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## *NewsFlash!*

### **Are All IT Jobs Exempt From Overtime Requirements Under the Fair Labor Standards Act ?**

**By: Ruth A. Binger**

Most companies are under a common perception that all jobs involving computers are complex, require exceptional expertise and are therefore exempt from the requirement of overtime pay under the Fair Labor Standards Act. Legally, this is not true. As a preventive measure, companies should audit their workforce to make sure that their information technology workers are properly classified. Failure to do so could cause companies to lose their exemption from paying overtime for all misclassified employees, payment of two to three years of back pay and the payment of double damages.

There are three possible applicable exemptions available to avoid overtime pay for information technology jobs. They are: (1) the computer related exemption under 29 CFR Section 541.400; (2) the administrative exemption under 29 CFR Section 541.200; and (3) the executive exemption under 29 CFR Section 641.100. This article will focus only on the computer related exemption.

#### **Computer Exemption Requires Skill & Proficiency**

Under the applicable regulations, employees who qualify for the computer exemption must not only be highly skilled but they also must have achieved a level of proficiency in the "theoretical and practical application of a body of highly specialized knowledge in computer systems analysis, programming or related work in software functions." Although a job title alone is not determinative of the exemption's applicability, the Department of

Labor lists the following as common job titles for this exemption: computer programmer, systems analyst, computer systems analyst, computer programmer analyst, applications programmer, application systems analyst, application systems analyst/programmer, software engineer, software specialist, systems engineer and systems specialist. 29 CFR Sections 541.400-402. Although covered employees commonly have a bachelor's degree, it is not required and expertise and skill can be combined through a combination of education and experience in the field.

#### **Two Pronged Test — Salary & Primary Duty**

Turning to the applicable two pronged test, companies must look at the employee's salary and the nature of the employee's primary duty. First, the employee must be paid at least \$23,660 annually (\$455 weekly) or \$27.53 per hour. Very favorably, payment of \$27.53 per hour allows the company to avoid the salary basis test. The salary basis test requires the employee to regularly receive a predetermined amount constituting all or part of the employee's salary. That amount cannot be subject to reduction because of variations in the quality or quantity of work performed.

Secondly, the employee's primary duty must consist of the following: (1) the application of system-analyst techniques and procedures, including consulting with users to determine hardware, software or systems func-

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tional 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 or the aforementioned duties, the performance of which provides the same level of skills. 29 CFR Section 541.400.

For example, applying the above test to “help desk” employees, a common misclassification, a recent Court decision holds that “help desk” employees are non-exempt. In *Martin v. Indiana Michigan Power Company*, 381 F.3d 574 (6th Cir. 2004), the Court ruled that the employee’s maintenance of computer systems within predetermined parameters does not rise to the level of “theoretical and practical application of highly-specialized knowledge.” *Martin* was an information support specialist working in the company’s self described “maintenance organization that takes care of computer systems.” He had no education or training in systems engineering. He was responsible for installing and upgrading hardware and software on workstations, configuring desktops, checking cables, replacing parts, testing and troubleshooting Windows problems. The Court held that *Martin* merely consulted with users for purposes of repair and user support versus actually determining hardware, software or system functional specifications. Likewise, any testing that *Martin* did

was for the purpose of testing things to determine what was wrong with the workstation, not the type of testing involved in actually creating a system.

### Additional Exclusions from “Computer Exemption”

Trainees learning to become proficient in the areas cited above are similarly not covered. Neither are employees, although having a title, who have not attained the level of skill and expertise which allow them to work independently and generally without close supervision.

Also excluded from the exemption are employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment. Further, employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, e.g. engineers, drafters and other skilled in computer-aided design software like CAD/CAM but who are not in computer systems analysis and programming occupations, are also excluded from the exemption 29 CFR Section 541.401.

### Conclusion — Offensive and Defensive Strategy

Companies should be prepared to defend their computer related exemption conclusions by compiling detailed information about the employee’s primary duties, the processes actually assigned to the employee, and the applicable computer systems analysis, programming or software engineering required.

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[www.dannamckitrick.com](http://www.dannamckitrick.com)

150 N. Meramec, Fourth Floor  
St. Louis, MO 63105



*Ruth A. Binger is a principal in the firm serving both mature and emerging businesses concentrating in the areas of corporate, intellectual property and technology, as well as labor and employment law. Both her commitment to businesses and her understanding of multifaceted issues inherent in operations distinguish her practice.*