

FLSA status — exempt vs non-exempt, what do employers need to know?

Employment classifications can be troubling territory. One wrong move and your business could be hit with major fines or even a lawsuit. Businesses can be subject to federal and state penalties, back wages, and more. But wading through the regulations to evaluate whether an employee should fall under the exempt or nonexempt classification can be confusing, even for the most experienced HR professionals.

Here's what you need to know to avoid fines and protect your business.

What is the FLSA?

The Fair Labor Standards Act (FLSA) is a federal law that provides many important labor laws and provisions around compensation, child labor, and more.

The FLSA establishes federal minimum wage, overtime pay requirements, employer recordkeeping standards, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a minimum wage of at least \$7.25 per hour. Many states and cities have higher minimum wages set. Employers should check federal, state, and local laws and provide employees with hourly wages that meet all regulations.

Nonexempt employees are also to receive overtime pay at a rate not less than one and one-half times the regular rate of pay for any time worked beyond 40 hours in a workweek.

Exempt vs. non-exempt

Under the FLSA, workers can either be classified as exempt or nonexempt. How you classify your employees will determine whether they are eligible for overtime.

Non-exempt employees are typically paid by the hour and are eligible for overtime pay. Employers must follow FLSA regulations as well as any state overtime rules in order to properly compensate non-exempt employees for the time worked.

Exempt workers aren't entitled to overtime pay. You pay them based on the job they do, not the number of hours worked. These are typically salaried employees.

Thus, classifying employees as exempt can help your business save money. If your industry has specific busy seasons that require extra hours, having exempt employees that are able to stay late without overtime pay is largely beneficial. However, there are strict guidelines on which employees are able to be classified as exempt.

Who can be exempt under the FLSA?

Generally, you must meet three requirements before properly classifying a worker as exempt:

- Pay the worker a DOL set minimum salary level amount per week.
- Pay the worker on a salary basis.
- Show that the worker holds a position that includes duties outlined in DOL regulations for specific exempt classifications. These classifications include executive, administrative, professional, computer, outside sales and highly compensated employees.

An exempt worker must meet the minimum DOL set salary, the salary basis test, and the duties test for the specific exempt classification you have assigned the employee.

Administrative exemption

Employees who earn the requisite weekly salary and perform certain functions that support the primary business will qualify as exempt administrators. Functions include tax, finance, accounting, budgeting, and auditing; insurance, quality control, purchasing, and procurement; advertising, marketing, and research; safety and health, human resources, benefits administration, labor relations, public relations, and government relations; computer network, Internet, and database administration; and legal and regulatory compliance.

The two-part duties test for the administrative exemption compels you to determine what type of work administrators perform (i.e. functionality), and the level or nature of the work performed (i.e. independence).

To qualify for the administrative exemption, employees must:

1. Have as their primary duty the performance of office or non-manual work that's directly related to the management or general business operations of the employer or the employer's customers.
2. Exercise discretion and independent judgment with respect to matters of significance, including the authority to formulate, interpret, or implement management policies; carry out major assignments; spend significant amounts of company money; waive or deviate from established policies without prior approval, etc.

Professional exemption

There are two types of professionals that can garner exempt status—learned professionals and creative professionals. Either way, creative and learned professionals must earn the requisite weekly salary.

A key difference from other exempt positions is that professionals may be paid hourly fees or flat fees per completed task, regardless of how long they take to complete it. Most other exempt roles must receive a set salary.

Creative professionals are exempt if their primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, and novelists.

To be exempt, a learned professional must perform work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized study. This exemption isn't available for occupations that are customarily performed by employees who possess general undergraduate degrees; with knowledge acquired through apprenticeship; or with training in the performance of routine mental, manual, mechanical, or physical processes.

The learned professional exemption is aimed at physicians, attorneys, architects, engineers, scientists, and other professionals who require prolonged courses of specialized schooling and who earn advanced degrees. However, an advanced degree won't automatically mean that an employee is exempt. A lawyer just out of law school, for example, can spend all of her time doing document coordination for a partner. The routine nature of this work could serve as the basis for considering her to be non-exempt.

Outside salesperson exemption

An outside sales exemption applies to employees whose primary duties consist of making sales or obtaining orders or contracts for services or the use of facilities away from their employer's place of business. There's no short test for outside salespersons.

Executive exemption

The executive exemption covers more than just the occupants of the executive suite. Assistant managers can qualify for this exemption if they earn the requisite weekly salary and pass the standard duties test. The duties test provides that an exempt executive must:

1. Have as a primary duty managing the enterprise or a customarily recognized department or subdivision (e.g., setting and adjusting employees' pay rates and work hours, directing employees' work, maintaining production or sales records, handling complaints and grievances, planning and controlling the budget, implementing legal compliance measures).
2. Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
3. Have the authority to hire or fire employees, or have particular weight given to suggestions and recommendations regarding the hiring, firing, advancement, promotion, or any other change of status of other employees..

Highly-paid employees exemption

Employees who earn at least \$107,432 a year may be classified as exempt if their primary duty includes performing office or non-manual work (blue-collar workers can't qualify, no matter how much they earn), and they customarily and regularly perform at least one of the duties of an exempt executive, administrator, or professional.

The annual salary limit salary includes commissions, non-discretionary bonuses, and other non-discretionary compensation. It doesn't include employer payments for health or life insurance, pension contributions, or the cost of other fringe benefits. Any 52-week period may be used to determine the compensation limit.

Employees who don't work a full 52-week period may be paid a prorated portion of their annual salary, based on the number of weeks they will be or have been employed.

If employees are close to the salary by the end of that 52-week period, employers may, during the last pay period or within one month after the end of that annual period, make one final payment to boost their salary over the line. Employers can count this extra payment only once, toward the prior year's compensation limit.

Employees who fail this test can still be considered exempt if they would otherwise meet the duties test for their particular exemption.

Who can not be exempt under the FLSA?

Employees working in the following occupations can never be considered exempt employees. They will, therefore, always qualify for overtime pay, regardless of how much they earn in straight-time pay.

Trainees

No FLSA exemption applies to any employee who is training to become an executive, administrator, or professional unless they are actually performing the duties of an executive, administrator, or covered professional.

Blue-collar workers

Production-line workers and non-management employees in maintenance; construction; and similar occupations such as carpenters, electricians, mechanics, plumbers, ironworkers, craftsmen, operating engineers, longshoremen, and laborers are always entitled to overtime.

First responders

Also eligible for overtime pay, regardless of their rank or pay, are police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, and parole or probation officers; park rangers; fire fighters, paramedics, emergency medical technicians, ambulance personnel, and rescue workers; hazardous materials workers; and similar employees.

The importance of accurate employment classifications

Misclassifying employees can land your business in hot water with the Department of Labor. There are a lot of guidelines to wade through in order to ensure that you are properly classifying, paying, and providing appropriate breaks to your employees. If you need more assistance in navigating the FLSA requirements, check out our FLSA compliance guide.