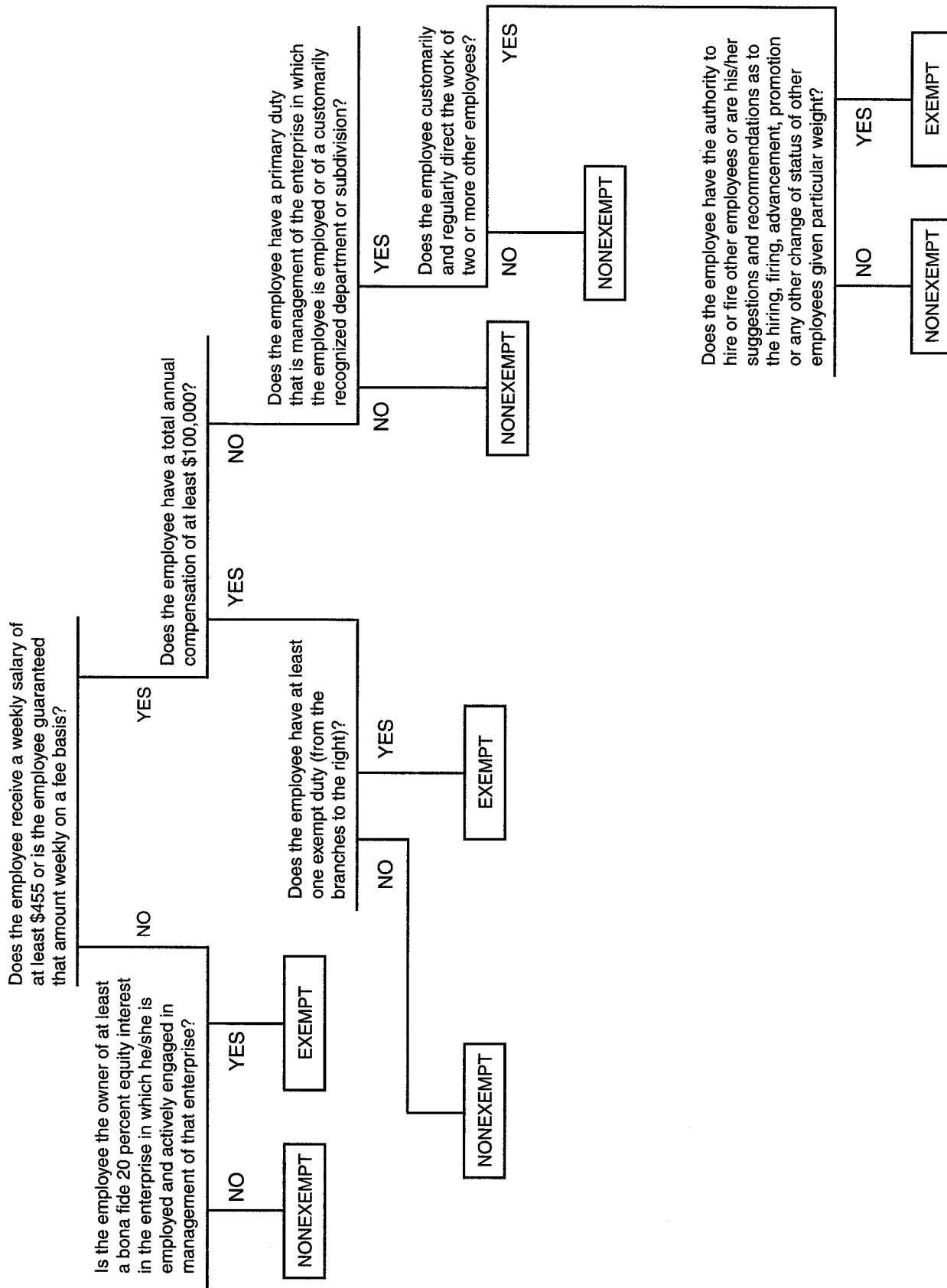


Fig. 234-C
Executive Exemption Decision Chart



Employees who meet the above five criteria are bona fide executives under the regulations. If any of the above questions was answered in the negative, the employee is not exempt as an executive unless he or she is “highly compensated.” (See Fig. 234-B)

Fig. 234-B

Checklist for Executive Exemption “Highly Compensated Employee” Test:

- 1. Is the employee’s total annual compensation at least \$100,000?
- 2. Is the employee paid not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities?
- 3. Is the employee paid on a salary basis? With certain limited exceptions (see ¶225), he or she must:
 - Experience no reduction in salary for variances in the quality and quantity of work;
 - Experience no deductions for absences of less than one day; and
 - Receive each pay period a predetermined amount constituting all or part of his or her compensation.
- 4. Does the employee regularly and customarily perform one or more exempt duties?

Employees who meet the above four criteria are bona fide highly compensated executives under DOL’s white-collar exemption regulations.

Fig. 234-C illustrates the analysis followed in determining whether an employee qualifies for the FLSA’s executive exemption.

Fig. 234-A**Checklist for Executive Exemption “Standard” Test:**

- 1. Is the employee paid not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities?
- 2. Is the employee paid on a salary basis? With certain limited exceptions (see ¶225), he or she must:
 - Experience no reduction in salary for variances in the quality and quantity of work;
 - Experience no deductions for absences of less than one day; and
 - Receive each pay period a predetermined amount constituting all or part of his or her compensation.
- 3. Does the employee’s “primary duty” consist of managing the enterprise or a customarily recognized department or subdivision thereof?
 - The primary duty means the principal, main, major or most important duty that the employee performs.
 - The primary duty must be managing a customarily recognized department or subdivision, not a mere collection of employees assigned from time to time to a specific job or series of jobs.
 - See ¶231 for examples of “management” duties under the regulations.
- 4. Does the employee regularly and customarily supervise two or more employees?
 - The employee must supervise two full-time employees or the equivalent (for example, one full-time and two part-time employees).
 - Employees supervised must be employed in the department that the “executive” is managing.
 - A shared responsibility for the supervision of the same two (or more) employees in the same department does not fulfill the requirement; however, a single department can have more than one manager if there is a ratio in the department of at least two full-time equivalents to each manager.
- 5. Does the employee have the authority to hire or fire other employees or are the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees given particular weight?
 - To determine whether an employee’s suggestions and recommendations are given “particular weight,” factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon.

management decisions, supervises no one, has no authority over personnel, and possibly earns less than the minimum wage. For example, in *Lavian v. Haghazari*, 884 F. Supp. 670 (E.D.N.Y. 1995), an uncle invested more than \$70,000 in his nephew's pharmacy business in exchange for a promise of 49 percent stock ownership interest in the closely held corporation. After working at the pharmacy for two years without compensation, and never receiving share certificates, the uncle sued. The court denied a motion to dismiss an FLSA claim, noting that the court must accept as true the uncle's allegations that his duties were "clerical, and lacking in actual supervisory and discretionary authority in relation to the enterprise." (Under DOL's revised exemption rules, effective Aug. 23, 2004, the uncle would be clearly nonexempt.)

It makes no difference whether the business is a corporate or other type of organization. Also, it makes no difference how the individual is compensated. A business owner who meets the above requirements is exempt under the executive exemption whether or not he or she meets the salary requirements (both minimum salary and payment on a salary basis) of the regulations. The reason for this, according to DOL, is that the salary requirements are not necessary, given the likelihood that an employee who owns a bona fide 20 percent equity interest in the enterprise will share in its profits. Additionally, business owners at this level are able to receive compensation in other ways and have sufficient control over the business to prevent abuse (69 *Fed. Reg.* 22,132). Thus, the 20 percent equity ownership interest is an adequate substitute for the salary requirements, DOL states.

¶234 Executive Exemption Checklists and Decision Chart (Effective Aug. 23, 2004)

Provided in this section are checklists designed to help the employer determine whether an employee is a bona fide executive qualified for exemption from the overtime pay and minimum wage requirements of the Fair Labor Standards Act (FLSA). Checklists are provided for both the "standard" executive exemption test (Fig. 234-A) and the "highly compensated employee" test (Fig. 234-B). If the employee is paid a total annual compensation of at least \$100,000, of which at least \$455 per week is paid on a salary or fee basis, the highly compensated employee test should be used. Otherwise, the standard test should be used.

Also provided in this section is a decision chart (Fig. 234-C) to help the employer apply the executive exemption standard and highly compensated employee tests.