

TO PAY OR NOT TO PAY?

Get to know the U.S. Fair Labor Standards Act for answers and guidance

Another day, another overtime rule violation.

Despite the tenets of the Fair Labor Standards Act on how, when and to whom overtime should be paid, the economic downturn has made it too tempting to get more done with fewer nonexempt workers. And with wage and hour violations expected to be a big wave in litigation this year, it's worth getting to know well all the ins and outs of federal pay rules as they relate to overtime exemptions. It's also best to avoid the temptation to play games with nonexempt status.

FLSA fact check

The FLSA, Title 29 of the U.S. Code, Chapter 8, Section 213, governs whether an employer must pay overtime to its employees. It also provides exemptions from the general requirement that an employer pay overtime to its employees for working more than 40 hours in a workweek.

The exemptions cover employees in executive, administrative or professional capacities, or in the capacity of outside salespeople. While the exemptions vary greatly in both requirements and how they are applied, they generally focus on the level of pay, responsibilities and supervisory duties of the individual employee.

To qualify for the executive, administrative or professional exemptions, for example, the employee must be compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities.

The primary duties of an exempt executive employee must include management of the business or of a department. The employee also must regularly direct the work of two or more employees and have the authority to recommend or directly hire or fire.



EMPLOYMENT LAW

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For an employee to qualify for the administrative exemption, the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers. This must include the "exercise of discretion and independent judgment with respect to matters of significance," meaning more than just skill at applying techniques, procedures or standards described in manuals or other sources.

Rocket scientists?

Further, a professional exemption applies to those employees who perform work requiring advanced knowledge in a field of science or other complex learning or involving a recognized field of artistic or creative endeavor. Within the professional exemption are also categories of exemptions related to specific fields, including Learned Professional and Creative Professional exemptions.

A computer/IT exemption applies to employees who apply systems analysis techniques or design, develop, document, analyze, create or test computer systems or programs, including those related to machine operating systems.

Outside sales employees also are exempt if they obtain contracts for services or for the use of facilities that requires work away from the employer's

business. This does not include sales made by mail, telephone or the Internet, unless such contact is used merely as an adjunct to personal calls.

High-salary rules

Highly compensated employees may be exempt if they receive annual compensation of at least \$100,000. However, non-management production line workers and employees in maintenance, construction and similar occupations who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section, no matter how high their pay.

Finally, the executive, administrative, professional, outside sales and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee.

Yes, it can be headache to keep the rules — and your employee categories — straight for the purposes of overtime compensation. But if the threat of potential worker litigation isn't enough incentive, it's worth noting that the Department of Labor recently hired 250 new investigators with a view to tightening enforcement of wage hour and overtime laws. Between the regulators and the whistle-blowers, you cut corners on overtime and employees' exemption status at your own peril in 2010.

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