

Employee Classification: Exempt vs. Non-Exempt

Q: I am in the process of reviewing our job classifications. Can you help me determine how to classify my employees as exempt or non-exempt?

A: First, it is important to understand from where the terms “exempt” and “non-exempt” derive. The Fair Labor Standards Act (29 U.S.C. §§ 201, et seq.) requires that most employees receive overtime pay at 1.5 times the employee’s regular pay rate for time worked in excess of 40 hours in a seven-day workweek and that employees be paid at least the federal minimum wage, which currently is \$7.25 per hour (\$8.25 per hour under Illinois’ minimum wage law). There are, however, certain employees/jobs that are exempt from the FLSA’s overtime requirements. Whether an employee is “exempt” or “non-exempt” is a very important question that must be carefully considered.

Certain categories of workers are beyond the FLSA’s scope. Those non-covered workers include volunteers, certain trainees and interns, various agricultural workers and independent contractors. In that regard, the general rule is that an individual will be deemed an independent contractor if the person for whom the individual performs work has the right to control or direct the result of the work, but not the means and methods of achieving the result. This is significant, as an employer is not obligated to withhold and pay income, Social Security, Medicare and unemployment taxes on wages paid to an independent contractor. Please note: The Department of Labor, the IRS and their state equivalents have been very focused on examining an employer’s categorization of workers as independent contractors — an area in which they feel there have been abuses.

In addition to the non-covered workers, several exemptions to the FLSA are provided for employees who meet specified requirements. Those requirements generally are referred to as the “salary basis” test and the “duties” test. The FLSA

exemptions provided under the salary basis and duties tests are limited, and the burden is on the employer to prove that a given employee is exempt (and therefore not entitled to receive overtime pay). The following criteria must be met for an employee to be exempt from the FLSA’s overtime and minimum wage requirements:

1. The employee must be paid on a salary, not hourly, basis;
2. The employee must be paid at least \$455 per week (\$23,660 per year), regardless of the percent time worked (note that criteria 1 and 2 make up the “salary basis” test); and
3. The employee’s job duties (the “duties” test) must fall within one of six specific categories.

The six categories of exempt job duties for FLSA purposes include:

Executive Exemption. The employee’s primary duties must involve managing an enterprise or a recognized department or subdivision of an enterprise, and must involve directing the work (with the authority to make hiring and firing decisions or recommendations) of two or more employees.

Administrative Exemption. The employee’s primary duties must involve office work — performed with an appreciable amount of discretion and independent judgment — that is directly related to the management or general business operations of the enterprise.

Learned or Creative Professional Exemption. The employee’s primary duties must involve intellectual work requiring advanced knowledge in a field of science or professional learning (e.g., law, medicine, nursing, pharmacy, accounting, actuarial services, engineering, education and various natural sciences), or must involve work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (e.g., music, art, writing and acting).

This Law Review was written by Timothy A. French and edited by Jed Mandel, both of whom are founding members of Chicago Law Partners, LLC. CLP serves as the Association Forum’s general counsel.



Computer Professional Exemption.

The employee’s primary duties must involve work as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field.

Outside Sales Exemption.

The employee’s primary duties must involve making sales or obtaining orders or contracts for services or for the use of facilities, and the employee must be regularly engaged away from the employer’s place of business.

Highly Compensated Employees.

Employees performing office (non-manual) work and who are paid total annual compensation of \$100,000 or more are exempt if they regularly perform at least one of the duties of an exempt executive, administrative, or learned or creative professional.

Another important caveat is that the foregoing categories of FLSA-exempt jobs apply only to “white-collar” workers who also meet the “salary basis” test. The exemptions do not apply to manual laborers or other “blue-collar” workers whose work involves repetitive operations performed with their hands that requires physical skill and energy. Thus, non-management employees in maintenance, production, construction and similar occupations (e.g., carpenters, electricians, plumbers and laborers) are non-exempt and are entitled to the FLSA’s overtime and minimum wage requirements regardless of their compensation level.

The categories in which employees fall have significant implications under the FLSA. Knowing the answer to whether an employee is exempt or non-exempt is important to the management of any enterprise, whether it’s for-profit or not.



The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.