# White Collar Exemptions: Do Employers Need to Pay Overtime Compensation to H-1B Workers?[i] [Part II[ii]]

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In the context of an H-1B visa, it is the definition of "professional" employees that may pose a challenge for employers in deciding whether the employee qualifies for an exemption or not pursuant to the FLSA. There are two types of "exempt" professional employees under the FLSA: *learned professionals* and *creative professionals*. To qualify for the *learned professional* employee exemption, all of the following tests must be met: (1) The employee must be compensated on a salary or fee basis at a rate not less than $455 per week ($23,660.00 annually); (2) The employee's primary duty[iii] must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (3) The advanced knowledge must be in a field of science or learning; and (4) The advanced knowledge must be 'customarily' acquired by a prolonged course of specialized intellectual instruction.

The FLSA regulations define "work requiring advanced knowledge" as work that is predominantly intellectual in character and that includes work requiring the consistent exercise of discretion and judgment. Professional work is distinguished from work involving routine mental, manual, mechanical, or physical work. A professional employee generally uses advanced knowledge to analyze, interpret, or make deductions from various facts or circumstances.

The FLSA regulation provides examples of "exempt" status as it relates to the fields of science or learning. Those include: law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy. In addition, the regulation specifies that there could be other occupations that have a recognized professional status and are distinguishable from the "mechanical arts" or "skilled trades" where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the *appropriate* academic degree. However, the word "customarily" alludes the possibility that the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.

The FLSA exemption is not available for occupations that customarily may be performed with only general knowledge acquired by an academic degree in any field, with knowledge acquired through an

apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

In the majority of the cases, H-1B employee(s) would generally be "exempt" under the FLSA unless the employee is working in an occupation that requires only general knowledge acquired by an academic degree in any field academic. Having said that, it is important to understand why the H-1B worker would typically not qualify for benefits under the FLSA. The threshold requirement for the H-1B visa is that the employer must demonstrate both: (1) that the position requires a professional in a specialty occupation; and (2) that the intended employee has the required qualifications. Offered position requiring a baccalaureate or higher degree *or equivalent* typically qualifies for the H-1B visa. Further, to qualify for the H-1B visa, the employee must have been conferred a baccalaureate or higher degree in the specialized field or have its equivalence in work experience. A combination of education and experience is treated as sufficient when the prospective employee holds some formal college-level education in addition to experience in the specialized field. Conversely, a general degree absent specialized experience may be insufficient because there must be a showing of a degree in a specialized field.

Because the prerequisite for obtaining an H-1B visa is that both the offered position and the prospective employee should possess a baccalaureate or higher degree *or equivalent,* employees working on H-1B visas would typically qualify for the FLSA's learned professional exemption. Consider, for instance, the case of a computer professional working on an H-1B visa in the Information Technology (IT) industry. As specifically stated in the FLSA regulations, H-1B computer professionals earning $27.63 per hour ($57,470.4 annually) would qualify for the exemption of overtime pay compensation. It is important to note that even those making less than that amount would qualify for exempt status under the learned professional exemption.

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[i] This article does not cover rights and benefits of public agency employees under FLSA.

[ii] This is the second part of the three part article. This part will explore the question of "why H-1B employees are *usually* treated as an "exempt employee" under the FLSA". Finally, Part III will build on the Part II discussion and will also examine situations involving H-1B employees working in occupation(s) that usually do not require an advanced specialized academic degree.

[iii] According to the FLSA, the term "primary duty" means the principle, main, major, or most important duty that an employee performs. Determination of an employee's primary duty must be based upon all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.