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by

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Labor Relations Challenges

Practical Applications of the New Overtime Regulations

and

Health Insurance Portability and Accountability Act (HIPAA)

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A. THE "WHITE COLLAR" EXEMPTIONS

Since the FLSA's enactment in 1938, Congress has exempted executive, administrative and professional – or "white collar" – employees from the Act's overtime requirements. [1] The white collar exemptions represent a major exemption from FLSA overtime requirements. It is critical for employers to understand the exemptions and to apply them correctly.

Although the FLSA exempts executive, administrative and professional employees from coverage, the Act itself does not define these terms. Instead, Congress delegated this responsibility to the DOL, [2] which recently modified the fifty year old white collar exemption regulations.

To qualify for an executive, administrative or professional exemption under the new regulations, the employee must receive a minimum salary of $455 per week. [3] This prong is known as the "standard test," and it eliminates the prior "short" and "long" test terminology. Additionally, the employee must be paid on a "salary basis." [4] Together, these two prongs compromise the "salary" test. The employee must also satisfy the appropriate "duties" test. This section describes these tests and the relevant court decisions.

1. THE SALARY TESTS

a. Introduction to the Salary Tests

Technically, there are two components to the salary tests. First, the employee must be paid a salary of "not less than 455." [5] Second, and far more relevant than the salary amount, is the requirement that all exempt employees be paid on a "salary basis." One of the more controversial aspects of the white collar exemptions, the salary basis test has been the focus of considerable litigation in both the private and public sectors. Simply put, salary basis means payment of a predetermined amount of pay on a weekly or less frequent basis, regardless of the quality or quantity of work actually performed.

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With the exception of doctors, teachers, attorneys, computer programmers (who qualify for the special professional exemption), and highly compensated employees, all exempt employees must meet the salary basis test in order to be considered exempt under the "white collar" exemptions. Thus, it is critical to ensure compliance with this test.

b. Requirements of the Salary Basis Test

(1) The General Requirement for Predetermined Pay

The salary basis regulation begins with the premise that exempt employees must receive a predetermined amount of pay, subject to specified exceptions. The regulation states:



"An employee will be considered to be paid on a 'salary basis' within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." [6]

Thus, if the employee performs any work in a work period, the employee must receive his or her full salary regardless of the number of days or hours worked, unless one of the exceptions listed below is met. [7] However, if the employee does not provide any work in that work period, the employee generally does not need to be paid for that work period.[8]

(a) Use of Accrued Leave Is Not a Deduction From Pay

The Ninth Circuit Court of Appeals has held that requiring an employee to use accrued leave, such as vacation, sick, or administrative leave, is not a salary deduction. [9] The use of the accrued leave insures that the employee is still paid his or her full salary for the work period. Therefore, an employer may require its exempt employees to use their accrued leave for absences from work without violating the salary basis test, even if those absences are only for one or two hours in the workday. [10]

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(2) Exceptions to Predetermined Pay Requirements

The general rule is that employers may not deduct amounts from an employee's salary if he or she performs any work in the work period. The regulations establish the following exceptions to the general requirement that exempt employees receive a predetermined amount of pay per work period, regardless of quality or quantity of work.

(a) Deductions for Absences of a Day or More for Personal Leave, Sickness or Disability

The regulations allow deductions for absences of a day or more when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident.[11] Salary deductions may also be made for absences of a day or more occasioned by sickness or disability, if the deductions are made pursuant to a plan, policy or practice of providing compensation of loss of salary occasioned by sickness and disability, and the employee has exhausted the leave allowance thereunder. [12]

(b) Partial Day Docking for Personal Leave or Sick Leave

Public employers often are under the mistaken impression that they cannot require an exempt employee to use accrued leave or deduct pay for absences during the workday. However, in response to *Abshire v. County of Kern*, [13] the DOL issued regulations that eliminated the outright prohibition on deductions of less than one day for public agencies. The regulations allow partial day deductions where an employee is paid pursuant to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences of personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because:

- permission for its use has not been sought or has been sought and denied;
- accrued leave has been exhausted; or

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- the employee chooses to use leave without pay. [14]

This regulation permits a public employer to deduct pay from an exempt employee who has exhausted their accrued leave for absences during the workday.

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Public employers may dock the pay of exempt employees for absences during the work day. For example, a public employer may require an exempt employee to use sick leave or dock the employee's pay if no leave is available for a medical appointment. This rule is often misunderstood because private sector employers are not allowed to dock exempt employees for absences of less than one day.

(c) Disciplinary Deductions

The DOL has previously allowed any form of discipline for violation of a major safety rule. The new white collar regulations retain this provision:



"Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines"[15]

However, the new regulations significantly expand the ability of employers to discipline exempt employees for misconduct by permitting daily suspensions. Previously, a disciplinary suspension in an increment other than a full workweek, except for a major safety violation, would have violated the salary basis test and precluded the employee from being exempt from overtime. The DOL eliminated that rule to conform the FLSA to other employment laws, such as Title VII, that require employers to discipline employees for misconduct such as workplace harassment.

The new regulation permits daily unpaid disciplinary suspensions if the following conditions are met:

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1) The discipline is for a violation of a workplace conduct rule;
2) The discipline is imposed in good faith; and
3) The disciplinary suspension is imposed pursuant to a written policy that is applicable to all employees.

The DOL does not consider discipline based on poor job performance or attendance to be an infraction of a workplace conduct rule. The regulation does not permit partial day disciplinary deductions, such as a one and one half day suspension. The DOL also did not intend for the new regulations to permit other types of monetary deductions for disciplinary reasons, such as fines. The Ninth Circuit had held that "economic sanctions" such as a reduction in pay or a temporary demotion with a corresponding reduction in pay also would violate the prior salary basis test, unless the sanction was imposed for violation of a safety rule of major significance.[16]

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The DOL has previously indicated that other forms of discipline, such as permanent demotions, reprimands and reassignments, will not violate the salary basis test.

(d) Deductions for Budget Required Furloughs

The regulations expressly allow public entities to deduct for absences due to a budget required furlough.[17] However, employees not paid on a salary basis because of such budget reductions will lose the exemption for the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.[18]

c. Miscellaneous Salary Basis Test Issues:

(1) Additional Compensation

The regulations expressly allow employers to pay an exempt employee compensation in addition to the employee's regular salary.[19] Extra compensation may be paid on any basis, including overtime tied to specific hours worked.[20] The overtime payment need not be at time and one-half, but may be at straight time, or at one-half time, or a flat sum, or on any other basis, including compensatory time off.[21] However, the additional compensation must be separate from the employer's guarantee to pay the employee at least $455 per week.

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(2) Jury Duty, Witness Time and Military Leave

The regulations preclude deductions for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave.[22] However, employers may offset from salary any amounts (such as daily stipends) paid to the employee for such service.[23] Witness time is required for any subpoena that compels the witness to be present in a court or administrative hearing. However, the exclusion on witness time does not apply to legal actions initiated by the employee.[24] Temporary military leave may cover leaves of up to three months.[25]

(3) Family and Medical Leave Act Deductions

The new regulations add a provision previously covered under the Family and Medical Leave Act ("FMLA") regulations. The new regulation permits an employer to reduce an exempt employee's salary by the amount of FMLA leave taken without violating the salary basis test.[26] Thus, if an exempt employee is regularly scheduled to work 40 hours per week, and takes 4 hours of unpaid FMLA leave during the work week, the employer may deduct 10% from the employee's weekly salary for that work week.

(4) Effect of Improper Salary Deductions

The new regulations provides that an employee's exempt status will only be lost if there is an "actual practice" of improper deductions by the employer.[27] The factors considered when determining whether the employer has an actual practice of improper deductions include, but are not limited to:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline;
- The time period during which the employer made improper deductions;
- The number and geographic location of employees whose salary was improperly reduced;
- The number and geographic location of managers responsible for taking the improper deductions; and
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.[28]

Under the former regulations, if an employer made improper deductions, all of the employees who were subject to the same

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policy would also lose their exempt status. The new regulations attempt to avoid such sweeping liability for employers by placing restrictions on which employees will lose their exempt status due to an improper deduction. If an actual practice of improper deductions exists, the exemption will be lost:

1) Only for employees within the same job classification as the original affected employee and who work for the same manager(s) responsible for the improper deductions; and
2) Only during the time period in which the improper deductions were made.[29]

Moreover, isolated or inadvertent deductions will not result in loss of the exemption for any employees subject to such improper deductions if the employer reimburses the employees for such improper deductions.[30]

(5) Safe Harbor

The DOL's prior regulations provided that an employer could avoid liability for an improper salary deduction by utilizing a window of correction. However, the window of correction was only available in limited circumstances and resulted in significant litigation. When the window of correction was not available, all employees covered by the deduction policy would lose their exempt status. The new white collar regulations eliminate the window of correction and instead provide employers with a much broader "safe harbor" for improper salary deductions.

An employer who violates the salary basis test by making improper pay deductions may avoid liability by utilizing the "safe harbor" provision in the new regulations. To qualify for the safe harbor, an employer must:

- Maintain a clearly communicated policy prohibiting improper pay deductions, including a complaint mechanism;
- Reimburse its employees for any improper pay deductions; and
- Make a good faith commitment to comply in the future.[31]

The safe harbor provision applies regardless of the reason for the improper deduction. However, if an employer continues to violate its policy prohibiting improper deductions after receiving employee complaints, the employer will be barred from utilizing the safe harbor provision.[32] The DOL recognized in its comments

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to the final regulations that employers will need a reasonable amount of time to investigate employee complaints.

(6) Special Exception to Test for Doctors, Lawyers and Teachers

The DOL regulations provide that doctors, lawyers and teachers do not need to satisfy the salary basis test to be exempt from FLSA overtime requirements.[33] A doctor or lawyer must hold a valid license permitting the practice of law or medicine and actually be engaged in the practice of law or medicine. The term doctor applies to podiatrists, dentists, optometrists, and holders of medical degrees performing a residency or internship.[34] A teacher must be employed as a teacher and engaged in the activity of imparting knowledge.[35]

(7) Payment on a Fee Basis

The administrative and professional exemptions provide for an exception to the salary basis requirement for employees paid on a fee basis.[36] A fee basis is payment of an agreed sum to the employee for the completion of the job regardless of the amount of time it takes the employee to complete the job.[37] The regulations intend that the fee be paid for performing a unique assignment as opposed to the same task repeatedly. Determination of whether the employee meets the standard test of $455 per week for the administrative or professional exemptions is made by examining the total hours worked on a project and converting the compensation for the project into a hourly amount. If 40 hours worked at that hourly amount would equal or exceed $455, the employee meets the salary basis test.[38]

(8) Payment on an Hourly, Daily or Shift Basis

The new regulations also permit pay based on an hourly, daily or shift rate of pay, as long as the employer guarantees a minimum weekly amount of at least $455 per week and a reasonable relationship exists between the amount guaranteed by the employer and the amount actually earned.[39]

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2. THE DUTIES TESTS

Assuming the salary basis test is met, the corresponding "duties test" must be performed to ascertain whether the executive, administrative, or professional exemption applies. The duties tests are based upon a determination of an employee's primary duty.

The regulations define an employee's "primary duty" as "the principal, main, major or most important duty that the employee performs."[40] A determination of what tasks constitute an employee's primary duty must be made on a case-by-case basis. The DOL places major emphasis on "the character of the employee's job as a whole." The DOL regulations provide the following non-exclusive list of factors to consider to determine the primary duty of an employee:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee's relative freedom from direct supervision; and
- The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.[41]

An employee's primary duty does not require that the employee spend over fifty percent of his or her time performing exempt work to qualify.[42] For example, "assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register."[43]

Moreover, only time that would be considered hours worked under the FLSA is considered in determining an employee's primary duty. Thus, standby or on-call time is not counted in determining how much time an employee spends in the performance of his or her duties.[44]

If the employee performs a combination of exempt duties (*i.e.*, administrative and professional), the employee may combine the exempt duties for purposes of establishing that she is exempt.[45]

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a. Executives

(1) The Test

To qualify for the executive employee exemption, the employee must:

(1) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof:

(2) Customarily and regularly direct the work of two or more other employees (or the equivalent of two or more full-time employees); and

(3) Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees.[46]

(2) Examples of Executive Duties

The DOL's regulations state that the following work is considered to be "management" of the enterprise and, therefore, exempt:

- Interviewing, selecting, training and evaluating the performance of employees;
- Setting and adjusting employees' rates of pay and hours of work;
- Directing and planning the work of employees, including determining the techniques to be used by the employees;
- Maintaining production or sales records for use in supervision or control;
- Handling employee complaints and grievances;
- Disciplining employees;
- Apportioning the work among employees;
- Determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked or sold;
- Controlling the flow and distribution of materials or merchandise and supplies; or
- Providing for the safety of the employees or the employer's property.[47]

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(3) Definition of "Department or Subdivision"

The DOL has also issued regulations relating to the meaning of "a customarily recognized department or subdivision."[48] The phrase "is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or a series of jobs and a unit with a permanent status and function."[49] Thus, for example, a Human Resources Department of a large entity may have several qualifying subdivisions under the exemption, such as employee benefits, labor negotiations and relations, and personnel management.

(4) Definition of "Two or More Other Employees"

The DOL has issued a regulation concerning the meaning of the requirement that an executive customarily and regularly direct the work of "two or more other employees."[50] Key points regarding this regulation include:

- It is sufficient for an executive to supervise the "equivalent" of two or more other employees. The DOL and courts have interpreted this provision to require supervision of employees who work a total of 80 hours per week, regardless of how many employees are being supervised.[51]
- The employees supervised must be employed in the department that the executive is managing.
- Merely classifying an employee with an "honorific title such as assistant supervisor" will fail. The test requires consideration of actual supervisory duties.
- An employee who merely supervises two or more employees in the actual manager's absence will not meet the requirement.
- A shared responsibility for supervising two or more employees in the same department does not satisfy the requirement that the employee customarily and regularly directs the work of two or more employees.[52]

(5) Definition of "Particular Weight"

Even if an employee does not make hiring or firing decisions, the employee can still be exempt as an executive if the employee's suggestions and recommendations about the employment status of an employee are given particular weight. Among the factors to

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consider to determine if recommendations are given particular weight are:

- Whether it is part of the employee's job duties to make those suggestions;
- The frequency with which the employee's suggestions are made or requested; and
- The frequency with which the employee's suggestions are relied upon.[53]

(5) Concurrent Duties

The fact that a supervisor performs a significant amount of work that would normally be considered to be non-exempt work does not preclude a finding that the supervisor is exempt. The regulations indicate that a supervisor whose primary duty is exempt executive work will normally decide when he or she performs non-exempt work. In contrast, a supervisor whose primary duty is non-exempt work will typically be directed to perform exempt work or only perform exempt work for limited time periods, such as when the manager is away from the facility.[54]

b. Administrative Employees

(1) The Test

The DOL regulations provide that an "administrative employee" means any employee who has a primary duty that:

(1) consists of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(2) includes the exercise of discretion and independent judgment with respect to matters of significance.[55]

(2) Related to the Management or General Business Operations

The DOL defines work that is related to the management or general business operations of the employer as "assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment."[56] Typically, "work

directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities."[57]

(3) Discretion and Independent Judgment

The DOL requires that an administrative exempt employee must exercise "discretion and independent judgment with respect to matters of significance."[58] To meet the requirement, the employee must be involved in the "comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed."[59]

Factors to be considered when determining whether an employee exercises "discretion and independent judgment" include, but are not limited to:

- "Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating procedures;
- Whether the employee carries out major assignments in conducting the operations of the business;
- Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- Whether the employee has authority to negotiate and bind the company on significant matters;
- Whether the employee provides consultation or expert advice to management;
- Whether the employee is involved in planning long or short-term business objectives;

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- Whether the employee investigates and resolves matters of significance on behalf of management; and
- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.[60]

The regulations also provide that "the exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision."[61] Moreover, "the fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment."[62] Thus, for example, "the policies formulated by [an exempt administrative] credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies."[63]

(4) Educational Establishments

The DOL regulations provide that employees in the "overall academic administration" of schools satisfy the administrative duties test.[64] Qualifying employees include "the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program."[65] Such individuals typically include the principal, vice-principals who are responsible for school operations, and department heads.

(5) Illustrative Examples

The DOL provides the following examples of exempt administrative occupations:

- An insurance claims adjuster if his or her duties include interviewing parties (*e.g.*, insureds, witnesses and physicians), inspecting property damage, reviewing factual information to prepare damage estimates, and evaluating and making recommendations regarding coverage of claims;
- An employee in the financial services industry whose job duties include collecting and analyzing client information regarding income, assets and debts or advising clients of different financial options;

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- An employee that leads a team of other employees assigned to complete a major project for the employer (such as purchasing, selling or closing another business);
- A human resources manager who formulates, interprets or implements employment policies;
- A management consultant who studies the operations of a business and proposes changes in organization; and
- An executive or administrative assistant to a proprietor or chief executive of a business if such employee, without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers and answer correspondence.[66]

(6) Public Sector Inspectors

The DOL also provides illustrative examples of the following positions that would generally not qualify for the administrative exemption:

- Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists, and similar employees.

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Employers are reminded that titles do not control whether an employee will be considered exempt. Rather, titles are simply one indicator. Courts will consider the actual duties of employees and the totality of circumstances in determining exempt status.

(7) Case Studies for Administrative Status

Bothell v. Phase Metrics, Inc.[67]

The plaintiff was a field service engineer for one of his employer's largest clients, a maker of disk drives. The court held that if the plaintiff's primary duty was to manage the client's account, creating policy for the employer or assisting the client in the running of its general business operations (as opposed to its production capabilities), then his employment would satisfy the primary duty requirement of the short test. If, as the plaintiff alleged, he was a highly skilled repairman whose primary duty was to install, troubleshoot, and maintain production equipment, then he would not qualify as exempt. The Ninth Circuit remanded to the district court for a factual determination of these issues.

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Bratt v. County of Los Angeles[68]

The plaintiff was a field service engineer for one of his employer's largest clients, a maker of disk drives. The court held that if the plaintiff's primary duty was to manage the client's account, creating policy for the employer or assisting the client in the running of its general business operations (as opposed to its production capabilities), then his employment would satisfy the primary duty requirement of the short test. If, as the plaintiff alleged, he was a highly skilled repairman whose primary duty was to install, troubleshoot, and maintain production equipment, then he would not qualify as exempt. The Ninth Circuit remanded to the district court for a factual determination of these issues.

Heidtman v. County of El Paso[69]

The Court held that the employees of a convention and visitor's bureau jointly operated by a city and a county did not meet the duties test for the administrative exemption. The positions were primarily responsible for attracting visitors and events to the area. The Court found that the employees did not exercise sufficient independent judgment and discretion and essentially performed sales duties to attract visitors, which are non-exempt duties.[70]

c. Professional Employees

(1) The Test

The regulations provide an exemption for professional employees whose **primary duty** is the performance of work:

(1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (*i.e.*, the "learned" professional); or

(2) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (*i.e.*, the "creative" professional).[71]

(2) The Learned Professional

"Knowledge of an advanced type" means knowledge that cannot be attained at the high school level.[72] This type of knowledge is

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"predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work."[73]

The DOL further defines the phrase "field of science or learning" as one that distinguishes the learned professions from "the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advance type, but is not in a field of science or learning."[74]

The regulations categorize the typical learned professionals to include the following professions:

1. Law;
2. Medicine;
3. Theology;
4. Accounting;
5. Actuarial computation;
6. Engineering;
7. Architecture;
8. Teaching;
9. Various types of physical, chemical and biological sciences;
10. Pharmacy;
11. Registered or certified medical technologists;
12. Registered nurses;
13. Dental hygienists;
14. Physician assistants;
15. Accountants;
16. Chefs; and
17. Athletic trainers.[75]

An example of a position that would not qualify for the learned professional exemption is a paralegal.[76] Although paralegals may possess a paralegal certificate or two year degree, an advanced academic degree is generally not a prerequisite for entry into the paralegal field. Therefore, the position does not require knowledge customarily acquired by a prolonged course of academic instruction and it does not meet the professional duties test.

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(3) The Teaching Professional

The teaching professional exemption includes any employee with a **primary duty** of "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment."[77] Although a teaching certificate provides the greatest clarity to determine if an employee qualifies for the professional exemption, a certificate may not be required if the school does not require certification and the teacher otherwise meets the requirements for the exemption.[78] Examples of exempt teachers include, but are not limited to:

- "Regular academic teachers;
- Teachers of kindergarten or nursery school pupils;
- Teachers of gifted or disabled children;
- Teachers of skilled and semiskilled trades and occupations;
- Teachers engaged in automobile driving instruction;
- Aircraft flight instructors;
- Home economics teachers; and
- Vocal or instrumental music instructors."[79]

Moreover, "those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching."[80]

(4) The Creative Professional

The employee must have a primary duty of performing work requiring invention, originality, imagination or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting or the graphic arts.[81] Examples of creative professional employees include "actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen play writers who choose their own subjects and hand in a finished piece of work to their employers . . .; and persons holding the more responsible writing positions in advertising agencies."[82]

Thus, for example, employees whose office work primarily relates to television show production, and consists of researching facts, developing story elements, writing scripts and supervising the editing of videotapes, are properly classified as exempt creative professionals.[83] However, employees whose primary duties includes gathering routine facts about community meetings and information contained in the local police blotter for a small newspaper, and then reporting on those facts in a predetermined format, are not exempt creative professionals.[84]

(5) Case Studies for Professional Status

 ***Reich v. Wyoming***[85]

The Court held that game wardens with the State of Wyoming, whose primary duty was wildlife management, qualified for professional status. The wardens were required to execute a number of complex and scientific tasks, such as developing wildlife management plans; they had to have specialized knowledge of various species and habitats; and they exercised a significant degree of discretion and independent judgment.

 ***Dybach v. Florida Dep't of Corrections***[86]

Adult probation officer positions were held not to qualify for the professional exemption, where the positions did not require a college or advanced degree in any specialized field of knowledge.

B. SPECIAL EXEMPTION FOR HIGHLY COMPENSATED EMPLOYEES

In 2004, the DOL amended the overtime regulations to create a new overtime exemption for the "highly compensated" employee. To qualify for the exemption, the employee must:

(1) Perform office or non-manual work;

(2) Be paid a total annual compensation of at least $100,000; and

(3) Customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee (as identified above).[87]

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Although the minimum annual compensation excludes board, lodging, use of other facilities or payments for fringe benefits (*e.g.*, medical insurance, life insurance, contributions to retirement plans, etc.), the amount does include base salary, commissions, non-discretionary bonuses and other non-discretionary compensation.[88] "The 'total annual compensation' must include at least $455 per week paid on a salary or fee basis."[89]

Thus, for example, an employee who earns $103,000 per year and manages the Community Development Office for a small city satisfies the highly compensated employee exemption, even though the employee may not supervise two or more full-time employees, because the employee (1) customarily and regularly performs a duty required by the executive exemption (*i.e.*, managing a recognized subdivision of the employer), (2) performs office or non-manual work, and (3) is paid more than $100,000 per year.

If an employee fails to earn more than $100,000 during the year, the employee will not qualify for the highly compensated employee exemption for the prior year.[90] Accordingly, the employee would be eligible for overtime for all hours worked in excess of 40 per week (although the employee might otherwise qualify for the executive, administrative or professional exemption) during the prior year. However, an employer may "make up" a final payment within one month after the end of the year if an employee fails to earn at least $100,000 during the prior year.[91] For example, if an employee earned $86,000 in base salary and $12,000 in bonuses within the year, the employer can make an additional payment of $2,001 to the employee within one month of the new year to bring the employee above the $100,000 threshold. Any such "make up" payments made after the end of the one-year period, only apply to the prior year and cannot be credited as compensation paid in the new year.[92]

The new regulations define the one-year period as any 52-week period (*e.g.*, fiscal year, calendar year, anniversary date).[93] If the employer fails to designate the one-year period in advance, the calendar year serves as the default. Additionally, if an employee is hired or fired before the one-year period matures, the employee's "annual compensation" is determined on a pro rata share of the $100,000 threshold.[94]

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C. SPECIAL EXCLUSION FOR "FIRST RESPONDERS"

The new regulations mandate that certain "first responders" are not eligible for the white collar exemptions. Specifically, the new overtime exemptions "do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics . . . and [other] similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detective crimes . . .; pursuing, restraining and apprehending suspects . . .; preparing investigative reports; or other similar work."[95]

The first responder regulation was intended to address concerns raised by members of the public that the revisions to the DOL regulations would deprive police officers and firefighters of the overtime that they previously earned. The regulation does not alter the primary duty test for the white collar exemptions. Rather, it indicates that the primary duty of a safety employee who fights fires, rescues victims, apprehends criminal suspects or investigates crimes or fires cannot be executive, administrative or professional in nature. However, it will require agencies to monitor supervisors who frequently respond to calls for service, as the regulation applies "regardless of rank or pay level." The regulation does not affect the ability of an employer to adopt a 7(k) work period between 7 and 28 days for its law enforcement and fire protection employees.

D. SPECIAL EXEMPTION FOR COMPUTER SOFTWARE EMPLOYEES

The DOL regulations provide that a computer employee will be exempt if he or she earns at least $27.63 per hour (or receives more than $455 per week on a salary or fee basis), and has a primary duty 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;

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(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.[96]

Although the DOL declined to cite specific examples of exempt job titles, the computer software exemption typically applies to computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field.[97] However, the 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 . . ., but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations . . . are also not exempt computer professionals."[98]

E. "RECREATIONAL ESTABLISHMENT" POSITIONS

The "recreational establishment" positions exemption exempts from the FLSA's overtime requirements employees who are "employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non profit educational conference center."[99] The term "establishment" refers to a "distinct physical place," such as a summer camp or swimming pool operation of a municipal recreation and parks department. To qualify for the exemption, the establishment must meet one of the following seasonal requirements:

- The establishment does not operate for more than seven months in any calendar year; or
- The establishment's receipts for any six months of the preceding calendar year were not more than 33½ percent of its average receipts for the other six months of the preceding calendar year.[100]

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F. OUTSIDE SALES PERSONS

To qualify as an exempt outside sales employee, the employee must:

1. Have a primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customers; and

2. Customarily and regularly be engaged away from the employer's place or places of business in performing such primary duty.[101]

Unlike the other exemptions (*e.g.*, executive, administrative, professional and computer software), the outside sales exemption does not require that the employee meet the salary test.[102]

In the public sector, this exemption may apply to sales agents for an agency's convention center or arena who solicit various organizations to schedule events at the facility. The exemption requires that the sales person typically make his or her sales at the customer's place of business, not his or her employer's place of business.[103]

G. AGRICULTURAL IRRIGATION POSITIONS FOR WATER AGENCIES

Employees employed in connection with the operation or maintenance of ditches, canals, reservoirs or waterways, not owned and operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least ninety percent of which was ultimately delivered for agricultural purposes during the preceding calendar year, are exempt from the overtime requirements of the FLSA.[104] The exemption had previously required that all of the water be delivered for agricultural purposes. However, in 1997 Congress modified the Act to require that only 90 percent of the water needs to be delivered for agricultural purposes.

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SECTION 2 APPLYING THE NEW DOL REGULATIONS FOR WHITE COLLAR EMPLOYEES

DETERMINING IF AN EMPLOYEE IS EXEMPT

Categorizing an employee as overtime exempt or non-exempt is a critical decision that can have significant repercussions if the employee is misclassified (*i.e.*, owing an "exempt" employee two to three years of overtime, plus liquidated damages and attorney's fees, if it is later determined the employee was actually non-exempt.) Classifying an employee involves a two-step process. First, the employer must investigate the facts supporting the employee's potential classification status. Second, the employer must analyze the facts and determine if the employee satisfies the DOL regulations and relevant court decisions for exempt status.

HOW TO CONDUCT AN INVESTIGATION INTO AN EMPLOYEE'S CLASSIFICATION STATUS

The investigation of determining whether an employee is exempt contains several steps. Initially the employer should verify that the employee earns a salary of more than $455 per week before deductions. This step may be accomplished by simply reviewing the employee's paycheck or payroll data to ensure that the employee earns more than the threshold amount. The employer should also determine whether the employee earns more than $100,000 per year including non-discretionary bonuses for the highly compensated employee exemption.

Next, the employer must review the employee's discipline records and verify that the employee has not been subjected to suspensions for less than a full work day. The employer must also verify that the employee has only been subjected to discipline in full day increments based on major safety violations or violations of uniformly applied work place conduct rules. Likewise, the employer should simultaneously review the employee's leave usage and payroll records to confirm that the employee's salary has not been reduced for taking jury duty, military leave or witness time. In addition, it is highly recommended that the employer review all salary basis issues (*e.g.*, amount of weekly compensation, leave usage, discipline, etc.) with members of the employer's finance or payroll department. Upon completion of these tasks, the employer should have sufficient information to determine if the employee satisfies the salary basis test.

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After gathering sufficient facts to determine that the employee satisfies the salary test, the employer should review and verify the accuracy of the employee's job description. As a reminder, the job description, job title, MOU and bargaining unit do not control whether an employee meets one of the duties tests. Rather, the employee's actual job duties determine whether an employee satisfies one of the duties tests. Thus, it is strongly recommended that the employer personally interview the employee and the employee's supervisor regarding the employee's regular job duties, including a percentage break down of the tasks performed and the percentage of time spent performing each task.

Attached as Appendix B is a sample employee/supervisor questionnaire to assist employers with gathering information to determine if an employee satisfies one of the duties tests. The questionnaire is also a good method to verify the accuracy of an employee's job description against the actual duties performed. Finally, direct questioning of the employee through a questionnaire or interview will provide greater protection to the employer if the employee ever claims that he or she was misclassified as overtime exempt.

HOW TO PREPARE A WRITTEN DETERMINATION OF AN EMPLOYEE'S CLASSIFICATION STATUS

It is important to prepare written findings and conclusions based on the information gathered from the investigation phase to support the employer's "good faith defense" should the employee's classification ever be challenged. The good faith defense is the only method available to an employer to prevent "liquidated" (double) damages, which are otherwise mandatory if an FLSA violation is proven.

The first step in this procedure is to identify and analyze each prong of the salary and duties test. The analysis should include reference to the materials relied upon by the employer (*e.g.*, questionnaire, payroll documents, policies and procedures manual, etc.). The employer should strongly consider consulting with legal counsel or human resources professionals with expertise in FLSA exemption analyses to further support a good faith defense. Ignorance of the law or inexperience in performing exemption analyses will not establish a good faith defense for an employer.

Next, the written materials should include a finding of whether the employee is exempt or non-exempt, and the reasons for the determination. The findings should include a detailed analysis supporting the findings. As a final step, the employer should implement the findings and classify the employee based upon the

written materials. The employer should be able to identify which of the white collar exemptions apply to the employee. The employer must also periodically review each exempt classification to ensure that the employee is still performing exempt duties.

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SECTION 3 HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

On April 14, 2003, privacy regulations enacted by the Department of Human Health Services ("DHHS") under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. 1301 *et seq*., went into effect.

The federal regulations, entitled *Standards for Privacy of Individuality Identifiable Health Information* ("HIPAA Privacy Rule"), impose numerous requirements on entities covered by HIPAA ("covered entities") to protect individually identifiable health information of patients and, in some cases, employees. In particular, the Rule imposes standards regarding the rights of individuals who are the subjects of individually identifiable health information and procedures for the exercise of those rights. In addition, the Rule contains standards regarding the authorized and required uses and disclosures of this information by covered entities, and imposes on covered entities, several administrative burdens and onerous penalties for non-compliance.

The limits and administrative requirements imposed by HIPAA's Privacy Rule preempt all contrary privacy state laws except where the state law is more stringent.[105] For instance, if a privacy requirement or limitation is provided by a provision of state law and no analogous requirement or limitation exists in HIPAA's Privacy Rule, the state law provision would not be contrary to the HIPAA regulations, and would therefore not trigger preemption.[106] Accordingly, entities covered by HIPAA must comply with the requirements of both HIPAA and state law, depending on which provides greater privacy protection.

The primary thrust of HIPAA's Privacy Rule is directed at hospitals, doctors, medical clinics, health plans and health insurers. However, under some circumstances, local public agencies may be subject to the Rule's requirements as well.

APPLICABILITY OF HIPAA'S PRIVACY RULE

Covered entities under HIPAA are health plans, health-care clearinghouses or health care providers conducting certain health care transactions electronically.[107] Also affected by HIPAA are hybrid entities whose business activities include both covered and non-covered functions,[108] and health plan sponsors.

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HEALTH PLANS

Health plans covered by HIPAA's Privacy Rule include individual or group plans that provide or pay the cost of medical care. They may be private entities such as health insurers and managed care organizations, or government organizations such as Medicaid, Medicare, and the Veterans Health Administration.[109] A state retirement plan may also be considered a covered entity for purposes of HIPAA's Privacy Rule.[110]

Flexible spending accounts and cafeteria plans are covered entities under HIPAA's Privacy Rule if they have 50 or more participants and are self-administered, at least to the extent that they meet the definition of an employee welfare benefit plan under the Employee Retirement Income Security Act, 42 USC § 1320d(5)(A), and pay for medical care.

The following are not covered health plans under HIPAA. They are therefore exempted from the Rule's requirements:

- Employer administered group health plans with fewer than 50 participants
- Life, automobile liability, disability income and workers compensation insurance plans and certain government funded programs.[111]

HEALTH-CARE PROVIDERS

Health-care providers covered by HIPAA's Privacy Rule are individuals or organizations such as physicians, hospitals, or clinics, that provide, bill, or are paid for health care, in the normal course of business, and transmit health information electronically in connection with a health care transaction for which a HIPAA standard has been adopted by the DHHS.[112] HIPAA covered transactions include: health claims and benefit eligibility inquiries and responses, and referral authorization requests and responses.[113]

HEALTH CARE CLEARINGHOUSES

Health-care clearinghouses covered by the Privacy Rule are public or private entities, including billing services, repricing companies, or community health information systems, that process nonstandard data or transactions received from another entity into standard transactions or data elements, or vice versa.[114]

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HYBRID ENTITIES

A hybrid entity is any single legal covered entity whose business activities include both covered and non-covered functions.[115] The covered functions are known as health care components.[116] If an agency voluntarily designates itself as a hybrid entity, only its health care components will be subject to the limits and requirements of HIPAA's Privacy Rule.[117]

HIPAA's Privacy Rule generally applies to public agencies only to the extent and degree in which they function as a covered entity, or carry out functions covered under HIPAA. Thus, the Privacy Rule does not apply to public agencies acting solely in their capacity as employers or to the employment records that they maintain.[118]

The kinds of employment records maintained by local agencies in their capacity as employers and therefore, not subject to HIPAA's Privacy Rule include:

- Physician statements from employees to document sick leave
- Medical information needed to carry out employer obligations under the FMLA, ADA, and similar laws
- Files or records relating to the results of an applicant/employee's fitness for duty examination or drug screening tests, or regarding an employee's occupational injuries, disability insurance eligibility, or workplace medical surveillance

Conversely, if an agency operates a health clinic or hospital providing health care services and performing certain health care transactions electronically, it is a covered entity. Once it designates itself as a hybrid entity, however, only its health care components will be subject to the limits and requirements of HIPAA's Privacy Rule.[119]

Similarly, when an employer engages in activities related to its role as a sponsor of health plans covered under HIPAA's Privacy Rule, the employer/plan sponsor should ensure that its use and disclosure of health information complies with the Privacy Rule is requirements as set out below.[120]

Public employers are covered entities under two specific circumstances:

- First, if the public agency provides health care to the general public by means of a hospital, clinic or any similar method of delivering health care, you are covered. Significantly, the providing of

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paramedic services through a Fire Department may subject the agency's paramedic functions to HIPAA's privacy rules.

- Second, if the public agency has a self-administered health plan with 50 or more participants it is subject to HIPAA. Self-insured plans, cafeteria plans or flexible spending accounts with more than 50 participants (if administered by a public agency rather than a third-party administrator) are all covered by HIPAA.

If a public agency has an outside administrator for its health plans, cafeteria plans or flexible spending accounts, then it is not covered by the full range of HIPAA's Privacy Rule. However, even if it is not a covered entity, a public agency still has to meet certain lesser requirements such as:

- Ensuring that the third party administrator is complying with the Privacy Rule;
- Obtaining authorizations from employees to access information about their health claims
- Ensuring that the health plan provides that employees can access their own health information.

REQUIREMENTS IMPOSED ON COVERED ENTITIES BY HIPAA'S PRIVACY RULE

HIPAA's Privacy Rule imposes a number of administrative requirements on covered entities. If your agency is a covered or hybrid entity, the Rule requires it to do the following:

- Notify individuals regarding their privacy rights and how their Private Health Information can be used or disclosed.
- Adopt and implement internal privacy policies and procedures.
- Train employees to understand these policies and procedures as appropriate for their functions in carrying out duties related to the employer's capacity as a health plan or health provider.
- Designate individuals who are responsible for implementing these policies and procedures, and who will receive privacy-related complaints.
- Establish privacy requirements in contracts with business associates that perform functions related to the employer's capacity as covered entity.
- Implement appropriate administrative, technical, and physical safeguards to protect the privacy of health information; so that they are not readily available to those who do not need them.

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- Meet obligations concerning the exercise by individuals of their rights under the Privacy Rule.[121]

An agency must designate an employee who will serve as the privacy officer. HIPAA does not specify any particular qualifications, but an employer may want to consider selecting someone with knowledge of the agency as a whole from a management perspective and a familiarity with benefits administration.

Additionally, covered entities must require business associates to comply with HIPAA's Privacy Rule. A business associate is a person or entity that performs certain functions on behalf of a covered health plan or health care provider which involve the use or disclosure of information protected by HIPAA's Privacy Rule. Examples of functions carried out by business associates include claims processing, quality assurance, and billing. Although HIPAA does not regulate business associates, a covered entity needs to enter into a business associate contact with business associates that requires compliance with HIPAA's Privacy Rule. Use and disclosure by business associates of information protected under HIPAA's Privacy Rule is further described below.

MEDICAL INFORMATION PROTECTED UNDER HIPAA'S PRIVACY RULE

HIPAA's Privacy Rule applies only to protected health information ("PHI"). PHI is defined very broadly under the Privacy Rule, however, as individually identifiable health information that is transmitted or maintained in any form or medium, including electronically, on paper, or orally.[122] Individually identifiable health information itself is a subset of health information created or received by a health care provider, health plan, employer or health care clearinghouse that identifies an individual, or provides a reasonable basis to believe the information can be used to identify an individual, and relating to:

- Past, present or future physical or mental health or condition of an individual;
- Provision of health care to an individual; or
- Past, present, or future payment for the provision of health care to an individual.[123]

Excluded from PHI are employment records and certain education and other student records subject to, or defined in the Family Educational Rights and Privacy Act , 20 U.S.C. §1232g.[124]

USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION BY COVERED ENTITIES

HIPAA's Privacy Rule permits covered entities to use or disclose PHI for limited purposes and/or in limited circumstances. A covered entity may not use or disclose PHI except as follows:[125]

- Disclosure to the individual.
- For purposes of treatment, payment, or health care operations which are the activities of a covered entity related to covered functions.
- Uses and disclosures that are incident to a use or disclosure permitted by the Rule.
- Pursuant to, and in compliance with, a valid authorization from the individual to whom the PHI pertains.
- Pursuant to agreement.
- Required Disclosures.
- Public Policy.

MINIMUM NECESSARY STANDARD

When using or disclosing PHI, or when requesting PHI from another covered entity, entities covered by HIPAA's Privacy Rule must make reasonable efforts to limit PHI to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.[126] The minimum necessary standard does not apply, however, to the following:

- Disclosures to or requests by a health care provider for treatment;
- Uses or disclosures made to the individual;
- Uses or disclosures made pursuant to an authorization
- Disclosures made to the Secretary of the DHSS
- Uses or disclosures required by law; and
- Uses or disclosures that are required by law and/or for compliance with applicable requirements of HIPAA's Privacy Rule.[127]

AUTHORIZATION REQUIREMENT

As a general rule, a covered entity may not use or disclose PHI without a valid authorization in writing from the individual who is the subject of the PHI, except as otherwise permitted or required by HIPAA's Privacy Rule.[128] When a covered entity obtains or receives a valid authorization, use or disclosure of PHI must be consistent with the authorization.[129]

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An authorization must be used in all circumstances where:

- HIPAA does not permit the use or disclosure of PHI;
- Covered entities have determined that an authorization is required as part of their Privacy Policies and Procedures, or
- As required by law.[130]

Authorization provided by the individual to whom the PHI pertains must contain or satisfy the following minimum elements:

- Specific and meaningful identification of the information to be used or disclosed.
- Names of the person(s), classes of persons, or organizations that will receive, use, or disclose the PHI.
- Description of the purpose for each requested use or disclosure of PHI. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure of PHI.
- Notice to the individual of his or her right to revoke the authorization at any time in writing; how to exercise that right and any applicable exceptions to that right under the Privacy Rule.
- Notice to the individual of his or her right to refuse to sign the authorization without negative consequences to treatment, payment, or health plan enrollment or benefit eligibility, except under specific circumstances.
- The individual's signature and the date he or she signed the authorization. (If the authorization is signed by the individual's personal representative, a description of the representative's authority to act for the individual must also be provided.)
- The authorization must be written in plain language.
- Explanation of the potential for PHI disclosed pursuant to the authorization to be subject to redisclosure
- A copy of the signed authorization must be provided to the individual if it is being sought by a covered entity.[131]

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EXCEPTIONS – PERMITTED USES AND DISCLOSURES OF PROTECTED HEALTH INFORMATION BY COVERED ENTITIES WITHOUT AUTHORIZATION

PHI can be used or disclosed by covered entities, without an authorization, as follows:

For Treatment, Payment and Health Care Operations, and Incidental Uses and Disclosures

- Uses and disclosures of PHI for treatment, payment or health care operations ("TRO") purposes,[132] except where the PHI consists of psychotherapy notes, in which case special rules apply.[133]
- Uses or disclosures of PHI that are incidental in nature and otherwise permitted or required by HIPAA, provided that the covered entity has complied with the Privacy Rule's minimum necessary and safeguarding provisions.[134]

Required Disclosures

- To the individual who is the subject of the PHI.[135]
- To the Secretary of the DHHS for investigation or determination of the covered entities compliance with HIPAA's privacy rule.[136]

If Individuals Given Opportunity to Agree or Object

- A covered entity may use or disclose protected health information for certain specified purposes if the individual is informed in advance of the use or disclosure and given the opportunity to agree or object.137

Public Policy

- As required by federal, state, or local laws.
- Disclosures to or use by public health authorities for public health purposes including but not limited to public health surveillance, investigations, and interventions.
- Health research under certain specified conditions
- To report abuse, neglect, or domestic violence under specified circumstances.
- Disclosures to or use by law enforcement officials pursuant to a court order, subpoena, or other legal order, under specified conditions, in order to help identify and locate a suspect, fugitive, or missing person; provide information related to a victim of a

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crime or a death that may have resulted from a crime; or report a crime.

- ❑ Disclosure to or use in judicial or administrative proceedings under specified circumstances.
- ❑ Tissue or organ donation purposes.
- ❑ Disclosure to or use by a health oversight agency for oversight activities authorized by law.
- ❑ As authorized by, and to the extent necessary to comply with, workers' compensation programs.[138]

USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION BY BUSINESS ASSOCIATES

As noted earlier, covered entities must ensure that their business associates comply with HIPAA's Privacy Rule. A business associate, who is not an employee of a covered entity, acts on behalf of the covered entity by performing or assisting with functions or activities that involve the use or disclosure of PHI.[139]

Business associate functions or activities may include claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, billing, benefit management, practice management, and repricing, as well as legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services.[140] Business associates can be lawyers, accountants, billing companies, and other contractors, all of whom have a relationship with covered entities that requires the sharing of PHI.

HIPAA's Privacy Rule permits the use and disclosure of PHI by and to business associates. Under the Rule, however, a covered entity may only disclose PHI to business associates if the covered entity obtains satisfactory assurances that the business associate will appropriately safeguard the PHI.[141] A contract for this purpose between the covered entity and a business associate must therefore include assurances that the business associate will:

- ❑ Only use or disclose the PHI as permitted or required by the plan documents or as required by law.
- ❑ Use appropriate safeguards to prevent use or disclosure of the PHI other than as provided by the contract.
- ❑ Report any use or disclosure of the PHI that is inconsistent with the uses or disclosures provided for by the contract of which it becomes aware.

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- ❑ Ensure that any agents and subcontractors to whom it provides the PHI agree to adhere to the same restrictions conditions.
- ❑ Make the PHI accessible to those to whom it pertains, and available for amendment or as required to provide an accounting of PHI disclosures, in accordance with HIPAA's privacy rule.
- ❑ Make its internal practices, books, and records relating to the use and disclosure of the PHI available to the Secretary of DHHS for purposes of determining compliance by the health plan with HIPAA's privacy rule.

Return or destroy the PHI, if feasible, at termination of the contract.[142]

USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION BY PUBLIC AGENCIES IN THEIR CAPACITY AS HEALTH PLAN SPONSORS

Many public agencies are plan sponsors of the health plans they offer to their employees. Since plan sponsors are not covered entities, they are not subject to the same administrative requirements and burdens imposed upon covered entities.

However, HIPAA's Privacy Rule does place limitations on when health plans may disclose PHI to employer/plan sponsors.

Health plans can only disclose PHI to employers/plan sponsors that voluntarily agree to limit the use and disclose the information according to HIPAA's privacy rule.[143] Moreover, a health plan's documents must be amended to include assurances that the employer/plan sponsor will:

- ❑ Only use or disclose the PHI as permitted or required by the plan documents or as required by law.
- ❑ Ensure that any agents and subcontractors to whom it provides the PHI agree to adhere to the same restrictions conditions.
- ❑ Not use or disclose the PHI for employment-related actions and decisions or in connection with any other benefit or employee benefit plan.
- ❑ Report any use or disclosure of the PHI that is inconsistent with the uses or disclosures provided for in the plan documents of which it becomes aware.
- ❑ Make the PHI accessible to those to whom it pertains, and available for amendment or as required to provide an accounting of PHI disclosures, in accordance with HIPAA's privacy rule.

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- Make its internal practices, books, and records relating to the use and disclosure of the PHI available to the Secretary of DHHS for purposes of determining compliance by the health plan with HIPAA's privacy rule.
- Return or destroy the PHI when no longer needed for the purpose for which disclosure was made.
- Ensure there is adequate separation between itself and the health plan.[144]

After the plan documents are amended, a health plan may only disclose PHI to the employer/plan sponsor for plan administration functions specified in the plan documents. Administration functions are functions performed by the plan sponsor on behalf of the health plan such as enrollment/disenrollment of participants, claims processing, auditing, etc.[145]

In addition, summary or de-identified can be provided to employer/plan sponsors by health plans if needed to obtain competitive bids from other health plans, or to modify, amend, or terminate a health plan.[146] Summary or de-identified health information is health information that includes the claims history, claims expenses, or types of claims experienced by individuals in the group health plan after certain identifiers have been deleted.[147]

ENFORCEMENT OF HIPAA PRIVACY RULE AND PENALTIES FOR VIOLATIONS

Compliance with HIPAA's Privacy Rule is enforced by DHHS' Office for Civil Rights. Violations of the Rule by covered entities can result in both civil and criminal penalties of up to $100 per violation, not exceeding $25,000 during a calendar year.[148] If a covered entity knowingly violates HIPAA's Privacy Rule, it may be fined up to $50,000, or and face imprisonment for up to one year, or both. If a known violation is committed with the intent to profit or inflict harm, a covered entity may be subject to a criminal fine of up to $225,000 and/or a jail sentence of up to10 years.

HIPAA PRIVACY RULE COMPLIANCE DATES

Compliance with HIPAA's Privacy Rule was required by April 14, 2003, except for small health plans who are required to comply by April 14, 2004.[149] Small health plans are those having annual receipts of $5 million or less.[150]

ENDNOTES

[1] 29 C.F.R. Part 541.

[2] *See SEIU Local 102 v. County of San Diego*, 60 F.3d 1346, 1350 (9th Cir. 1995), *cert. denied* 516 U.S. 1072, 116 S.Ct. 774, 133 L.Ed.2d 726 (1996).

[3] 29 C.F.R. § 541.600(a).

[4] 29 C.F.R. § 541.602(a).

[5] 29 C.F.R. § 541.600(a).

[6] 29 C.F.R. § 541.602(a).

[7] 29 C.F.R. § 541.602(a).

[8] *Id.*

[9] *Barner v. City of Novato*, 17 F.3d 1256, 1261 (9th Cir. 1994).

[10] 29 C.F.R. § 541.710(a).

[11] 29 C.F.R. § 541.602(b)(1).

[12] 29 C.F.R. § 541.602(b)(2).

[13] 908 F.2d.483 (9th Cir. 1990).

[14] 29 C.F.R. § 541.710(a).

[15] 29 C.F.R. § 541.602(a)(4).

[16] *Hurley v. Oregon*, 27 F.3d 392, 395-96 (9th Cir. 1994). Under the former regulations, courts held that "economic sanctions," such as a reduction in pay or a temporary demotion with a corresponding reduction in pay, violated the salary basis test, unless the sanction was imposed for a major violation of a safety rule. However, the new regulations expand the "disciplinary deductions" to include permitting an employer to deduct an employee's salary for violations of uniformly followed workplace guidelines (*e.g.*, policies against sexual harassment, retaliation, workplace violence, etc.). The new regulations do not specifically address the propriety of a reduction in pay or temporary demotion as a disciplinary measure.

[17] 29 C.F.R. § 541.710(b).

[18] *Id.*

[19] 29 C.F.R. § 541.604(a).

[20] *Boykin v. Boeing Co.*, 128 F.3d 1279 (9th Cir. 1997) (quoting DOL Letter Opinion, April 5, 1995); 29 C.F.R. § 541.604(a).

[21] 29 C.F.R. § 541.604(a).

[22] 29 C.F.R. § 541.602(b)(3).

[23] *Id.*

[24] *Shockley v. City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993).

[25] DOL Letter Opinion, June 27, 1996.

[26] 29 C.F.R. § 541.602(b)(7).

[27] 29 C.F.R. § 541.603(a).

[28] *Id.*

[29] 29 C.F.R. § 541.603(b).

[30] 29 C.F.R. § 541.603(c).

[31] 29 C.F.R. § 541.603(d).

[32] 29 C.F.R. § 541.603(d).

[33] 29 C.F.R. §§ 541.303, 541.304.

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[34] 29 C.F.R. § 541.304(b).

[35] 29 C.F.R. § 541.303(a).

[36] 29 C.F.R. § 541.605(a).

[37] *Id.*

[38] 29 C.F.R. § 541.605(b).

[39] 29 C.F.R. § 541.604(b).

[40] 29 C.F.R. § 541.700(a).

[41] *Id.*

[42] 29 C.F.R. § 541.700(b).

[43] 29 C.F.R. § 541.700(c).

[44] *Jarrett v. ERC Properties*, 211 F.3d 1078, 1082 (8th Cir. 2000).

[45] 29 C.F.R. § 541.708

[46] 29 C.F.R. § 541.100(a)(2-4).

[47] 29 C.F.R. § 541.102.

[48] 29 C.F.R. § 541.103(a).

[49] *Id.*

[50] 29 C.F.R. § 541.104(a).

[51] *Secretary of Labor v. Daylight Dairy Products*, 779 F.2d 784, 787 (1st Cir. 1985); DOL Field Operations Handbook, ¶22c00; 29 C.F.R. § 541.104(d).

[52] *Id.*

[53] 229 C.F.R. § 541.105.

[54] 29 C.F.R 541.106).

[55] 29 C.F.R. § 541.200(a)(2-3).

[56] 29 C.F.R. § 541.201(a).

[57] 29 C.F.R. § 541.201(b).

[58] 29 C.F.R. § 541.202(a).

[59] *Id.*

[60] 29 C.F.R. § 541.202(b).

[61] 29 C.F.R. § 541.202(c).

[62] *Id.*

[63] *Id.*

[64] 29 C.F.R. § 541.204(a)(2).

[65] 29 C.F.R. § 541.204(c)(1).

[66] 29 C.F.R. § 541.203.

[67] *Bothell v. Phase Metrics, Inc*. 299 F.3d 1120 (9th Cir.)

[68] *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990).

[69] *Heidtman v. County of El Paso*, 171 F.3d 1038 (5th Cir. 1999).

[70] *Id.* at 1042.

[71] 29 C.F.R. § 541.300(a)(2).

[72] 29 C.F.R. § 541.301(b).

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[73] *Id*.

[74] 29 C.F.R. § 541.301(c).

[75] 29 C.F.R. § 541.301(e).

[76] 29 C.F.R. § 541.301(e)(7).

[77] 29 C.F.R. § 541.303(a).

[78] 29 C.F.R. § 541.303(c).

[79] 29 C.F.R. § 541.303(b).

[80] *Id*.

[81] 29 C.F.R. § 541.302(a).

[82] 29 C.F.R. § 541.302(c).

[83] *Freeman v. National Broadcasting Company, Inc.*, 80 F.3d 78 (2d Cir. 1996).

[84] *Reich v. Newspapers of New England*, 44 F.3d 1060 (1st Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3d Cir. 1994).

[85] *Reich v. Wyoming*, 993 F.2d 739 (10th Cir. 1993).

[86] *Dybach v. Florida Dep't of Corrections*, 942 F.2d 1562 (11th Cir. 1991).

[87] 29 C.F.R. § 541.601(a), (d).

[88] 29 C.F.R. § 541.601(b).

[89] 29 C.F.R. § 541.601(b)(1).

[90] 29 C.F.R. § 541.601(b)(2).

[91] *Id.*

[92] *Id.*

[93] 29 C.F.R. § 541.601(b)(4).

[94] 29 C.F.R. § 541.601(b)(3).

[95] 29 C.F.R. § 541.3(b)(1).

[96] 29 C.F.R. § 541.400(a-b).

[97] 29 C.F.R. § 541.400(a).

[98] 29 C.F.R. § 541.401.

[99] 29 U.S.C. § 213(a)(3).

[100] *Id.*

[101] 29 C.F.R. § 541.500(a).

[102] 29 C.F.R. § 541.500(c).

[103] 29 C.F.R. § 541.502.

[104] 29 U.S.C. § 213(b)(12).

[105] 45 CFR § 160.203.

[106] HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 Federal Regulation 82581.

[107] 45 CFR § 160.103.

[108] See 45 CFR § 164.103.

[109] 45 CFR § 160.103.

[110] CalPERS Circular Letter No: 600-065-02, "HIPAA - Health Insurance Portability And Accountability Act," (October 30, 2002.)

[111] 45 CFR § 160.103.

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[112] *Id.*

[113] *Id.*

[114] 45 CFR § 160.103.

[115] See 45 CFR § 164.103.

[116] *Id.*

[117] 45 CFR § 164.105.

[118] Standards for Privacy of Individually Identifiable Health Information, *Part III: Section-by-Section Description of Final Modifications and Response to Comments*; 67 FR at 53192 (August 14, 2002.)

[119] 45 CFR § 164.105.

[120] 45 CFR §164.105.

[121] 45 CFR § 164.530.

[60] 45 C.F.R. § 160.103.

[123] 45 C.F.R. 160.103.

[124] *Id.*

[125] 45 C.F.R. § 164.502 (a)(1).

[126] 45 C.F.R. § 164.502(b)(1).

[127] 45 CFR. § 164.502(b)(2).

[128] 45 CFR § 164.508(a)(1).

[129] 45 C.F.R. § 164.508(a)(1).

[130] 45 C.F.R. § 164.508

[131] 45 CFR § 164.508 (b)(1) and (2)

[132] 45 CFR § 164.506

[133] 45 CFR § 164.508(2).

[134] 45 C.F.R. § 164.502(a)(1)(iii).

[135] 45 C.F.R. § 164.502(a)(2)(ii).

[136] 45 C.F.R. § 164.502(a)(2)(iv.)

[137] 45 C.F.R. §164.510

[138] 45 C.F.R. § 164.512

[139] 45 CFR § 164.501.

[140] 45 CFR § 160.103.

[141] 45 CFR § 164.502.

[142] 45 CFR § 164.504(e)(2)(ii).

[143] 45 CFR 164.504(f)(1).

[144] 45 CFR 164.504(f)(2).

[145] 45 CFR 164.504(a).

[146] 45 CFR 164.504 (f)(1)(ii).

[147] 45 CFR §§164.504 (f)(1)(ii) and 164.514(b)(2)(i).

[148] 45 CFR §160.508

[149] 45 CFR §164.534

[150] 45 CFR §160.501

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