

803 KAR 1:070. Executive, administrative, supervisory or professional employees; salesmen.

RELATES TO: KRS 337.275, 337.285

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

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010(2)(a)2 exempts 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 executive director from both the minimum wage and overtime requirements set forth in KRS 337.275 and 337.285. This administrative regulation defines 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 set forth in KRS 337.010(2)(a)2, as defined by this administrative regulation, do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill, and energy. These nonexempt "blue collar" employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professionals such as medical doctors, architects, and archeologists. Thus, for example, nonmanagement production line employees and nonmanagement employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremens, construction workers, and laborers are entitled to minimum wage and overtime premium pay under KRS Chapter 337, and are not exempt under this administrative regulation no matter how highly paid they are.

(2)

(a) The KRS 337.010(2)(a)2 exemptions and this administrative regulation also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and 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 detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining, and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(b) These employees do not qualify as exempt executive employees, because their primary duty is not management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof as required under Section 2 of this administrative regulation. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under KRS 337.010(2)(a)(2) merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(c) These employees do not qualify as exempt administrative employees, because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under Section 3 of this administrative regulation.

(d) These employees do not qualify as exempt professionals, because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as required under Section 4 of this administrative regulation. Although some police officers, fire fighters, paramedics, emergency medical technicians, and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in these occupations.

Section 2. General Rule for Executive Employees.

(1) The term "individual employed in a bona fide executive capacity" in KRS 337.010(2)

(a)2 shall mean an employee:

- (a) Compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities;
- (b) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (c) Who customarily and regularly directs the work of two (2) or more other employees; and
- (d) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

(2) Business owner. The term "employee employed in a bona fide executive capacity" in KRS 337.010(2)(a)2 also include any 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 corporate 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 described in this subsection.

(3) Management. "Management" shall include, but is not limited to, activities such as interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the types of material, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked, or sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

(4) Department or subdivision.

(a) The phrase "a customarily-recognized department or subdivision" distinguishes between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily-recognized department or subdivision shall have a permanent status and continuing function. For example, a large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.

(b) If an enterprise has more than one (1) establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.

(c) A recognized department or subdivision may be physically outside the employer's establishment and may move from place to place. The mere fact that the employee works in more than one (1) location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee does not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

(5) Two (2) or more other employees.

(a) To qualify as an exempt executive under this section, the employee shall customarily and regularly direct the work of two (2) or more other employees. The phrase "two (2) or more other employees" means two (2) full-time employees or their equivalent. One (1) full-time and two (2) half-time employees, for example, are equivalent to two (2) full-time employees. Four (4) half-time employees are also equivalent.

(b) The supervision may be distributed among two (2), three (3), or more employees, but each employee shall customarily and regularly direct the work of two (2) or more other full-time employees or the equivalent. Thus, for example, a department with five (5) full-time, nonexempt workers may have up to two (2) exempt supervisors if each such supervisor customarily and regularly directs the work of two (2) of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two (2) or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee shall not be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two (2) employees in the same department does not satisfy this requirement. However, a full-time employee who works four (4) hours for one (1) supervisor and four (4) hours for a different supervisor, for example, may be credited as a half-time employee for both supervisors.

(6) Particular weight. To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make the suggestions and recommendations; the frequency with which the suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. An executive's suggestions and recommendations shall pertain to employees whom the executive customarily and regularly directs. It shall not include an occasional suggestion with regard to the change in status of a coworker. An employee's suggestions and recommendations may be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

(7) Concurrent duties.

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of this administrative regulation are otherwise met. Whether an employee meets the requirements of this administrative regulation when the employee performs concurrent duties is determined on a case-by-case basis. Exempt executives shall make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast,

the nonexempt employee shall be directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent, or repetitive tasks shall not qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves, and cleaning the establishment, except performance of the nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager may supervise employees and serve customers at the same time without losing the exemption. An exempt employee may also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees if, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

Section 3. General Rule for Administrative Employees.

(1) The term "individual employed in a bona fide administrative capacity" in KRS 337.010(2)(a)2 shall mean any employee:

(a) Compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities;

(b) Whose primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and

(c) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(2) Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty shall be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee shall perform work directly related to 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.

(b) 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. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

(3) Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty shall include the exercise of discretion and independent judgment with respect to matters of significance. The exercise of discretion and independent judgment shall involve 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.

(b) The phrase "discretion and independent judgment" shall be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider in determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; 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 commit the employer in matters that have significant financial impact; 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; 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.

(c) For the exercise of discretion and independent judgment, the employee shall have authority to make an independent choice, free from immediate direction or supervision. Except, employees may exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment shall be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. The exercise of discretion and independent judgment also shall not include clerical or secretarial work, recording, or tabulating data, or performing other mechanical, repetitive, recurrent, or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician".

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

(4) Administrative exemption examples.

(a) Insurance claims adjusters meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses, and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendation regarding litigation.

(b) Employees in the financial services industries meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments, or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing, or promoting the employer's financial products. Except, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling, or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if the employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret, or implement employment policies and management consultants who study the operations of a business and propose changes in organization meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment do not meet the duties requirements for the administrative exemption. The personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company official, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, if the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, the duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. The inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, do not meet the duties requirements for the administrative exemption. The employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. Except, the buyer who evaluates the reports on competitor prices to set the employer's prices meets the duties requirements for the administrative exemption.

(j) 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, do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. The employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

(5) Educational establishments.

(a) The term "individual employed in a bona fide administrative capacity" shall also include employees:

1. Compensated for services on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
2. Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment, department, or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education, or other educational institution. Elementary and secondary schools are those day or residential schools that provide elementary or secondary education, as determined by state law. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children, regardless of any classification of the schools as elementary, secondary, or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally-recognized

accrediting organization for career schools. Also, for the purposes of the exemption, a distinction shall not be drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

1. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of matters such 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; the principal and any vice-principals; department heads in institutions of higher education; academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements; and other employees with similar responsibilities;

2. Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers, or dieticians do not perform academic administrative functions. Although the work is not considered academic administration, the employees may qualify for another exemption, if the requirements for the exemption are met.

Section 4. General Rule for Professional Employees.

(1) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)(2) shall mean any employee:

- (a) Compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities; and

- (b) 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; or
2. Requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

(2) Learned professionals.

- (a) To qualify for the learned professional exemption, an employee's primary duty shall be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three (3) elements:

1. The employee shall perform work requiring advanced knowledge;
2. The advanced knowledge shall be in a field of science or learning; and
3. The advanced knowledge shall be customarily acquired by a prolonged course of specialized intellectual instruction.

- (b) The phrase "work requiring advanced knowledge" means work which is 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. An employee who performs work requiring advanced knowledge uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge shall not be attained at the high school level.

(c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. Except, the work "customarily" means that the exemption shall also be available to employees in those professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who does not possess a degree in chemistry. Except, the learned professional exemption shall not be available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also shall not apply to occupations in which most employees have acquired their skill by experience rather than by advanced, specialized, intellectual instruction.

(e) Registered or certified medical technologists. Registered or certified medical technologists who have successfully completed three (3) academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association meet the duties requirements of the learned professional exemption.

(f) Nurses. Registered nurses who are registered by the state examining board meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, do not qualify as exempt learned professionals, because possession of a specialized, advanced, academic degree is not a standard prerequisite for entry into occupations.

(g) Dental hygienists. Dental hygienists who have successfully completed four (4) academic years of preprofessional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association meet the duties requirements for the learned professional exemption.

(h) Physician assistants. Physician assistants who have successfully completed four (4) academic years of preprofessional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants meet the duties requirements for the learned professional exemption.

(i) Accountants. Certified public accountants meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. Except, accounting clerks, bookkeepers, and other employees who normally perform a great deal of routine work do not qualify as exempt professionals.

(j) Chefs. Chefs, such as executive chefs and sous chefs, who have attained a four (4) year specialized academic degree in a culinary arts program, meet the duties requirements for the learned professional exemption. The learned professional exemption shall not be available to cooks who perform predominantly routine mental, manual, mechanical, or physical work.

(k) Paralegals. Paralegals and legal assistants do not qualify as exempt learned professionals, because an advanced, specialized, academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four (4) year advanced degrees, most specialized paralegal programs are two (2) year associate degree programs from a community college or equivalent institution. Except, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer qualifies for exemption.

(l) Athletic trainers. Athletic trainers who have successfully completed four (4) academic years of preprofessional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education programs and who are certified by the Board of Certification of the National Athletic Trainers Association meet the duties requirements for the learned professional exemption.

(m) Funeral directors or embalmers. Licensed funeral directors and embalmers meet the duties requirements for the learned professional exemption only if they are required to complete successfully four (4) academic years of preprofessional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, in order to be licensed.

(n) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened, and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced, specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in this section also may be created in the future. Those organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

(3) Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty shall be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. The exemption shall not apply to work which can be produced by a person with general manual or intellectual ability and training.

(b) To qualify for exemption as a creative professional, the work performed shall be "in a recognized field of artistic or creative endeavor". This includes fields such as music, writing, acting, and the graphic arts.

(c) The requirement of "invention, imagination, originality, or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The duties of employees vary widely, and exemption as creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Determination of exempt creative professional status, therefore, shall be made on a case-by-case basis. This requirement is met by 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 rely on their own creative ability to express the concept; essayists, novelists, short-short writers, and screenplay writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of these persons are, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement is not met by a person who is employed as a copyist, as an "animator" of motion-picture cartoons, or as a retoucher of photographs, since the work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality, or talent, as opposed to work which depends primarily on intelligence, diligence, and accuracy. Employees of newspapers, magazines, television, and other media are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. Except, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television, or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator.

(4) Teachers.

(a) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)2 shall also mean 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 by which the employee is employed.

(b) 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. 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. Those activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the state to refer to different kinds of certificates. private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, if that individual is employed as a teacher by the employing school or school system.

(d) The salary requirements of Section 8 of this administrative regulation shall not apply to the teaching professionals described 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 also mean:

1. Any employee who holds a valid license or certificate to practice law or medicine, or any of their branches, and is actually engaged in that practice; and
2. Any employee who holds the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(b) For medicine, the exemption shall apply to physicians and other practitioners licensed and practicing in the field of medicine, science, and healing, or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors, including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter the internship or resident programs after earning the appropriate degree required for the general practice of their profession.

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

Section 5. The term "individual employed in a bona fide supervisory capacity" in KRS 337.010(2)(a)2 shall mean any employee:

- (1) Whose primary duty consists of customarily and regularly directing the work of two (2) or more other employees, as defined in Section 2(5) of this administrative regulation, where he is employed; and
- (2) Who is compensated for his services on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities.

Section 6. General Rule for Outside Sales Employees.

(1) The term "individual employed in the capacity of outside salesman" shall mean any employee:

(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) Who is 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, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

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

(4) Making sales or obtaining orders.

(a) Making sales within the meaning of this section includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Sale includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(b) Obtaining orders for the use of facilities includes 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.

(c) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

(5) Away from the employer's place of business. An outside sales employee shall be customarily and regularly engaged "away from the employer's place or places of business". The outside sales employee shall be an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales shall not include sales made by mail, telephone, or the Internet unless the contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters for telephonic solicitation of sales is considered one (1) of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. Except, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms shall not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one (1) or two (2) weeks) shall not be considered as the employer's place of business.

(6) Promotion work.

(a) Promotion work is one (1) type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this section may still qualify as an exempt employee under other sections of this administrative regulation.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves, or rearranging the merchandise. That employee may be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

(7) Drivers who sell.

(a) Drivers who deliver products and also sell the products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving, or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors shall be considered in determining if a driver has a primary duty of making sales, including, but not limited to: a comparison of the driver's duties with

those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when the license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amount of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; methods of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

1. A driver who provides the only sales contact between the employer and the customers visited, who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.
2. A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.
3. A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods.
4. A driver who calls on established customers along the route and persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who do not qualify as exempt outside sales employees include:

1. A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep the machines stocked, in good operating condition, and in good locations.
2. A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call if the sale was not significantly affected by solicitations of the customer by the delivering driver, or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.
3. A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless the work is in furtherance of the driver's own sales efforts.

Section 7. The term "individual employed as an outside collector" shall mean any employee:

(1) 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:

(a) Collecting money for goods or services previously or presently furnished by his employer; or

(b) Collecting money for 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 regarded as exempt work.

(3) The salary requirements of Section 8 of this administrative regulation do not apply to the outside collector employees described in this section.

Section 8. Salary Requirements. Amount of salary required.

(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 \$455 per week, exclusive of board, lodging, or other

facilities. Administrative and professional employees may also be paid on a fee basis as defined in Section 12 of this administrative regulation.

(2) The \$455 a week may be translated into equivalent amounts for periods longer than one (1) week. The requirement will be met if the employee is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Except, the shortest period of payment that meets this compensation requirement is one (1) week.

(3) For academic administrative employees, the compensation requirement also 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 provided in Section 3(4) 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 provided in Section 14 of this administrative regulation.

(5) For professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers; employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof; or to employee who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession. In the case of medical occupations, 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 which service the medical profession.

Section 9. Highly-Compensated Employees.

(1) An employee with total annual compensation of at least \$100,000 is deemed 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 identified in this administrative regulation.

(2)

(a) "Total annual compensation" shall include at least \$455 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. Total annual compensation shall not include board, lodging, or other facilities as defined 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.

(b) 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. For example, an employee may earn \$80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn \$20,000 in commissions. Except, due to poor sales in the final quarter of the year, the employee actually only earns \$10,000 in commissions. In this situation, the employer may within one (1) month after the end of the year make a payment of at least \$10,000 to the employee. The final payment made after the end of the fifty-two (52) week period shall count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make the payment, the employee shall not qualify as a highly compensated employee, but may still qualify as exempt under other sections of this administrative regulation.

(c) 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 (b) of this subsection within one (1) month after the end of employment.

(d) 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 high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee shall qualify for exemption if the employee customarily and regularly performs any one (1) of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in this administrative regulation. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two (2) or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under Section 2 of this administrative regulation.

(4) This section shall apply only to employees whose primary duty includes performing office or nonmanual work. Thus, for example, nonmanagement production line workers and nonmanagement employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers, and other employees who perform work involving repetitive operations with their hands, physical skill, and energy are not exempt under this section no matter how highly paid they might be.

Section 10. Salary Basis.

(1)

(a) An employee will be considered to be paid "on a salary basis" within the meaning of this administrative regulation 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. Subject to the exceptions in subsection 2 of this section, the employee shall receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hour worked. Exempt employees need not be paid for any workweek in which they perform no work.

(b) An employee shall not be considered to be "on a salary basis" if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing and able to work, deductions shall not be made for time when work is not available.

(2) The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(a) Deductions from pay may be made, if an exempt employee is absent from work for one (1) or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two (2) full days to handle personal affairs, the employee's salaried status is not be affected if deductions are made from his salary for two (2) full days. Except, if an exempt employee is absent for one and one-half (1 1/2) days for personal reasons, the employer may deduct only for the one (1) full-day absence.

(b) Deductions may also 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. Thus, 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. Similarly, 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. For an industrial accident, the "salary basis" requirement will 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; if, the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(c) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. Except the employer may, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(d) 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.

(e) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one (1) or more full days imposed in good faith for infractions of workplace conduct rules. These suspensions shall be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three (3) days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve (12) days for violating a generally applicable written policy prohibiting workplace violence.

(f) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In those weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. Except, employees are not paid on a salary basis within the meaning of these administrative regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(g) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, if an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works forty (40) hours per week uses four (4) hours of unpaid leave under the Family and Medical Leave Act, the employer may deduct ten (10) percent of the employee's normal salary that week.

(3) If calculating the amount of a deduction from pay allowed under subsection (2) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules allowed under subsection (2)(d) of this section may be made in any amount.

(4) Effect of improper deductions from salary.

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider in determining whether an employer has an actual practice of making 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 makes improper deductions; 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.

(b) If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers shall not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager lose the exemption; except engineers at other facilities or working for other managers, remain exempt.

(c) Improper deductions that are either isolated or inadvertent shall not result in loss of the exemption for any employees subject to the improper deductions, if the employer reimburses the employees for the improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in this section and includes a complaint mechanism, reimburses employees for any improper deductions, and makes a good faith commitment to comply in the future, the employer shall not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook; or publishing the policy on the employer's Intranet.

(e) This subsection shall not be construed in an unduly technical manner so as to defeat the exemption.

Section 11. Minimum Guarantee Plus Extra.

(1) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least \$455

each week paid on a salary basis may also receive additional compensation of a one (1) percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least \$455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. The additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half (1/2), or any other basis), and may include paid time off.

(2) An exempt employee's earnings may be computed on an hourly, a daily, or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test is met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily, or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least \$500 for any week in which the employee performs any work, and who normally works four (4) or five (5) shifts each week, may be paid \$150 per shift without violating the salary basis requirement. The reasonable relationship requirement shall apply only if the employee's pay is computed on an hourly, daily, or shift basis. It shall not apply, for example, to an exempt store manager paid a guaranteed salary of \$650 per week who also receives a commission of one-half (1/2) percent of all sales in the store or five (5) percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

Section 12. Fee Basis.

(1) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee shall be considered to be paid on a "fee basis" within the meaning of this administrative regulation if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task shall not be considered payments on a fee basis.

(2) To determine whether the fee payment meets the minimum amount of salary required for exemption under this administrative regulation, the amount paid to the employee shall be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$455 per week if the employee worked forty (40) hours. Thus, an artist paid \$250 for a picture that took twenty (20) hours to complete meets the minimum salary requirements for exemption since earnings at this rate would yield the artist \$500 if forty (40) hours were worked.

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 may provide to an employee. Thus, the 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. Separate transactions are not prohibited between employers and their employees, but the costs to employers associated with the transactions may not be considered in determining if an employee has received the full required minimum salary payment.

(2) "Other facilities" refers to items similar to board and lodging, such as meals furnished 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; and transportation furnished to employees for ordinary commuting between their homes and work.

Section 14. General Rule for 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. Because job titles vary widely and change quickly in the computer industry, job titles shall not be determinative of the applicability of this exemption.

(2) The exemption shall apply to any computer employee compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities, or on an hourly basis at a rate of not less than twenty-seven (27) dollars and sixty-three (63) cents an hour, whose primary duty consists of:

- (a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- (b) 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;
- (c) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- (d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(3) The exemption for employees in computer occupations shall 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 (e.g., engineers, drafters, and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations shall also not be exempt computer professionals.

(4) Computer employees, either within or outside the scope of this exemption, may also have executive and administrative duties which qualify the employees for exemption under Sections 2 and 3 of this administrative regulation. For example, systems analysts and computer programmers meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific, or engineering problems of the employer or the employer's customers. Similarly, a senior or lead computer programmer who manages the work of two (2) or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion, or other change of status of the other programmers are given particular weight, meets the duties requirements for the executive exemption.

Section 15. Miscellaneous Provisions.

(1) Primary duty.

(a) To qualify for exemption under this administrative regulation, an employee's "primary duty" shall be the performance of exempt work. The term "primary duty" shall mean the principal, main, major, or most important duty that the employee performs. Determination of an employee's primary duty shall be based on all the facts

in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider in determining the primary duty of an employee include, but are not limited to, 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.

(b) The amount of time spent performing exempt work may be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than fifty (50) percent of their time performing exempt work shall satisfy the primary duty requirement. Except time alone, is not the sole test, and nothing in this subsection requires that exempt employees spend more than fifty (50) percent of their time performing exempt work. Employees who do not spend more than fifty (50) percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support that conclusion.

(c) Thus, for example, assistant managers in 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 fifty (50) percent of the time performing nonexempt work such as running the cash register. Except, if the assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers do not satisfy the primary duty requirement.

(2) Customarily and regularly. The phrase "customarily and regularly" shall mean a frequency that shall be greater than occasional but which, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one (1) time tasks.

(3) Exempt or nonexempt work. The term "exempt work" shall mean all work described in this administrative regulation and the activities directly and closely related to the work. All other work shall be considered "nonexempt".

(4) Directly and closely related.

(a) Work that is "directly and closely related" to the performance of exempt work shall also be considered exempt work. The phrase "directly and closely related" means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, "directly and closely related" work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work "directly and closely related" to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not "directly and closely related" if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

1. Keeping time, production, or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.
2. The distribution of materials, merchandise, or supplies to maintain control of the flow of and expenditures for the items is directly and closely related to the performance of exempt duties.
3. A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the

product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, if the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

4. A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. That setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In large plants, nonsupervisors may perform the work. In small plants, the work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under those circumstances, it is exempt work.

5. A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

6. A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, the note-taking and typing would be routine in nature. Except, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating those routine tasks is not required as a condition of exemption.

7. A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits is performing exempt work. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis, and writing letters giving credit data and experience to other employers or credit agencies.

8. A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, the order-taking is a routine function and is not directly related to the exempt work.

9. An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though the menial tasks can be assigned to laboratory assistants.

10. A teacher performs work directly and closely related to exempt duties if, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

(5) Use of manuals. The use of manuals, guidelines, or other established procedures containing or relating to highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills shall not preclude exemption under KRS 337.010(2)(a) (2) or this administrative regulation. The manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of the reference material does not affect an employee's exempt status. Except the exceptions set forth in KRS 337.101(2)(a)(2) are not available, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

(6) Trainees. The executive, administrative, professional, supervisory, outside sales, and computer employee exemptions shall not apply to employees training for employment in an executive, administrative, professional, supervisory, outside sales, or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, supervisory, outside sales or computer employee.

(7) Emergencies.

(a) An exempt employee shall not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, if emergencies arise that threaten the safety of employees, a cessation of operations, or serious damage to the employer's property, any work performed in an effort to prevent those results is considered exempt work.

(b) An "emergency" shall not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

1. A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a bona fide executive.

2. Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

3. Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending upon factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

4. Regular repair and cleaning of equipment is not emergency work, even if necessary to prevent fire or explosion; except, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

(8) Occasional tasks. Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employees to carry out properly exempt functions and responsibilities, shall be considered exempt work. The following factors shall be considered in determining whether the work is exempt work: Whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice for the exempt employee to perform the task.

(9) Combination exemptions. Employees who perform a combination of exempt duties as set forth in this administrative regulation for executive, administrative, professional, supervisory, outside sales, and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt

administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one (1) section of this administrative regulation shall not defeat the exemption under any other section.

(10) Motion picture producing industry. 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 \$695 a week (exclusive of board, lodging, or other facilities). Thus, 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 \$695 a week is 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. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

- (a) 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 \$695 if six (6) days were worked; or
- (b) The employee is in a job category having a weekly base rate of at least \$695, and the daily base rate is at least one-sixth (1/6) of such weekly base rate.

(11) 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 which 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.

(LAB-6; 1 Ky.R. 255; Am. 586; eff. 2-5-75; 18 Ky.R. 1204; eff. 12-8-91; 31 Ky.R. 419; 1243; eff. 1-21-2005; TAm eff. 8-9-2007; Certified to be amended, filing deadline 8-26-2021.)