

Exempt vs. Non-Exempt Employees

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The Fair Labor Standards Act (FLSA) establishes a minimum wage and requires payment of mandatory overtime for covered employees who work more than 40 hours per week. However, certain employees are exempt from the wage and hours and/or overtime payment provisions of the FLSA. Therefore, employees are divided into two general classes: non-exempt employees, who are paid on an hourly basis and receive overtime payment at premium rates, and exempt employees.

While there are numerous exemptions to the FLSA, the most common are known as “white-collar” exemptions for executive, administrative and professional employees. In order to qualify for the white-collar exemption, employees must meet both a salary test (i.e. they must be paid on a salary basis) and a duties test (i.e. they must perform exempt duties).

Exempt employees paid on a salary basis must receive a predetermined weekly salary which is not subject to reduction because of variations in the quality or quantity of work performed. Subject to limited exceptions, the employee receives the full weekly salary for any week in which he or she performs any work.

Deductions from the weekly salary are permitted for absences of a day or more for personal reasons but may not be made for absences occasioned by the employer. Deductions for partial-day absences could render the employee non-exempt, entitling the employee to overtime compensation. Attendance problems should be addressed by using disciplinary action, not pay docking.

Job titles can be misleading and the term “white-collar employee” is often generally applied to anyone who works in an office. Employers may consider an employee to be exempt when, based on actual job duties, the employee may be non-exempt and rightly entitled to overtime compensation. To avoid these problems, the FLSA established a substantive duties test as part of the white-collar exemptions. There are certain criteria which must be met by executive, administrative and professional employees to qualify them as exempt employees.

The substantive duties test focuses on the specific job duties of the employees, requiring that the employee’s *primary duties* are exempt in nature. This usually means that 50% of the employee’s time should be spent on exempt work.

An executive employee’s primary duties are to manage all or part of a business, exercise discretionary powers, and direct the work of two or

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more employees. An executive has the authority to hire, fire, promote or change the status of other employees or the executive's opinion is given great weight in those matters.

An administrative employee's duties consist of either office work or non-manual work which is "directly related to management policies or general business operations." The administrative employee must exercise discretion and independent judgment, work under only general supervision, and assist someone employed in an executive or administrative capacity. A distinction must be made between administrative employees, whose duties involve special knowledge, experience and training to actually run the business, and non-exempt employees who perform administrative tasks to aid in day-to-day operations.

The duties undertaken by professional employees require advanced education or an extended course of study beyond general academic education. Professional employees produce work which is intellectual, creative, and heavily dependent on talent, invention, or imagination. Examples of professional employees include doctors, attorneys, dentists, teachers and professors, registered nurses, scientists, highly skilled workers in the computer software field, musicians, painters, and actors.

Don't let a job title throw you. The focus is on the actual job duties of the employee, not the title. Many employers treat employees as exempt when they are not, risking liability. These employers could be held liable for substantial damages.

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