



# Payroll Administration Guide

NEWSLETTER

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## Web Coverage of APA

Can't make it to the American Payroll Association's 22nd Annual Congress next week in Nashville? The next best thing is following BNA's free daily coverage of the general sessions and selected workshops online at <http://www.bna.com/payroll/apa2004>.

## DOL Issues Final Overtime Exemption Rules

The Department of Labor has released its long-awaited revisions to the overtime provisions of the Fair Labor Standards Act. The new rules, with their numerous modifications to the proposed rules announced March 2003, will present some major changes to the way in which employers distinguish between nonexempt employees—those who are subject to the minimum wage and overtime provisions of the FLSA—and exempt employees—those who are not subject to those provisions. The rules become effective in 120 days.

### \$455 Minimum Weekly Standard Salary

As in the proposed rules offered last year, there will be only one “standard” test for determining most employee’s exempt status. The current “long” and “short” tests will be eliminated. Generally, the new standard test includes the salary-level requirement that an employee be paid a minimum of \$455 per week—or \$23,660 per year. Last year’s proposal had set a \$425 per week minimum.

- Exempt **executives** under the new rules must have the authority to hire or fire other employees, a requirement currently not a part of the “short test.”
- Other than the new higher salary requirement, the **administrative** exemption remains essentially unchanged.
- The new rules for **professionals** drop the proposed definition that would have allowed for the acquiring of “advanced knowledge” through a combination of experience and “prolonged course of instruction.”

Flow charts illustrating the exemptions are included in a special PAG Newsletter Part 2 with this issue.

The rules clarify the status of many industry-specific workers, exempting inside sales workers, insurance claims adjusters, and funeral directors from overtime, while guaranteeing that first responders and veterans get overtime.

### Exempt at \$100,000

An employee earning a minimum of \$100,000 a year generally will be exempt from overtime if the employee primarily performs office or nonmanual

*Continued on next page.*

## New Exemption Rules Examined During Audio Conference

**B**NA offers an audio conference, “Updating the FLSA: What You Need to Know About Overtime Pay Rules and Duties Tests (and Other FLSA Issues),” on Wednesday, April 28, 2004. Labor and employment law experts from the law firm Alston & Bird are featured speakers at the conference, which is scheduled for 2:00 p.m.-3:15 p.m. ET. Register securely online at <https://ww4.premconf.com/webbrsvp> (use code 41819), or call toll-free at 888-605-5063. Lines are open from 9:30 a.m. to 5:30 p.m. ET.

Continued from previous page.

work and customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

### Pay Docking for Discipline

Under the new rules, an employee's exempt status will not be jeopardized by unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Currently, such deductions are violations of the salary-basis requirement for exempt employees.

In response to situations in which employers inadvertently make improper deductions to an exempt employee's salary, the new rules create a new **safe harbor**. Under this provision, an employer can avoid the consequence of a misclassification rippling throughout the company by (1) establishing a company policy prohibiting improper deductions, (2) reimbursing the employee, and (3) making a "good faith commitment to comply in the future," according to DOL.

DOL has posted the full-text of the rules, a preamble, fact sheets, and a news release at <http://www.dol.gov>.

### Reactions to Rules Mixed

While Republicans in Congress hailed the final rules as making "significant improvements over the proposed rules," Democrats said the rule still causes workers to lose their overtime eligibility, although the Labor Department had removed some of the most obvious troublesome provisions in its proposed rule.

Democrats said they are concerned about exemptions in the final rule for specific categories of workers, such as funeral directors, computer network operators, or database administrators. "Given this administration's track record, I remain skeptical and will need to read the fine print," said Sen. Tom Harkin (D-Iowa). Support for Harkin's amendment to ban DOL from making any rule that would render an existing overtime eligible worker exempt is holding up passage of an export tax bill (S. 1637).

Senate Minority Leader Thomas Daschle (D-S.D.) appeared a bit more upbeat about the proposal. "I have to assume this is at least a good start," he said.

The National Restaurant Association Federal Relations Vice President Rob Green praised the rule, but he also said it is "not perfect." "You

never get everything you ask for," Green told BNA. "On balance, it's fair."

AFL-CIO Legislative Director Bill Samuel pointed out that the administration made "explicit changes" because of widespread publicity that certain workers would be exempt, he said. The AFL-CIO has said in the past that it might consider legal action once the final rule was issued.

### Executive Compensation

#### Tax Audit Guidelines Nearing Release by IRS

Internal Revenue Service field agents will have new guidance this week to help them in executive compensation audits, director of field specialists Keith Jones told BNA. The guidance is the result of an audit initiative begun by the IRS late last year to examine eight executive compensation issues across two dozen large and mid-sized companies (see PAG Newsletter, 2/25/04).

The new guidance represents a realignment of agency resources to the areas identified as highest priority and highest risk, Jones said. These include deferred compensation, stock compensation, and the sale of stock options to family limited partnerships. The audit also uncovered problems in the area of fringe benefits and involving the use of corporate jets and country club memberships, among other things, Jones noted.

Speaking at a recent Federal Bar Association symposium, IRS assistant chief counsel Alan Tawshunsky gave some additional information on the results of the audit. Tawshunsky noted that an area of particular concern is corporate compliance with the asset risk requirement for nonquali-

#### ON THE HILL: A Legislative Snapshot

<i>Federal Legislation</i>	<i>Bill Number</i>	<i>Disposition</i>
<b>Senate</b>		
■ Military Reserve Mobilization Income Security Act of 2004	S. 2309	Finance Committee
■ Adoption Assistance Act	S. 2316	Finance Committee

*Payroll Library subscribers can click on bill numbers for a brief summary of each bill.*

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fied deferred compensation plans under Internal Revenue Code Section 3121(v), requiring that taxation occur as soon as there is no “substantial risk of forfeiture.”

Amounts held in funded (i.e., guaranteed) nonqualified plans are immediately taxable for federal income tax purposes, Tawshunsky noted, although some plans have been set up to get around this risk management requirement.

The audit also uncovered what many payroll practitioners already know: corporate noncompliance is often not the result of lax policies in the payroll department but of senior executives overriding effective compliance policies already in place.

## International Payroll

### **Payroll Issues Outlined for Multinational Firms**

**A**n increasingly complex environment and the need for greater operational flexibility are combining to provide greater challenges for payroll professionals operating in the international arena, according to Glen Elliott, Senior Consultant with ORC Worldwide, an international human resources and compensation consulting firm.

The growth in reciprocal tax treaties and totalization agreements, the increased harmonization of paid time off elements, and the complexity surrounding the taxability of compensation and benefits are among the challenges payroll professionals currently face, Elliott said.

Elliott spoke at a recent forum of the Washington Area Compensation and Benefits Association, a Worldat-Work affiliate, held in Reston, Virginia.

### **Tax Treaties**

Reciprocal income tax treaties between countries are designed to coordinate the countries’ tax systems in cases where each has a right to tax a worker’s income. The treaties generally provide workers with relief from double taxation, ensure that citizens of one country will not be treated any less favorably than citizens of another country, and provide a mechanism for settling income tax disputes, Elliott said.

“There are two main compensation areas to consider when operating internationally,” Elliott said. “One

area is compensation design, and the other is compensation delivery.”

“Payroll professionals have traditionally been more involved on the delivery side,” he said, adding that there are some significant “down stream” benefits for the worker and his or her family when the payroll professional makes sure that the compensation and social benefits are handled properly.

Income tax treaties have been either revised or enacted in the past few years between the United States and Australia, Japan, Mexico, Sri Lanka, and the United Kingdom. (See PAG coverage at 125:1331 for details.)

### **Totalization Agreements**

Countries enter into totalization agreements with each other in order to coordinate Social Security-type benefits among expatriate workers. Without totalization agreements foreign nationals working in a host country may be subject to the social benefit laws of both the host country and the country of origin, leading to double taxation, Elliott said. Furthermore, a foreign national working in a host country may not be able to contribute to the host country’s social security program long enough to receive any benefits back, he added.

Under totalization agreements, social taxes are paid in only one of the two countries, and employees who

have paid into more than one social benefit program may count the years of service under all of the systems to which they have contributed so that they will have enough time to qualify for social benefits in one country.

“Payroll professionals can view themselves as performing an essential social function here,” Elliott said. “Expatriate workers can have confidence that the time they spend working overseas will have been fully accounted for and the social benefit programs under which they worked will be accurately funded,” he said.

Totalization agreements have been executed recently between the United States and Australia, Chile, Japan, the Netherlands, and Norway. (See the PAG chart at 125:1381 for details.)

### **Paid Time Off**

Greater harmonization is occurring in the way major world regions handle paid time off program elements, Elliott said. The nations in the European Union, for example, are working on establishing minimum standards for paid time off, which is particularly important as country membership in the EU is constantly expanding, he noted. Payroll professionals working in the international arena will need to be aware of these standards, plus nonstandardized practices that vary from country to country. Greater cooperation will be

## **Payroll Briefs . . .**

### **Class Challenge Denied in Major Off-the-Clock Case**

The California Supreme Court has declined to block class certification of 250,000 employees in a state action alleging Wal-Mart Stores Inc. required some to work off the clock (*Wal-Mart Stores Inc. v. Superior Court (Savaglio)*, Cal. Sup. Ct., No. S122640, 4/14/04). Without comment, the state high court refused to grant Wal-Mart’s request to stay the case over class certification issues. The employees allege the company required them to finish their work before going home and that Wal-Mart understaffed stores to make working off-the-clock mandatory for all practical purposes. The employees also allege that they missed many of their meal and rest periods and were not compensated for the time worked. Christi Gallagher, spokeswoman for Bentonville, Ark.-based Wal-Mart, said while the company is “disappointed that the Supreme Court chose not to intervene at this early stage, we look forward to continuing our vigorous defense in the trial court.”

### **FLSA Collective Actions Increase 70 Percent Since 2000**

The number of collective actions brought under the Fair Labor Standards Act has increased 70 percent since 2000, according to an analysis by plaintiffs’ lawyer Richard Seymour. FLSA class actions went from 71 in 2000 to 91 in 2002 and 121 in 2003, Seymour noted.

needed in the future between field and home office payroll staff, he said.

Recognizing these differences and accommodating them will help a company distinguish itself and become an employer of choice, Elliott added, a designation which has gained greater importance due to the shortage of skilled knowledge workers worldwide.

### **Taxability, Pension Issues**

The taxability of employee benefits and pension provisions are often

overlooked when paying workers in foreign countries, Elliott said.

Generally, the taxability of employee benefits and compensation is determined for expatriate employees by the host country, he said, adding that the collection abilities of the country's revenue service are a factor some companies consider.

Some countries also require that resident employees be provided with mandatory pension benefits, so employers should make certain that they

check the country's regulatory environment, Elliott advised.

Employers may want to consider offering professional tax services to expatriate employees as an employee benefit, Elliott said, in order to avoid confusion in this area for employees and to help them avoid mistakes when preparing their own tax returns. An employer should also ensure that it takes all the tax credits it is entitled to, even after the workers return home and leave the company, he said.

# Policy Guide

## On Third-Party Sick Pay . . .

### Successful Management Depends on Communication

**T**he outsourcing of sick pay administration to a third-party provider complicates an employer's payroll reporting responsibilities and requires effective communication of benefit payment and tax withholding information between all parties involved in the process, as Aetna manager Tom Cotter explained during an audio conference sponsored by the National Association for Tax Reporting and Payroll Management.

Cotter noted in particular the importance of clear and continuing communication between human resources, payroll, and the third-party insurance provider. Each of the three has crucial responsibilities that must be clearly defined to ensure that all reporting, withholding, and remittance obligations are met.

#### **Sharing Information**

The third-party payer (TPP) is responsible for withholding and remitting the employee's share of FICA from sick pay benefits (and for withholding and remitting income tax if the employee requests). It may, however, pass back to the employer the obligation for remitting FUTA and the employer's share of FICA. As Cotter noted, this is the most common approach. The employer can only calculate its obligation, however, if it has

accurate information from the third-party payer of payments actually made to the employee. The employer's liability date is the date the employer receives notice of its obligation from the TPP.

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#### **The employer's employment tax liability begins upon HR's receipt of the TPP report.**

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A problem can arise here, Cotter warned, if the TPP communicates liability information to the employer's HR office and HR does not pass this information along to Payroll in a timely fashion. The employer's employment tax liability begins upon HR's receipt of the TPP report. Unless that information is immediately passed along to Payroll, remittance of taxes can be delayed and the employer can become subject to late-payment penalties.

Since employees are not taxed for the portion of benefits attributable to their after-tax payments and have no FICA liability after six full months away from work, the employer, for its part, must let the TPP know the portion of the benefit that was paid by

the employee and the last day the employee worked.

#### **Reporting Information**

If the TPP retains responsibility for the employer's taxes, it can also retain full reporting responsibility—Forms 940, 941, W-2, and W-3. Normally, the TPP passes back the employer FICA and FUTA obligations, and dual reporting may be required to both the IRS (Forms 940 and 941) and the Social Security Administration (Forms W-2 and W-3). The TPP can also pass back the reporting obligation to the employer, and the employer is required to provide sick pay information to the employee on a Form W-2. The employer may include the TPP sick pay information on the wage Form W-2, or issue separate Forms W-2, one for the employer wage payments, the other reflecting the benefits paid by the TPP.

The entity, whether employer or third-party payer, that does not file Forms W-2 to report employee payments must file a "sick-pay recap" W-2 so that Form W-2 and Form 941 totals reconcile. This can lead to problems with the states, Cotter noted, which may not understand the split-reporting process on the federal level and question the amounts reported on Forms W-2 filed with the state. Cotter recommended that employers in this situation attach an explanation to the state W-2 copy.

# State Highlights

## Idaho

■ New percentage method income tax withholding tables, effective July 1, 2004, have been released. The tables have been posted to the "Late-Breaking News" section of *Payroll Library* on the Web. The tax rates continue to range between 1.6 percent and 7.8 percent, but the threshold for imposition of the 1.6 percent tax rate has risen to \$1,750 annually.

■ Quarterly State Income Tax Withholding Returns, Form 958, are no longer required, under a recently enacted bill (H.B. 537). Instead, split-monthly and monthly filers must keep making monthly income tax withholding payments either electronically on the state Web site or by using the Form 910, Idaho Withholding Payment Voucher, and must use the annual reconciliation Form 956 to reconcile the 12 payments with the actual amount of tax withheld. Quarterly filers are to begin making quarterly income tax withholding payments either electronically or by using Form 910 and are to file the annual reconciliation Form 956 to reconcile the four payments with the actual amount of tax withheld.

## Maryland

A living wage bill that would require large state contractors and subcontractors to pay their employees at least \$10.50 an hour, more than double the federal minimum wage, has been approved and sent to the governor (S.B. 621). If the measure is enacted, Maryland would become the first state in the nation to have a living wage law, according to supporters. Gov. Bob Ehrlich (R), however, strongly opposes the measure and has threatened to veto it. Two counties in Maryland and Baltimore City

already have similar living wage ordinances.

## Michigan

Unemployment insurance quarterly wage detail reports will not be accepted on reel tape after the reporting period for the first quarter of 2004, according to a statement from the Unemployment Insurance Agency. Employers will be required to make the transition to electronic filing, beginning with the second quarter. The agency has also stated that it will phase out tape cartridges for wage reporting; however, no date has been set at this time. For more information, contact the agency at (313) 456-2764.

## Nebraska

When reporting new hires, employers will be required to report the date of hire or rehire on Form W-4, effective Jan. 1, 2005 (L.B. 950).

## New Hampshire

An unemployment insurance tax rate reduction is not effective for the second and third quarters of 2004. For the first quarter, a 0.5 percent rate reduction was applicable for new and positive-balance employers.

## Pennsylvania

*Reminder:* The employee tax for unemployment compensation is 0.09 percent (0.0009) in 2004. Although the state has a taxable wage base of \$8,000 for employer contributions, the employee tax is applicable to the total gross wages paid during the year.

## Tennessee

Under an amendment to the state's employment security law, a staff leasing company will not be considered a

successor employer to any client, and the company will not be able to acquire the experience rating of any client with whom it has contracted. Similarly, a client that has terminated its contract with a staff leasing company will not be considered a successor employer to the leasing company, and the client may not acquire the company's experience rating (S.B. 3401).

## Virginia

Employers may pay employees by credit to a prepaid debit card or card account from which the employee is able to withdraw or transfer funds, effective July 1, 2004. Employers must inform employees of any applicable fees and must obtain the employee's consent. If an employee does not consent, payment must be made by cash or check (H.B. 472).

## Washington

In an effort to eliminate workers' compensation fraud, a recently enacted bill provides the Department of Labor and Industries with new tools to root out fraud and abuse in the state workers' compensation system, according to a department spokesman. The legislation (H.B. 3188), effective June 10, allows the department to go after businesses that have not paid workers' compensation premiums and "close their doors and reopen under another name," perhaps that of a wife or girlfriend, said the spokesman. The bill's most significant feature is aimed at the department's "real successorship problem," according to the spokesman.

## Wisconsin

The city of *Madison* has enacted its own minimum wage, which applies to any employee who performs at least two hours of compensable work per week in the city. The new law applies to work performed for every employer within the city. The minimum wage rate will be \$5.70 an hour, effective Jan. 1, 2005; \$6.50 in 2006; \$7.25 in 2007; and \$7.75, plus indexing, in 2008. The minimum rate for tipped employees (with the balance made up in tips) will be \$2.57 an hour in 2005; \$2.94 in 2006; \$3.28 in 2007; and \$3.50, plus indexing, in 2008 (Madison Minimum Wage Ordinance, Section 3.45).

## The Payroll Puzzler

**The Question:** Diane, a patient manager for a large children's hospital, goes out on sick leave for three and a half weeks. She receives her sick pay weekly from an insurance company. Diane requests that \$45 be withheld from each sick companyr6.1 (oe)JTJT4 (withheld)-,JTthheldeldbeweeldat there time

# Rulings and Advice

## From Government Agencies and the Courts

### Employment Tax Liability

#### **DOJ Sues to Shut Down Alleged Tax Scam**

**T**he Justice Department has sued to shut down an alleged “employment-tax scam” used by 200 employers across the country, according to a DOJ news release.

Participants in the scheme report lower federal employment taxes by disguising wages as health care benefits, DOJ alleged in its civil injunction complaint against defendants Carmelo Zanfei of Steger, Ill., and William Crouse of Greenwood, Ind.

#### **\$63 Million May Have Been Lost**

The complaint estimated revenue losses to the federal government could be as much as \$63 million. According to the complaint, filed in the U.S. District Court for the Northern District of Illinois, the Internal Revenue Service estimates that as many as 20,000 employees are receiving incorrect wage statements and therefore filing incorrect income tax returns because of their employers’ participation in the schemes.

Zanfei and Crouse have allegedly been selling the schemes since 2001 through various companies—Redwood Group LLC, Redwood Group Inc., TRG Marketing LLC, Superior Solutions Group Inc., and Paradigm Solutions Group—and DOJ said they promote through sales agents and on the Internet.

### FLSA

#### **On-Call Time Not Compensable If Usually Uninterrupted**

**A**n unpaid meal period of at least 30 minutes interrupted less than half the time qualifies as a noncompensable break under the federal Fair Labor Standards Act, a U.S. district court has reaffirmed (*Jones v. Philip Morris USA, Inc.*, M.D.N.C., No. 1:03-CV-00122, 4/8/04).

Maintenance technicians employed at a Philip Morris facility are required to wear pagers whenever actually present in the facility. Even when outside the facility and logged off the system, the technicians can be paged if needed for an emergency.

Technicians are allowed an unpaid daily 30-minute lunch period taken at the time of the employee’s choice. During this half hour, employees are free to leave the employer’s premises to eat or tend to other personal business, but can be subject to call back if an emergency arises demanding their attention.

One of the technicians brought suit against the employer, contending that he was called back to work so frequently that his unpaid lunch period actually constituted work time and that, consequently, he should be paid for that time and the 30 minutes included in calculating his eligibility for overtime.

In reaching its decision, the court noted that the primary consideration in determining whether on-call time is compensable is whether that time is spent predominantly for the employer’s benefit or for the employee’s. Under the Fair Labor Standards Act, an employee must be relieved from all duties for at least 30 minutes for the time to qualify as a noncompensable meal break. While the lunch break time met the duration criterion, the employee contended that he was so frequently interrupted by a page that the time was effectively not his own.

In ruling for the employer, the court cited precedent to the effect that employees interrupted during fewer than 50 percent of their lunch

periods are not entitled to compensation for uninterrupted meal breaks. The interruptions in this case failed to meet the 50 percent standard, according to the court.

### Employment Tax Liability

#### **PEOs Ordered to Close, Justice Department Says**

**A** federal judge has ordered two residents of Oklahoma City to close most of their professional employer organizations (PEOs) or leasing companies, according to a press release from the Department of Justice.

Citing the federal government’s determination to “put a stop to schemes to evade the payment of employment taxes,” DOJ says the action came as a result of the two men’s “continued failure to pay federal employment taxes.” Under the court’s preliminary injunction, the men also are constrained from establishing new PEOs, pending the results of the trial.

The court held that “the continued loss of millions of dollars. . . through the [defendants’] abusive scheme” justified the injunction. Further, the court found that the defendants allegedly used PEOs “to frustrate and hinder the ability of the Internal Revenue Service to collect the taxes that are legitimately due.”

The injunction order authorized the four individuals to continue to operate one of their companies, TSI Installers and Erectors, as long as they fully complied with the applicable tax laws.

#### **Puzzler Answer**

**D**iane should have \$27 withheld from her final sick pay payment ( $\frac{3}{5} \times \$45 = \$27$ ). Withholding on a partial payment must be computed as an appropriate fraction of withholding from a full payment. Withholding on third-party sick pay must be specified as a whole-dollar amount on Form W-4S, but a third-party payer has the option to permit withholding on a percentage basis. See PAG at 115:2103 for more information.

# You Be The Judge

## On W-2 Filing Requirements . . .

### Failure to File or No Verification of Timely Submission

**“W**e filed the W-2s on time. As a matter of fact, none of our employees mentioned any problems,” Gina told the IRS official.

“How did you file—by mail?”

“Yes, that’s our standard procedure. We never received a notice that the forms didn’t make it to the SSA.”

“Well, did you send the copies to SSA by registered or certified mail? That way, you would have some form of proof they were mailed on time.”

“We sent them through the regular mail. We had no idea they were required to be submitted via registered mail,” said Gina, starting to worry.

“How else can you prove you sent them to us on time?” asked the official.

**FACTS:** Shortly after filing for bankruptcy relief under Chapter 11 in February 2002, a trucking company entered into an agreement with the Internal Revenue Service in which it promised to pay all post-petition federal taxes in a timely manner. The following April, IRS filed a proof of claim, asserting that the employer owed \$82,359.15 for unpaid FICA and FUTA taxes, covering periods from December 2000 through February 2002, plus highway taxes.

IRS later amended its claim, reducing the FUTA tax amount and increasing the vehicle tax, for a total of \$90,076.19. The company filed a partial objection to IRS’s claim, arguing that it did not owe the FUTA tax amount of \$3,300 for the period ending Dec. 31, 2001. The company also objected to the vehicle tax increase.

IRS made a series of objections to the company’s amended reorganization plan and, in June 2003, amended its claim to assert a Form W-2, Wage and Tax Statement, penalty for the tax period ending Dec. 31, 1999, in the amount of \$69,561.41. IRS claimed it assessed the W-2 penalty, which was referenced for the first time under the June 2003 amendment, because of the company’s failure to provide the agency with copies of its employees’ W-2s for 1999 as required under 26 U.S.C. § 6051.

The company disputed the W-2 penalty, claiming that IRS did not notify it that the agency had not received the forms prior to the agency’s W-2 assessment, which came after IRS had previously filed and amended its proof claim.

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**The company claimed that the notice of penalty was its only notification that the forms had not been filed.**

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In a joint pretrial hearing, the parties asked the court to resolve the following three issues. First, did the company timely file its 1999 Form W-2 statements with the Social Security Administration? Second, if the employer did not timely file its W-2 statements, was its failure to timely file because of an intentional disregard of the filing requirement within the meaning of § 6721(e) and, therefore, subject to a penalty equal to 10 percent of the total amount of the wages required to be reported? Lastly, is the company subject to the lower penalty of \$50 for each unfiled information return, as outlined under § 6721(a)? In this case, there were 60 W-2 forms which had not been timely filed (60 W-2s x \$50 = \$3,000).

**ISSUE:** *Did the company intentionally fail to file its W-2 statements and is, therefore, liable for the increased penalty under § 6721(e)?*

**DECISION:** The employer failed to timely file its W-2 forms; however, the failure did not result from an intentional disregard of the filing requirements under § 6721(e), determined the U.S. Bankruptcy Court for the Eastern District of Tennessee. Thus, the company is liable for the lower penalty of \$3,000.

To avoid the penalty for untimely filing, the court said that the company had to prove actual, timely de-

livery of the W-2s. Because the company did not send the 1999 W-2s by certified or registered mail, the court found that the company did not prove actual, timely delivery of the forms.

The company president testified that the company believed in good faith that it had satisfied the filing requirement, since it did not receive a notice from the IRS that the forms had not been filed, noted the court. He also testified that, according to the company’s standard procedure, the forms were prepared by its CPA and mailed by the company, said the court.

According to federal rules, an intentional disregard of the filing requirement occurs when the failure to timely file was “knowing or willful,” as determined from considering all the facts and circumstances in a particular case. The court found that the company’s delays cited by IRS did not establish a pattern by the company of failing to meet its filing obligations, noting that the company had a system in place to ensure it met its filing obligations.

In conclusion, the facts clearly establish that the employer’s failure to timely file its 1999 W-2 forms did not result from an intentional disregard of the filing requirements, said the court (*In re Flanary and Sons Trucking, Inc.*, Bankr. E.D. Tenn., No. 02-20553, 2/4/04).

**POINTERS:** I.R.C. § 6724 provides that penalties may be waived if a filer establishes “reasonable cause” by showing, among other things, that the failure was due to an event beyond the filer’s control.

A discussion on Form W-2 filing requirements is available at PAG 121:1515. Electronic filing of Form W-2 using the Internet is also available (see PAG 121:1513).

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*The case discussion above is designed to illustrate how courts resolve pay-related disputes. The names and dialogue are fictitious.*

# Practitioner's Perspective

## On Business Conferences . . .

### APA Congress: Limit Employer Compliance Exposure

FRED BASEHORE, JR., CPP

**P**ayroll professionals from all over will attend the upcoming American Payroll Association's Annual Congress in Nashville. As payroll professionals, we must make sure our employers are aware of the various issues in paying the employees' wages and that reimbursement of their travel expenses follows all the rules of the various governing bodies.

When employees travel on company business, there are many areas we as payroll professionals must look at to ensure compliance, some for certain categories of employees—such as those not exempt from overtime—and some for all employees on travel, such as the proper substantiation of business expenses related to that travel.

#### Work Time and the Nonexempt

Travel time is governed by the Fair Labor Standards Act, and it covers employees who are eligible for overtime pay—or not exempt from the FLSA's minimum wage and overtime rules. Bona fide exempt employees are not affected by this section of FLSA, and employers only need to pay those employees their regular salary while attending Congress. Many of the participants who will attend Congress, however, are considered nonexempt employees—in general, they are paid by the hour. With that said, be careful to properly pay nonexempt attendees for any warranted travel time to and from the conference, along with the hours they log for attending the conference sessions.

The time spent by a nonexempt employee traveling to and from Nashville during normal work hours is compensable, regardless of the day of the week, and needs to be included as hours worked. Any time spent traveling that crosses the employees

normal workday—even if it is a day they do not normally work—is considered compensable. If the employee travels on Saturday, since the conference doesn't start until Sunday, the time spent for personal purposes Saturday after arriving is not considered hours worked. See PAG at 141:1306 for an example of how to figure this time.

Once in Nashville's Opryland, most nonexempt employees attending will begin working when the conference starts. In general, all the time spent attending the Congress sessions would be working time and compensable. The only exception would be if an employee's attendance is voluntary and the session is not work-related. It would be very difficult, however, for any of the time attending workshops to meet these criteria.

#### Attendance at workshops must be substantiated.

What about the evening festivities and other noninstructional, voluntary events, such as the time spent in the exhibit hall? If it is an employee's directed task to attend a function specifically to network or for some other business purpose, then the time is compensable. If there is no work being performed, and it is up to the individual to choose to attend or not, the time spent at nonmandatory functions—despite the networking opportunities—generally is not considered hours worked.

#### Legitimate Substantiation

Business expenses related to travel are not required to be included in the employee's income. In order for the expenses to be excluded from in-

come, however, there are many rules that must be followed. One primary rule for attendees at Congress is that in order for amounts spent on travel to qualify as a legitimate business expense for tax purposes, employees must be required to attend scheduled meetings and workshops. The business-related purpose for payroll professionals attending is clear, so long as attendance can be substantiated under an accountable plan.

Briefly, under an accountable plan, an employee must have paid or incurred deductible expenses while performing services as an employee. The employee must also adequately account for (substantiate) expenses within a reasonable period of time. An employee must return any overpayments within a reasonable time and any expenses incurred must have a business connection.

Conference-related expenses, including transportation, lodging, meals, and other incidental expenses, are considered ordinary and necessary business expenses. Travel expenses, including mileage, parking and tolls, and meals and lodging, can be treated as tax-exempt, provided they are covered under an accountable plan.

In order for the employee's expenses to qualify as travel expenses, the conference must be held outside the entire city or general area where the employee's tax home (generally the regular place of business) is located. A description of the business conference, a formal agenda outlining each day's scheduled business sessions, and manuals and handouts supporting the business purpose of the conference or meeting should be kept.

If the expenses are reimbursed under an accountable plan the amounts reimbursed are not considered wages. No taxability or tax withholding, therefore, needs to occur.

*Fred serves on the PAG Advisory Board.*



# Payroll Administration Guide

NEWSLETTER

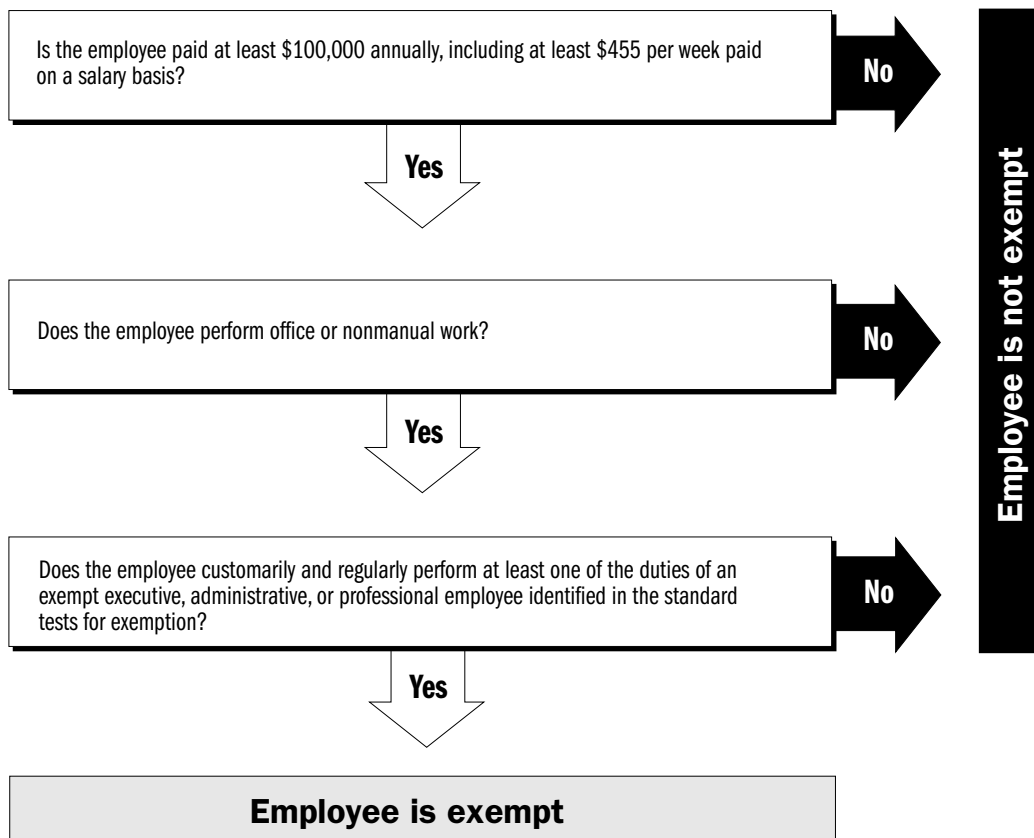
## DOL Releases FLSA White Collar Exemption Rules

The Department of Labor has released revised exemptions under the Fair Labor Standards Act's "white collar" overtime rules, which will be effective in 120 days, according to DOL. Included in this special PAG Newsletter Part 2 are eight decision-making flow charts illustrating the revised exemptions, including a new highly compensated employee exemption.

Information regarding the new regulations is available on DOL's Web site at <http://www.dol.gov/fairpay>, and the regulations will be published in the *Federal Register* April 23.

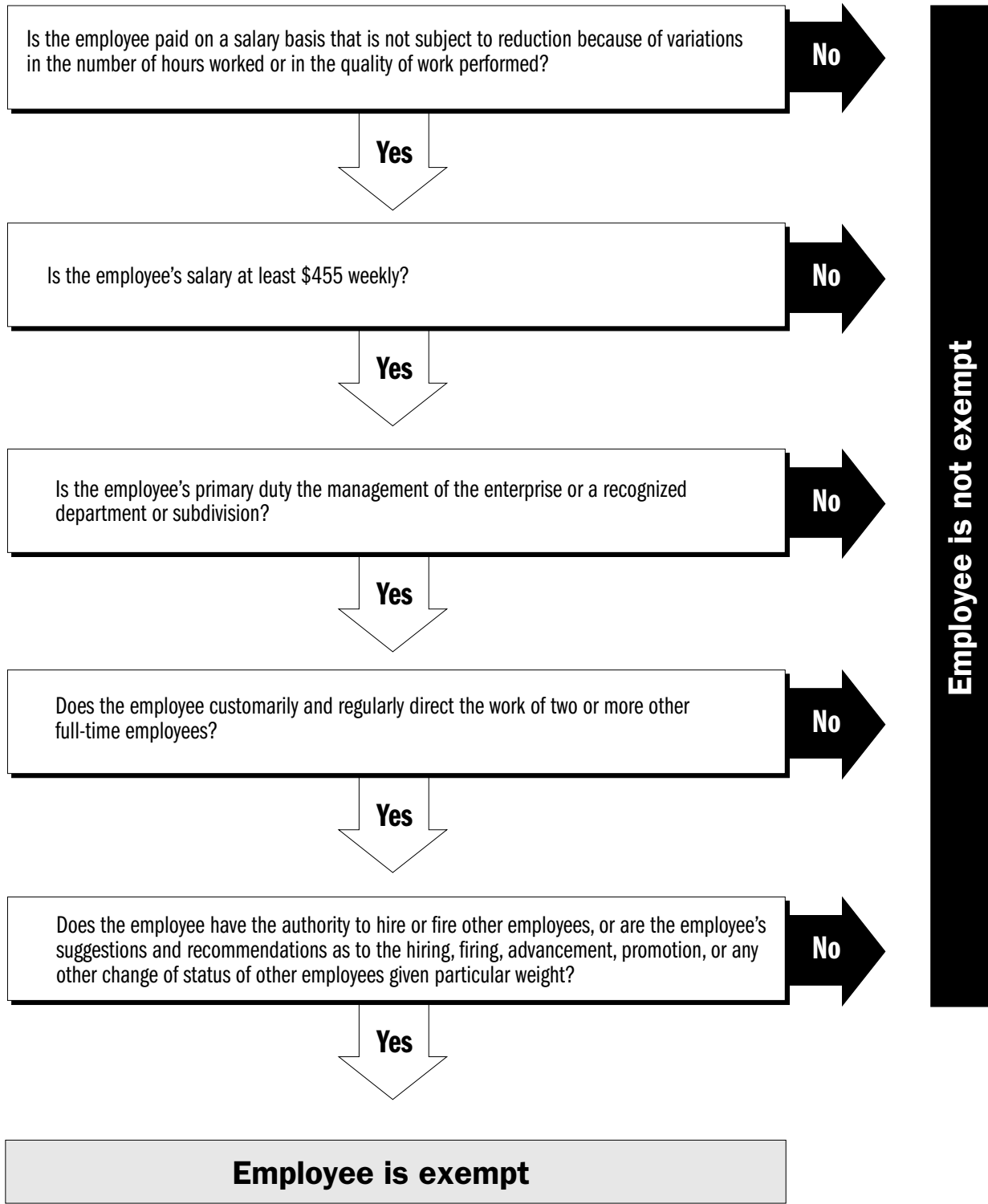
The new rules nearly triple the salary threshold. Under the old regulations, workers earning less than \$8,060 annually were guaranteed overtime. Under the new regulations, workers earning less than \$23,660 annually are guaranteed overtime.

### Highly Compensated Employees: White Collar Exemption Test



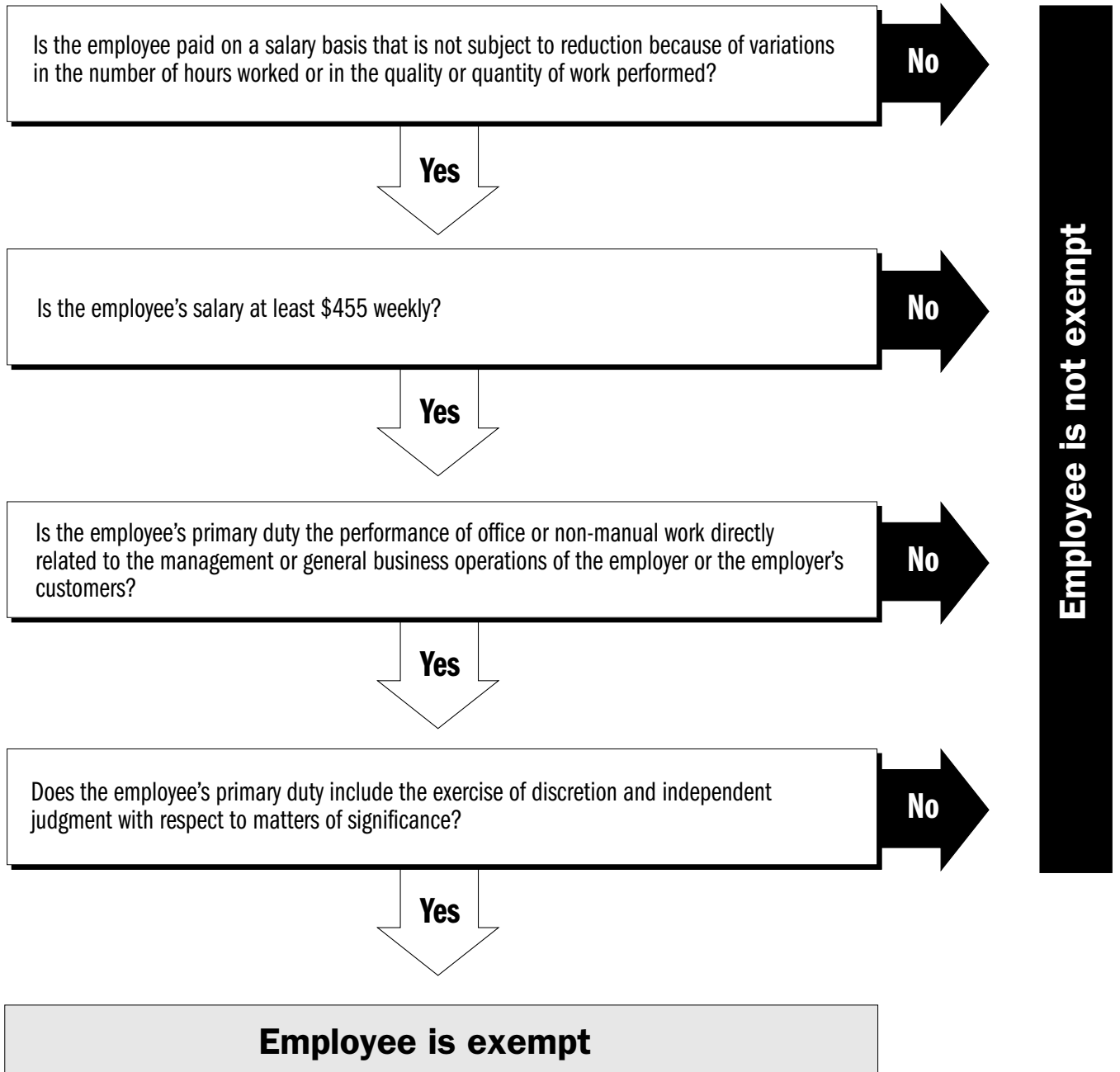
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## Executive Employees: White Collar Exemption Test



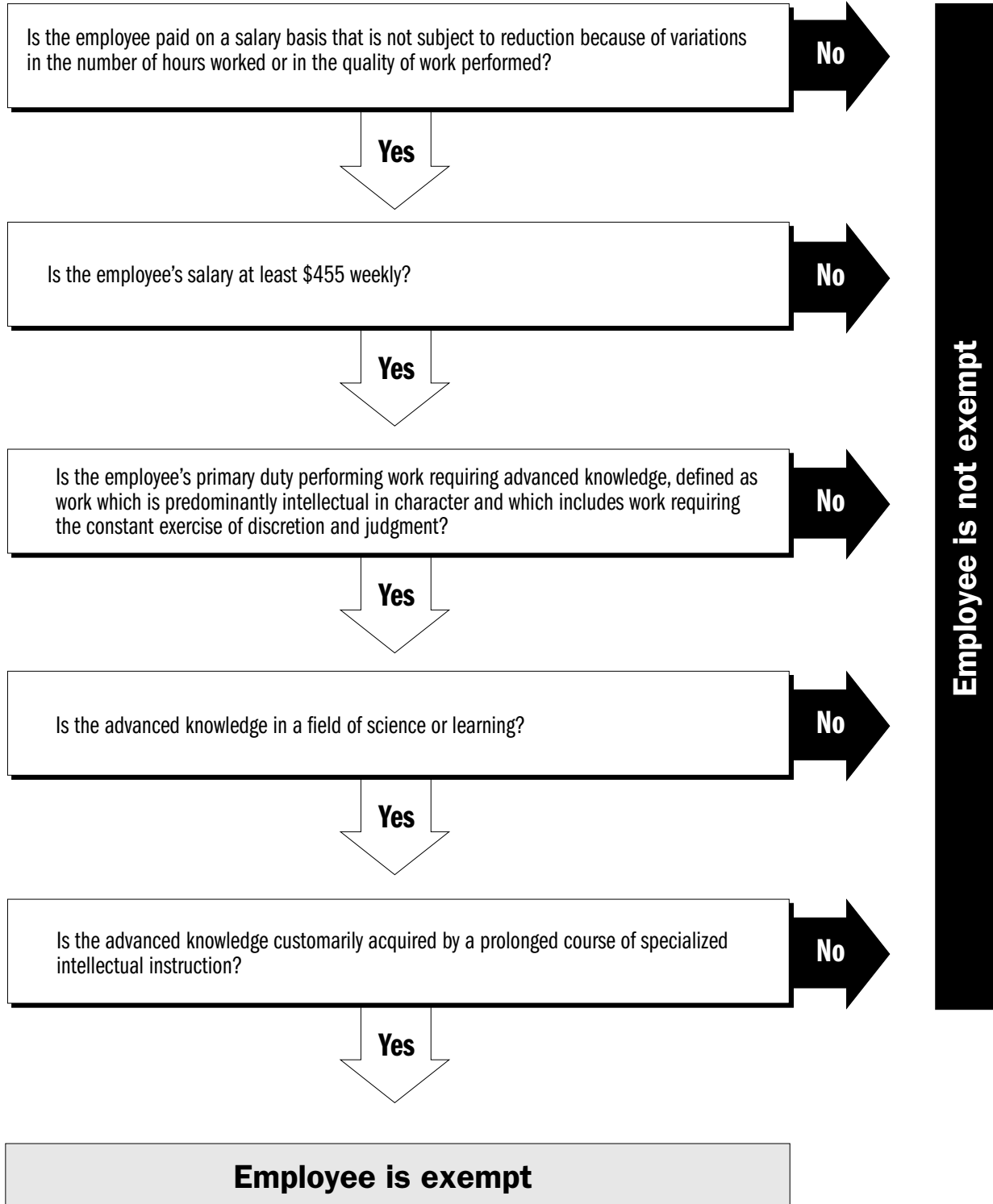
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# Administrative Employees: White Collar Exemption Test



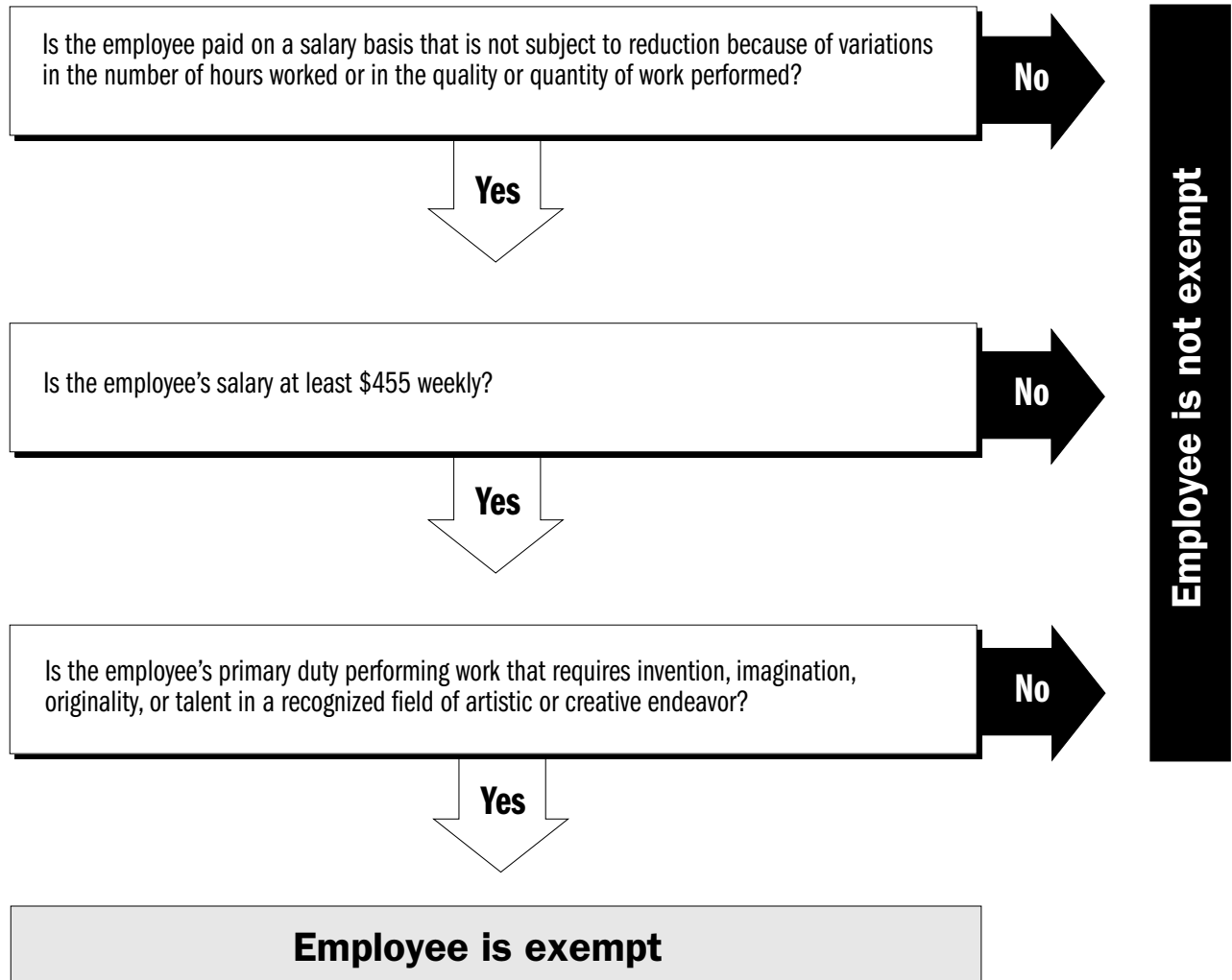
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# Learned Professional Employees: White Collar Exemption Test



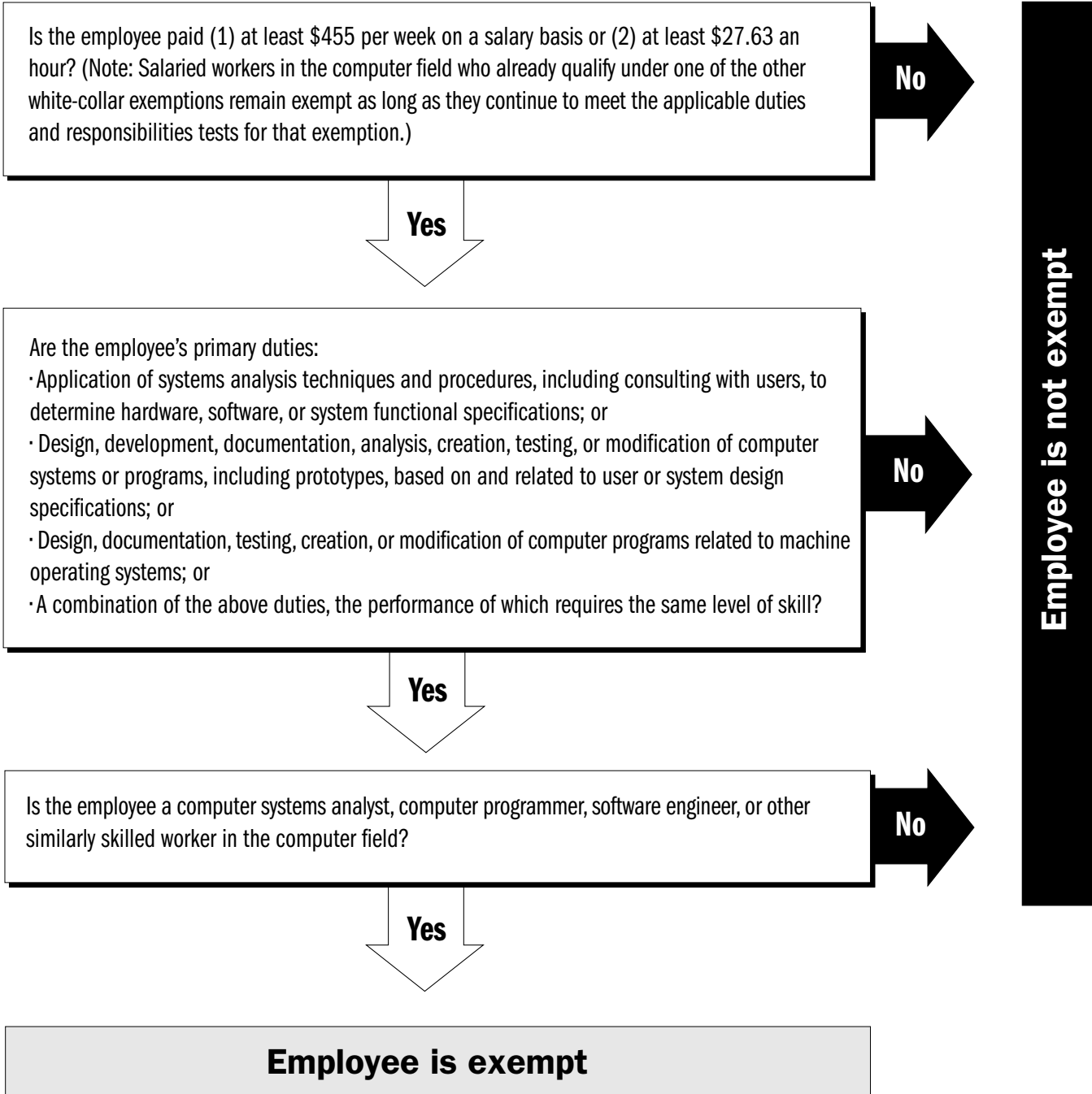
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# Creative Professional Employees: White Collar Exemption Test



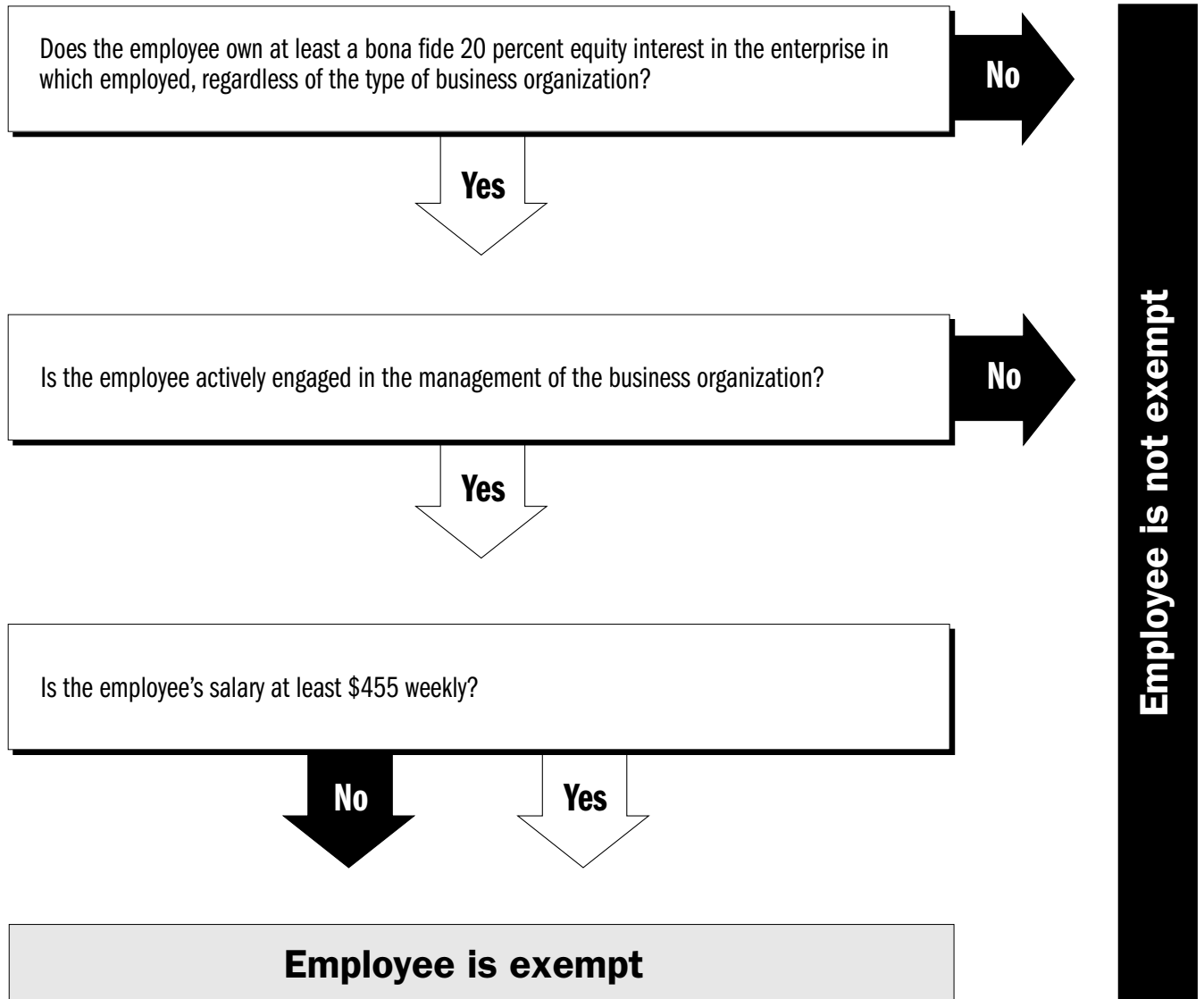
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# Computer-Related Professions: White Collar Exemption Test



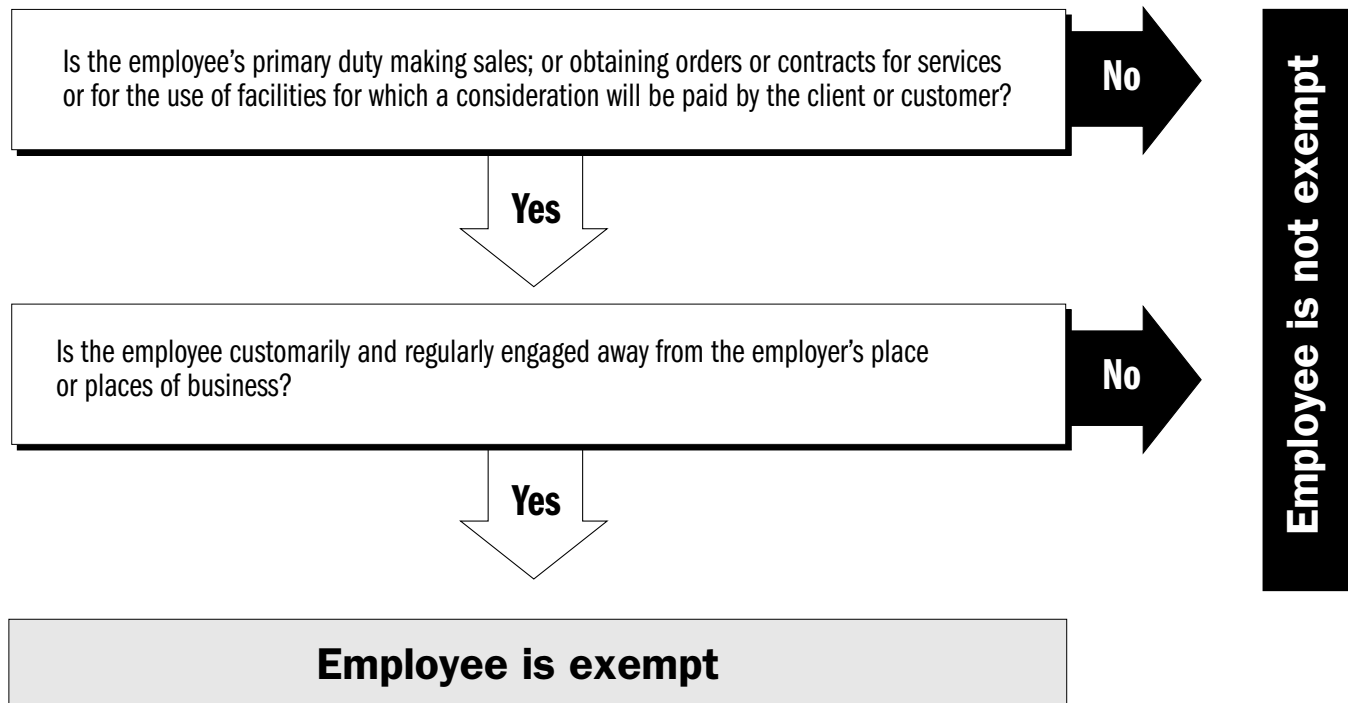
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# Executive Business Owners: White Collar Exemption Test



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## Outside Salesperson: White-Collar Exemption Test



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