

Fair Labor Standards Act



Presented
November 9, 2016
at the
State Personnel Office

Training Objectives

- Explain the Basic Provisions of the FLSA.
- Discuss the “White Collar Exemptions”.
- Discuss the application of the regulations to determine whether or not an employee is considered FLSA exempt or not.
- Discuss the steps necessary to change an employee from FLSA exempt to FLSA non-exempt.

WE ARE NOT GOING TO

- Cover everything related to the FLSA.
- Make FLSA status determinations of specific jobs.
- Make FLSA status determinations for you.

Part I

The Basics

Fair Labor Standards Act

- FLSA was enacted in 1938 to establish and regulate
 - Minimum Wage
 - Overtime Pay
 - Recordkeeping
 - Child Labor Standards
- Also referred to as the Wage and Hour Law
- Revised in 2004 and again in 2016 by the Department of Labor
- An employer has no obligation to independent contractors under FLSA.
- Who is "*covered*" versus "*non-covered*"?

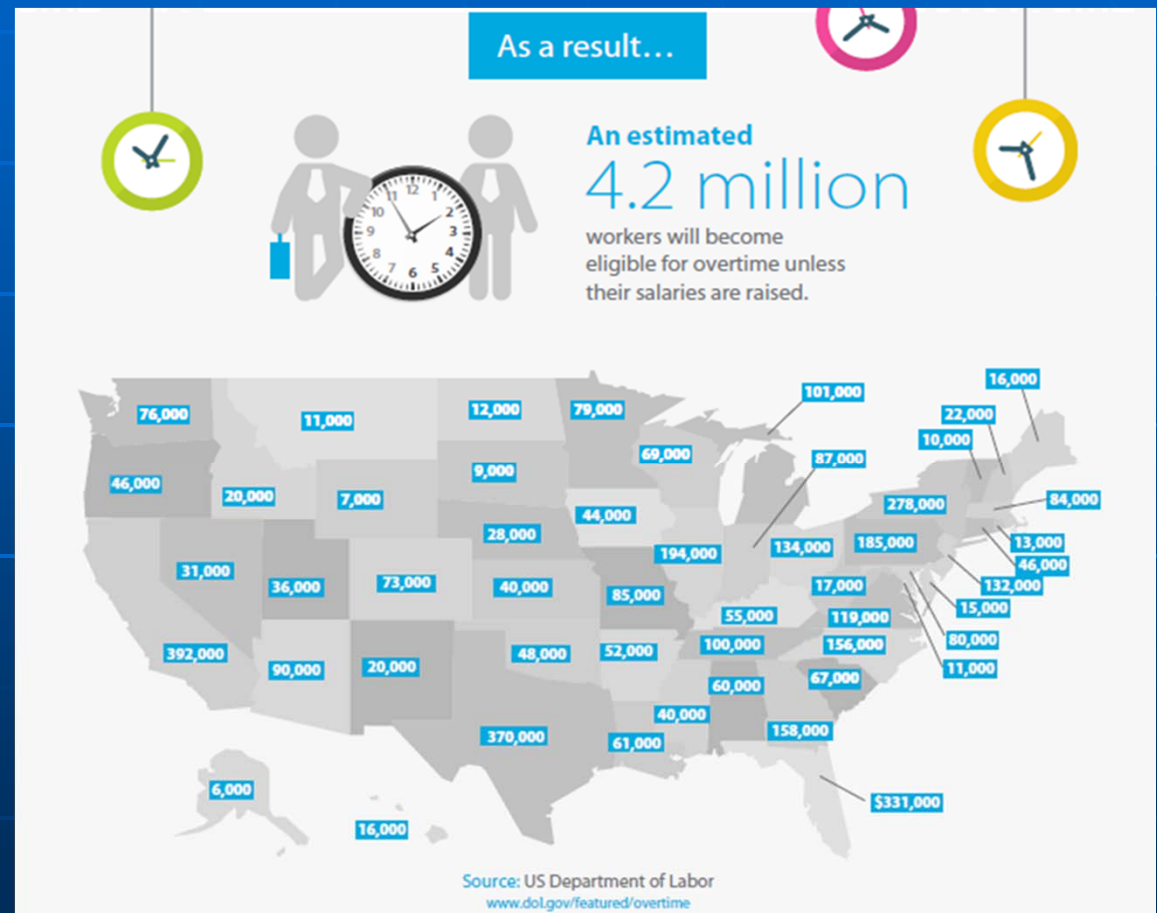
Key Provisions of the Final Rule

The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. Specifically, the Final Rule:

- Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South (\$913 per week; \$47,476 annually for a full-year worker);
- Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally (\$134,004); and
- Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

DOL Projected Impact of 2016 “New Rule”

- 4.2 million workers will become eligible for overtime effective December 1, 2016
- 20,000 New Mexico workers
- 1,579 State employees
- 1,132 Classified employees



Fair Labor Standards Act

- What the FLSA does not cover
 - Vacation, Holiday, Severance or Sick Pay
 - Meal or rest periods, holidays off, or vacations
 - Premium pay for weekend or holiday pay
 - Pay raises or fringe benefits; and
 - A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
 - Wage payment or collection services
 - Does not limit the hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours if that employee is at least 16 years old

Who is Covered?

- A covered enterprise is...
 - ... an enterprise ... whose annual gross volume of sales made or business done is not less than \$500,000; or
 - ... is engaged in the operation of a hospital, an institution primarily engaged in the care for the sick, the aged or mentally ill...a preschool, elementary school, or an institution of higher education; or
 - ... is an activity of a public agency (1986)

FLSA

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graph TD; FLSA[FLSA] --> Covered[Covered]; FLSA --> NonCovered[Non-Covered]; Covered --> FLSANonExempt[FLSA Non-exempt]; Covered --> FLSAExempt[FLSA Exempt]; FLSANonExempt --> RKR1[* Recordkeeping Requirements]; FLSANonExempt --> PO[* Premium Overtime]; FLSAExempt --> RKR2[* Recordkeeping Requirements];
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Covered

Non-Covered

FLSA Non-exempt

FLSA Exempt

- * Recordkeeping Requirements
- * Premium Overtime

- * Recordkeeping Requirements

1.7.4.14 NMAC – Regulates Overtime Provisions in the Classified Service

Covered v. Non-covered FLSA

■ Non-Covered

- Independent Contractors
- Elected Officials
- Personal Staff
- Policy Making Appointees
- Legal Advisors
- Legislative Employees
- Bona Fide Volunteers
- Independent Contractors
- Prisoners
- Trainees

■ Covered

- Nonexempt
 - Recordkeeping
 - Overtime Provisions (1.5X)
- Exempt
 - Recordkeeping

Nonexempt Employees

FLSA Regulations guarantees overtime protection to employees with a quoted salary of less than \$47,476 per year or \$913 per week.

“White Collar” Exemptions

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity.
- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA.

FLSA Exemptions

An exempt employee must meet three requirements, referred to as white-collar exemptions.

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graph LR; A[An exempt employee must meet three requirements, referred to as white-collar exemptions.] --- B[Minimum salary]; A --- C[Paid on a salary basis without improper deductions]; A --- D[Perform exempt duties];
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Minimum salary

Paid on a salary basis without improper deductions

Perform exempt duties

Minimum Salary Test

- Salary Test: Minimum salary level of \$913 per week.
 - Equivalent to \$22.825/hr
 - Equivalent to \$47,476 annually
- Several FLSA Exempt state employees are under the \$913 weekly salary.

Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs *any* work
- Need not be paid for any workweek when no work is performed
- ***Public Sector Excluded: 29 CFR 541.710***

What is Not Included in Salary?

- Does not include
 - Discretionary bonuses/payments
 - Board, lodging or other facilities
 - Payments for medical, disability or life insurance
 - Contributions to retirement plans
 - *Other fringe benefits*

Primary Duty Issue

- Ask yourself “Why does the job exist”?
- A primary duty is the principal, main, most important duty and is considered in determining exempt status.
- It includes the exercise of discretion and independent judgment in matters of significance.
- Matters of significance refers to the level of importance or consequence of the work performed.
- Factors to consider include, but are not limited to:
 - Relative importance of the exempt duties;
 - Amount of time spent performing exempt work;
 - Relative freedom from direct supervision

Primary Duty

- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement
- However, the regulations *do not require* that exempt employees spend more than 50% of time performing exempt work

Executive Exemption

- \$913/ week
- Primary duty is management of the enterprise or a customarily recognized department or subdivision
- Customarily and regularly supervises two or more employees (**No time requirement**)
- Has authority to hire and fire or whose suggestions and recommendations as to hiring, firing, advancement, promotion, or other "change of status" of other employees are given **particular weight**

Management

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Maintaining production or sales records
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work among employees

Management

- Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used; or the merchandise to be bought, stocked and sold
- Providing for the safety and security of employees or property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

Department or Subdivision

- A “customarily recognized department or subdivision” (Department, Bureau, etc.) must have a permanent status and continuing function
 - Need not be physically within the employer’s establishment, and may move from place to place
 - Continuity of the same subordinate personnel is not essential to the existence of a recognized unit.
- Does not include a mere collection of employees assigned from time to time to a specific job or isolated or one-time tasks
- Customarily and Regularly: More than occasional but may be less than constant

Department or Subdivision

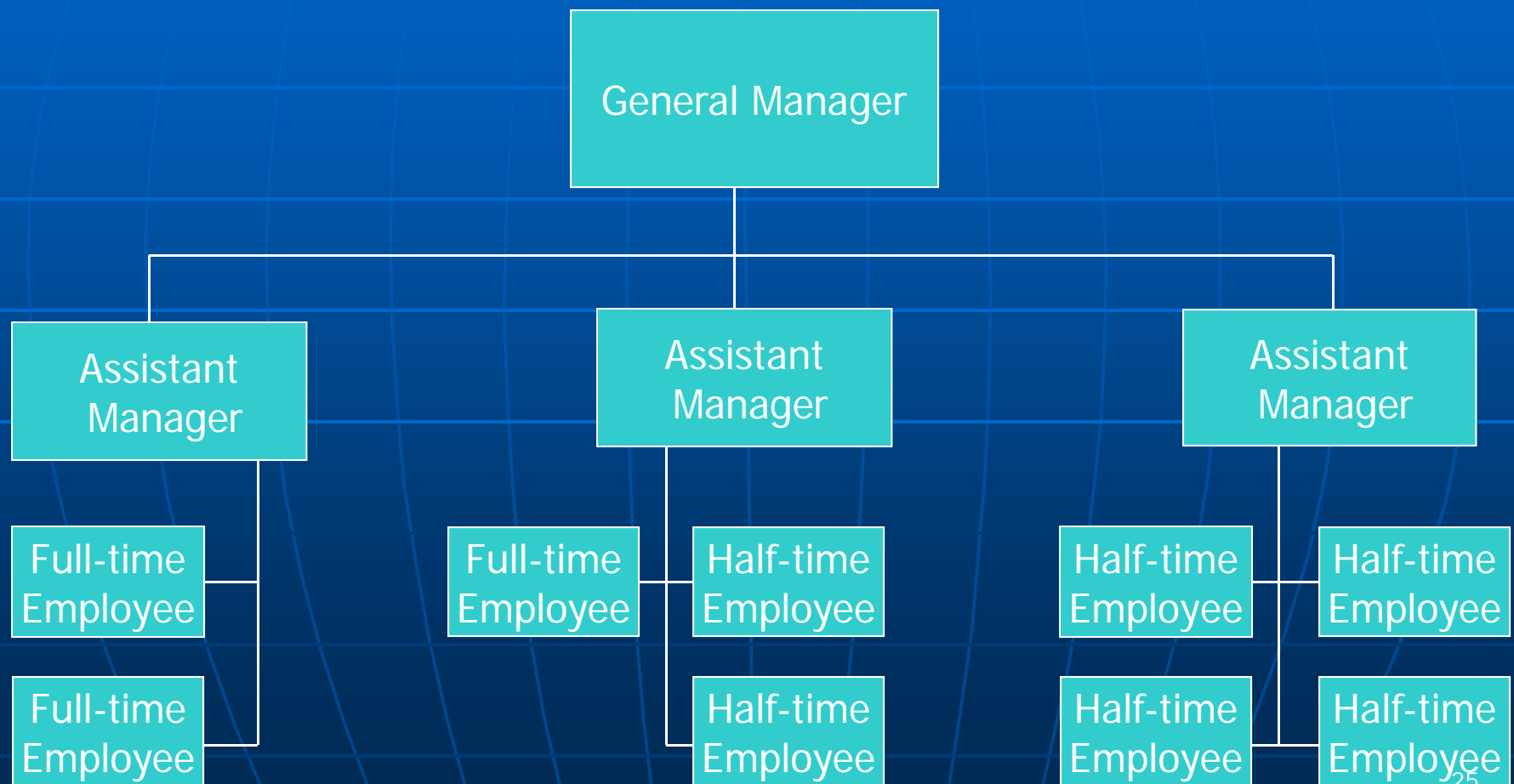
- Examples of customarily recognized departments or subdivisions include:



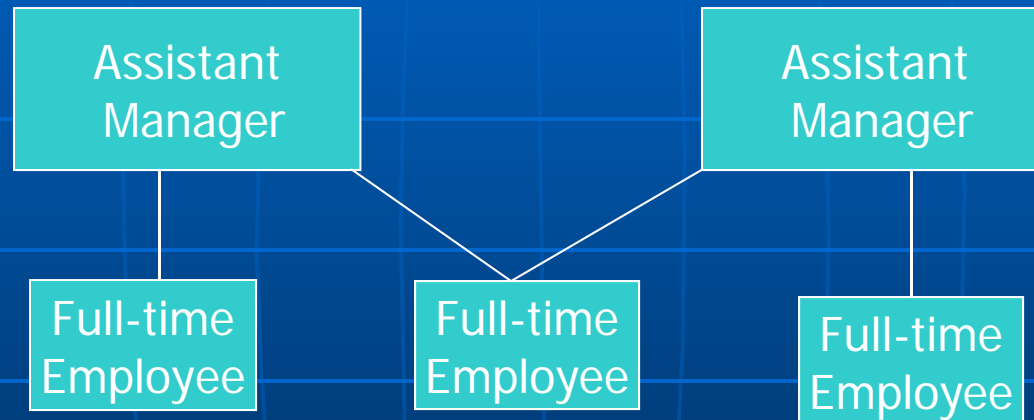
Two or More

- The phrase “two or more other employees” means two full-time employees or the equivalent
- Full-time generally means 40 hours per week
- The supervision of the same employees can be distributed among two or more exempt executives, but the hours worked by an employee cannot be credited more than once

Staffing Meets the “Two or More” Requirement



Staffing Does Not Meet the “Two or more” Requirement



Particular Weight

- Factors include, but are not limited to:
 - Suggestions or Recommendations
 - Frequency made
 - Frequency accepted and relied upon
 - Whether it is part of the employee's job duties to make suggestions and recommendations
 - The exempt executive need not have authority to make the ultimate decision

Executive Exemption Concurrent Duties

■ Concurrent Duties

- Production-level work does not prevent a supervisor or manager from meeting the exemption
 - Determined on a case by case basis
 - Generally, the exempt executive decides to perform work (instead of being assigned work by someone else) and remains responsible for the success or failure of business operations
 - What is the primary duty – supervision or production work? Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption

Administrative Exemption

- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- No requirement for holding a "position of responsibility".
- No requirement for having a "high level of skill or training."

Management or General Business Operations

- Work must be directly related to assisting with the running or servicing of the organization
- Does not include working on a manufacturing production line or selling a product in a retail or service establishment

Management or General Business Operations

(Enabling Support Roles)

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

Administrative Exemption

- **Discretion and Independent Judgment in matters of significance**
 - “involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”
 - Matters of Significance refers to the level of importance or consequences of the work performed.
 - Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed.

Administrative Exemption

- Other Factors to Consider
 - Authority to formulate, affect, interpret or implement management policies or operating practices
 - Carries out major assignments in conducting the operations of the business
 - Performs work that affects the business operations to a substantial degree
 - Authority to commit the employer in matters that have significant financial impact

Administrative Exemption

- More Factors to Consider
 - Authority to waive or deviate from established policies and procedures without prior approval
 - Authority to negotiate and bind the organization/company on significant matters
 - Provides consultation or expert advice to management
 - Involved in planning business objectives
 - Investigates and resolves matters of significance on behalf of management
 - Represents the company in handling complaints, arbitrating disputes or resolving grievances
- Independent Judgment implies that the employee has the authority to make an independent choice, free from *immediate* direction or supervision (but oversight may occur without changing the exempt nature of position)

Discretion and Independent Judgment

- Discretion and independent judgment *does not* include:
 - Applying well-established techniques, procedures or specific standards described in manuals or other sources
 - Clerical or secretarial work
 - Recording or tabulating data
 - Performing mechanical, repetitive, recurrent or routine work

Use of Manuals

- Exempt employees may use manuals, guidelines or other established procedures if they:
 - contain or relate to highly technical, scientific, legal, financial or other similarly complex matters
 - can be understood or interpreted only by those with advanced or specialized knowledge or skills
- Employees are not exempt if they use manuals to apply well-established techniques or procedures within closely prescribed limits

Insurance Claims Adjusters

- Exempt status depends on actual job duties
- May be exempt if duties include:
 - 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
 - Making recommendations regarding litigation

Financial Services

- May be exempt if duties include:
 - 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
 - Marketing, servicing or promoting the employer's financial products

Human Resources

- Human resource managers who formulate, interpret or implement employment policies generally meet the administrative duties requirements
- Personnel clerks who “screen” applicants to obtain data regarding minimum qualifications and fitness for employment generally are not exempt administrative employees

Other Exempt Positions

- An employee who leads a team of other employees assigned to complete major projects
- Executive assistant or administrative assistant to a business owner or senior executive of a large business who has been delegated authority regarding matters of significance
- Management consultants who study the operations of a business and propose changes in organization

Non-exempt Positions

- Ordinary inspection work involving well-established techniques and procedures
- Examiners and graders who perform work involving comparison of products with established standards
- Comparison shoppers who merely report the prices at a competitor's store
- Public sector inspectors or investigators

Learned Professional

- The employee's primary duty must 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

Advanced Knowledge

- Predominantly intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances
- *Not* work involving *routine* mental, manual, mechanical, or physical work
- *Cannot* be attained at the high school level
- Specialized academic training is a prerequisite for entering the profession.

Field of Science or Learning

- Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law

Accounting

Actuarial Computation

Theology

Teaching

Physical Sciences

Medicine

Architecture

Chemical Sciences

Pharmacy

Engineering

Biological Sciences

Prolonged Course of Specialized Intellectual Instruction

- The learned professional exemption is *not* available for occupations that may be performed with:
 - Only the general knowledge acquired by an academic degree in any field
 - Knowledge acquired through an apprenticeship
 - Training in the performance of routine mental, manual, mechanical or physical processes
- The exemption also *does not* apply to occupations in which most employees acquire skill by experience

Medical Profession

- The learned professional exemption applies to any employee who holds a valid license or certificate permitting the practice of medicine
 - Osteopathic physicians
 - Podiatrists
 - Dentists
 - Optometrists
- Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption
 - Many registered nurses, however, are paid by the hour, not on a salary basis, and thus are entitled to overtime pay
- Licensed practical nurses generally *do not* qualify as exempt learned professionals

Other Medical Professions

- Registered or certified medical technologists
 - 3 years of pre-professional study in an accredited college or university, plus 1 year of professional study in an accredited school of medical technology
- Dental hygienists
 - 4 years of pre-professional and professional study in an accredited college or university
- Certified physician assistants
 - 4 years of pre-professional and professional study, including graduation from an accredited physician assistant program

Other Exempt Professions

- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Athletic trainers

Other Nonexempt Professions

- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians

Creative Professional Duties

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Recognized Field of Artistic or Creative Endeavor

- Music
 - Musicians, composers, conductors, soloists
- Writing
 - Essayists, novelists, short-story writers, play writers
 - Screen play writers who choose their own subjects
 - Responsible writing positions in advertising agencies
- Acting
- Graphic Arts
 - Painters, photographers, cartoonists

Exempt status is determined on a case-by-case basis, depending on the extent of the invention, imagination, originality or talent exercised

Journalists

- Employees of newspapers, magazines, television and other media are not exempt if they:
 - Collect, organize and record information that is routine or public
 - Do not contribute a unique interpretation or analysis
 - Their work product is subject to substantial control
- Journalists may be exempt if they:
 - Perform on-air in radio or television
 - Conduct investigative interviews
 - Analyze or interpret public events
 - Write editorials, opinion columns or commentary

Computer Employees

- Must meet the salary minimum with a salary of \$913 per week or \$27.63 per hour.
- Employee's pay cannot be subject to deductions inconsistent with salary basis requirement.
- Primary duties must fall within a specified list.

Exemption Changes – Computer Professionals

- Primary duty consists of
 - Application of system analysis techniques and procedures
 - 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.
 - Design, documentation, creation, testing or modification of computer programs related to machine operating systems.
 - A combination of the above.

Exemption Changes – Computer Professionals

- Computer Professional Exemption does not apply to the manufacture and repair of computers
- Also does not apply to users of computer programs

Blue-Collar Workers

Blue-collar workers:

- Perform work involving repetitive operations with their hands, physical skill, and energy.
- Remain nonexempt no matter how highly they are compensated.

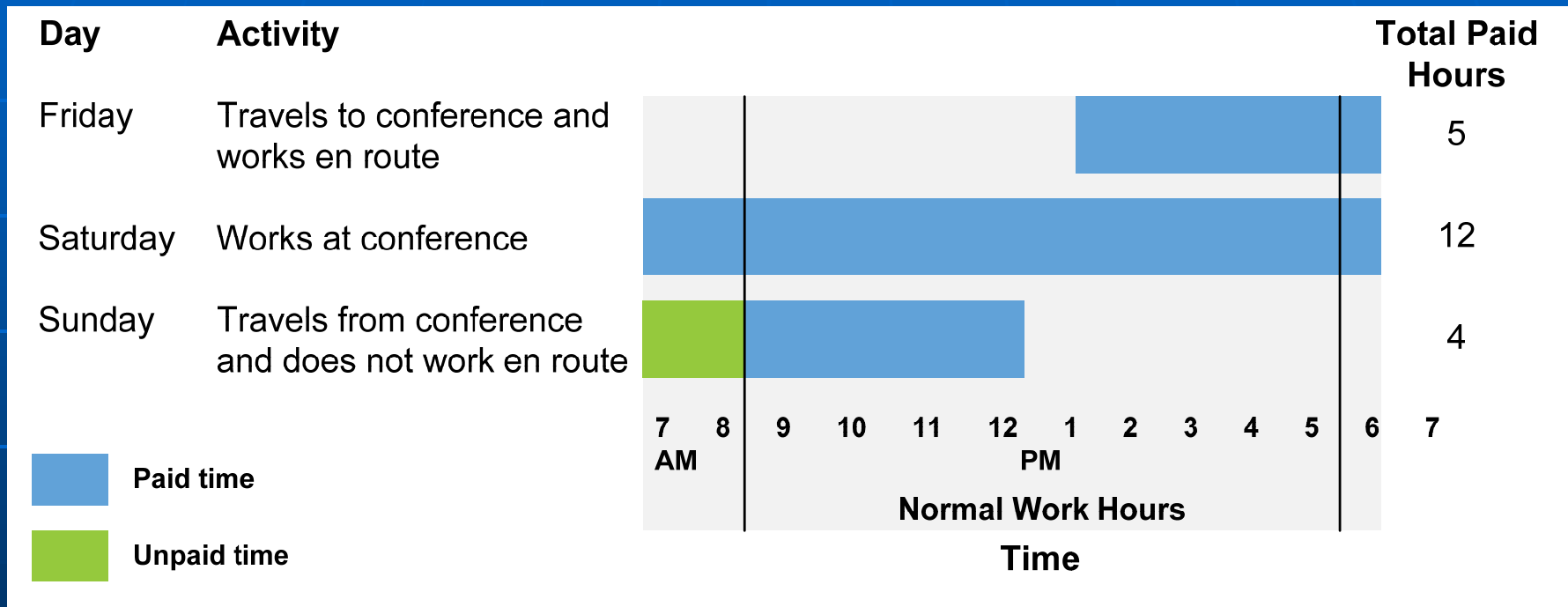
Veterans

- Military training is not sufficient to meet the requirements of a professional exemption.
- Blue-collar workers with military training maintain their nonexempt status.

Portal-to-Portal Act

- Defines the beginning and the end of the workday.
- Provides guidelines on:
 - **On-call/standby time.**
 - **Preparatory/concluding activities.**
 - **Waiting time.**
 - **Meals and breaks.**
 - **Travel time.**
 - **Training time.**

Travel Pay



Improper Deductions

Employers that make improper deductions will lose the exemption if they did not intend to pay on a salary basis.

Example:

An exempt employee is normally not subject to deductions for illness in less than full-day increments. (An FMLA exception may occur.)

Safe Harbor

A “safe harbor” exists if:

- ✓ The employer has a clearly communicated policy prohibiting improper pay deductions.
- ✓ Employees are reimbursed for any improper deductions.
- ✓ The organization makes a good-faith effort to comply in the future.

Basic Overtime Provisions

- Sets rate of overtime pay (1.5 time regular pay after hours worked).
- Requires overtime on time worked, not time compensated.
- Sets workweek as any fixed, recurring period of 168 consecutive hours (7 days x 24 hours).
 - *1.7.4.14(E) defines the State workweek starting at 12:01 a.m. Saturday and ending at 12:00 p.m. the following Friday*

Compensatory Time

- Overtime usually must be paid in cash.
- Public-sector employers may grant compensatory time off.
- Public employees can accumulate “comp” time.



Presently, compensatory time is not allowed for private-sector nonexempt employees.

Public Sector Exemption

29 CFR §541.710 Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when 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.

Exempt Employee Q & A

This Week's Tip: Tracking Exempt Employee Hours Q&A

Q: We need to account for the hours our exempt employees work so that our clients know how much time was spent on their projects. Can we require exempt employees to fill out hourly time sheets?

A: Yes, as long as this requirement does not affect their pay. The Fair Labor Standards Act (FLSA) does not specifically prohibit employers from keeping track of the hours that exempt employees work. (Exempt employees are those employees who are not subject to the FLSA's minimum wage and overtime requirements because of the nature of their job duties and the fact they generally are paid on a salary basis.)

In fact, the Department of Labor (DOL) preamble to the new exemption regulations (which took effect on August 23, 2004) specifically states that employers may require exempt employees to record and track hours without affecting their exempt status. To support this position, the preamble also cited a Sixth Circuit Court decision, *Douglas v. Argo-Tech Corp.*, 113 F.3d 67 (6th Cir. 1997). In that case, the court stated that the fact, by itself, that an employer uses a time clock does not jeopardize the exemption.

However, when you require exempt employees to account for their work time on an hourly basis, you must be careful because you may jeopardize their status if the accounting has the effect of treating them like hourly workers. For example, if their salary fluctuates based on the number of hours worked or if you dock their salary for hours that are not worked in any day, they most likely will no longer be considered exempt.

You generally are allowed to keep track of hours worked for other purposes unrelated to exempt employee pay, such as to account for work time billed to clients or for performance of a federal contract. You also may track exempt employee daily attendance.

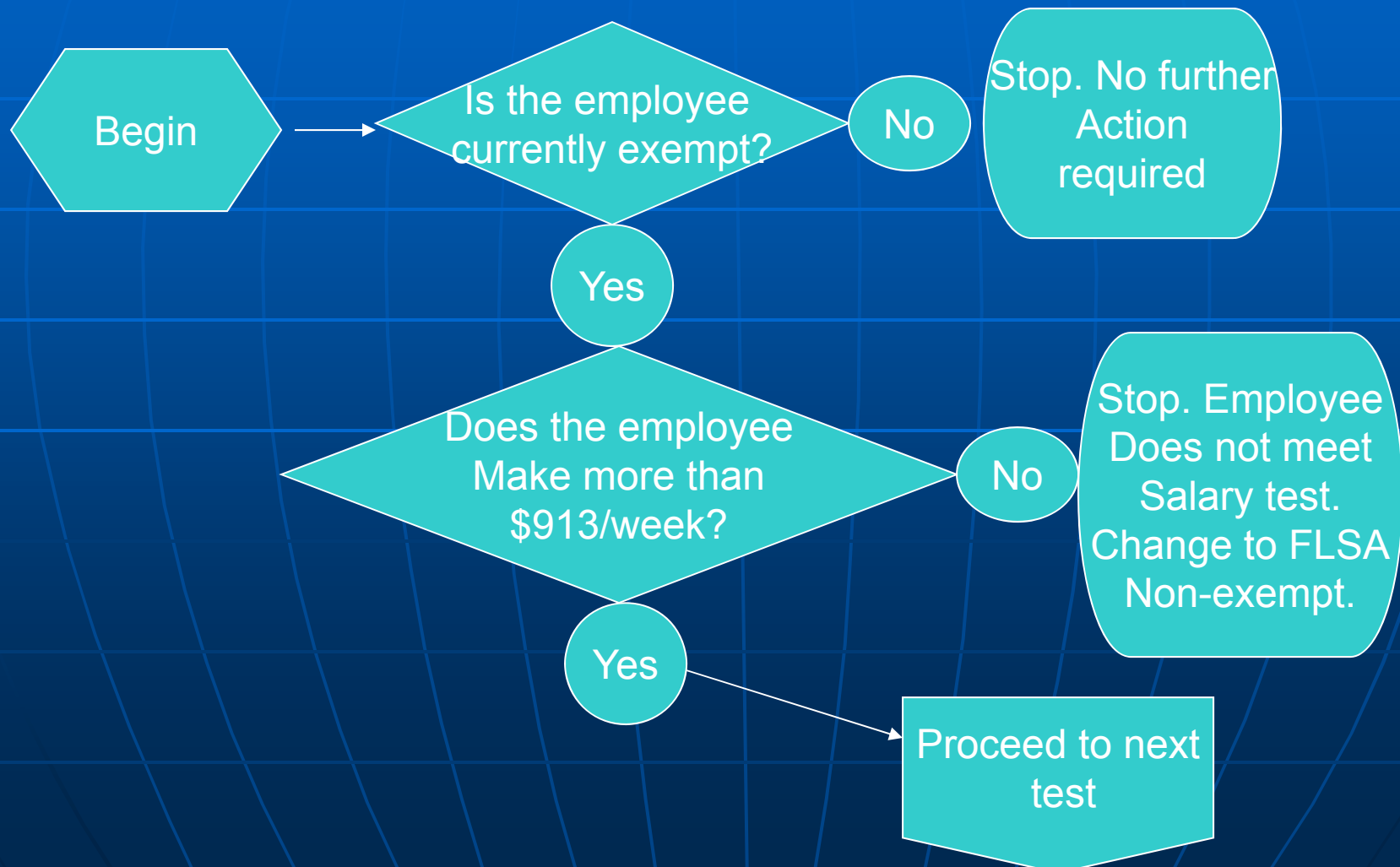
References

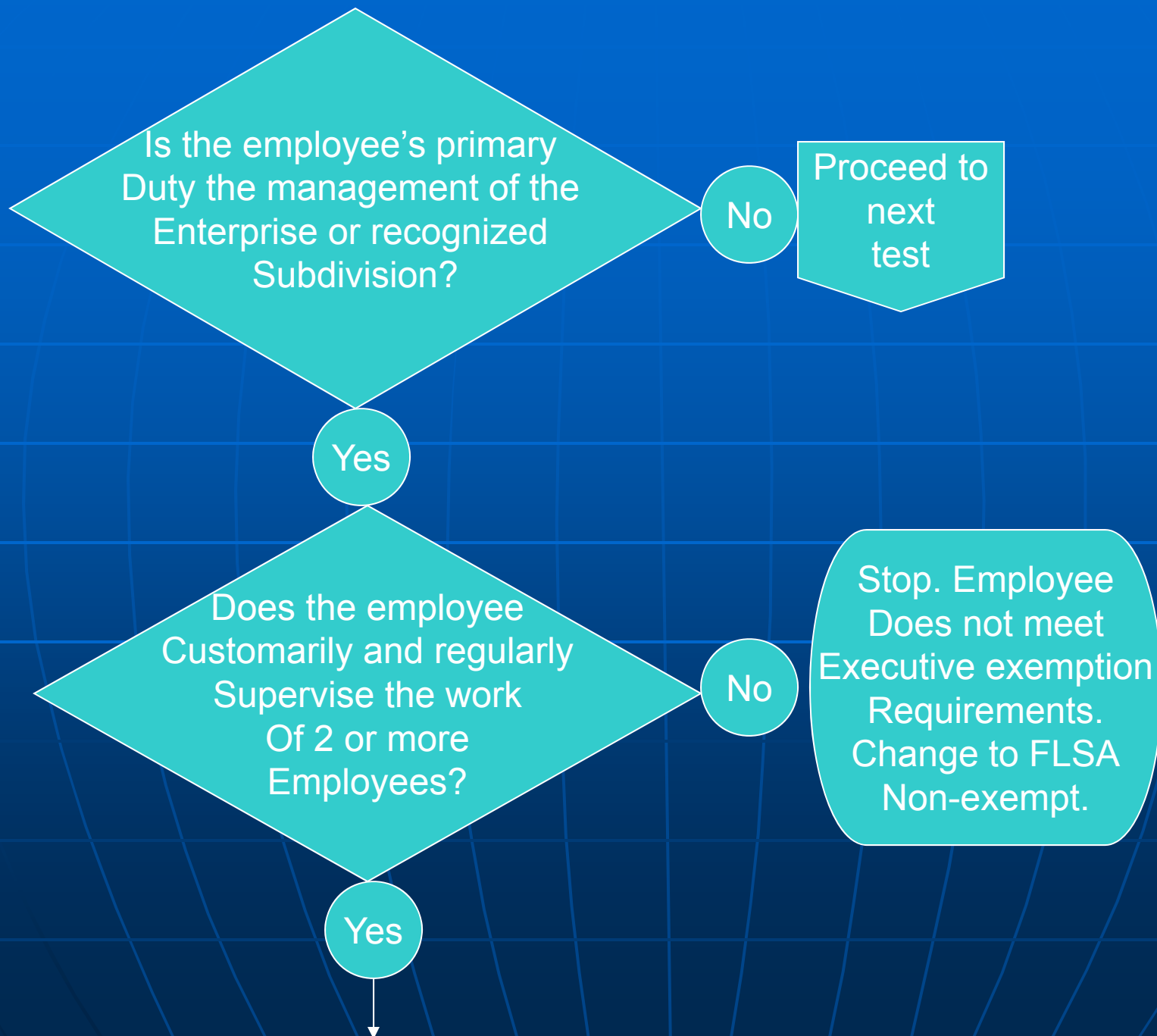
- USDOL Website:
<https://www.dol.gov/whd/overtime/final2016/>
- 29 CFR Part 541: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule.
- <http://www.spo.state.nm.us/flsa-and-overtime-resources.aspx>

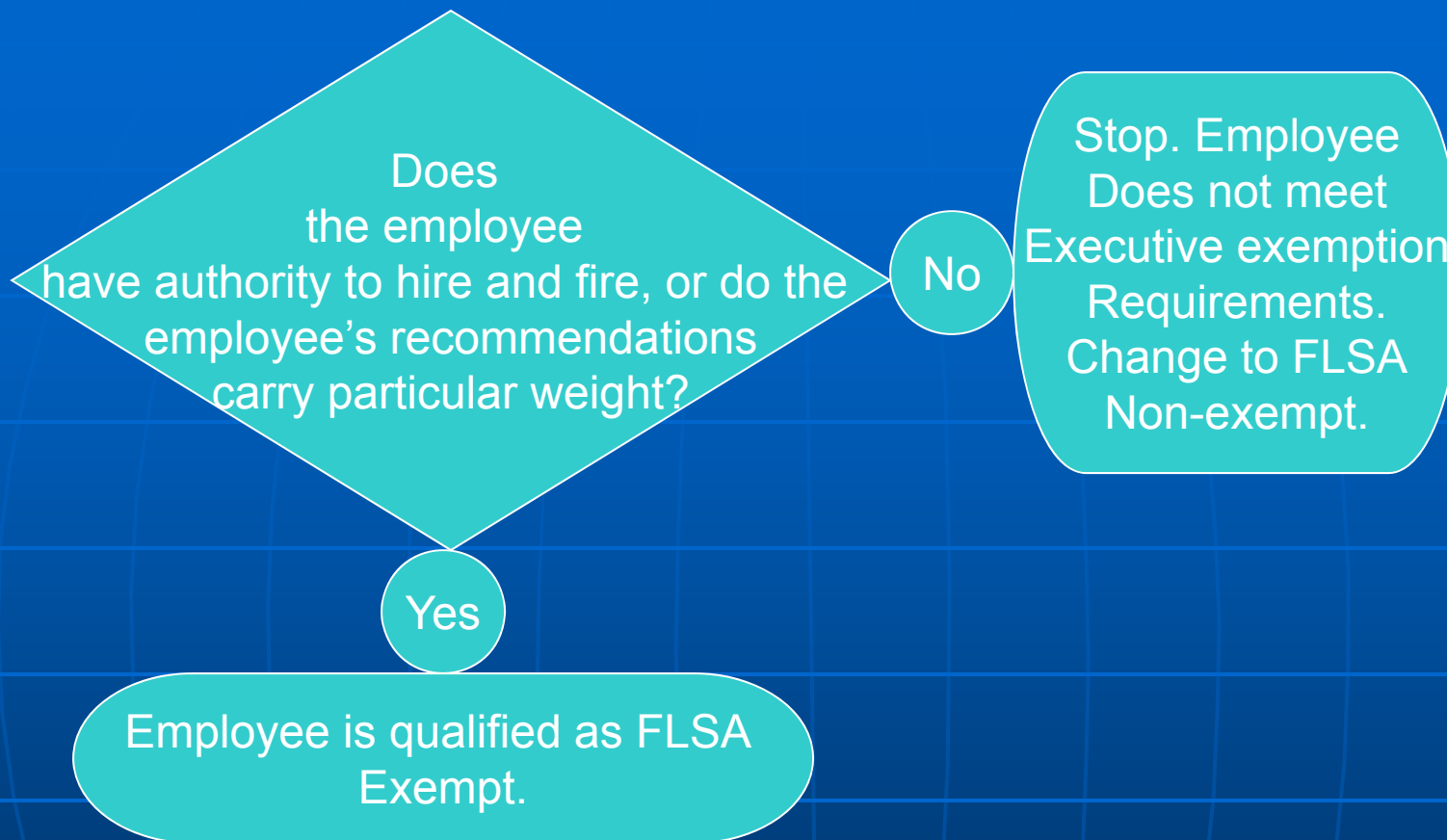
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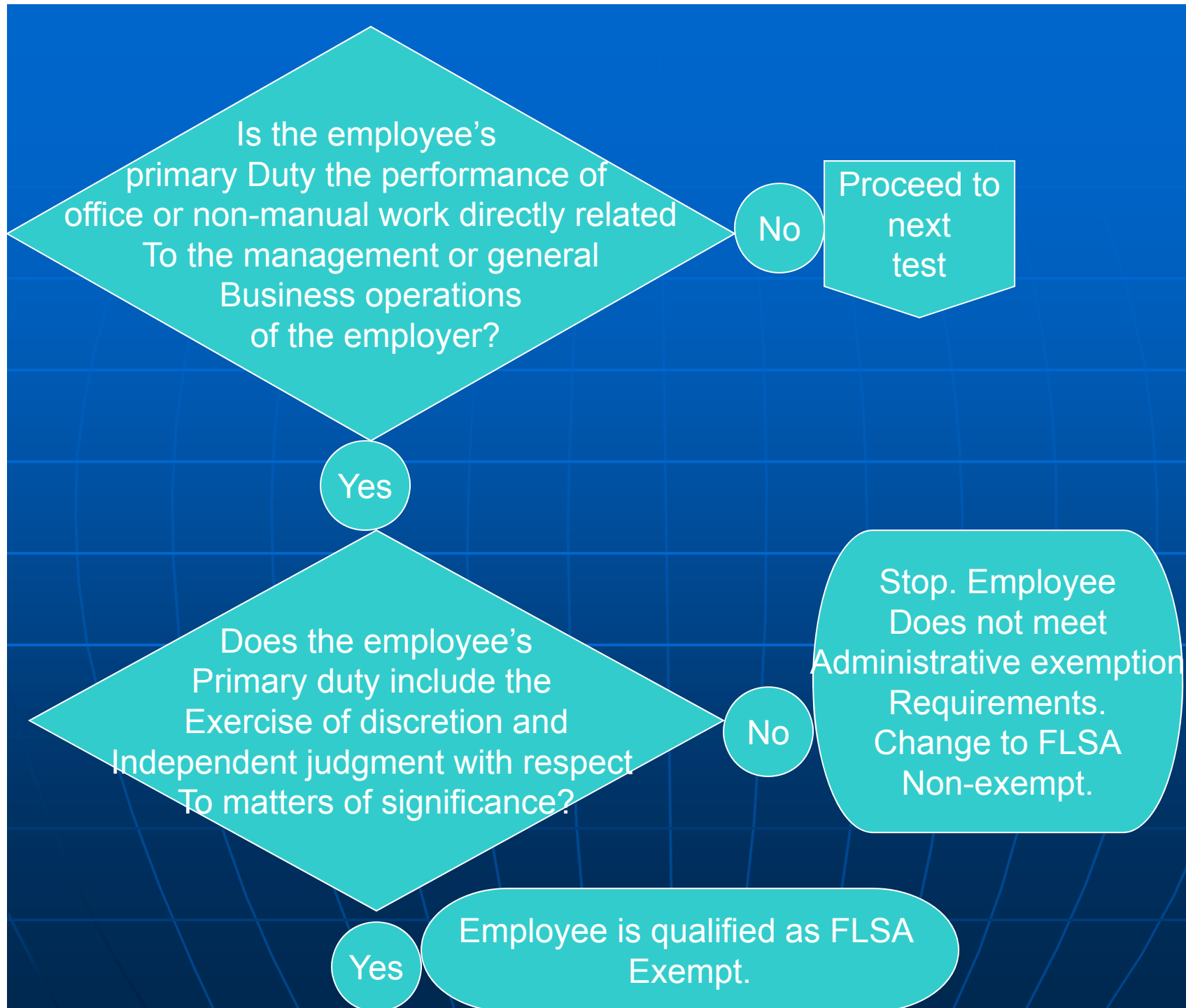
Application of FLSA Standards to
Determine if an Employee is (or
should remain) Exempt

Standard Flow Chart









Is the employee's
primary Duty 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

Does the primary duty require
Invention, imagination, originality or talent
In a recognized field of artistic
or creative endeavor

No

Stop. Employee
Does not meet
Learned
Professional
exemption
Requirements.
Change to FLSA
Non-exempt.

Yes

Employee is qualified as FLSA
Exempt.

Part III

What you have to do now!

Steps to Compliance

- Examine every position in your agency and classify appropriately.
- Document Exemptions
- To change an employees overtime status:
 - Change in HRIS system (if applicable)
 - Inform the employee in writing
 - Treat employee as non-exempt or exempt as appropriate

Steps to Compliance

- Examine every FLSA Exempt position currently earning less than \$47,476 to determine proper FLSA classification
- Train HR/Payroll and Manager/Supervisor staff
- Revise agency policies
- Document FLSA determination
- Inform the employees in writing
- Treat employee as non-exempt or exempt as appropriate

Other Considerations

The duties test

Additional hours
worked

Flexible
schedules

Timekeeping
changes

Benefit changes

Pay
compression

Impact to
employee
morale

Management
training

Risk of non-
compliance

Increased use
of non-exempt
Managers and
Supervisors

Documentation

Communication

Questions?

