol Police, Congressional Budget Office, Office of the Architect of the Capitol, Office of the Attending Physician, or Office of Compliance. Employees of these entities should contact their human resources office regarding FLSA matters.

## Agency Authority

The employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria in part 551 of title 5, Code of Federal Regulations (CFR), and supplemental guidance issued by OPM.

## General Principles of Exemptions

In all exemption determinations, the employing agency will observe the principles that—

- (a) Each employee is presumed to be FLSA non-exempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria in 5 CFR 551 and supplemental guidance issued by OPM.
- (b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
- (c) The burden of proof rests with the agency that asserts the exemption.
- (d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.
- (e) There are groups of General Schedule employees who are FLSA nonexempt because they do not fit any of the exemption categories. These groups include the following:
  - (1) Nonsupervisory General Schedule employees in equipment operating and protective occupations, and most clerical occupations (see the definition of *participation in the executive or administrative functions of a management official* in 5 CFR 551);

(2) Nonsupervisory General Schedule employees performing technician work in positions properly classified below GS-9 (or the equivalent level in other comparable white-collar pay systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent level in other comparable white-collar pay systems); and

(3) Nonsupervisory General Schedule employees at any grade level in occupations requiring highly specialized technical skills and knowledges that can be acquired only through prolonged job training and experience, such as the Air Traffic Control series, GS-2152, or the Aircraft Operations series, GS-2181, unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.

(f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. All exempt work, regardless of category, must be considered. The only restriction is that, when the requirements of one category are more stringent, the combination of exempt work must meet the more stringent requirements.

(g) Failure to meet the criteria for exemption under what might appear to be the most appropriate criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative exemption criteria may be performing exempt executive work.

(h) Although it is normally feasible and more convenient to identify the exemption category, this is not essential. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee's primary duty may involve two categories which are intermingled and difficult to segregate. This does not preclude designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria.

(i) The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee.

## **For More Information**

Please visit our web site at <http://www.opm.gov/flsa>. If you have specific questions or need more information, contact the OPM Oversight Division having jurisdiction over your geographical area, or send an email to us at [federal\\_flsa@opm.gov](mailto:federal_flsa@opm.gov). OPM's FLSA regulations are published in part 551 of title 5, Code of Federal Regulations.

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**The District of Columbia**

In **Maryland**: the counties of Charles, Montgomery, and Prince George's.

In **Virginia**: the counties of Arlington, Fairfax, King George, Loudoun, Prince William, and  
Stafford; the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park; and  
any overseas area not included above.

# Summary of FLSA Exemption Criteria

This chart summarizes the FLSA exemption criteria in part 551 of title 5, Code of Federal Regulations, and should be used in conjunction with those regulations.

## REGULAR DUTIES

EMPLOYEE CATEGORY	Executive Exemption Criteria	Administrative Exemption Criteria	Professional Exemption Criteria
<p>GS employees at or above GS-7.</p> <p>and</p> <p>GS employees above GS-9 in positions subject to section 7(k) of the Act, that is, fire and law enforcement personnel on special shift work schedules.</p> <p>and</p> <p>FWS supervisors classified at situation 3 or 4.</p>	<p>551.205: To be EXEMPT, the employee need meet only the primary duty test in 551.205(a).</p> <p>(The 80 percent test in 551.205(b) does not apply.)</p>	<p>551.206: To be EXEMPT, the General Schedule employee must meet the primary duty test in 551.206(a), the nonmanual work test in 551.206(b), and the discretion and independent judgment test in 551.206(c).</p> <p>(The 80 percent test in 551.206(d) does not apply.)</p> <p><b>551.206: Not applicable to FWS supervisors.</b></p>	<p>551.207: To be EXEMPT, the General Schedule employee must meet the primary duty test in 551.207(a), the intellectual and varied work test in 551.207(b), and the discretion and independent judgment test in 551.207(c).</p> <p>(The 80 percent test in 551.207(d) does not apply.)</p> <p><b>551.207: Not applicable to FWS supervisors.</b></p>
<p>GS employees in GS-7, 8, or 9 positions subject to section 7(k) of the Act, that is, fire and law enforcement personnel on special shift work schedules.</p>	<p>551.205: To be EXEMPT, employees in GS-7, 8, or 9 '7(k)' positions must meet both of the tests in 551.205. Those tests are the primary duty test in 551.205(a) and the 80 percent test in 551.205(b).</p>	<p>551.206: To be EXEMPT, the General Schedule employee must meet the primary duty test in 551.206(a), the nonmanual work test in 551.206(b), and the discretion and independent judgment test in 551.206(c).</p> <p>(The 80 percent test in 551.206(d) does not apply.)</p>	<p>551.207: To be EXEMPT, the General Schedule employee must meet the primary duty test in 551.207(a), the intellectual and varied work test in 551.207(b), and the discretion and independent judgment test in 551.207(c).</p> <p>(The 80 percent test in 551.207(d) does not apply.)</p>
<p>FWS supervisors classified below situation 3.</p>	<p>551.205: To be EXEMPT, FWS supervisors classified below situation 3 must meet both of the tests in 551.205. Those tests are the primary duty test in 551.205(a) and the 80 percent test in 551.205(b).</p>	<p><b>551.206: Not applicable to FWS supervisors.</b></p>	<p><b>551.207: Not applicable to FWS supervisors.</b></p>
<p>GS employees at GS-5 or 6.</p>	<p>551.205: To be EXEMPT, employees at GS-5 or 6 must meet both of the tests in 551.205. Those tests are the primary duty test in 551.205(a) and the 80 percent test in 551.205(b).</p>	<p>551.206: To be EXEMPT, an employee at GS-5 or 6 must meet the four tests in 551.206. Those tests are the primary duty test in 551.206(a), the nonmanual work test in 551.206(b), the discretion and independent judgment test in 551.206(c), and the 80 percent test in 551.206(d).</p>	<p>551.207: To be EXEMPT, an employee at GS-5 or 6 must meet the four tests in 551.207. Those tests are the primary duty test in 551.207(a), the intellectual and varied work test in 551.207(b), the discretion and independent judgment test in 551.207(c), and the 80 percent test in 551.207(d).</p>
	<p>551.205: To meet the 80 percent test, the employee must spend 80 percent or more of worktime in a representative workweek on supervisory and related work.</p>	<p>551.206: To meet the 80 percent test, the employee must spend 80 percent or more of worktime in a representative workweek on administrative work.</p>	<p>551.207: To meet the 80 percent test, the employee must spend 80 percent or more of work-time in a representative workweek on professional work.</p>
<p>GS employees at or below GS-4.</p>	<p>551.205: Not applicable</p>	<p>551.206: Not applicable</p>	<p>551.207: Not applicable</p>
<p>FWS nonsupervisory employees.</p>	<p>551.205: Not applicable</p>	<p>551.206: Not applicable</p>	<p>551.207: Not applicable</p>

## Summary of FLSA Exemption Criteria (cont.)

This chart summarizes the FLSA exemption criteria in part 551 of title 5, Code of Federal Regulations, and should be used in conjunction with those regulations.

### TEMPORARY DUTIES

#### EMPLOYEE CATEGORY

#### Temporary Duties and EXEMPT Employees

#### Temporary Duties and NONEXEMPT Employees

#### Emergency Situations

GS employees **at or above GS-7**, and GS employees **above GS-9** in positions subject to section 7(k) of the Act, that is, fire and law enforcement personnel on special shift work schedules. and FWS supervisors classified at **situation 3 or 4**. and GS employees in **GS-7, 8, or 9** positions subject to section 7(k) of the Act, that is, fire and law enforcement personnel on special shift work schedules.

551.208(c): An EXEMPT employee becomes NONEXEMPT for the entire period of the temporary duties **only if** the temporary duties exceed 30 calendar days and the temporary duties are NONEXEMPT.

If an EXEMPT employee becomes NONEXEMPT under 551.208(c), the employee is NONEXEMPT for the entire period of the temporary duties. Pay may need to be recalculated as explained in 551.208(c)(2).

551.208(b): A NONEXEMPT employee becomes EXEMPT for the entire period of the temporary duties **only if** the temporary duties exceed 30 calendar days and the temporary duties are EXEMPT.

If a NONEXEMPT employee becomes EXEMPT under 551.208(b), the employee is EXEMPT for the entire period of the temporary duties. Pay may need to be recalculated as explained in 551.208(b)(2).

551.208(d): Regardless of grade level, in an emergency--  
  
A NONEXEMPT employee remains NONEXEMPT whether the employee performs EXEMPT or NONEXEMPT work.

The exemption status of an EXEMPT employee must be determined on a workweek basis. This determination will result in the employee either remaining EXEMPT or becoming or NONEXEMPT for that workweek. The employee becomes NONEXEMPT for any workweek in which the employee performs NONEXEMPT work or duties for more than 20 percent of the worktime in a given workweek.

FWS supervisors classified **below situation 3**.

551.208(c)(3): An FWS supervisor classified **below situation 3** who is performing temporary duties becomes NONEXEMPT for the given workweek only if the employee performs NONEXEMPT duties for 20 percent or more of the worktime in that workweek.

551.208(b): Not applicable to-- FWS supervisors classified **below situation 3**.

**Emergency situation regulations apply to all employees.**

GS employees at or below **GS-5 or 6**.

551.208(c)(3): An EXEMPT employee at GS-5 or GS-6 who is performing temporary duties becomes NONEXEMPT for the given workweek only if the employee performs NONEXEMPT duties for 20 percent or more of the worktime in that workweek.

551.208(b): Not applicable to-- GS employees at or below **GS-5 or 6**.

GS employees **at or below GS-4**

551.208(b): Not applicable to-- GS employees **at or below GS-4**.

551.208(b): Not applicable to-- GS employees **at or below GS-4**.

FWS nonsupervisory employees.

551.208(b): Not applicable to-- FWS nonsupervisory employees.

551.208(b): Not applicable to-- FWS nonsupervisory employees.

## Summary of FLSA Exemption Criteria (cont.)

This chart summarizes the FLSA exemption criteria in part 551 of title 5, Code of Federal Regulations, and should be used in conjunction with those regulations.

### FOREIGN EXEMPTION

551.209: Regardless of grade level, an employee is **NOT** subject to the minimum wage and overtime provisions of the Act if *either 1 or 2* is met.

① The employee is permanently assigned to an exempt area *and* performs no hours of work in a workweek in a nonexempt area.

② An employee on TDY performs all hours of work in a workweek in an exempt area.

“Exempt area” and “nonexempt area” are defined in 551.102.

**Foreign exemption regulations apply to all employees.**

### SPECIAL EXEMPTIONS/ EXCLUSIONS

#### 551.210: **Availability Pay.**

The following employees are **EXEMPT** from the hours of work and overtime pay provisions of the Act:

(a) A criminal investigator receiving availability pay under 550.181 of title 5, Code of Federal Regulations; and

(b) A pilot employed by the United States Customs Service who is a law enforcement officer as defined in section 5541(3) of title 5, United States Code, and who receives availability pay under section 5545a(i) of title 5, United States Code.

#### 551.211: **Statutory exclusion.**

A customs officer who receives overtime pay under subsection (a) or premium pay under subsection (b) of section 267 of title 19, United States Code, for time worked may not receive pay or other compensation for that work under any other provision of law. “Customs officer” means a United States Customs Service supervisory or nonsupervisory customs inspector or supervisory or nonsupervisory canine enforcement officer.