

Exempt vs. non-exempt: FAQs

The questions surrounding who is exempt and who is non-exempt from overtime obligations under the FLSA (Fair Labor Standards Act) have spurred hundreds of class action lawsuits costing employers hundreds of millions of dollars in monetary damages.

Employers must struggle with understanding the different types of exemptions (executive, managerial, administrative, professional, etc.) as well as what actions can jeopardize those exemptions, and what the overtime ramifications of misclassification can be.

1. *What does it mean when an employee is deemed "non-exempt" from the FLSA?*

Non-exempt employees are those employees who do not fall into one of the FLSA's exemption categories. Non-exempt employees must be paid at least the minimum wage for all hours worked, as well as one-and-a-half times their regular rates of pay for all hours worked over 40 in one workweek.

2. *So who's considered "exempt" under the FLSA?*

Exempts are usually managers, administrators, and executives. Exempts can also be professionals, artists, or outside salespersons. But be careful. The FLSA was specifically designed to cover as many employees as possible, so the burden is on you to prove your employees are exempts.

To prove that an employee should be exempt from the minimum wage and overtime requirements of the FLSA, you need to show that he/she meets the requirements of a duties test and a salary test.

Duties test: The duties test applies to certain executive, administrative, professional, and outside sales employees who meet the following criteria.

a. **Executive exemption**

- The employee must be paid on a salary basis at a rate not less than \$455 per week (\$913 under the proposed new DOL rules).
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

b. **Administrative exemption**

- The employee must be paid on a salary or fee basis at a rate not less than \$455 per week (\$913 under the proposed new DOL rules).
- The employee's primary duty must be 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.
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

c. Learned professional exemption

- The employee must be paid on a salary or fee basis at a rate not less than \$455 per week (\$913 under the proposed new DOL rules).
- The employee's primary duty must be the performance of work requiring advanced knowledge, that's predominantly intellectual in character, which includes work requiring the consistent exercise of discretion and judgment.
- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

d. Creative professional exemption

- The employee must be paid on a salary or fee basis at a rate not less than \$455 per week (\$913 under the proposed new DOL rules).
- The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

e. Highly compensated employee exemption

- The employee earns total annual compensation of \$100,000 or more (\$134,004 under the proposed new DOL rules).
- The employee's primary duty includes performing office or non-manual work.
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

f. Outside sales exemption

- The employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. The employee must be customarily and regularly engaged away from the employer's place or places of business.

Salary test: Exempt employees must be paid on a salary basis. This means that they must regularly receive the same amount on payday, regardless of the number of hours they've worked during the pay period. Therefore, you may not dock exempts' pay for hours not worked, except under limited circumstances.

3. When a company changes the status of exempt workers to non-exempt, is it liable for back overtime? If so, how far back must it go?

According to the Department of Labor (DOL), employers are liable for two years of back overtime, provided the original exempt misclassification wasn't willful. Since job duties change over time, and to avoid back overtime claims, you should determine employees' FLSA status on an ongoing basis.

4. Can exempt employees be required to submit time cards without having their exempt status jeopardized?

Nothing in the FLSA prohibits employers from requiring exempt employees to submit time cards, as long as those employees' wages aren't calculated according to the time recorded. Time cards are a simple and uniform way of tracking all employees' entitlement to vacation, sick, and personal time.

5. Does having supervisors fill in for vacationing non-exempts jeopardize their status during the weeks they substitute for the vacationing employees?

Probably not. Managers are expected to step up to the plate and fill in. The better course of action is to spread vacationing employees' work throughout the department. That way, managers won't have to take on more than a minimal amount of extra work.