EXEMPT VS. NON-EXEMPT TEST

Is there a clear cut definition of what makes an employee exempt or non-exempt? The Fair Labor Standards Act (FLSA – Federal Law) sets out a duties test for each of its white collar exemptions. Remember that exempt means exempt from wage and hour laws.

Many states have wage and hour laws that are more severe than the federal definitions. As well as the exemption test below, there is a minimum required salary. Since that salary may change when the minimum wage does, please be sure to stay on top of your state and local requirements. More and more smaller businesses are being audited in the current economic climate and it is more important than ever to be aware of the rules and ensure all your jobs have appropriate classifications.

Executives

- The executive exemption applies to the following employees:
  - Their primary duty is management.
  - They direct the work of two or more full-time employees.
  - They have authority to hire and fire, or make recommendations regarding hiring and firing.
  - They regularly exercise a high degree of independent judgment in their work.
  - They don't devote more than 20% of their time to non-managerial functions

Administrators

- The administrative exemption applies to the following employees:
  - Their primary duty is office or non-manual work which relates to their employer's management policies or general business operations.
  - They regularly exercise discretion and judgment in their work.
  - They assist a proprietor or executive, perform specialized or technical work, or undertake special assignments.
  - They don't devote more than 20% of their time to non-administrative functions
Professionals

The professional exemption applies to the following employees:

- They work in fields requiring advanced knowledge and education, and they do original and creative work in artistic fields.
- They exercise discretion and judgment.
- Their work is intellectual and varied in character and can't be accomplished according to a time schedule.
- They don't devote more than 20% of their time to non-professional functions.
- They are licensed or certified by the State and primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting (other categories may apply – see the Industrial Wage Orders relevant to your state).
- Pharmacists and registered nurses are not considered exempt professional employees except for certified nurse midwives, certified nurse anesthetists or certified nurse practitioners who are primarily engaged in performing duties for which certification is required.
- Computer software employees are exempt if the employee’s hourly rate of pay is not less than forty-four dollars and sixty-three cents ($44.63).

Outside salespersons

- The outside sales exemption applies to employees who make sales or obtain orders away from their employer's place of business and who don't devote more than 20% of their time to non-sales functions.

QUESTIONS AND ANSWERS

Q. Is there a risk-free or low-risk method for reclassifying an exempt employee to non-exempt status that would eliminate or reduce the possibility of having to retroactively calculate overtime for the employee?

A. One of the keys to minimizing overtime liability when reclassifying an exempt to a non-exempt position is to periodically audit all your job classifications. An annual audit is recommended. Once the audit is complete, you can then show in writing how the job changed. If you audit annually, there's only the possibility of owing one year's worth of back overtime. Negotiating with the affected employee is good, but there's a rule which says that employees can't negotiate away their right to overtime.

Q. My company is in the process of re-evaluating positions as exempt and non-exempt. Do we need to have our exempt employees report their time along with the non-exempts? If so, do the exempts have to list all of the hours they work, including time put in at home, etc.?
A. The Fair Labor Standards Act (FLSA) grants employers a great deal of latitude when it comes to time-keeping for exempts. Since exempts must be paid their full salary in any week they perform any work, they may not need to keep track of their time at all. Or you can require them to keep track of their office time, but not their home time, etc. There is one caveat under the FLSA, though, when it comes to time-keeping for exempts. While you may require them to keep track of their time, you may not use those records for disciplinary purposes. That is, you may not condition their receipt of full paychecks on their time sheets indicating that the full numbers of hours for the pay period were worked. This would constitute partial-day docking, a procedure which is prohibited for exempts under the FLSA.

Q. What is the basic difference between exempt and non-exempt employees?

A. As a general rule, exempt status under the FLSA doesn't depend on an employee's title; it depends on his/her actual job duties. To be considered exempt, employees must fall into one of the white-collar exemption categories. These categories are executive, administrative, professional, and outside salesperson. Also, exempts must be paid on a "salary basis," which means they must receive their full salaries in any week they perform any work.

Q. Is it a violation of the FLSA to require both exempt and non-exempt employees to use a time clock?

A. There's nothing in the FLSA that prohibits you from requiring exempt employees to submit time cards, or to punch (or swipe) in and out. Time cards are a simple and uniform way of tracking all employees' entitlement to vacation, sick, and personal time. There are also some practical reasons for having exempts keep track of their time.

- If exempts challenge their FLSA status and sue for unpaid overtime, you'll have records of their time worked.

- Exempt employees' entitlement to leave under the federal Family and Medical Leave Act depends on whether they have worked 1,250 hours in the previous 12-month period. If you don't have records showing their hours worked, it will be assumed that they have worked the requisite number of hours.

- The key to having exempts keep track of their time is that you can't use their time cards to dock them for partial-day absences. The FLSA requires that exempts be paid on a "salary basis." That is, they must receive the same amount of salary each pay period, regardless of the quality or quantity of their work, or the number of hours worked.

Web resource for FLSA laws and questions: [http://www.dol.gov/elaws/fgsa.htm](http://www.dol.gov/elaws/fgsa.htm)

If you have questions, please contact

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