



INFORMATION MEMO

Fair Labor Standards Act (FLSA): Determining Exempt vs. Non-Exempt Status

Learn how to determine which employees are covered (non-exempt employees) and which employees are not covered (exempt employees) under the Fair Labor Standards Act. Understand the two tests (salary test and duties test) that qualify an employee as exempt, and become familiar with general definitions and guidelines of this law.

RELEVANT LINKS:

[29 U.S.C. §201-219.](#)

See LMC information memos [An Overview of the Fair Labor Standards Act \(FLSA\)](#), and [Police and Fire Employees and the Fair Labor Standards Act \(FLSA\)](#).

[State of Nev. Vs. U.S. Dep't of Labor](#), Civil Action No. 4:16-CV-00731.

I. Coverage

The federal Fair Labor Standards Act (FLSA) requires, among other things, that cities compensate covered employees at the rate of time-and-one-half for hours worked over 40 in one workweek. In this memo you will learn which employees are covered (non-exempt) employees and which are not covered (exempt) employees. However, police and fire department employees have some unique exemptions discussed elsewhere.

All cities are covered by the FLSA, but some employees are “exempt” from the overtime provisions of the act. To be “exempt,” employees must meet both of two separate tests:

- A duties test.
- A salary basis test.

Non-exempt employees must be paid overtime for all hours worked over 40 in one workweek; exempt employees do not earn overtime. Being “salaried” does not mean the same thing as being “exempt.” With a few exceptions (e.g., doctors, lawyers), any employee who does not earn \$455 per week (which increases to \$913** per week effective December 1, 2016) is not exempt.

****NOTE:** On November 22, 2016, a Federal District Court Judge for the Eastern District of Texas issued a nationwide injunction blocking the U.S. Department of Labor from implementing the rule that would have raised the salary threshold for the FLSA's “white collar” exemption from \$455/week to \$913/ week (equivalent to \$47,476/year) on December 1, 2016. This means that the rule will NOT go into effect on December 1 (absent some further decision of the court, the 5th circuit Court of Appeals, or the United States Supreme Court) and the previous \$455 weekly threshold will continue.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

[29 U.S.C. § 213.](#)

[29 C.F.R. § 541.100.](#)

See Appendix A flow chart, “Executive Exemption under FLSA”.

U.S. Dep’t of Labor: [Final Rule: Overtime.](#)

U.S. Dep’t of Labor: [Overtime for White Collar Workers: Overview and Summary of Final Rule.](#)

[State of Nev. Vs. U.S. Dep’t of Labor](#), Civil Action No. 4:16-CV-00731.

U.S. Dep’t of Labor: [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.](#)

[29 C.F.R. § 541.102.](#)

II. Duties test

There are generally four types of exemptions used by cities.

Employees must meet the criteria outlined in one of the following four exemptions (executive, administrative, professional, and computer) in order to meet the “duties” test and be considered exempt. There are additional special considerations for performing a combination of exempt duties and for highly compensated individuals.

A. Executive duties

Executive employees must:

- Be paid at least \$455 per week on a salary basis. It is important to note on May 18, 2016, the U.S. Department of Labor (DOL), issued final rules to increase this \$455 figure to \$913 week (equivalent to \$47,476 annually) to be effective beginning December 1, 2016.**

****NOTE:** Please see Note on page 1, under the section titled, “Coverage” regarding the Texas federal judge injunction blocking the December 1st salary changes.

In the May 18, 2016 final rules, the DOL also established a mechanism for updating salary threshold levels every three years beginning on January 1, 2020, which will be based on 40th percentile of full-time salaried workers in the lowest-wage Census region. These new salary levels will be posted by the DOL 150 days in advance of their effective date, beginning August 1, 2019. Have the primary duty of “managing” the enterprise (e.g., the city) or a customarily recognized “department or subdivision” of the city.

- Regularly supervise two or more employees (at least 80 hours’ worth of employee work per week).
- Have the authority to hire or fire other employees or have their recommendations on hiring/firing, advancement, promotion, or other change of status decisions be given “particular weight.”

“Managing” includes spending approximately 50 percent of work time on management activities such as:

- Interviewing, selecting, and training employees.
- Setting and adjusting employee rates of pay and hours of work.

RELEVANT LINKS:

- Directing employee work.
- Evaluating employee performance.
- Handling employee complaints/grievances.
- Disciplining employees.
- Planning work and determining techniques.
- Determining materials, supplies, equipment, and tools to be used.
- Planning and controlling the budget.
- Providing for employee safety.

[29 C.F.R. § 541.103.](#)

“Department or subdivision” means a unit with permanent status and a continuing function. For example, in a larger city, there may be separate subdivisions within the public works department for “streets,” “utilities,” and “parks,” and these subdivisions may meet the definition of a “department or subdivision” under the FLSA regulations. However, “department or subdivision” does not mean a group of employees assigned from time to time to work as a team on a specific job or project.

[29 C.F.R. § 541.105.](#)

“Particular weight” refers to the requirement that a certain amount of consideration be given to an employee’s recommendations if that employee’s position is to meet the executive exemption. The following questions are used to determine “particular weight”:

- Is it part of the employee’s job duties to make hiring/firing/job change recommendations?
- How often does the employee make such recommendations?
- How often are the employee’s recommendations taken (vs. overridden) by the council or higher management?

See section IV-B.

An employee can still meet the executive exemption duties test if he or she sometimes performs non-exempt work (e.g., the labor or production work of the employees he or she supervises). However, the employee’s “primary duty” must be management.

B. Administrative duties

Administrative employees must:

- Be paid at least \$455 per week on a salary basis. It is important to note on May 18, 2016, the U.S. Department of Labor (DOL), issued final rules to increase this \$455 figure to \$913 week (equivalent to \$47,476 annually) to be effective beginning December 1, 2016.**

[29 C.F.R. § 541.200.](#)

See Appendix B flow chart, “Administrative Exemption under FLSA”.
U.S. Dep’t of Labor: [Final Rule: Overtime.](#)
U.S. Dep’t of Labor: [Overtime for White Collar Workers: Overview and Summary of Final Rule.](#)

RELEVANT LINKS:

[State of Nev. Vs. U.S. Dep't of Labor](#), Civil Action No. 4:16-CV-00731.
U.S. Dep't of Labor:
[Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.](#)

[29 C.F.R. § 541.201.](#)

[29 C.F.R. § 541.202.](#)

****NOTE:** Please see Note on page 1, under the section titled, "Coverage" regarding the Texas federal judge injunction blocking the December 1st salary changes.

In the May 18, 2016 final rules, the DOL also established a mechanism for updating salary threshold levels every three years beginning on January 1, 2020, which will be based on 40th percentile of full-time salaried workers in the lowest-wage Census region. These new salary levels will be posted by the DOL 150 days in advance of their effective date, beginning August 1, 2019. Have the primary duty of performing office or non-manual work directly related to the management or general business operations of the employer (the city).

- The office or non-manual work must require the exercise of discretion and independent judgment on significant matters.

If the employee's primary duty is to administer the business affairs of a city, the employee is likely an "administrator." If the employee's primary duty is providing the goods/services of the organization, the employee is likely a "production" employee. Work performed in areas such as finance, accounting, insurance, purchasing, human resources, computer network, Internet, and database administration is likely to be seen as administering the business affairs of the city.

To determine whether an employee exercises discretion and independent judgment on significant matters, the city should ask these questions:

- Does the employee have authority to formulate, interpret, or implement management policies?
- Does the employee carry out major assignments and perform work that affects business operations to a substantial degree?
- Does the employee have authority to commit the city in matters with a significant financial impact?
- Does the employee have authority to waive or deviate from established policies and procedures without prior approval?
- Does the employee have authority to negotiate and bind the company on significant matters?
- Does the employee provide expert advice to management?
- Is the employee involved in planning long- or short-term business objectives?
- Does the employee investigate and resolve important matters for management?
- Does the employee handle complaints, arbitrate disputes, or resolve grievances?

RELEVANT LINKS:

[29 C.F.R. § 541.202\(c\).](#)

[29 C.F.R. § 541.300.](#)

See Appendix C flow chart, “Professional Exemption under FLSA”.
U.S. Dep’t of Labor: [Final Rule: Overtime.](#)
U.S. Dep’t of Labor: [Overtime for White Collar Workers: Overview and Summary of Final Rule.](#)

[State of Nev. Vs. U.S. Dep’t of Labor](#), Civil Action No. 4:16-CV-00731.

[29 C.F.R. § 541.301.](#)

The more “yes” answers to the above questions, the more likely the employee would be considered exempt under the administrative exemption.

An employee can still qualify for the administrative exemption even if his or her decisions or recommendations are reviewed at a higher level and occasionally revised or reversed.

C. Professional exemption

Professional employees must:

- Be paid at least \$455 per week on a salary basis. It is important to note on May 18, 2016, the U.S. Department of Labor (DOL), issued final rules to increase this \$455 figure to \$913 week (equivalent to \$47,476 annually) to be effective beginning December 1, 2016.**

****NOTE:** Please see Note on page 1, under the section titled, “Coverage” regarding the Texas federal judge injunction blocking the December 1st salary changes.

In the May 18, 2016 final rules, the DOL also established a mechanism for updating salary threshold levels every three years beginning on January 1, 2020, which will be based on 40th percentile of full-time salaried workers in the lowest-wage Census region. These new salary levels will be posted by the DOL 150 days in advance of their effective date, beginning August 1, 2019. Primarily perform work that requires knowledge of an advanced type in a field of science or learning (“learned professionals”), or work that requires invention, imagination, originality, or talent in a recognized artistic or creative field (“creative professionals”).

In general, to meet the “learned professional” definition, the employee must do work that is mostly intellectual and that requires the consistent exercise of discretion and judgment (not routine mental, manual, mechanical, or physical work). The employee must use the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be obtained at the high school level.

Lawyers, doctors, accountants (but not accounting clerks or bookkeepers), and engineers are examples of professionals that are likely to meet the requirements of this exemption. Occupations that can be performed with only the general knowledge of an academic degree in any field are not likely to qualify under this exemption. Nor are occupations in which the employees generally learn “on-the-job” rather than by obtaining an advanced degree.

RELEVANT LINKS:

Dep't of Labor, Wage & Hour Div., Fact Sheet 17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA).
29 C.F.R. § 541.303.
29 C.F.R. § 541.304.

29 C.F.R. § 541.302.

29 C.F.R. § 541.400.

See Appendix D flow chart, "Computer Exemption under FLSA".
U.S. Dep't of Labor: [Final Rule: Overtime](#).
U.S. Dep't of Labor: [Overtime for White Collar Workers: Overview and Summary of Final Rule](#).

State of Nev. Vs. U.S. Dep't of Labor, Civil Action No. 4:16-CV-00731.

Keep in mind the salary basis test does not apply to bona fide teachers, doctors, or lawyers.

To qualify for the "creative professionals" exemption, the employee must perform work in fields such as music, writing, acting, and graphic arts. These must be determined on a case-by-case basis; cities may want to contact the League or work with a consultant/attorney in determining these exemptions.

D. Computer exemption

While Minnesota law also exempts anyone employed in a bona fide executive, administrative, or professional capacity from overtime pay requirements, the state does not exempt computer systems analysts, programmers, software engineers, or other similarly skilled workers from its minimum wage or overtime requirements like Federal law does. Thus, assuming the computer employee does not meet the other exemptions (executive, administrative or professional), that employee in Minnesota would be eligible for minimum wage as well as overtime pay.

Computer employees must meet the following tests:

- Be paid at least \$455 per week on a salary basis or at least \$27.63/hour if paid on an hourly basis. It is important to note on May 18, 2016, the U.S. Department of Labor (DOL), issued final rules to increase this \$455 figure to \$913 week (equivalent to \$47,476 annually) to be effective beginning December 1, 2016.**

****NOTE:** Please see Note on page 1, under the section titled, "Coverage" regarding the Texas federal judge injunction blocking the December 1st salary changes.

In the May 18, 2016 final rules, the DOL also established a mechanism for updating salary threshold levels every three years beginning on January 1, 2020, which will be based on 40th percentile of full-time salaried workers in the lowest-wage Census region. These new salary levels will be posted by the DOL 150 days in advance of their effective date, beginning August 1, 2019. Perform work in the area of computer systems analysis, computer programming, or computer software engineering

Have a primary duty consisting of:

RELEVANT LINKS:

[29 C.F.R. § 541.708.](#)

[State of Nev. Vs. U.S. Dep't of Labor](#), Civil Action No. 4:16-CV-00731.

[29 C.F.R. § 541.601.](#)

U.S. Dep't of Labor: [Final Rule: Overtime.](#)
U.S. Dep't of Labor: [Overtime for White Collar Workers: Overview and Summary of Final Rule.](#)

- Using systems analysis techniques and procedures to determine hardware, software, or system-functional specifications.
- Designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs based on and related to user or system design specifications.
- Designing, documenting, testing, creating, or modifying computer programs related to machine operating systems.
- A combination of the above duties requiring the same level of skills.

E. Combination exemption

Employees who perform a combination of various types of exempt duties may qualify for exemption if the exempt duties, taken altogether, comprise the employee's primary duty. However, the employee must still be paid at least \$455 per week until November 30, 2016, and then beginning December 1, 2016, that amount will increase to \$913 per week, on a salary basis.**

****NOTE:** Please see Note on page 1, under the section titled, "Coverage" regarding the Texas federal judge injunction blocking the December 1st salary changes.

F. Highly compensated employees

An employee who earns \$100,000/year until November 30, 2016, and then beginning December 1, 2016, that amount increases to \$134,004,** is exempt if the employee regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. The employee must meet the salary basis test and be paid at least a total compensation of at least \$100,000, and effective December 1, 2016, that number will increase to \$134,004**, which includes at least \$455 per week paid on a salary basis (the \$455 figure increases to \$913/week** effective December 1, 2016). Fringe benefits may not be counted toward the \$100,000/year (or on or after December 1, 2016 \$134,004/year**) amount. Future automatic updates to the \$134,004 threshold will occur every three years, beginning on January 1, 2020. This exemption applies only to employees whose primary duty includes performing office or non-manual work. Therefore, employees who perform physical work, such as maintenance workers and laborers, do not qualify for this exemption, no matter how much they earn.

RELEVANT LINKS:

[State of Nev. Vs. U.S. Dep't of Labor, Civil Action No. 4:16-CV-00731.](#)

[29 C.F.R. § 541.602\(a\).](#)

[29 C.F.R. § 541.602.](#)

[State of Nev. Vs. U.S. Dep't of Labor, Civil Action No. 4:16-CV-00731.](#)

[29 C.F.R. § 541.602\(b\).](#)

[29 C.F.R. § 541.710\(a\).](#)

****NOTE:** Please see Note on page 1, under the section titled, “Coverage” regarding the Texas federal judge injunction blocking the December 1st salary changes.

III. Salary basis

To be compensated on a salary basis, the employee:

- Must receive a predetermined amount of pay each pay period.
- Cannot be paid by the hour.
- Cannot be subject to variations in pay based on quality or quantity of work.
- Must receive the full salary for any week in which any work is performed.

Since the salary basis test is generally dependent on whether an employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount of at least \$455 per week (which increases to \$913/week beginning December 1, 2016), cities will want to consider making the salary change effective the beginning of the pay period before the December 1 date. ******

****NOTE:** Please see Note on page 1, under the section titled, “Coverage” regarding the Texas federal judge injunction blocking the December 1st salary changes.

Deductions from the weekly salary can be made when:

- The employee is absent for a day or more for personal reasons unrelated to illness or injury.
- The employer imposes penalties for a major safety violation (e.g., suspension without pay).
- No work is performed in that week.

Public-sector employers who have a personal leave and sick leave system that employees must use for partial-day absences due to personal reasons or illness/injury can make deductions for these partial-day absences when:

- Accrued leave is exhausted, and the employee takes a partial or full day off.
- The employee did not request paid leave or the paid leave was denied, but the employee still takes the time off as unpaid leave (partial or full day).
- The employee requests the use of unpaid leave (partial or full day off).

RELEVANT LINKS:

[29 C.F.R. § 541.710\(b\).](#)

[29 C.F.R § 541.604\(a\).](#)

[29 C.F.R. § 541.602\(b\)\(3\).](#)

Dep't of Labor, Wage & Hour Div., [Admin. Ltr. Rul. \(February 14, 2008\).](#)

[State of Nev. Vs. U.S. Dep't of Labor](#), Civil Action No. 4:16-CV-00731.

[LMC Model Overtime Policy.](#)

[20 C.F.R. § 541.701.](#)

Deductions from the pay of an exempt employee of a public agency for absences due to budget-required leave-without-pay programs shall not disqualify the employee from being paid “on a salary basis” except in the workweek in which the budget-required leave without pay occurs and for which the employee’s pay is accordingly reduced.

A city may pay an exempt employee extra compensation for additional hours worked beyond the person’s normal work schedule. Paying the extra compensation, on any basis, even time-and-one-half, does not change the employee’s designation as an exempt employee, assuming that the position has met both the salary and duties tests.

The city may not dock an exempt employee’s wages for an absence due to jury duty, attendance as a subpoenaed witness, or for a temporary military leave. However, if the city does not provide paid time for these situations, the only “penalty” is that the employee will not be considered exempt for the week in which the absence occurs; in most of these situations, the employee is unlikely to work overtime.

The city also may offset from paid time any amount paid to the employee for the service.

Part-time employees must meet the same requirements as full-time employees to be exempt, including the requirement to be paid at least \$455/week (which increases to \$913/week effective December 1, 2016).**

****NOTE:** Please see Note on page 1, under the section titled, “Coverage” regarding the Texas federal judge injunction blocking the December 1st salary changes.

In 2004, the U.S. Department of Labor amended the regulations to provide a “safe harbor” for improper salary deductions. An employer who violates the salary basis test by making an improper deduction in an exempt employee’s paycheck can avoid liability by:

- Maintaining a clearly communicated policy prohibiting improper pay deductions.
- Including a complaint mechanism in the policy.
- Reimbursing employees for the improper pay deduction.
- Making a good faith commitment to comply in the future.

IV. General definitions and guidelines

A. Customarily and regularly

A customary and regular duty is a duty that is performed more often than just occasionally—i.e., normally performed every workweek, not isolated or one-time tasks.

RELEVANT LINKS:

[29 C.F.R. § 541.707.](#)

[29 C.F.R. § 541.700.](#)

[29 U.S.C. § 213\(a\)\(3\).](#)

B. Exempt vs. non-exempt work

Exempt work is the work performed by executive, administrative, professional, and computer employees. The definition of exempt work includes “closely related work” that exempt employees perform. An example of “closely related work” is when the finance director uses computer software to prepare a budget presentation for the city council. While technically this may be a non-exempt duty, it is closely related to his or her exempt duty of preparing the budget. By definition, any work that is not exempt work is non-exempt work.

C. Primary duty

To qualify for any of the above exemptions, an employee’s primary duty must be executive, administrative, professional, or computer work.

Primary duty means the principal, main, major, or most important duty that an employee performs. Factors to consider include:

- The relative importance of the exempt duties compared with other types of duties. (If the job exists mainly for the purpose of performing the exempt duties, it is likely to be considered exempt).
- How much time the employee spends performing exempt work. (Ideally it should be 50 percent or more of the time, but this is not an absolute requirement).
- How much supervision the employee receives and how free the employee is to determine how to spend his or her time. (The more independence and freedom, the more likely it is to be considered exempt).
- The relationship between the employee’s salary and the wages paid to other employees for the kind of non-exempt work performed by the employee. (If the employee’s pay is relatively close to the level of non-exempt workers, this may harm the employee’s chance of being considered exempt).

V. Special exemptions

A. Separate seasonal amusement and recreational establishments

Employees working in separate seasonal amusement and recreational establishments are exempt from the federal wage and hour law if the establishment is physically separated from the rest of the city’s operations, either by distance or structurally (e.g., a fence).

RELEVANT LINKS:

[Minn. Stat. § 177.24.](#)

In addition, it must be open no more than seven months of the year, or its average receipts for any six months of the preceding year must not be more than one-third of its average receipts for the other six months of the year.

If the city does not meet this federal exemption, and meets the large employer definition, then effective August 1, 2016, it must pay \$9.50/hour for recreation employees and time-and-one-half overtime for all hours worked over 40 in one workweek. As of August 1, 2016, large employers must pay most employees covered by minimum wage law at a rate of at least \$9.50 per hour, and small employers must pay all applicable employees at a rate of at least \$7.75 per hour. The League generally advises cities with a total budget of \$500,000 or more to comply with the higher Minnesota minimum wage rate (i.e., in August 2016 paying the \$9.50 hour rate).

On Aug. 1 of 2015 and 2016, the Minnesota minimum wage increased for both large and small employers.

On Aug. 1, 2016, the Minnesota minimum pay rate increased to \$9.50 per hour for large employers, and to at least \$7.75 per hour for small employers.

Beginning in 2017 and each year after, the Department of Labor and Industry will determine with feedback of stakeholders any appropriate minimum wage increase. The minimum wage increase, if any, will be effective in August of the following year.

If it does meet this federal exemption, one or more of the following state law exemptions and provisions may apply:

[Minn. Stat. § 177.23 subd. 7\(14\).](#)

- The city is not required to pay minimum wage/overtime to any individual under 18 working less than 20 hours per workweek for a city as part of a recreational program.
- Effective August 1, 2016, the city must pay employees \$9.50/hour or more if the city's total budget is \$500,000 or more, and at least \$7.75/hour if the city's total budget is under \$500,000. In addition, during the first 90 consecutive days of employment, a large employer may pay employees under the age of 20 a wage of \$7.75/hour. After the 90 days, the minimum hourly rate for the employee working for a large employer becomes the appropriate minimum wage rate (as of August 1, 2016, \$9.50/hour).
- The city must pay time-and-one-half overtime for all hours worked over 48 in one workweek.

[Minn. Stat. § 177.25.](#)

RELEVANT LINKS:

[29 U.S.C. § 207\(p\)\(2\).](#)

[29 C.F.R. § 778.602 \(b\).](#)

B. Occasional and sporadic employment

Employees who freely choose to work part-time for the city in a different job than their normal job on an occasional and sporadic basis do not need to be paid time-and-one-half for the additional hours if the duties in the two jobs are substantially different.

C. 1040/2080 Plans for unionized employees

A 1040/2080 plan provides a partial exemption from the FLSA overtime requirement. Such plans are only valid in union environments, and the parameters of the plan must be defined in a collective bargaining agreement. While a 1040/2080 plan provides the employer with increased flexibility, such plans may also present bookkeeping and payroll challenges.

Examples of how overtime might be calculated under a 1040/2080 plan are provided in the regulations.

1. 1040 Plans

Overtime compensation is not required for hours worked over 40 in a workweek if there is an agreement that no employee shall be employed more than 1,040 hours during a period of 26 consecutive weeks.

When such a plan is in place, unionized employees can work an average of 40 hours per workweek (over the 26-week period, for a total of 1,040 hours) without receiving overtime compensation for each hour worked over 40 in a given week.

At the end of the 26-week period, all hours worked over 1,040 must be compensated as overtime at time-and-one-half. In addition, employees must receive overtime for any hours worked in excess of 12 hours in a workday or 56 hours in a workweek.

2. 2080 Plans

This plan is more complicated than the 1040 plan. Employees must be guaranteed at least 1,840 hours of work and may not work more than 2,240 hours in a 52-week period even if they are paid overtime. Exceeding 2,240 hours during the 52 weeks may negate the plan and retroactively entitles employees to overtime compensation for any week in which they worked more than 40 hours. At the end of the 52 weeks, all hours worked over 2,080 must be compensated as overtime at time-and-one-half. Like the 1040 plan, employees must be paid overtime for hours worked in excess of 12 hours in a workday or 56 hours in a workweek.

RELEVANT LINKS:

Dep't of Labor, Wage &
Hour Div., [Admin. Ltr. Rul.](#)
(Apr. 1, 1985).

[Minneapolis Office -
National Labor Relations
Board.](#)

To be valid, a 1040/2080 plan must be created as part of a collective bargaining agreement. In addition, the employee representative(s) must be certified as “bona fide” by the National Labor Relations Board (NLRB). While the NLRB does not generally have jurisdiction over public employers, a Wage and Hour Opinion Letter, dated Nov. 1, 1985, advises that the NLRB has the authority to process petitions from unions of government employees requesting certification as “bona fide” for the purpose of forming a 1040/2080 plan. Petitions for certification may be filed in the NLRB Regional Office.

D. Belo Plan

The Belo Plan was named after a Supreme Court decision, *Walling v. Belo Corporation* (316 U.S. 624 (1942)), and was given legislative sanction by FLSA amendments. A Belo Plan provides guaranteed compensation that includes a predetermined amount of overtime. It offers employees with irregular hours of work a set weekly income and enables the employer to anticipate labor costs and payroll calculations.

The U.S. Department of Labor (DOL) notes that few jobs qualify for a Belo Plan as the interpretation of “irregular hours of work” is strictly enforced.

There are a number of requirements for a valid Belo Plan, including the following:

- A specific agreement must be in place between the employer and the employee(s). There is no requirement that the agreement be in writing. However, it is a good practice to put it in writing so as to avoid any ambiguity surrounding the arrangement.
- The employees’ duties must necessitate irregular hours of work. In other words, the irregular hours must be dictated by the work itself, not scheduled by the employer. The employees’ work must fluctuate such that they sometimes work more than 40 hours a week and other times work less than 40 hours a week. If virtually the only work hours that fluctuate are those over 40, the DOL has usually held that the irregular hours requirement is not met.
- The weekly overtime payment must be guaranteed. For example, if the Belo Plan calls for 60 hours of work and the employee works 40 hours, he or she still gets full payment. The employer must pay a premium rate at time-and-one-half for all guaranteed hours over 40, or the Belo Plan will not be valid.
- The number of weekly hours guaranteed cannot exceed 60 hours per week. Any hours worked beyond 60 in any workweek must be compensated at an additional time-and-one-half.

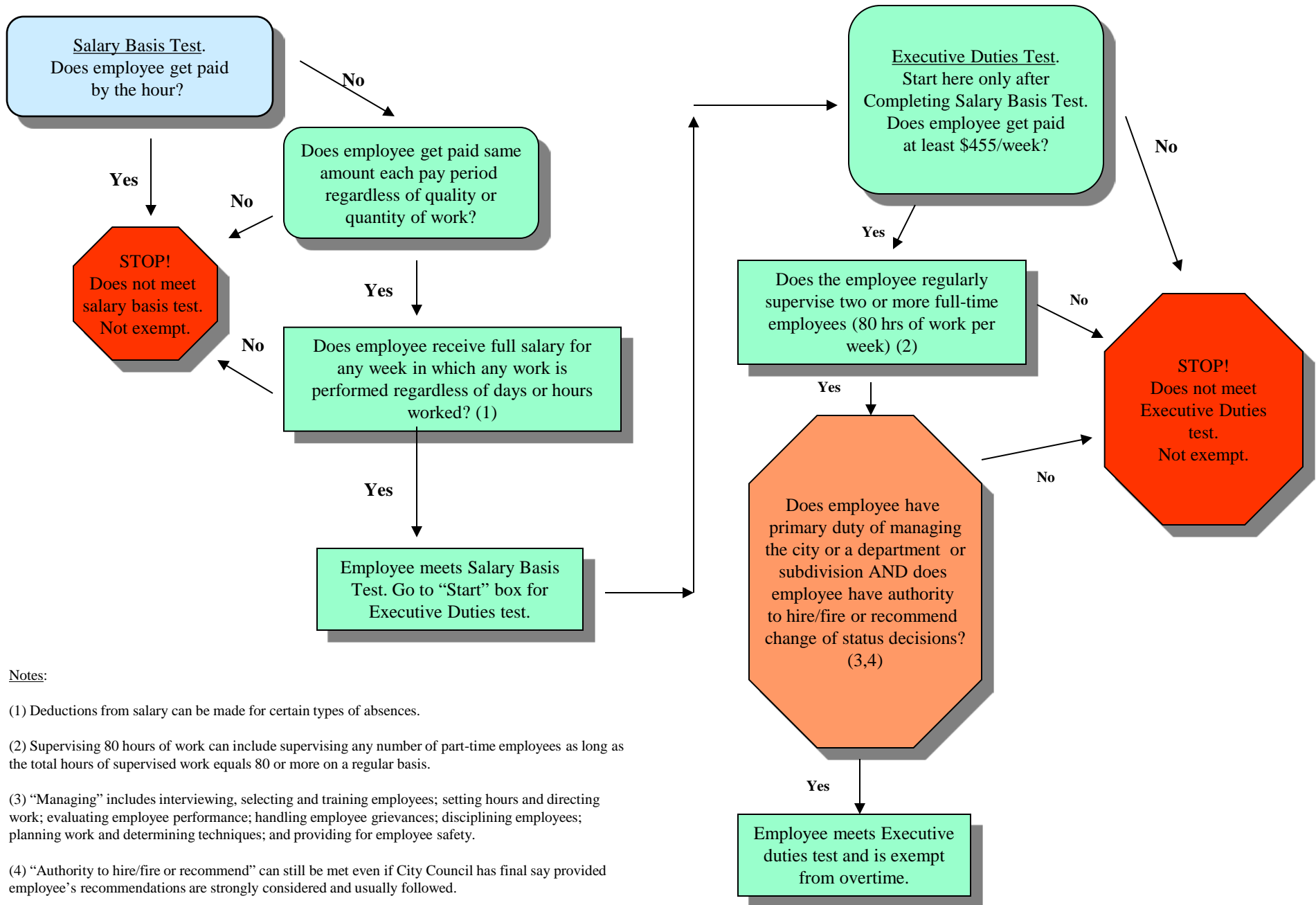
RELEVANT LINKS:

800.925.1122
651.281.1200
HRbenefits@lmc.org

VI. Further assistance

If you have any additional questions, please contact the League's Human Resources and Benefits Department.

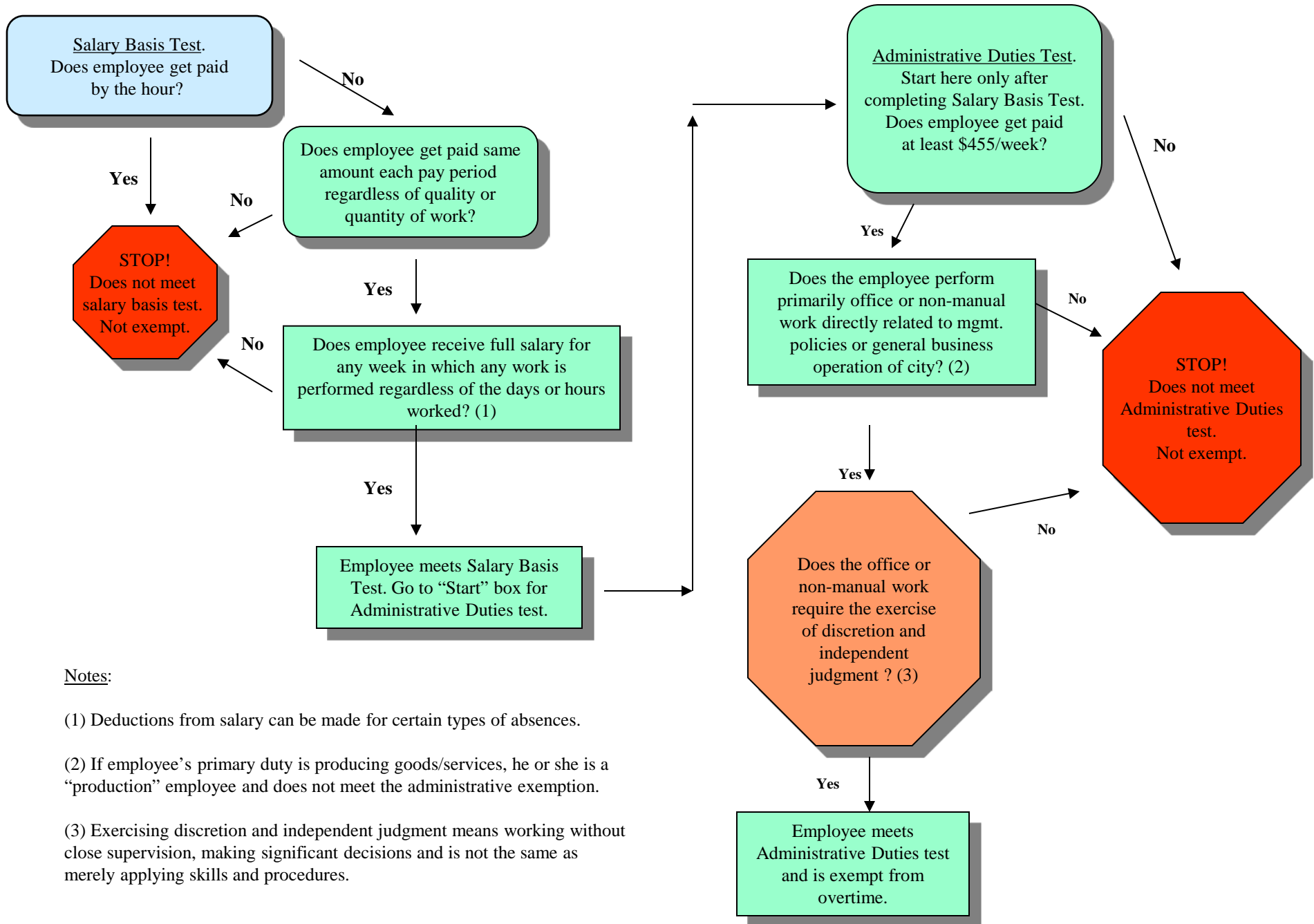
Appendix A: Executive Exemption under FLSA



Notes:

- (1) Deductions from salary can be made for certain types of absences.
- (2) Supervising 80 hours of work can include supervising any number of part-time employees as long as the total hours of supervised work equals 80 or more on a regular basis.
- (3) “Managing” includes interviewing, selecting and training employees; setting hours and directing work; evaluating employee performance; handling employee grievances; disciplining employees; planning work and determining techniques; and providing for employee safety.
- (4) “Authority to hire/fire or recommend” can still be met even if City Council has final say provided employee’s recommendations are strongly considered and usually followed.

Appendix B: Administrative Exemption under FLSA



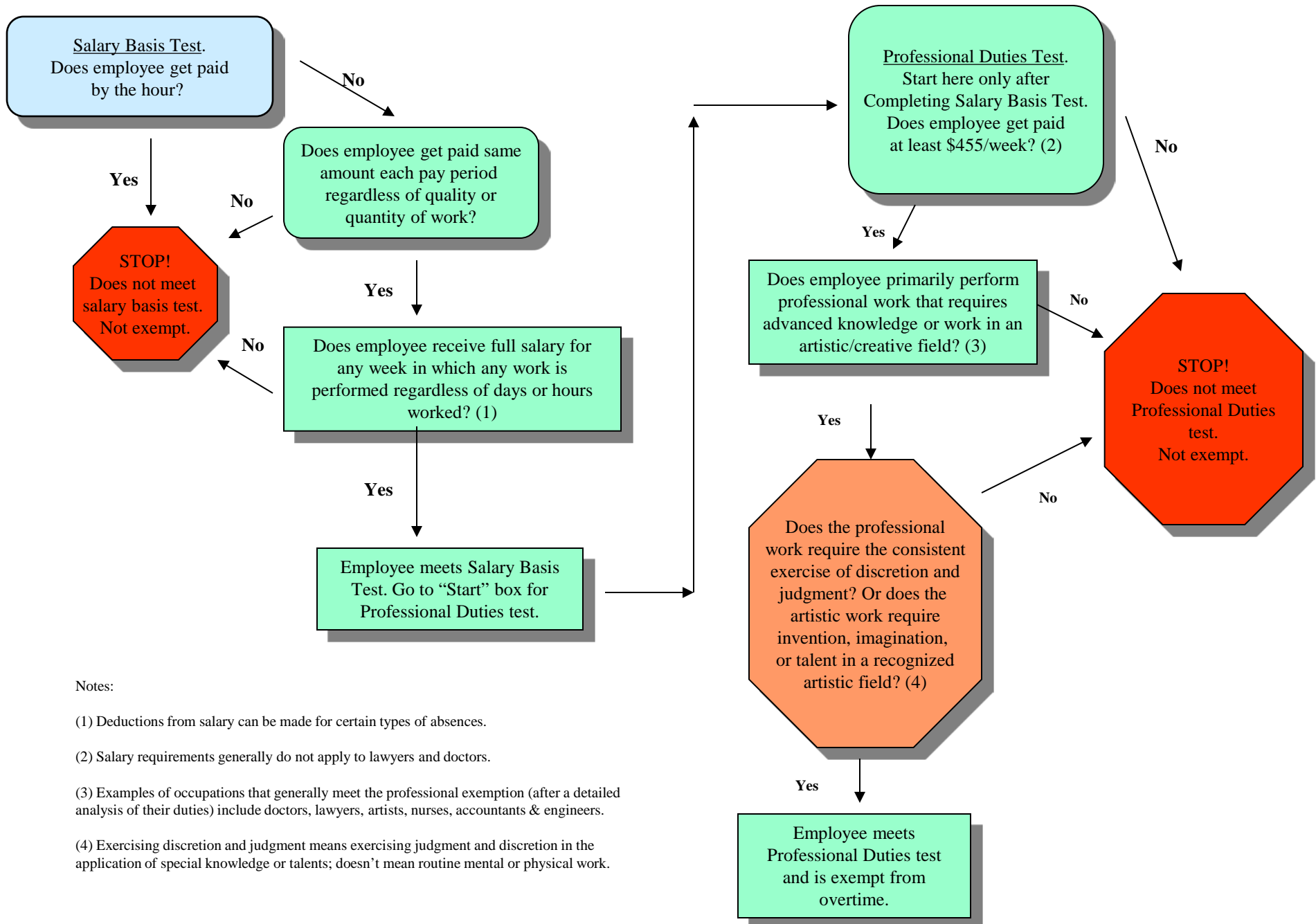
Notes:

(1) Deductions from salary can be made for certain types of absences.

(2) If employee’s primary duty is producing goods/services, he or she is a “production” employee and does not meet the administrative exemption.

(3) Exercising discretion and independent judgment means working without close supervision, making significant decisions and is not the same as merely applying skills and procedures.

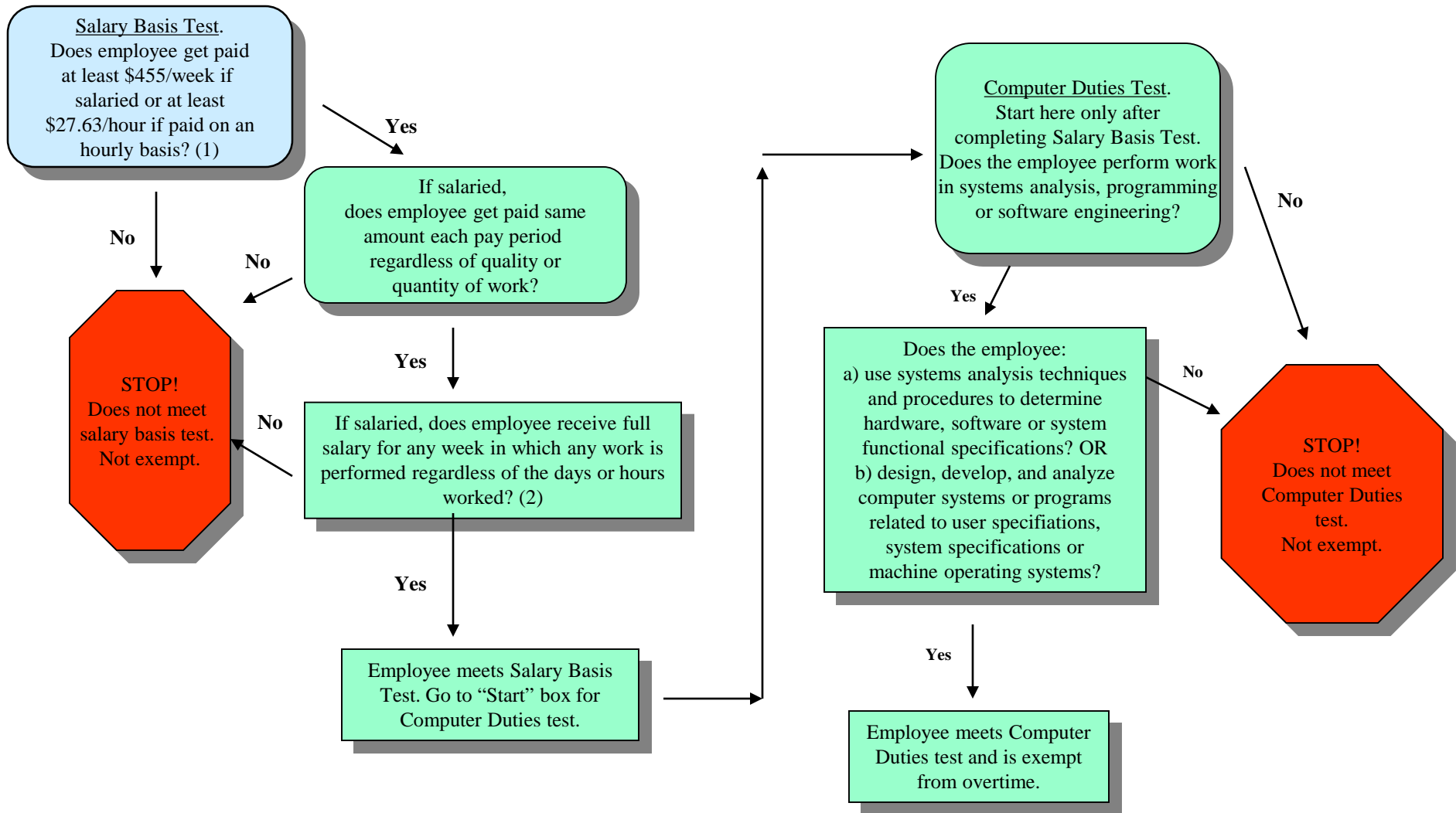
Appendix C: Professional Exemption under FLSA



Notes:

- (1) Deductions from salary can be made for certain types of absences.
- (2) Salary requirements generally do not apply to lawyers and doctors.
- (3) Examples of occupations that generally meet the professional exemption (after a detailed analysis of their duties) include doctors, lawyers, artists, nurses, accountants & engineers.
- (4) Exercising discretion and judgment means exercising judgment and discretion in the application of special knowledge or talents; doesn't mean routine mental or physical work.

Appendix D: Computer Exemption under FLSA**



Notes:

(1) Computer employees can be paid on an hourly basis if paid at least \$27.63 per hour. Otherwise, they must be paid on a salary basis in the same manner as other employees, including the requirement to pay at least \$455/week.

(2) Deductions from salary can be made for certain types of absences.

** While Minnesota law exempts anyone employed in a bona fide executive, administrative, or professional capacity from overtime pay requirements, the state does not exempt computer systems analysts, programmers, software engineers, or other similarly skilled workers from its overtime requirements like Federal law does. For additional information, please refer to "II-D - Computer Exemption" in the attached memo.