

# The Fair Labor Standards Act and Computer Employees

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These days, we live most of our lives tethered to our computers. We use them for information, for play, and for work. The Department of Labor recognized this emerging trend years ago, and attempted to carve out regulations for employees whose work primarily involves computers. The ever-changing nature of computers and the work associated with them caused the rules pertaining to computer employees to be, for several years, somewhat of a moving target. Because of the pre-eminence of computer-related professions in every industry, it is often necessary for employers to take a closer look at the rules related to computer professionals.



**In today's economy, it is difficult to imagine a job or profession that does not involve or include the use of a computer.** Recognizing this growing trend, in 2004 the Department of Labor created separate statutory and regulatory provisions applicable specifically to computer employees. Because of the prominence of computers in every facet of the workforce, an analysis of the provision of the Fair Labor Standards Act (FLSA) that applies to computer employees is critical for most employers.

## The History of Computer Employees and the FLSA

Historically, computer professionals were treated as a subset of exempt professional employees. In 1990, computer employees were included in the regulations and treated as exempt under FLSA § 13(a)(1), whether these employees were paid on a salary basis or on an hourly basis if they were compensated at a rate of not less than 6.5 times the minimum wage. In 1992, the Department of Labor issued final regulations addressing the 1990 amendment; the regulations treated both salaried and hourly computer employees as “profession-

als” under 29 C.F.R. § 541.3 if they were engaged as “computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers.” Pub. L. No. 101-583, § 2, 104 Stat. 2871 (1990).

In 1996, Congress amended the FLSA to include a specific statutory exemption in § 13(a)(17) entitled “Computer Professionals.” Pub. L. No. 104-188, § 2105, 110 Stat. 1755, 1929 (1996). The 1996 amendment altered the previous computer exemption in two major ways. The amendment maintained the threshold hourly rate of pay for exempt computer employees at \$27.63 an hour (the figure was derived by multiplying the former federal minimum wage of \$4.25 by 6.5) and constructively eliminated a link between minimum wage and the computer exemption. In addition, the amendment codified most of the existing regulation for computer employees.

However, the 1996 amendment did not repeal former Public Law 101-583, which provided an exemption for computer employees under FLSA § 13(a)(1). Instead, Congress indicated that computer employees should be exempt under § 13(a)(17) as computer professionals and, as a result, they should be exempt under § 13(a)(1) as well.

## The 2004 Fair Labor Standards Act Revisions

In 2004, the Department of Labor consolidated the law in 29 U.S.C.A. § 213(a)(17) and 29 C.F.R. § 541.400, et seq., applying it specifically to computer employees, such as computer programmers, software engineers, computer systems analysts, and other highly skilled workers. The new regulatory scheme consolidated the computer employee exemption and relied on relevant federal case law as of 2004.

These provisions acknowledge the reality that job duties, responsibilities, and titles in computer-related professions change frequently and vary widely. For that reason, job titles alone are not determinative of the applicability of the computer employee exemption. Each job must be analyzed independently against several provisions. The computer employee exemption applies to

- computer employees paid either on a salary or a fee basis of at least \$455 a week; or
- computer employees who, if paid hourly, are paid at least \$27.63 per hour (that minimum rate must apply to every hour worked, including overtime).

See 29 C.F.R. § 541.400(a), 541.400(b).

Unlike some other exemptions, then, the computer exemption applies to both salaried and hourly employees (as long as the employee receives at least \$27.63 for *each* hour worked). It is interesting to note that, if their salary is based on a 40-hour workweek, hourly employees actually have a much higher compensation threshold than employees paid on a salary basis have (\$1,105.20 for hourly employees versus \$455 for salaried employees).

In addition, the computer employee must be employed as one of the following:

- computer systems analyst,
- computer programmer,
- software engineer, or
- other “similarly skilled worker in the computer field.”

According to the regulation, certain “primary duties”—defined as the “principal, main, major, or most important duty the employee performs” rather than the percentage of time the employee spends performing that duty—qualify an employee for the computer exemption. The following primary duties, where the focus of the analysis is on the character of the employee’s job as a whole, are included in the exemption:

- application of systems analysis, techniques, and procedures;
- design, development, documentation, analysis, creation, testing, or modification of computer systems or programs related to user or system design specifications;
- design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- a combination of the aforementioned duties, requiring the same level of skills.

## Application of the 2004 Regulations

Even though, at first blush, this exemption may seem relatively straightforward, its practical application can hinge on very fine distinctions. For example, in a 2004 decision, the Sixth Circuit determined that an employee was not an exempt computer employee based on a seemingly razor-thin distinction between “... highly specialized knowledge in computer systems analysis, programming, and software engineering” and “highly specialized knowledge of computers and software.” *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574 (6th Cir. 2004). The fact, in that case, that the employee in question was assigned to review a newly developed operating system was not enough to make systems analysis that employee’s primary duty. The court determined that maintaining a computer system according to specifications designed and tested by others does not require highly specialized knowledge of the type contemplated by the Department of Labor in the computer employee exemption.

The computer employee exemption clearly is not applicable to every employee who works with a computer or even relies heavily on one for his or her work. Moreover, an employee who is responsible for the maintenance, repair, or manufacture of computers and related equipment is not necessarily exempt. Interestingly, personnel who work on the “help desk” typically are not considered exempt under this provision, because their primary duties generally do not include high-level design, creation, or modification of computer programs or a system’s functional specifications (although these employees may still be eligible for a different white-collar exemption, such as the professional or administrative exemption).

## Conclusion

Since the technological revolution of the 1990s, both Congress and the Department of Labor have attempted to provide an exemption for computer professionals. The result of the combined legislative and regulatory activity is a narrow exemption for hourly or salaried highly skilled computer professionals as well as inclusion of these employees in the broader categories provided for other professional and administrative employees. Simply using a computer or, in some instances, doing work that is specifically computer-related may not be enough to meet the primary duties prong of the computer exemption, but, in many cases, the employees in question are already considered exempt under one or more other categories. **TFL**

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