



Are Your Exempt Employees Really Exempt?

How To Make Sense of the Changing Requirements for Exempt Status

On Tuesday, November 22, 2016, the U.S. District Court for the Eastern District of Texas entered an order enjoining the United States Department of Labor (DOL) from implementing and enforcing the new DOL Overtime Rule that was to take effect on December 1, 2016. Per this rule, employees need to earn at least \$913 per week or \$47,476 per year in order to be considered an exempt employee, even if the employee's duties qualify as executive, administrative or professional. The rule further provides that these new salary amounts will increase every three years effective January 1, 2020. The Texas court's order essentially invalidates the DOL Overtime Rule. While the court's decision is likely to be appealed, the order does offer a reprieve, at least temporarily, from the requirement to reclassify exempt employees who are paid less than these new salary amounts.

The Texas court's decision however, does not impact any reclassifications that employers have made due to the nature of the duties performed by employees. Thus, for those employers who have reclassified exempt positions to nonexempt positions based upon the duties performed, those reclassifications are not impacted by the court's decision and should remain in place.

Now may be a good time to go back to the basics and review what the Fair Labor Standards Act (FLSA) requires of employers, what liability can result from not complying with the FLSA and how to avoid liability and make sure your exempt employees are really exempt.

What is the FLSA?

The FLSA provides an exemption from the minimum wage and overtime requirements for the executive, administrative and professional staff of an organization. The FLSA was enacted in 1938 to ensure employees were adequately compensated for their work. The law established a 40-hour work week, a minimum hourly wage and a requirement that employers pay time and a half for all hours over 40 worked per week. The FLSA also requires employers to maintain time sheets for its nonexempt employees, to provide equal pay for equal work and to post FLSA signage in the workplace. The DOL enforces the FLSA and adopts rules, such as the Overtime Rule, to implement the FLSA.

Liability Under the FLSA

When Congress enacted the FLSA, it wanted employers to take the law seriously; therefore, the law includes provisions that make violating the FLSA costly for employers. Employers who don't pay a nonexempt employee the minimum wage, or overtime, or don't maintain time sheets for their nonexempt employees are subject to liability for back pay, an equal amount for liquidated damages, civil penalties in some cases, and payment of the employee's attorneys' fees. Damages can be assessed for up to three years of violations. Moreover, the FLSA exemptions are very narrowly construed, which means if an employer misclassifies an employee as exempt, the employer can be subject to liability for unpaid overtime and other damages. Therefore, properly classifying your employees as exempt or nonexempt is critical to avoiding liability under the FLSA.

Who is an Exempt Employee?

In most cases, an employee is considered exempt if he/she meets all of the following three tests:

Salary Basis Test. An exempt employee must be paid a predetermined and fixed salary. Because of this test, an exempt employee can be expected to work more than eight hours a day to complete their tasks; on the other hand, an exempt employee is not to be docked pay if he works less than a full day. Over the years, it has become customary for many employers to overlook both the "duties" test and the "salary level" test for purposes of determining whether an employee is exempt or not and instead base an exempt determination on whether or not an employee is compensated by salary or by an hourly rate. Employers will often say an employee is exempt

because they receive a salary. The "salary basis" test is only one of three that must be satisfied in order for an employee to be considered an exempt employee.

Duties Test. The DOL, and the Texas court's order, has not changed the basic "duties" test for determining whether an employee is exempt or nonexempt. Consequently, the following tests still apply to determine whether someone's duties constitute executive, administrative or professional duties:

- ▶ An executive employee must have as his/her primary duty the management of at least a subdivision of an enterprise, which includes the supervision of at least two employees and the authority to make hiring and firing decisions;
- ▶ An administrative employee must have as his/her primary duty office or nonmanual work directly related to the operations of the employer or its customers, and must have the responsibility to exercise discretion and independent judgment with respect to significant business matters; and
- ▶ A professional employee must have as his/her primary duty work requiring specialized knowledge acquired through prolonged education and the work must require the consistent exercise of discretion and judgment. Skilled computer employees--computer systems analysts, programmers and software engineers--are considered professional employees.

For purposes of determining whether an employee meets one of these three tests, the job description for the position the employee is employed in is the critical factor. Make sure you have a job description for each of your employees that accurately reflect the duties, skills and minimum education required for the position in which they are employed. Make sure job titles and job descriptions match up—if you have three administrative assistants, all three should have the same job description. Also, if one of your three administrative assistants is classified as nonexempt, all three should be classified as nonexempt. If your three administrative assistants are classified differently because they have different duties and responsibilities, then they should have different job titles with job descriptions that accurately match the differences in their responsibilities. >

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Salary Level Test. Until the new DOL rule, employers tended to overlook this test, which was easy to do because the salary level was so low – \$455 per week or \$23,660 per year – and most exempt employees earned this much. The Texas court's order enjoining the new Overtime Rule means that the existing salary levels of \$455 per week or \$23,660 per year must be satisfied if an employee who is exempt based upon his/her duties is to be classified as exempt from the overtime requirements of the FLSA.

Special Rules for Salespersons, Teachers and Academic Administrative Personnel

Outside Salesperson Exception to the Salary Level Test. Outside salespeople are exempt employees regardless of how much they earn. To qualify as an outside salesperson, the employee must regularly and consistently work off-site and must have as his/her primary duty the responsibility for making sales or securing orders for services or the use of facilities.

Inside Salespeople. Inside sales personnel are nonexempt employees based upon their job duties. If you are not already paying your inside sales staff on an hourly basis, subject to overtime and minimum wage requirements, you should be doing so.

Like outside salespeople, **bona fide teachers and academic administrative personnel** are exempt personnel regardless of the amount they earn.

- ▶ Bona fide teachers are employees:
 - 1) whose primary duty is to teach, tutor, instruct or lecture; and
 - 2) are employed and engaged in these primary duties in an educational establishment. An educational establishment is defined as an elementary or secondary school system, an institution of higher education or other educational institution. Preschool and kindergarten teachers can qualify as bona fide teachers if they are employed by an institution that qualifies as a school.

- ▶ Academic administrative personnel include school superintendents, principals and vice principals, college and university department heads, academic counselors and advisors and employees with similar, academic-related responsibilities. To be exempt however, employees must be paid on a salary basis at least equal to the entrance salary for teachers in the same educational institution. Employees in educational institutions who perform nonacademic related duties, such as work relating to general business operations, facilities management and work relating to the health of students and staff are not considered academic administrative personnel. These employees, in order to be considered exempt, must meet the definition of an executive, administrative or professional employee and must also earn more than \$47,476 per year.

Special Rules for Ministers and Nonprofits. Priests, deacons and religious are not subject to the FLSA in connection with jobs they perform pursuant to their religious obligations in schools, hospitals and other institutions operated by their diocese or religious order. Also, some nonprofit organizations may not be required to comply with the FLSA, depending upon the nature of their activities; however, whether or not a particular nonprofit can claim an exclusion from the FLSA and the new Final Rule must be determined on a case-by-case basis.

Importance of Time Sheets. The law requires you to maintain accurate time records for your nonexempt employees. Some states require you to maintain them for your exempt employees too. If you don't use time sheets, now is the time to start.

We expect you will have many questions regarding your exempt and nonexempt employee classifications. Please contact your legal counsel to see how the law applies to your organization. ☀

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