Compensation Audit And Counseling Services

FLSA EXEMPTION CHECKLIST

The federal Fair Labor Standards Act (FLSA) has several exemptions. The most commonly relied upon though are the so-called "white collar" employee exemptions for executives, administrative employees, professionals, and outside salespeople. Employees meeting these exemptions can be treated as being exempt from the FLSA requirements – minimum wage, overtime, and timekeeping – if they meet detailed criteria set forth in U.S. Department of Labor (USDOL) regulations, which are paraphrased below. Each term has a specific legal meaning that oftentimes is narrower than how the term commonly is used. Moreover, most, but not all, of these exemptions include a "salary basis" or "fee basis" pay requirement, which has its own nuances

Does The Employee Meet The Executive Employee Exemption?

Primary duty is managing the enterprise by which they are employed, or managing a customarily recognized department or subdivision of that enterprise (certain business owners might meet a variation of this exemption), and

Customarily and regularly directs the work of two or more other full-time employees (or the equivalent), and

Authority to hire or fire other employees, or particular weight is given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or other significant change of employee status, and

Paid on a "salary basis" at not less than the required weekly threshold amount established by USDOL (currently $844/week and is set to increase to $1,128/week on January 1, 2025).

Does The Employee Meet The Administrative Employee Exemption?

Primary duty is managing the enterprise by which they are employed, or managing a customarily recognized department or subdivision of that enterprise (certain business owners might meet a variation of this exemption), and

Customarily and regularly directs the work of two or more other full-time employees (or the equivalent), and

Authority to hire or fire other employees, or particular weight is given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or other significant change of employee status, and

Paid on a "salary basis" at not less than the required weekly threshold amount established by USDOL (currently $844/week and is set to increase to $1,128/week on January 1, 2025).

Does The Employee Meet The Learned-Professional Employee Exemption?

Meet one or more of the following three:

- Whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is engaged in this activity as a teacher in an educational establishment by which they are employed (certain administrators might meet a variation of the administrative employee exemption above), regardless of the manner or amount of pay, or

- Who both holds a valid license or certificate permitting the practice of law, medicine, or any of their branches and is engaged in that practice. This also includes medical interns or residents holding the requisite degree who are engaged in an internship or a resident program, regardless of the manner or amount of pay, or

- Whose primary duty is work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, and

  - The work must be predominantly intellectual, and

  - The work must require the consistent exercise of discretion and judgment), and

  - The employee is paid on a "salary basis" or a "fee basis" at not less than the required weekly threshold amount established by USDOL (currently $844/week and is set to increase to $1,128/week on January 1, 2025).

Does The Employee Meet The Creative-Professional Employee Exemption?

Primary duty is work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, and

Paid on a "salary basis" or a "fee basis" at not less than the required weekly threshold amount established by USDOL (currently $844/week and is set to increase to $1,128/week on January 1, 2025).

Does The Employee Meet The Creative-Professional Employee Exemption?

Employed as a computer systems analyst, a computer programmer, a software engineer, or a similarly-skilled worker in the computer field, and

Primary duty is one or more of the following four:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications, or

- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications, or

- The design, documentation, testing, creation or modification of computer programs related to machine operating systems, or

- A combination of these duties, the performance of which requires the same skill level, and

Paid on a "salary basis" or a "fee basis" at not less than the required weekly threshold amount established by USDOL (currently $844/week and is set to increase to $1,128/week on January 1, 2025) or paid on an hourly basis at a rate of at least $27.63 an hour).

Does The Employee Meet The Outside-Sales Employee Exemption?

Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities, and

Customarily and regularly engaged away from the employer's place(s) of business in performing that duty.

This exemption does not require that an employee be paid in any particular way or any particular amount.

Does The Employee Meet The Highly-Compensated Employee Exemption?

Primary duty includes performing office or non-manual work, and

Customarily and regularly performs any one or more exempt duties or responsibilities of an executive, administrative, or professional employee, and

Paid on a "salary basis" or a "fee basis" at not less than the required weekly threshold amount established by USDOL (currently $844/week and is set to increase to $1,128/ week on January 1, 2025), and

Total annual compensation, including both salary and any commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned in a 52- week period, is not less than the required annual threshold amount established by USDOL (currently $ 132,964/ year). It will not matter that an employee satisfies this requirement if they do not meet the duties-related tests or is not paid on the requisite basis.

Full-Exemptions and Common Partial Exemptions

The white-collar exemptions discussed above are, by far, the most common. There are many other exemptions though from the FLSA's minimum wage and/or overtime provisions – each with its own nuances. This summary can help you start identifying what kind of exemption might apply to your circumstances.

Minimum Wage And Overtime Exemptions

- Executive, administrative, learned professional, creative professional, computer, outside sales, and highlycompensated employees (MW/OT)
- Agricultural employees (MW/OT)
- Employees of a seasonal amusement or recreational establishment, organized camp, or religious or non-profit educational conference center (MW/OT)
- Casual babysitters (MW/OT)
- Domestic companions (MW/OT)
- Seamen on non-American vessels (MW/OT)
- Switchboard operators at small independent telephone companies (MW/OT)
- Fishing industry employees, including employees engaged in offshore seafood processing (MW/OT)
- Employees delivering newspapers to end users (MW/OT)
- Employees employed in the publication of local newspapers (MW/OT)
- Employees engaging in wreathmaking (MW/OT)
- Employees working in a foreign country for an entire workweek (MW/OT)
- Federal criminal investigators (MW/OT)

These full-exemptions from minimum wage and overtime mean exempt from timekeeping too

Common Exemptions From Overtime Only

- Employees of retail or service establishments who are primarily commissioned (OT)
- Drivers, helpers, loaders, and mechanics of motor private carriers and motor carriers in interstate commerce (OT)
- Salespersons, parts persons, and mechanics of auto, truck, or farm implement dealers (OT)
- Employees closely connected to the agricultural field (OT)
- Household domestics, such as service employees, who reside in the household (OT)

Common Variations On Requirements

- Public employers awarding compensatory time off in lieu of overtime pay (OT)
- Employees working under limited-hours collective bargaining contracts (OT)
- Employees engaged in law enforcement or fire protection activities (OT)
- Hospitals and certain residential care facilities (OT)
- Workers with disabilities (MW)

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