

(b) The rule in paragraph (a) of this section is not applicable, however, to nonexempt work arising out of occurrences which are not beyond control or for which the employer can reasonably provide in the normal course of business.

(c) A few illustrations may be helpful in distinguishing routine work performed as a result of real emergencies of the kind for which no provision can practicably be made by the employer in advance of their occurrence and routine work which is not in this category. It is obvious that a mine superintendent who pitches in after an explosion and digs out the men who are trapped in the mine is still a bona fide executive during that week. On the other hand, the manager of a cleaning establishment who personally performs the cleaning operations on expensive garments because he fears damage to the fabrics if he allows his subordinates to handle them is not performing "emergency" work of the kind which can be considered exempt. Nor is the manager of a department in a retail store performing exempt work when he personally waits on a special or impatient customer because he fears the loss of the sale or the customer's goodwill if he allows a salesperson to serve him. The performance of nonexempt work by executives during inventory-taking, during other periods of heavy workload, or the handling of rush orders are the kinds of activities which the percentage tolerances are intended to cover. For example, pitching in on the production line in a canning plant during seasonal operations is not exempt "emergency" work even if the objective is to keep the food from spoiling. Similarly, pitching in behind the sales counter in a retail store during special sales or during Christmas or Easter or other peak sales periods is not "emergency" work, even if the objective is to improve customer service and the store's sales record. Maintenance work is not emergency work even if performed at night or during weekends. Relieving subordinates during rest or vacation periods cannot be considered in the nature of "emergency" work since the need for replacements can be anticipated. Whether replacing the subordinate at the work-

bench, or production line, or sales counter during the first day or partial day of an illness would be considered exempt emergency work would depend upon the circumstances in the particular case. Such factors as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly would all have to be weighed.

(d) All the regular cleaning up around machinery, even when necessary to prevent fire or explosion, is not "emergency" work. However, the removal by an executive of dirt or obstructions constituting a hazard to life or property need not be included in computing the percentage limitation if it is not reasonably practicable for anyone but the supervisor to perform the work and it is the kind of "emergency" which has not been recurring. The occasional performance of repair work in case of a breakdown of machinery, or the collapse of a display rack, or damage to or exceptional disarray of merchandise caused by accident or a customer's carelessness may be considered exempt work if the breakdown is one which the employer cannot reasonably anticipate. However, recurring breakdowns or disarrays requiring frequent attention, such as that of an old belt or machine which breaks down repeatedly or merchandise displays constantly requiring re-sorting or straightening, are the kind for which provision could reasonably be made and repair of which must be considered as nonexempt.

§ 541.110 Occasional tasks.

(a) In addition to the type of work which by its very nature is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which cannot practicably be performed by the production workers and

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are usually performed by the executive. These small tasks when viewed separately without regard to their relationship to the executive's overall functions might appear to constitute nonexempt work. In reality they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materials, and production. The particular tasks are not specifically assigned to the "executive" but are performed by him in his discretion.

(b) It might be possible for the executive to take one of his subordinates away from his usual tasks, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than to delegate them to other persons. When any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and must be counted as nonexempt work. In determining whether such work is directly and closely related to the performance of the management duties, consideration should be given to whether it is: (1) The same as the work performed by any of the subordinates of the executive; or (2) a specifically assigned task of the executive employees; or (3) practicably delegable to nonexempt employees in the establishment; or (4) repetitive and frequently recurring.

§ 541.111 Nonexempt work generally.

(a) As indicated in § 541.101 the term "nonexempt work," as used in this subpart, includes all work other than that described in § 541.1 (a) through (d) and the activities directly and closely related to such work.

(b) Nonexempt work is easily identifiable where, as in the usual case, it consists of work of the same nature as that performed by the nonexempt subordinates of the "executive." It is more difficult to identify in cases where supervisory employees spend a significant amount of time in activities not performed by any of their subordinates

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and not consisting of actual supervision and management. In such cases careful analysis of the employee's duties with reference to the phrase "directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section" will usually be necessary in arriving at a determination.

§ 541.112 Percentage limitations on nonexempt work.

(a) An employee will not qualify for exemption as an executive if he devotes more than 20 percent, or in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work. This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

(b)(1) The maximum allowance of 20 percent for nonexempt work applies unless the establishment by which the employee is employed qualifies for the higher allowance as a retail or service establishment within the meaning of the Act. Such an establishment must be a distinct physical place of business, open to the general public, which is engaged on the premises in making sales of goods or services to which the concept of retail selling or servicing applies. As defined in section 13(a)(2) of the Act, such an establishment must make at least 75 percent of its annual dollar volume of sales of goods or services from sales that are both not for resale and recognized as retail in the particular industry. Types of establishments which may meet these tests include stores selling consumer goods to the public; hotels; motels; restaurants; some types of amusement or recreational establishments (but not those offering wagering or gambling facilities); hospitals, or institutions primarily engaged in the care of the sick, the aged, the mentally ill, or defective residing on the premises, if open to the general public; public parking lots and parking garages; auto repair shops; gasoline service stations (but not truck stops); funeral homes; cemeteries; etc. Further explanation and illustrations of the establishments included in the term "retail or service establishment"