

IS YOUR AI PROMPT ENGINEER EXEMPT FROM OVERTIME PAY? AN EMPLOYER'S 5-STEP GUIDE TO AVOIDING MISCLASSIFICATION MISTAKES

Insights
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As the AI revolution takes hold, employers are hiring for jobs we never imagined just a few years ago. This may leave you in the dark when trying to figure out if your new hires, including Prompt Engineers, will truly meet the requirements to be exempt from overtime pay under federal and state wage and hour laws. What are the job duties? How much will they be paid? What exemptions may apply? We'll walk you through a five-step analysis for a Prompt Engineer job to help you decide how to classify this position as you add innovative new AI roles to your team.

1. What Exactly is a Prompt Engineer?

If you've suddenly found the need to hire a full-time Prompt Engineer, you're not alone. Demand for AI jobs has soared even while listings for other tech jobs are diminishing, [according to the Wall Street Journal](#) – and a quick job search will return ample active listings specifically for Prompt Engineers.

A Prompt Engineer is responsible for designing instructions — or prompts — to help Generative AI models produce accurate and useful content in a wide array of areas, including product development, creative and technical writing, customer support, and document generation. The Prompt Engineer job involves testing and modifying these prompts to continuously improve GenAI results. Notably, this role generally requires teamwork skills in addition to technical skills, as the Prompt Engineer will likely collaborate with various cross-functional teams in the organization to meet companywide goals.

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If you are among the many companies adding this role to your operations, you'll want to take careful steps at the front end to ensure you've properly defined the job responsibilities and classified the role as exempt or non-exempt under wage and hour laws.

2. How Will the Role Be Defined?

As a best practice, your first step should be creating a job description, which helps potential new hires understand the skills needed for the role and your expectations once they start. It also serves as an internal guide for performance evaluations, compensation plans, and other key assessments, [which you can read more about here](#).

Importantly, job descriptions can support or contradict an employer's classification of an employee as exempt or nonexempt. Although job descriptions alone cannot prove that an employee was properly classified as exempt, a well-crafted job description can be helpful evidence to demonstrate the exempt nature of a position.

The ***Prompt Engineer role*** will naturally be a little different for each organization depending on size, industry, and business needs, but here are some of the common functions:

- **Designing prompts** to ensure GenAI models produce appropriate responses that meet the goals of the organization.
- **Testing and continuously improving prompts** to enhance performance, accuracy, and relevancy.
- **Collaborating** with a variety of internal teams, including content creators, product developers, customer relations specialists, AI developers, and data scientists.
- **Documenting** prompt designs, test results, and other processes.
- **Reporting** on processes, progress, and any issues encountered.
- **Staying on top of the latest developments** in AI, natural language processing, and machine learning.

Specific skills may vary depending on the industries or business functions. For example, a Prompt Engineer in

marketing, entertainment, or advertising may have different objectives than one in healthcare or pharmaceuticals. This means there's no one-size-fits-all job description or wage and hour classification.

3. What Exemptions May Apply?

A new role generally comes with some uncertainty about the specific tasks and level of autonomy, collaboration, and leadership the employee will take on. But overstating higher level responsibilities and misclassifying an employee as exempt can be a costly mistake. So, you should carefully review the possible exemptions to determine whether one will apply. Here are some key points to consider:

FLSA Basics: Under the federal Fair Labor Standards Act (FLSA), employees generally must be paid an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek — ***unless they fall under an exemption***. For a Prompt Engineer, the following exemptions are the most likely you'll be evaluating:

- **Administrative Exemption:** This is one of the so-called "white collar" exemptions and is the most common one applied to knowledge workers. You'll need to consider the following questions under this exemption:
 - Is your Prompt Engineer paid on a salary basis?
 - Are they paid at least [the designated minimum weekly salary](#) for the executive, administrative, and professional (white-collar) exemptions?
 - Is their primary duty the performance of office or non-manual work directly related to the management or general business operations of the company or your customers?
 - Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance?

[You can read more about the white-collar exemptions and the new salary requirements here.](#)

- **Highly Compensated Employee (HCE) Exemption:** The U.S. Department of Labor (DOL) applies a reduced duties test if certain criteria are met:

- Does your Prompt Engineer earn at least \$132,964 a year, and will they earn at least \$151,164 starting on January 1, 2025?
- Is their primary duty office or nonmanual work?
- Do they “customarily and regularly” perform at least one of the bona fide exempt duties of an executive, administrative, or professional employee?

[You can read more about the HCE exemption and the associated duties tests here.](#)

- **Computer Employee Exemption:** The technical aspects of the Prompt Engineer role might qualify for the computer exemption. Consider the following questions:
 - Are they paid on an hourly basis at a rate of at least \$27.63?
 - Does their role qualify as a computer systems analyst, computer programmer, software engineer, or other similarly skilled role in the computer field?
 - Does their primary duty meet the test outlined by the DOL for the computer employee exemption? [You can review the specific duties here.](#)

Remember that a job title or job description is not enough to satisfy the requirements. You will have to look at the actual duties performed.

Primary Duty: Keep in mind that the DOL generally defines a “primary duty” as “the principal, main, major or most important duty that the employee performs.” Moreover, determining an employee’s primary duty “must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.”

State Law Considerations: It is important to always check state law, too, as your jurisdiction may have more-stringent wage and hour requirements. For example, your state may have a different duties test, may have a higher salary threshold, or may not recognize the HCE exemption. Similarly, some states do not recognize the Computer Employee Exemption.

4. Are You on the Fence?

Not all jobs fit neatly into exempt and non-exempt categories. Don't forget that non-exempt is the default, so if you're unsure, you can reduce your risk by classifying workers as non-exempt, accurately tracking work hours, paying overtime premiums, and following other related requirements under federal, state, and local law.

If you think the role is likely exempt but want to minimize any uncertainty, think about whether you can shift some responsibilities to this role to move it solidly into the exempt category. For example, assuming other elements of the exemption have been met, this employee might be given the authority to:

- **Make strategic decisions** on how AI technology will be integrated into business processes
- **Lead AI-related projects** by setting goals, timelines, and budgets
- **Manage compliance and risks** associated with AI and prompt engineering activities by keeping up to date on relevant laws, regulations, and industry standards — and developing related policies and procedures.

Don't forget to work through the following two potential issues as you fine-tune the job description and determine whether the role is exempt:

- **From a legal standpoint**, you'll want to ensure the employee is actually performing the primary duties that make the role exempt. As we mentioned above, regardless of the exemption, neither the job title nor the job description alone determines whether an employee qualifies. Rather, the employee's primary job duties must meet both state and federal wage and hour law requirements.
- **From a practical standpoint**, be sure the combination of skills you're seeking and pay you're offering is realistic. If you're searching for a unicorn, you may have a hard time finding qualified candidates or retaining employees after they're hired.

5. Do Adjustments Need to Be Made?

We all know that job responsibilities may change over time and a new role might morph into something different than first expected. So, as with any other positions on your team,

it's a good idea to periodically review the role, update the job description if necessary, and reevaluate exempt or non-exempt status. You should also consider consulting with legal counsel to determine the best approach to classifying employees under applicable wage and hour laws and correcting any misclassification errors.

Conclusion

Our eyes will be on the courts and regulators to see how they ultimately weigh in on this job, but for now, a best practice is to apply the analysis discussed above and keep informed as these AI roles evolve. We will continue to monitor developments in this area and provide the most up-to-date information directly to your inbox, so make sure you are subscribed to [Fisher Phillips' Insight System](#). If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [AI, Data, and Analytics](#) or [Wage and Hour](#) Practice Groups.