

FLSA Checklist: Exempt vs. Non-exempt Status

It's up to employers to correctly determine whether to classify an employee as exempt or nonexempt under the Fair Labor Standards Act (FLSA). The key consideration: Exempt workers aren't eligible for overtime pay. Rather, they're paid for the job they do, not the hours they keep.

To comply with the FLSA, employers need to regularly review their employee classifications. Generally, two requirements must be met to classify an employee as exempt: 1) they must earn a salary and 2) hold a position with duties the U.S. Labor Department designates as appropriate for exempt positions. Those positions generally fall into six categories: executive, administrative and professional. Professional is broken into subcategories: learned professional and creative professional. In addition, special tests control the classification of computer professionals and outside sales employees.

There is also a new exemption category for 'highly compensated' employees. Basically, any employee earning more than \$100,000 per year (**\$134,004 after December 1, 2016**) and who regularly performs even one of the exempt duties of an executive, administrative or professional employee is precluded from earning overtime.

Under the current FLSA regulations through November 30, 2016, the minimum salary a worker must earn to qualify as exempt is \$455 per week, \$910 bi-weekly, \$985.83 semimonthly (every 1st and 15th of the month), \$1,971.66 monthly or \$23,660 annually. (You can't pay a salary more frequently than once a week.) **On December 1, 2016**, and thereafter, the salary requirements go to \$913 per week, \$1,826 bi-weekly, \$1,978.17 semimonthly, \$3,956.33 monthly or \$47,476 annually. Other characteristics of being paid on a salary basis:

- **You pay the employee a set salary** even if he or she works only part of the week.
- **You can't dock the person's pay** for disciplinary reasons unless the employee has committed a serious safety infraction.
- **The employee can't be docked** for a partial day absence.
- **The employee must be paid** for any day that he or she is ready, willing and able to work, even if you have no work available.

Make sure you abide by the salary rules. If you don't, the employee is no longer exempt, no matter what his or her duties and responsibilities are. Destroying someone's exemption can make you liable for two years' overtime pay for any hours worked beyond 40 per week.

ALLOWABLE PAY DEDUCTIONS

Some deductions won't destroy the exemption. These include:

- ✓ Deductions for a workweek in which the exempt employee performs no work at all, such as when the plant the employee manages shuts down for a holiday period.
- ✓ Deductions from vacation or sick-leave entitlement as discipline if the infraction involved safety rules of major significance. This deduction need not be for a full day or more.

- ✓ Absences for personal reasons lasting at least a day if the worker is voluntarily away handling personal matters. In other words, if the employee is absent more than a day, the person isn't ready and willing to work, so the employer can reduce his or her salary.
- ✓ Absences for illness lasting more than a day. However, you can't make a deduction if the employee is simply leaving early for a doctor's appointment. (Make sure you have a bona fide policy in place regarding absences for illness.)
- ✓ Partial deductions for jury duty and temporary military duty, but only to the extent that the employee received jury pay or military pay.

Note: The 2004 rewrite of the regulations added another possible deduction that won't destroy someone's salary-basis status. You are able to deduct for 'unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules,' such as sexual harassment or workplace violence. But you need a written policy that applies uniformly to all workers. (Of course, you should have a policy anyway to protect your organization from sexual harassment and other hostile environment lawsuits).

Basic Requirements for Exemption:

Exemption	Salary Level Test	Salary Basis Test	Duties Test
Executive	<ul style="list-style-type: none"> • At least \$913/week (\$47,476/year) 	<ul style="list-style-type: none"> • At least 90% of the salary level (\$822 / week) must be paid on a "salary" basis • Up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> • The employee's "primary duty" must be that of an exempt executive employee, as described in the "Duties Tests" section of this guide
Administrative	<ul style="list-style-type: none"> • At least \$913/week (\$47,476 / year) • "Academic administrative personnel" may qualify with a salary at least equal to the entry salary for teachers at their educational establishment. 	<ul style="list-style-type: none"> • At least 90% of the salary level (\$822/week) must be paid on a "salary" or "fee" basis • Up to 10% of the salary level (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> • The employee's "primary duty" must be that of an exempt administrative employee, as described in the "Duties Tests" section of this guide
Professional	<ul style="list-style-type: none"> • At least \$913/week (\$47,476/year) Salary level test does not apply to doctors, lawyers, or 	<ul style="list-style-type: none"> • At least 90% of the salary level (\$822/week) must be paid on a "salary" or "fee" basis • Up to 10% of the salary 	<ul style="list-style-type: none"> • The employee's "primary duty" must be that of an exempt professional employee, as described in the "Duties Tests" section of

	teachers	level (\$91/week) may be satisfied with nondiscretionary bonuses or incentive payments <i>These requirements do not apply for doctors, lawyers, and teachers</i>	this guide
Outside Sales	Does not apply	Does not apply	<ul style="list-style-type: none"> • The employee’s “primary duty” must be that of an exempt outside sales employee, as described in the “Duties Tests” section of this guide
Computer	<ul style="list-style-type: none"> • At least \$913/week (\$47,476/year), or at least \$27.63/hour 	<ul style="list-style-type: none"> • At least 90% of the salary level (\$822/week) must be paid on a “salary” or “fee” basis unless the employee is paid on an hourly basis and receives at least \$27.63/hour • Up to 10% of the salary level (\$91/week) may be satisfied with nondiscretionary bonuses or incentive payments 	<ul style="list-style-type: none"> • The employee’s “primary duty” must be that of an exempt computer employee, as described in the “Duties Tests” section of this guide

But it’s not that simple. That’s why we prepared this checklist, below. Use it to help you determine whether your employees are exempt (from overtime) according to the FLSA.

AUDIT: TEST YOUR COMPLIANCE

To be considered exempt from overtime, an employee must generally be paid on a salary basis and his job duties must meet the Labor Department's standards for one of the six exemption categories discussed below.

- **Executive Employee** - Exempt executive employees generally are responsible for the success or failure of business operations under their management. **Answer the following questions to determine whether you've misclassified a worker as an exempt executive:**

	Yes	No	Don't Know
1. Is the employee's primary duty managing the enterprise or a department or subdivision of the enterprise?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Does the employee customarily direct the work of two or more other employees or their equivalent?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Does the employee have the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other changes of status of other employees must be given particular weight? (Do her recommendations carry significant weight if unauthorized to make the final decision?)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Is the employee paid the equivalent of at least \$455 per week on a salary basis (\$913 per week after December 1, 2016)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "No" to any of these questions, you may have **misclassified** the worker as an Exempt executive.

Note: If the employee is at least a 20 percent owner of the business and meets requirements #1 and #2 above, he need not meet the salary requirement in #4 or the authority requirement in #3.

- **Administrative Employee** - All of the relevant factors must be considered when determining whether an employee in an administrative position is exempt.

Answer the following to determine whether a worker is misclassified as an exempt administrative employee:

	Yes	No	Don't Know
1. Is the employee's primary duty performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Does the employee exercise discretion and independent judgment with respect to matters of significance? That is, does he evaluate and compare possible courses of action and then make a decision or recommendation after considering the various possibilities?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the employee paid the equivalent of at least \$455 per week on a salary basis (\$913 per week after December 1, 2016)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "No" to any of these questions, the employee may be **misclassified** as exempt administrative.

■ **Learned Professional** - To be an exempt learned professional an employee must have a primary duty that is the performance of work requiring knowledge of an advanced type including the consistent exercise of discretion and judgment in a field of science or learning where the advanced knowledge is acquired by a prolonged course of specialized intellectual instruction (examples include lawyers, doctors, architects, teachers, etc.)

Answer the following to determine whether a worker is misclassified as an exempt learned professional:

	<u>Yes</u>	<u>No</u>	<u>Don't Know</u>
1. Is the employee's primary duty to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Is the advanced knowledge obtained by completing an academic course of study resulting in a four-year college degree or leading to certification?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the employee paid the equivalent of at least \$455 per week on a salary basis (\$913 per week after December 1, 2016)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "No" to any of these questions, the employee may be **misclassified** as an exempt learned professional. **Exception:** Those who've completed the educational requirements for a law or medical degree need not meet the minimum salary requirement. Also, teachers need not be certified or meet the minimum salary requirement to qualify as learned professionals.

■ **Creative Professional** - To meet the test for the creative professional exemption, an employee must have a primary duty that involves the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (examples include actors, musicians, composers, novelists, journalists, screenplay writers, cartoonists, painters, etc.).

Answer the following to determine whether a worker is misclassified as an exempt creative professional:

	<u>Yes</u>	<u>No</u>	<u>Don't Know</u>
1. Is the employee's primary duty to perform work requiring invention, imagination, originality or talent in a recognized field of artistic endeavor. The exemption doesn't apply to work that a person could perform with general manual or intellectual ability and training.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Works in a recognized field of artistic or creative endeavor, including music, writing, acting and the graphic arts.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the employee paid the equivalent of at least \$455 per week on a salary basis (\$913 per week after December 1, 2016)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "No" to these questions, you may have **misclassified** a worker as an exempt creative professional.

■ **Computer Professional** - An employee who meets the consolidated duties test for computer professionals will be exempt if he or she meets either the salary or fee basis test or is paid at least \$27.63 hourly. To qualify as an exempt computer employee, a worker must have a primary duty that consists of the four duties described under #3 below. The primary duty requirement applies both to salaried and hourly computer employees.

Answer the following to determine whether a worker is misclassified as an exempt computer professional:

	Yes	No	Don't Know
1. Is the employee compensated <i>either</i> on a salary or fee basis currently at a rate not less than \$455 per week (\$913 per week) <i>or</i> , if paid hourly basis, earn at least \$27.63 per hour.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Is the employee's primary duty:			
• Application of system analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• 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	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Design, testing, documentation, creation or modification of computer programs related to machine operating systems; or	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• A combination of the aforementioned duties requiring the same level of skills?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "No" to #1 or were unable to answer "Yes" to any parts under #2, you may have misclassified the worker as an exempt computer professional.

■ **Outside Sales Employee**

To determine whether a worker has been misclassified as an exempt outside sales employee, answer the following questions:

	Yes	No	Don't Know
1. Is the worker's primary duty making outside sales?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Does he regularly work away from the company's place of business?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Does the worker sell tangible or intangible items, such as goods, insurance, stocks, bonds or real estate, or obtain orders or contracts for services or the use of facilities?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you answered "No" to any of these questions, you may have misclassified the worker as an exempt outside sales employee.

Completed By: _____

Title: _____ Date: _____