

LABOR CABINET
Department of Workplace Standards
(Amended at ARRS Committee)

803 KAR 1:071. Executive, administrative, supervisory, or professional employees; salesmen.

RELATES TO: KRS 337.275, 337.285, 29 C.F.R. 541

STATUTORY AUTHORITY: KRS 337.010(2)(a)2, 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010(2)(a)2 requires exemption for any individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman or as an outside collector as the terms are defined by administrative regulations of the commissioner from both the minimum wage and overtime requirements established in KRS 337.275 and 337.285. This administrative regulation establishes what constitutes an individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of an outside salesman or outside collector.

Section 1. Scope.

(1) The exemptions established in KRS 337.010(2)(a) shall not apply to workers as established in 29 C.F.R. 541.3(a).

(2)

(a) The exemptions established in KRS 337.010(2)(a) shall not apply to workers as established in 29 C.F.R. 541.3(b)(1).

(b) The exempted employees established in paragraphs (a) this subsection shall not qualify as exempt employees for reasons established in 29 C.F.R. 541.3(b)(2) through 541.3(b)(4).

Section 2. Executive Employees.

(1) The term, "individual employed in a bona fide executive capacity" in KRS 337.010(2)(a)2 shall include employees:

(a) Compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(b) Who meet the criteria as established in 29 C.F.R. 541.100(a)(2) through 541.100(a)(4) and 541.101.

(2) An "employee" employed in a bona fide executive capacity, as established by KRS 337.010(2)(a)2., shall also include an employee who owns at least a bona fide twenty (20) percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporation or other type of organization, and who is actively engaged in its management. The salary requirements of Section 8 of this administrative regulation shall not apply to business owners established in this subsection.

(3) A person who performs activities established in 29 C.F.R. 541.102 shall be considered engaged in management.

(4) A customarily recognized department or subdivision shall comply with the criteria established in 29 C.F.R. 541.103.

(5) An executive exempt as established in KRS 337.010(2)(a)2. shall comply with the criteria established in 29 C.F.R. 541.104.

(6) An employee's suggestions and recommendations shall be given "particular weight" if the factors established in 29 C.F.R. 541.105 have been met.

(7) The criteria for concurrent performance of exempt and nonexempt work shall be as established 20 C.F.R. 541.106.

Section 3. Administrative Employees.

(1) The term "individual employed in a bona fide administrative capacity" in KRS 337.010(2)(a)2 shall include employees:

(a) Compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(b) Who meet the criteria as established in 29 C.F.R. 541.200(a)(2) and 541.200(a)(3).

(2) To qualify for the administrative exemption in KRS 337.010(2)(a)2, the criteria shall be as established in 29 C.F.R. 541.201 through 541.204.

Section 4. Professional Employees.

(1) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)2 shall include employees:

(a) Compensated on a salary or fee basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(b) Who meet the criteria as established in 29 C.F.R. 541.300(a)(2).

(2) To qualify for the learned professional exemption, the criteria shall be as established in 29 C.F.R. 541.301.

(3) To qualify for the creative professional exemption, the criteria shall be as established in 29 C.F.R. 541.302.

(4) Teachers.

(a) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)2 shall include any employee as established in 29 C.F.R. 541.303(a) through (c).

(b) The salary requirements of Section 8 of this administrative regulation shall not apply to the teaching professionals established in this subsection.

(5) Practice of law or medicine.

(a) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)2 shall include any employee as established in 29 C.F.R. 541.304(a) through 541.304(c).

(b) The salary requirements of Section 8 of this administrative regulation shall not apply to the employees established in this subsection.

Section 5. Supervisors. The term "individual employed in a bona fide supervisory capacity" in KRS 337.010(2)(a)2 shall include employees:

(1) Compensated for his or her services on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(2) Who meet the criteria as established in 29 C.F.R. 541.104.

Section 6. Outside Sales Employees.

(1) The term "individual employed in the capacity of outside salesman" in KRS 337.010(2)(a)2 shall include employees:

(a) Whose primary duty is:

1. Making sales; or

2. Obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and

(b) Customarily and regularly engaged away from the employer's place or places of business in performing the employee's primary duty.

(2) In determining the primary duty of an outside sales employee, the criteria shall be as established in 29 C.F.R. 541.500(b).

(3) The salary requirements of Section 8 of this administrative regulation shall not apply to employees established in this section.

(4) Making sales or obtaining orders.

- (a) The criteria for making sales within the meaning of this section shall include criteria as established 29 C.F.R. 541.501(b) and 541.501(d).
- (b) Obtaining orders for the use of facilities shall include the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.
- (5) The criteria for an outside sales employee to be customarily and regularly engaged "away from the employer's place or places of business" shall be as established in 29 C.F.R. 541.502.
- (6) The criteria for determining if promotional work is exempt under this section shall be as established in 29 C.F.R. 541.503.
- (7) The criteria for exempt drivers who sell under this section shall be as established in 29 C.F.R. 541.504.

Section 7. Outside Collector.

- (1) The term "individual employed as an outside collector" in KRS 337.010(2)(a)2 shall include any employee who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business and whose primary duty is collecting money for:
 - (a) Goods or services previously or presently provided by the employer; or
 - (b) An account placed in the hands of his employer for collection.
- (2) In determining the primary duty of an outside collector, work performed incidental to and in conjunction with the employee's outside collection activities shall be exempt work.
- (3) The salary requirements of Section 8 of this administrative regulation shall not apply to the outside collector employees established in this section.

Section 8. Salary Requirements.

- (1) To qualify as an exempt executive, administrative, professional, or supervisory employee under KRS 337.010(2)(a)2, an employee shall be compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities. Administrative and professional employees may also be paid on a fee basis as established in Section 12 of this administrative regulation.
- (2) The \$684 per week may be translated into equivalent amounts for periods longer than one (1) week. The requirement shall be met if the employee is compensated biweekly on a salary basis of at least \$1,368, semimonthly on a salary basis of at least \$1,482, or monthly on a salary basis of at least \$2,964. The shortest period of payment that meets this compensation requirement shall be one (1) week.
- (3) For academic administrative employees, the compensation requirement may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as established in Section 4(4)(b) of this administrative regulation.
- (4) For computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than twenty-seven (27) dollars and sixty-three (63) cents an hour, as established in Section 14 of this administrative regulation.
- (5) The exception from the salary or fee requirement shall not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions that service the medical profession.

Section 9. Highly-compensated Employees.

- (1) An employee with total annual compensation of at least \$107,432 shall be exempt under KRS 337.010(2)(a)2 if the employee customarily and regularly performs any one (1) or more of the exempt duties or responsibilities of an executive, administrative, or professional employee established in this administrative regulation.

(2)

(a) "Total annual compensation" shall include at least \$684 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned during a fifty-two (52) week period.

(b) "Total annual compensation" shall not include board, lodging, or other facilities as established in Section 13 of this administrative regulation and shall not include payments for medical insurance, payments for life insurance, contributions to retirement plans, and the cost of other fringe benefits.

(c) If an employee's total annual compensation does not total at least the minimum amount established in subsection (1) of this section by the last pay period of the fifty-two (52) week period, the employer may, during the last pay period or within one (1) month after the end of the fifty-two (52) week period, make one (1) final payment sufficient to achieve the required level.

(d) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a pro rata portion of the minimum amount established in subsection (1) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one (1) final payment as under paragraph (c) of this subsection within one (1) month after the end of employment.

(e) The employer may use any fifty-two (52) week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year shall apply.

(3) A highly compensated employee shall qualify for exemption if the employee customarily and regularly performs any one (1) or more of the exempt duties or responsibilities of an executive, administrative, or professional employee established in this administrative regulation.

(4) This section shall not apply to employees whose primary duty includes performing nonoffice or manual work.

Section 10. Salary Basis.

(1)

(a) The criteria for an employee to be considered paid "on a salary basis" within the meaning of this administrative regulation shall be as established by 29 C.F.R. 541.602(a)(1) through 541.602(a)(2).

(b) Up to ten (10) percent of the salary amount required in paragraph (a) of this subsection may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently.

1. The employer may utilize any fifty-two (52) week period as the year, such as a calendar year, fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year shall apply.

2. This provision shall not apply to highly compensated employees.

3. If by the last pay period of the fifty-two (52) week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than fifty-two (52) times the weekly salary amount required, the employer may make one (1) final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any final payment made after the end of the fifty-two (52) week period shall count only toward the prior year's salary amount.

4. An employee who does not work a full fifty-two (52) week period for the employer, either because the employee is newly hired after the beginning of this

period or ends the employment before the end of this period, may qualify for exemption if the employee receives a pro rata portion of the minimum amount established, based upon the number of weeks that the employee will be or has been employed. An employer may make one (1) final payment under subparagraph 3. of this paragraph within one (1) pay period after the end of employment.

(2)

(a) The exceptions to the prohibition against deductions from pay in the salary basis requirement shall be as established in 29 C.F.R. 541.602(b)(1) and 541.602(b)(3) through 541.602(c).

(b) Deductions from pay in the salary basis requirement may be made for absences of one (1) or more full days occasioned by sickness or disability, if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability.

1. If the employer's particular plan, policy, or practice provides compensation for the absences, deductions for absences of one (1) or more full days because of sickness or disability may be made before an employee has qualified under the plan, policy, or practice, and after the employee has exhausted his or her leave allowance thereunder. It is not required that the employee be paid any portion of his or her salary for the day or days for which the employee receives compensation for leave under the plan, policy or practice.

2. If the employer operates under a state sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of one (1) or more full days if benefits are provided in accordance with the particular law or plan.

3. For an industrial accident, if the employer has a plan, policy, or practice of providing compensation for sickness and disability other than that relating to industrial accidents, the "salary basis" requirement shall be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer.

(3) The effect of improper deductions from salary shall be as established in 29 C.F.R. 541.603.

Section 11. The criteria for the minimum guarantee plus extras shall be as established in 29 C.F.R. 604.

Section 12. The criteria for when administrative and professional employees may be paid on a fee basis, rather than on a salary basis shall be as established in 29 C.F.R. 541.605.

Section 13. Board, Lodging, or Other Facilities.

(1) The phrase "exclusive of board, lodging, or other facilities" shall mean "free and clear" or independent of any claimed credit for noncash items of value that an employer might provide to an employee.

(a) Costs incurred by an employer to provide an employee with board, lodging, or other facilities shall not count towards the minimum salary amount required for exemption under this administrative regulation.

(b) Separate transactions shall not be prohibited between employers and their employees, but the costs to employers associated with the transactions shall not be considered in determining if an employee has received the full required minimum salary payment.

(2) "Other facilities" shall include items similar to board and lodging, such as meals provided at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles

of food, clothing, and household effects; housing provides for dwelling purposes; and transportation provided to employees for ordinary commuting between their homes and work.

Section 14. Computer Employees.

- (1) Computer system analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field shall be eligible for an exemption as professionals under KRS 337.010(2)(a)2. Job titles shall not be determinative of the applicability of this exemption.
- (2) The exemption for computer employees shall apply to any computer employee as established in 29 C.F.R. 541.400(b) and 541.402.
- (3) The exemption for computer employees shall not include employees as established in 29 C.F.R. 541.401.

Section 15. Miscellaneous Provisions.

- (1) The criteria for primary duty shall be as established in 29 C.F.R. 541.700.
- (2) The phrase "customarily and regularly" shall be as established in 29 C.F.R. 541.701.
- (3) Directly and closely related shall be as established in 29 C.F.R. 541.703
- (4) The criteria for determining if the use of manuals precludes an exemption under KRS 337.010(2)(a)2 shall be as established in 29 C.F.R. 541.704.
- (5) The criteria for the prohibition of KRS 337.010(2)(a)2 exemption to trainees shall be as established in 29 C.F.R. 541.705.
- (6) The criteria for the application of emergencies to exempt employees shall be as established in 29 C.F.R. 541.706.
- (7) The criteria for determining if occasional tasks preclude exemption under KRS 337.010(2)(a)2 shall be as established in 29 C.F.R. 541.707.
- (8) The criteria for the exemption of employees performing a combination of exempt duties as established in this administrative regulation shall be as established in 29 C.F.R. 541.708.
- (9) The requirement that the employee be paid on a salary basis shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$1,043 a week (exclusive of board, lodging, or other facilities).
 - (a) An employee in this industry who is otherwise exempt under Sections 2, 3, or 4 of this administrative regulation, and who is employed at a base rate of at least \$1,043 a week shall be exempt if paid a proportionate amount, based on a week of not more than six (6) days, for any week in which the employee does not work a full workweek for any reason.
 - (b) An otherwise exempt employee in this industry shall qualify for exemption if the employee is employed at a daily rate under the following circumstances:
 1. The employee is in a job category for which a weekly base rate is not provided, and the daily base rate would yield at least \$1,043 if six (6) days were worked; or
 2. The employee is in a job category having a weekly base rate of at least \$1,043, and the daily base rate is at least one-sixth (1/6) of such weekly base rate.
- (10) Employees of public agencies.
 - (a) An employee of a public agency who otherwise meets the salary basis requirements of Section 10 of this administrative regulation shall not be disqualified from exemption under Sections 2, 3, 4, 5, or 14 of this administrative regulation on the basis that the employee is paid according to a pay system established by statute, ordinance, or administrative 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 that requires the public agency employee's pay to be reduced or the employee to be placed on leave without pay for absences for personal reasons or

because of illness or injury of less than one (1) work-day if accrued leave is not used by an employee because:

1. Permission for its use has not been sought or has been sought and denied;
2. Accrued leave has been exhausted; or
3. The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

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