

The Exemption Question

Understand whether FLSA rules on overtime and the minimum wage affect your team.

One of the best ways that employers can protect themselves from accusations of wage theft (and the associated liability) is to properly classify employees under the applicable wage and hour laws.

Most employers know there are certain exemptions from the minimum wage and overtime provisions of the Fair Labor Standards Act. However, too often, employers do not pay close enough attention to the boundaries of those exemptions. This puts the employer in a very precarious position and without much documentation to defend itself.

What Are the Standards?

The FLSA requires most employers to pay most employees the federal minimum wage and time-and-a-half for more than 40 hours worked in a given week. But the FLSA provides an exemption from those requirements for “bona fide” executives, administrative employees, professional employees, computer employees and outside sales professionals.

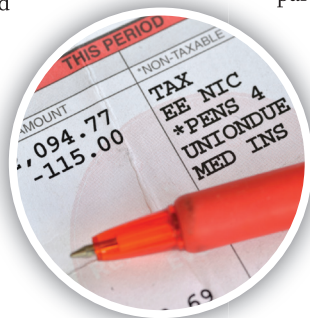
The qualifications for these exemptions are not determined by the employer via job title or any other single factor, but rather by considering the duties tests described in the applicable federal regulations, and the “salary basis” requirement that the employee receive a regular salary of at least \$455 per week regardless of the quality or quantity of the work.

Courts that examine claims involving the exemptions routinely hold that they are to be determined narrowly, giving every benefit of the doubt to a finding that the employee is not exempt.

How the Exemption Applies to Different Employees

Executive Employee // In addition to the salary basis test, an “executive” employee is exempt

if she has the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. She also must customarily and regularly direct the work of at least two other full-time employees or their equivalent. She either has the authority to hire or fire other employees, or her suggestions and recommendations about the status of other employees are given particular weight.



Administrative Employee // In addition to the salary basis test, an exempt “administrative” employee must have the primary duty of office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers. Administrative employees also are expected to exercise discretion and independent judgment on matters of significance.

Professional Employee // In addition to the salary basis test, an exempt “professional” employee must primarily perform 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. An exempt professional’s advanced knowledge must be in a field of science or learning, and must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional // An exempt “creative professional” employee must meet the salary basis test and hold a primary duty in the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee // An exempt “computer employee” must meet either the salary basis test or be compensated hourly at a rate not less than \$27.63 per hour. This kind of employee must be a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field.

Generally speaking, exempt computer employees analyze, design, document, test or modify computer programs, systems or machine operating systems.

Outside Sales Professional // Finally, an exempt “outside sales professional” (as

opposed to an inside salesperson) must primarily make sales or obtain orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Outside sales professionals also must be customarily and regularly engaged away from the employer’s place or places of business to be exempt.

Why It Pays to Be Careful

The U.S. Department of Labor provides fact sheets that give general guidance about the boundaries of each exemption, but employers should still be careful and resolve any doubts against exemption.

Suppose an employer hires an employee to serve as a social worker, a position for which the state requires an associate’s degree or a certain level of relevant work experience.

While that position is important to the company and its clients, it is very likely not a position that meets the professional exemption because it does not require “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction” because work experience can substitute for overly broad academic requirements.

But the employer, relying on the state regulations and a general understanding of the professional exemption, treats the employee as exempt and pays her a salary of \$40,000 per year.

If the employee works (or claims to work) 50 hours per week over the next year, she will have accrued approximately \$15,000 in overtime liability. The FLSA also provides for liquidated damages that can double the amount an employee can recover, plus attorneys’ fees.

If the employer has made this mistake with multiple employees in the same job group, those risks are multiplied. Finally, because the employer treated the employee as exempt, it likely will not have time records to defend against the employee’s claim of unpaid overtime.

Employers should carefully review their employees’ actual duties with a critical eye to determine if any exemptions apply. When in doubt, the employer should assume a position is not exempt from the minimum wage and overtime provisions of the FLSA. ■

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