

## **Executive, Administrative, Professional & Outside Sales Rulemaking (WAC 296-128-500 through WAC 296-128-545)**

### **Second Pre-Draft Rule**

**November 19, 2018**

This version shows the rule language as it would look following revision, and contains questions for stakeholder consideration relating to possible salary threshold level and implementation schedule. See also the drafting note in proposed new section WAC 296-128-545 for these questions.

Key elements in the draft language:

- The department currently intends to propose a rule that will raise the salary threshold to between 2 and 2.5 times the state minimum wage for a forty hour work week.
- The department currently intends for the updated rule to have an effective date of January 1, 2020.

The draft below reflects two types of changes – some that provide further alignment with the federal criteria for the duties tests for executive, administrative, professional, computer professional, and outside sales employees, and other changes that would retain or develop elements specific to Washington State in specific areas.

Questions for stakeholders:

1. Assuming an effective date of January 1, 2020, should the department consider a phased-in implementation of the new threshold for employers based on employer size? What phase-in schedule should the department propose?
  - a. What method would you recommend to define employer size?
  - b. When would you recommend the updated threshold take effect for all employer sizes?
2. During a phase-in period and/or once the rule is fully implemented, should the department consider adopting a higher salary threshold in higher-wage cities, counties, or areas of the state?
  - a. What method would you recommend for defining which areas would be subject to a different threshold?
  - b. Would you recommend a different phase-in schedule apply to these higher-threshold areas? How should the implementation schedule differ?
3. What definition of “primary duty” (found in WAC 296-128-505(4)) should be included in the rules?

4. What criteria for the duties tests, if any, should differ between the federal and state rules?

**Formatting Key:**

Plain text. Shows rule language as it would appear after proposed edits.

*Dark red italics.* Shows rule language that the department is scoping and evaluating for additional changes, and is of particular interest for stakeholder input.

**DRAFTING NOTE:** Comments regarding the drafting of the rule or stakeholder input appear here.

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**296-128-500**

**Purpose.**

(1) This regulation is adopted in accordance with chapter 49.46 RCW to define the terms "bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson," to define salary basis and to establish a procedure for computing overtime pay.

(2) An employee who meets the definitions of executive, administrative, or professional and who is paid on a salary basis (except as provided for in WAC 296-128-510(2)(b), WAC 296-128-520(1)(c), WAC 296-128-520(2)(b), WAC 296-128-530(1)(b), WAC 296-128-530(2)(b), WAC 296-128-530(3)(e), or WAC 296-128-535(1)(c)) is considered exempt from the requirements of chapter 49.46 RCW. A job title, or payment of a salary, does not in and of itself exempt a worker from these requirements.

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**296-128-505**

**Definitions.**

(1) “Customarily and regularly” means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed “customarily and regularly” includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

(2) “Educational establishment” means an elementary or secondary school system, an institution of higher education, or other educational institution.

(3) “Exclusive of board, lodging, or other facilities” means “free and clear” or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging, or other facilities may not count towards the minimum salary amount required for an exemption.

**DRAFTING NOTE:** The department invites public comment about the analysis of an exempt employee’s primary duty and whether or how it should differ from the analysis performed under federal rules.

The department is also including proposed language for public comment clarifying the primary duty requirement and the employer’s burden.

*(4) “Primary duty” means the principal, main, major, or most important duty that the employee performs.*

*(a) Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.*

*(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Employees who spend more than fifty percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than fifty percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion. The burden falls on the employer to demonstrate that the employees meet the primary duty requirement.*

**296-128-510**

**Executive.**

(1) The term "individual employed in a bona fide executive . . . capacity" in RCW 49.46.010(3)(c) shall mean any employee:

(a) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight; and

(d) Who is compensated on a salary basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities.

(2) The term "individual employed in a bona fide executive . . . capacity" in RCW 49.46.010 (3)(c) shall also include any employee:

(a) Who owns at least a bona fide twenty-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management; and

(b) The requirements of WAC 296-128-545 do not apply to the executive employees described in this subsection.

(3) For the purposes of this section:

(a) A "customarily recognized department or subdivision" must have a permanent status and a continuing function.

(i) A "recognized department or subdivision" need not be physically within the employer's establishment and may move from place to place.

(ii) When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a "recognized department or subdivision" of the enterprise.

(iii) Continuity of the same subordinate personnel is not essential to the existence of a "recognized department or subdivision" with a continuing function.

(b) "Management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

(c) "Two or more other employees" means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent. Hours worked by an employee cannot be credited more than once for different executives.

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**296-128-520**  
**Administrative.**

(1) The term "individual employed in a bona fide . . . administrative . . . capacity" in RCW 49.46.010 (3)(c) shall mean any employee:

(a) 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

(b) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance; and

(c) Who is compensated on a salary or fee basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities.

(2) The term "individual employed in a bona fide . . . administrative . . . capacity" in RCW 49.46.010 (3)(c) shall also include any employee:

(a) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof; and

(b) Who is compensated on a salary or fee basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed.

(3) For the purposes of this section:

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. "Directly related to management or general business operations" means work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) "Discretion and independent judgment" means the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. The exercise of discretion and independent judgment implies that the employee has the authority to make an independent choice,

free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.

(c) “Performing administrative functions directly related to academic instruction or training” means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

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**296-128-530**  
**Professional.**

(1) The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010 (3)(c) shall mean any employee:

(a) Whose primary duty consists of the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor; and

(b) Who is compensated on a salary or fee basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities.

(2) The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010 (3)(c) shall also include any employee:

(a) With a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed; and

(b) Who is compensated on a salary or fee basis.

(3) The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010(3)(c) shall also include any employee:

(a) Who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(b) Who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(c) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(d) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(e) The requirements of WAC 296-128-545 do not apply to the law or medicine professionals described in this subsection.

(4) For the purposes of this section:

(a) "Customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The exemption is also available to employees who attained substantially the same advanced knowledge through a combination of work experience and intellectual instruction.

(b) "Field of science or learning" means the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status.

(c) "Recognized field of artistic or creative endeavor" includes such fields as music, writing, acting, and the graphic arts.

(d) "Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

**296-128-532**

**Deductions for salaried, exempt employees.**

**DRAFTING NOTE: The department is not proposing changes to this section. The text of this section is not reproduced here.**

**296-128-533**

**Public employees.**

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**296-128-535**

**Computer professionals.**

(1) The term “individual employed in a bona fide . . . professional capacity” in RCW 49.46.010(3)(c) shall also mean any employee:

(a) Who is a computer system analyst, computer programmer, software engineer, or other similarly skilled worker; and

(b) Whose primary duty consists of one of the following:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or

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

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

(iv) A combination of the aforementioned duties, the performance of which requires the same level of skills; and

(c) Who is compensated on a salary or fee basis as provided in WAC 296-128-545 or on an hourly basis at a rate not less than **[3.0 – 4.0]** times the minimum wage prescribed in RCW 49.46.020 per hour.

(2) The exemption for employees in computer occupations does not include:

(a) Employees engaged in the manufacture, repair, or maintenance of computer hardware and related equipment; or

(b) Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in WAC 296-128-535(1)(a).

**296-128-540**

**Outside salespersons.**

(1) The term "individual employed in the capacity of outside salesperson" in RCW 49.46.010 (3)(c) shall mean any employee:

(a) Whose primary duty is:

(i) Making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(ii) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

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**296-128-545**  
**Salary thresholds**

**DRAFTING NOTE:**

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- The department currently intends for the updated rule to have an effective date of January 1, 2020.

**Questions for stakeholders about this section:**

1. Assuming an effective date of January 1, 2020, should the department consider a phased-in implementation of the new threshold for employers based on employer size? What phase-in schedule should the department propose?
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