

#### **§ 541.304**

#### **29 CFR Ch. V (7–1–04 Edition)**

hardware, software, or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The exemption provided by § 541.3(a)(4) applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience in the field. While such employees commonly have a bachelor's or higher degree, no particular academic degree is required for this exemption, nor are there any requirements for licensure or certification, as is required for the exemption for the learned professions.

(d) The exemption does not include employees engaged in the operation of computers or in the manufacture, repair, or maintenance 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 like CAD/CAM, but who are not in computer systems analysis and programming occupations, are also excluded from this exemption.

(e) Employees in computer software occupations within the scope of this exemption, as well as those employees

not within its scope, may also have managerial and administrative duties which may qualify the employees for exemption under § 541.1 or § 541.2 (see §§ 541.205(c)(7) and 541.207(c)(7) of this subpart).

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#### **§ 541.304 Primary duty.**

(a) For a general explanation of the term “primary duty” see the discussion of this term under “executive” in § 541.103. See also the discussion under “administrative” in § 541.206.

(b) The “primary duty” of an employee as a teacher must be that of activity in the field of teaching. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption within the scope of § 541.3(a)(3) if the individual is not in fact both employed and engaged as a teacher (see § 541.302(g)(2)). The words “primary duty” have the effect of placing major emphasis on the character of the employee's job as a whole. Therefore, employment and engagement in the activity of imparting knowledge as a primary duty shall be determinative with respect to employment within the meaning of the exemption as “teacher” in conjunction with the other requirements of § 541.3.

#### **§ 541.305 Discretion and judgment.**

(a) Under § 541.3 a professional employee must perform work which requires the consistent exercise of discretion and judgment in its performance.

(b) A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

#### **§ 541.306 Predominantly intellectual and varied.**

(a) Section 541.3 requires that the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. This test applies to the type of thinking which must be performed by the employee in question. While a doctor may make 20 physical examinations in

the morning and perform in the course of his examinations essentially similar tests. It requires not only judgment and discretion on his part but a continual variety of interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to be made therefrom. The work of the true professional is inherently varied even though similar outward actions may be performed.

(b) Another example of this is the professional medical technologist who performs complicated chemical, microscopic, and bacteriological tests and procedures. In a large medical laboratory or clinic, the technologist usually specializes in making several kinds of related tests in areas such as microbiology, parasitology, biochemistry, hematology, histology, cytology, and nuclear medical technology. The technologist also does the blood banking. He will also conduct tests related to the examination and treatment of patients, or do research on new drugs, or on the improvement of laboratory techniques, or teach and perform administrative duties. The simple, routine, and preliminary tests are generally performed by laboratory assistants or technicians. However, technologists who work in small laboratories may perform tasks that are performed by nonexempt employees in larger establishments. This type of activity will not necessarily be considered nonexempt (see § 541.307).

(c) On the other hand, X-ray technicians have only limited opportunity for the exercise of independent discretion and judgment, usually performing their duties under the supervision of a more highly qualified employee. The more complex duties of interpretation and judgment in this field are performed by obviously exempt professional employees.

**§ 541.307 Essential part of and necessarily incident to.**

(a) Section 541.3(d), it will be noted, has the effect of including within the exempt work activities which are an essential part of and necessarily incident to the professional work described

in § 541.3 (a) through (c). This provision recognizes the fact that there are professional employees whose work necessarily involves some of the actual routine physical tasks also performed by obviously nonexempt employees. For example, a chemist performing important and original experiments frequently finds it necessary to perform himself some of the most menial tasks in connection with the operation of his experiments, even though at times these menial tasks can be conveniently or properly assigned to laboratory assistants. See also the example of incidental interviewing or investigation in § 541.303(a)(3).

(b) It should be noted that the test of whether routine work is exempt work is different in the definition of "professional" from that in the definition of "executive" and "administrative." Thus, while routine work will be exempt if it is "directly and closely related" to the performance of executive or administrative duties, work which is directly and closely related to the performance of the professional duties will not be exempt unless it is also "an essential part of and necessarily incident to" the professional work.

(c) Section 541.3(d) takes into consideration the fact that there are teaching employees whose work necessarily involves some of the actual routine duties and physical tasks also performed by nonexempt employees. For example, a teacher may conduct his pupils on a field trip related to the classroom work of his pupils and in connection with the field trip engage in activities such as driving a school bus and monitoring the behavior of his pupils in public restaurants. These duties are an essential part of and necessarily incident to his job as teacher. However, driving a school bus each day at the beginning and end of the school day to pick up and deliver pupils would not be exempt type work.

**§ 541.308 Nonexempt work generally.**

(a) It has been the Divisions' experience that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment.