

The Best Class, the Wrong Class, the What Class? A Guide to Understanding FLSA Classifications



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Why Does It Matter?

- FLSA claims increased exponentially from 2000 to 2017
- FLSA allows for individual (i.e., manager) liability
- FLSA claims are generally not covered under EPL policies

Why Does It Matter?

- Back Wages
- Liquidated Damages
- Attorneys' Fees and Costs
- Class/Collective Action Claims

Why Does It Matter?

You are a mid-sized employer with approximately 150 hourly, non-exempt employees earning \$10.00 per hour and regularly scheduled to work 40 hours per week.

What happens if you do not count certain time (travel, on-call, e-mails, training) as compensable work time?

Why Does It Matter?

- Back Wages = \$1,950
 - 10 minutes per day x 5 days per week = 50 minutes per week
 - 50 minutes per week x \$15.00 per OT hour = \$12.50 OT per week
 - \$12.50 OT per week x 52 weeks = \$650 OT per year
 - \$650 OT per year x 3 years = \$1,950
- Liquidated Damages = \$1,950
- Class/Collective Action Claims = \$585,000
 - \$1,950 Back Wages + \$1,950 Liquidated Damages = \$3,900
 - \$3,900 x 150 non-exempt employees = \$585,000
- Attorneys' Fees and Costs = \$200,000

FLSA Requirements

- A minimum wage (currently \$7.25 per hour)
- Premium pay for overtime work (at a rate of 1.5 times the “regular rate” of pay for all hours worked over 40 in a week)
- Certain recordkeeping, including accurate time records
- Limitations on the employment of minors under 18

What Are “Exemptions”?

- “Exempt”: not subject to one or more FLSA requirements
- Some apply only to the overtime requirements, some apply to the minimum wage and overtime requirements
- Default rule: everyone is non-exempt, unless an employer can prove that an employee satisfies all of an exemption’s requirements

A History of FLSA Exemptions

- **1938:** FLSA passed in response to Depression-era underemployment
 - *Congress exempts “executive,” “administrative,” “professional,” and “outside sales” employees from FLSA’s minimum wage, overtime, and timekeeping requirements*
- **1940:** USDOL issues regulations defining the so-called “white collar” exemptions
 - *USDOL imposes minimum salary requirement of \$30 - \$50 per week*
- **2004:** USDOL increases the minimum salary threshold to \$455 per week (\$23,660 per year)

Overtime Rule 1.0

- **May 2016:** USDOL releases revised regulations updating “white collar” definitions, to be effective December 1, 2016
 - *Minimum threshold raised from \$455 per week to \$913 per week (or, from \$23,660 per year to \$47,476 per year)*
 - *Minimum salary to be automatically “updated” every three years*
- **November 22, 2016: Court preliminarily blocks rule nationwide**
 - *Appx. 84% of employers had already taken steps to comply*
- **December 2016:** USDOL launches appeal to salvage rules
- **January 20, 2017:** New occupant in White House

The End of Overtime Rule 1.0?

- District court ruled that USDOL “exceeded its authority” by placing undue emphasis on employee salaries, essentially eliminating the duties test from the “white collar” definitions
- USDOL appeals ruling but states that it has "decided not to advocate for the specific salary level (\$913 per week) set in the final rule at this time“
- USDOL announces that it "intends to undertake further rulemaking to determine what the salary level should be"

Overtime Rule 2.0 (Published March 22)

- Proposed increase of minimum salary to \$679 per week (\$35,308 per year)
- Proposed increase of highly compensated employee compensation to \$147,414 per year
- No “automatic updates”
- No change to duties tests
- Possible credit of certain non-discretionary pay to minimum salary requirement

The Future of Overtime Rule 2.0

- Open to public comment until May 21, 2019
- Expect final rule to look a lot like proposal
- Expect quick turnaround
- Possibility for litigation from interested parties

Executive Exemption

- Primary duty is managing the enterprise or a customarily-recognized department or unit
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight
- Paid on a salary basis at a rate of at least \$455 per week (soon to be \$679 per week)

Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- Work includes the exercise of discretion and independent judgment as to matters of significance
- Paid on a salary basis at a rate of at least \$455 per week (soon to be \$679 per week)

Professional Exemption

- **Learned Professional:** Primary duty is the performance of work requiring advanced knowledge, which is predominantly intellectual in character and requires consistent use of discretion and judgment, in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instructions
- **Creative Professional:** Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
- Paid on a salary basis at a rate of at least \$455 per week (soon to be \$679 per week)

Outside Sales Exemption

- 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
- Must be customarily and regularly engaged away from the employer's place of business
- No salary requirement

Other Exemptions

- **Computer Employee:** Employed as a computer systems analyst, computer programmer, software engineer or similarly skilled worker in the computer field
- **Highly Compensated Employee:** Primary duty is office or non-manual work in which employee performs at least one of the exempt white collar duties and receives total compensation of \$100,000 per year (soon to be \$147,414 per year)
- **Commission-Paid Employee:** Employed at a retail establishment in which employee receives the majority of compensation in the form of commissions and is paid at least time and one-half the minimum wage for all hours worked

Who Gets to Decide?

- In *Encino Motorcars v. Navarro*, the U.S. Supreme Court held that auto dealer service advisors satisfy an exemption available to dealership “salespersons”
- In doing so, the Court withdrew guidance that exemptions are to be “construed narrowly” and held that exemptions must be given “a fair [rather than a “narrow”] interpretation”
- An exemption is still an affirmative defense and the burden to prove the exemption is still on the employer

What Else Is New?

- **Regular Rate**: USDOL proposes clarifying rules on exclusion of PTO, sick, and other methods of pay not related to hours worked from regular rate
- **Joint Employment**: USDOL proposes new rule for joint employment based on totality of following circumstances:
 - *Hire or fire employees*
 - *Supervise or control work schedules or conditions of employment*
 - *Determine rate and method of employment*
 - *Maintain employment record*

What Else Is New?

- **Tipped Employees**: Certain employees may be paid a cash wage of at least \$2.13 per hour plus tips
 - *Tips are owned by employees and may not be shared among managers or supervisors regardless of tip credit*
 - *USDOL rescinds 80/20 rule with respect to tipped duties*
- **Minimum Wage Increases**: 20 states (and 23 additional localities) implemented minimum wage increases in 2019

What Else Is New?

- **Independent Contractors**: Increased scrutiny of independent contractor relationships following California *Dynamex* decision
- **Class Action Waivers**: U.S. Supreme Court has approved use of arbitration agreement prohibiting employees from bringing class or collective action claims

What To Do Next?

- **Perspective**: This is a process. Do not run out and make changes tomorrow based on a *proposal*
- **Be Prepared**: Start evaluating your exempt positions, be prepared to make changes before end of 2019 if necessary
- **Experience**: You've been through this before. You likely already know where to focus this time around

What To Do Next?

- Exemptions relate to individuals, not to job descriptions, pay classifications, etc.
- Detailed, accurate, current job information is essential
- Quick and easy evaluations usually leave serious vulnerabilities
- Consider pay alternatives to better manage overtime exposure

Questions



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Thank You



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