

# **“Exempt” and “Non-Exempt” Employees: What the Distinction Means for Unit 4 Members**

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## **I. What the Fair Labor Standards Act (FLSA) Says**

*Summary: The FLSA requires (1) payment of a “minimum wage” of currently at least \$7.25 per hour and (2) payment of “overtime” at no less than one and one-half times the employee’s “regular rate” for each hour worked beyond forty hours in any “workweek.” These requirements, however, do not apply to “exempt” employees who are employed in “a bona fide executive, administrative, or professional capacity.”*

### **A. Minimum Wage [29 USC § 206(a)]**

“Every employer shall pay to each of his employees . . . wages at the following rates:

(1) except as otherwise provided in this section, not less than—

. . .

(C) \$7.25 an hour . . . .”

### **B. Overtime [29 USC § 207]**

“(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

. . .

“(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .”

### C. Exempt Employees

#### 1. 29 USC § 213(a)

“The provisions of sections 206 and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, **administrative**, or professional capacity . . . .”

#### 2. 29 CFR § 541.200(a)

“The term “employee employed in a bona fide **administrative** capacity” in [29 USC § 213(a)(1)] shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . , exclusive of board, lodging or other facilities;

(2) 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

(3) Whose primary duty includes the **exercise of discretion and independent judgment with respect to matters of significance.**”

## II. How CSU Applies the “Exempt/Non-Exempt Distinction” to Unit 4 Employees

*Summary: CSU classifies most Unit 4 employees as “exempt” under the “administrative exemption.” This means that the FLSA does not entitle them to minimum wage or overtime pay.*

**A. Collective Bargaining Agreement**

**1. Exempt Classifications Are Listed in Appendix C**

“Employees in the following classifications are not eligible for overtime compensation.

<u>Class Code</u>	<u>Classification Title</u>
3081	Student Services Professional II - 10-month
3082	Student Services Professional II - 12-month
3083	Student Services Professional II - Academic Year
3084	Student Services Professional III - 12-month
3085	Student Services Professional III - Academic Year
3086	Student Services Professional IV - 12-month
3087	Student Services Professional IV - Academic Year
3088	Student Services Professional III - 10 month
3089	Student Services Professional IV - 10 month
5181	Extended Education Specialist I
5182	Extended Education Specialist II
2802	Educational Television Program Director, SDSU”

**2. Non-Exempt Classifications Are Listed in Appendix D**

“Employees in the following classifications are eligible for overtime compensation.

Class

<u>Code</u>	<u>Classification Title</u>
2627	Credential Analyst Trainee
2628	Credential Analyst I
2630	Credential Analyst II
2632	Evaluator I
2633	Evaluator II
2634	Evaluator Trainee
2635	Student Personnel Technician, Financial Aid
2895	Lead Library Assistant II
2896	Lead Library Assistant III
2891	Lead Library Assistant IV
3078	Student Services Professional I - 10-month*
3079	Student Services Professional I - 12-month*
3080	Student Services Professional I - Academic Year*
9164	Placement Interviewer”

\* With the exception of FLSA mandated overtime, SSP I will remain covered by all provisions of the Agreement which cover classifications listed in Appendix C of the Agreement.”

**B. Non-Exempt SSPs I and Exempt SSPs II: A Case Study**

**1. From the Technical Letter Reclassifying SSPs I as Non-Exempt:**

The California State University  
Office of the Chancellor  
400 Golden Shore  
Long Beach, CA 90802-4275  
(310) 985-2669

Code: HR 95-18

Date: November 14, 1995

To: Presidents

From: June M. Cooper  
Vice Chancellor  
Human Resources and Operations

Subject: **STUDENT SERVICES PROFESSIONAL I**

Please be advised that the Student Services Professional I classification (class codes 3078, 3079, and 3080) has been reviewed and its designation under the Fair Labor Standards Act (FLSA) has been determined to be non-exempt. This determination only impacts the payment of overtime. It does not change any provision of the Unit 4 collective bargaining agreement. Non-exempt CSU employees are paid overtime hours worked in excess of 40 in a work week; however, they do not receive overtime for working over 8 hours in a workday.

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***Administrative Exception Test***

- SSP I, Range A does not meet the administrative exception test because the exemption does not apply to employees who are training for employment in an administrative capacity. (Department of Labor Regulations Part 541.210).
- SSP I, Range B does not meet the criteria of the administrative exemption because workers do not "customarily and regularly exercise discretion and independent judgment" as required by FLSA. Although the work is "office or nonmanual" and directly related to management policies or general business operations and the salary rate is "not less than \$250 per week," the position must meet all of the criteria to be exempt. This decision is based on the following statements from the SSP I classification standard:
  1. "Incumbents may perform duties in several program operations or services which are well structured and procedural in nature."
  2. "Use of judgment is limited primarily to locating, selecting and organizing information."
  3. "Oral presentations to groups follow well-structured or established format."
  4. "Analysis is performed utilizing established guidelines, regulations, and precedents."
  5. "Assignments typically are well structured by policies, procedures and guidelines, although incumbents may exercise independence within the established structure in selecting approaches; incumbents work with close direction where procedures and parameters are less defined and/or change frequently."
  6. "Decision-making authority where it occurs is well-defined and of limited extent."

*Note: In the SSP I classification standard, the last sentence quoted above continues "... and typically impacts only individual student situations, and is not precedent setting."*

## **2. From the Classification Standard for SSPs II:**

- a. “Incumbents typically have sufficiently broad assignments which require some coordination with other functions within the same program area or within other program areas within Student Services.”
- b. “[S]ituations can arise in which judgment must be utilized to apply existing guidelines and procedures to unusual circumstances. Incumbents of Student Services Professional II positions are expected to use judgment within the area of their expertise to revise existing procedures and to recommend solutions to problems for which precedents may not exist.”
- c. “Oral presentations at this level are planned by the incumbent and are generally single presentation events covering moderately complex subject matter due to its diversity, frequency of change and/or lack of clear definition or precedent.”
- d. “Analysis is similar in nature to that at the SSPI level, but occurs more independently and in a wider variety of situations requiring sensitivity to the meaning of the problems encountered and the potential impact on other Student Services areas.”
- e. “Incumbents are expected to carry out their day-to-day assignments without immediate direction. Work objectives are set for employees but the methods for performing tasks are frequently left to the judgment of the employee who receives only occasional instruction or advice on decisions. Employees independently plan the work, solve problems and take action.”
- f. “Incumbents make decisions within established parameters, regulations and guidelines which impact student organizations, groups and individual students.”

### **III. What the Collective Bargaining Agreement Offers to Exempt and Non-Exempt Unit 4 Employees Above and Beyond the FLSA**

*Summary: Although the FLSA does not entitle exempt Unit 4 employees to overtime, the APC-CSU collective bargaining agreement limits their workweek to “an average of forty (40) hours per week during any six (6) consecutive pay periods” and specifies that they shall not be assigned “an unreasonable or excessive workload.” The FLSA entitles non-exempt Unit 4 employees to overtime, and the collective bargaining agreement additionally entitles them to meal and rest periods not mandated by the FLSA. The collective bargaining agreement entitles both exempt and non-exempt residence life employees in Unit 4 to “compensation” for “on-call time” and “call-backs.”*

**A. Exempt Employees Are Entitled to a Workweek of “an Average of Forty (40) Hours per Week During Any Six (6) Consecutive Pay Periods” and Shall Not Be Assigned “an Unreasonable or Excessive Workload.”**

“28.27 Exempt Employees

The intent of this section 28.27 is to comply with the requirements of the Fair Labor Standards Act.

A. For full-time employees in classifications listed in Appendix C, **the workweek shall be an average of forty (40) hours per week during any six (6) consecutive pay periods.** This provision shall apply pro rata to less than full-time employees. Authorized work may include performance of specialized professional services, participation in committee assignments and participation in approved professional activities. Work in excess of the average workweek is not compensable in cash or CTO, and shall not be deemed overtime.

**B. Employees shall not be assigned an unreasonable or excessive workload.**

**C. Employees who have absences of less than a full day shall receive a full day's salary and shall neither have their salary docked nor be required to use sick leave or vacation for such absences of less than a full day.**

D. CSU employees in exempt classifications are exempt from FLSA which means they are exempt from overtime payment requirements. If exempt employees need to work hours in excess of the normal business week or business day, they do not receive overtime or CTO. Exempt employees are expected to accomplish assigned work without regard for numbers of hours worked. When it is necessary for employees to work extended hours, managers may authorize informal adjustments in work hours. . . .”

**B. Exempt and Non-Exempt Employees Are Entitled to Unpaid Meal Periods.**

“28.9 An employee shall be entitled to a meal period not to exceed sixty (60) minutes. The time of such a meal period shall be designated by the appropriate administrator. The appropriate administrator may adjust meal periods to account for variations in work schedules. Such meal periods shall not count toward hours worked, except as provided for in provision 28.10.

**C. Non-Exempt Employees Are Entitled to Paid Overtime, Paid Rest Periods and, if they are required to remain “on the job,” Paid Meal Periods.**

**1. Overtime**

“28.15 Overtime is defined as authorized time worked in excess of forty (40) hours in the designated workweek.

- 28.16 For full-time employees in classifications listed in Appendix D, the workweek shall consist of seven (7) consecutive twenty-four (24) hour periods beginning at 12:01 a.m. on Sunday and ending at 12:00 midnight the following Saturday. The President may approve alternate workweeks of any other seven (7) consecutive twenty-four (24) hour periods. These employees shall work a minimum workweek of forty (40) hours and are eligible for overtime compensation. Authorized work may include participation in committee assignments and participation in approved career development activities.
- 28.17 Overtime shall be compensated at one and a half (1 1/2) times the employee's regular hourly rate.
- 28.18 Paid holiday, paid sick leave, and paid vacation time shall be counted as time worked for the purposes of this Article.
- 28.19 All overtime hours worked shall be compensated by cash or compensatory time off (CTO) as determined by the appropriate administrator. If an employee has been unable to take his/her CTO and has a CTO balance in excess of one hundred twenty (120) hours as of December 31, he/she shall be paid in cash for all hours in excess of one hundred twenty (120). Such payment shall be made by February 1 of each year. . . .”

## **2. Rest Periods**

- “28.14 An employee in a classification listed in Appendix D shall be allowed rest periods each workday of fifteen (15) minutes for each four (4) hours worked. Rest period schedules shall be determined by the appropriate administrator in accordance with the requirements of the department. Rest periods shall be counted toward hours worked. Rest period time not taken shall not be cumulative.”

## **3. Meal Periods**

- “28.10 An employee in a classification listed in Appendix D who is required to remain on the job at his/her work station for a full workday shall be permitted to take a meal period, not to exceed thirty (30) minutes, during worktime.”

**C. Both Exempt and Non-Exempt Residence Life Employees Are Entitled to Compensation for “On-Call Time” and “Call-Backs”**

“On-Call Time and Call-Back Residence Life Employees

28.28 Definitions

A. On-Call Time

‘On-call time’ as used in this Article refers to time during which a residence life employee must be available to work if deemed necessary by the appropriate administrator.

B. Call-Back

‘Call-Back’ refers to any instance in which the appropriate administrator deems it necessary that a residence life employee actually work while on on-call time.”

...

“28.30 Compensation for On-Call Time

A. Unrestricted

When the CSU does not impose mandatory restrictions on an employee’s use of on-call time other than being available to report for work fit for duty and in a timely manner, the first two (2) hours of continuous on-call time shall be considered as

1. For non-exempt employees, a compensable part of the “workday” within the meaning of Article 28.4 and 28.5 the ‘shift(s)’ within the meaning of Article 28.6, and “time worked” within the meaning of Article 28.15; and
2. For exempt employees, ‘hours worked’ within the meaning of Article 28.27.

B. Restricted

When the CSU imposes mandatory restrictions on an employee’s alcohol use or his or her geographical location while on-call other than being available to report for work fit for duty and in a timely manner, the entire period of continuous on-call time while under such restrictions shall be considered as

1. For non-exempt employees, a compensable part of the “workday” within the meaning of Article 28.4 and 28.5, the “shift(s)” within

the meaning of Article 28.6 and “time worked” within the meaning of Article 28.15; and

2. For exempt employees, “hours worked” within the meaning of Article 28.27.

#### 28.31 Compensation for Call Back

When an employee is called back to actually work while on on-call time, and the amount of time worked when called back exceeds the two(2) hours for which the employee has already been compensated under Article 28.30, the actual time worked beyond the two (2) hours compensated under Article 28.30 shall be considered as:

1. For non-exempt employees, a compensable part of the “workday” within the meaning of Article 28.4 and 38.5, the “shift(s)” within the meaning of Article 28.6 and “time worked” within the meaning of Article 28.15; and
2. For exempt employees, “hours worked” within the meaning of Article 28.27.”

#### **IV. FAQs**

- A. Question: I am an exempt employee. Does that mean I can come and go as I please and work as much or little as I see fit?

Answer: **No.** Article 28.8 of the APC-CSU collective bargaining agreement states: “Daily and weekly work schedules shall be established by the appropriate administrator.” If you deviate from your established work schedule without prior approval from the appropriate administrator or a valid excuse, you may be subject to discipline. In addition, Article 28.27(D) states that “[i]f a manager feels an employee is not working an appropriate number of hours, the employee should be counseled.” The article explicitly mentions only ‘non-disciplinary, corrective action,’ *i.e.*, “oral warning and written reprimands.” However, disciplinary action—*i.e.*, “dismissal, demotion, or suspension without pay” are also a possibility if your work ethic is found lacking.

- B. Question: I am an exempt employee. My supervisor keeps giving me an unreasonable amount of work and telling me to have it done by the end of the week. It routinely takes me fifty hours a week to do all the work s/he has given me that week. Can I stop working once I have worked forty hours in a week and refuse to do any additional work that week?

Answer: **No.** Your supervisor may be violating Article 28.27, which provides that, for exempt employees, “the workweek shall be an average of forty (40) hours per week during any six (6) consecutive pay periods” and that such “[e]mployees shall not be assigned an unreasonable or excessive workload.” However, under the rule “work now, grieve later,” your only option is to follow instructions and file a grievance. If you refuse to do the additional work, you may be subject to discipline. You should keep written time records for your grievance.

C. Question: I am an exempt employee. Yesterday, I became sick in the afternoon and had to leave two hours early. My supervisor told me this morning that I have to use two hours of sick leave for this. Can s/he do that?

Answer: **No.** Article 28.27 provides that exempt “[e]mployees who have absences of less than a full day shall receive a full day's salary and shall neither have their salary docked nor be required to use sick leave or vacation for such absences of less than a full day.”

## V. Resources

### A. Department of Labor FLSA Website:

<http://www.dol.gov/whd/flsa/>

### B. CSU FLSA Website:

<http://www.calstate.edu/HRAdm/Policies/flsa.shtml>

#### 1. See in particular “The Fair Labor Standards Act (FLSA): Time and Attendance Guidelines” (2004), available at:

<http://www.calstate.edu/HRAdm/pdf2004/HR2004-26TimeAttendanceGuide.pdf>

### C. APC-CSU Contract:

<http://www.apc1002.org/contract.php>

or

[http://www.calstate.edu/LaborRel/Contracts\\_HTML/APC\\_Contract/index.shtml](http://www.calstate.edu/LaborRel/Contracts_HTML/APC_Contract/index.shtml)

### D. APC Website:

<http://www.apc1002.org/index.php>