



Exempt or Not Exempt, That is the Question

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What is the FLSA?

- ❖ **Federal law passed in 1938; revised April 20, 2004**
- ❖ **Enforced by US Department of Labor**
- ❖ **Covers**
 - ❖ **Overtime**
 - ❖ **Minimum Wage**
 - ❖ **Child Labor**
 - ❖ **Equal Pay**
 - ❖ **Recordkeeping**

Key FLSA Concepts

- ❖ **General Rule – All employees must be paid 1-1/2 times their regular rate of pay for hours worked over 40 in a workweek**
 - ❖ **Note that requirement is not over 8 hours in a day**
- ❖ **Hours worked**
 - ❖ **Principal job activity**
 - ❖ **“Suffer” or permit to work**
 - ❖ **Rest periods less than 20 minutes in duration (except lunch)**
- ❖ **Regular rate**
 - ❖ **Includes all forms of remuneration (e.g. shift differential, on-call pay, lump sum payments, 2nd job salary)**
 - ❖ **Converted to an hourly rate**
 - ❖ **Is particular to each work week**
 - ❖ **Any employee can be paid overtime**

Exempt or Nonexempt?

Classification of Positions

❖ Two types

❖ Exempt – Not covered by FLSA
work, not quantitative

❖ Non-exempt
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❖ Three analysis

1. Salary Basis Test

2. Exemption Applicability

3. Job Duties

Must satisfy all three steps to be exempt!!!

Step 1: Salary Basis Test

- ❖ Employee must be paid at least \$455* per week
- ❖ No reduction permitted due to variation in quantity or quality of work
- ❖ Must be paid on a salary basis
- ❖ If employee does not make at least \$455* a week, the employee is nonexempt!
- ❖ Seasonal employees must be paid \$475 per week
- ❖ Outside Sales Exemption

Step 1: Permissible Deductions

- ❖ **Absence from work for one or more full days for personal reasons, other than sickness or disability**
- ❖ **Absence from work for one or more full days due to sickness or disability if deductions made under bona fide policy or practice of providing wage replacement benefits for these types of absences**
- ❖ **To offset any amounts received as payment for jury fees, witness fees, or military pay**

Step 1: Permissible Deductions

- ❖ **Penalties imposed in good faith for violating safety rules of “major significance”**
- ❖ **Unpaid leave taken pursuant to FMLA**
- ❖ **Unpaid disciplinary suspension of one or more full days for violations of workplace conduct rules**
 - ❖ **CT - only permits deductions for suspensions longer than one week**
- ❖ **Proportionate part of employee's full salary may be paid for time actually worked in first and last weeks of employment**

Step 1: Permissible Practices

- ❖ **Taking deductions from exempt employees' accrued leave accounts**
- ❖ **Requiring exempt employees to keep track of and record their hours worked**
- ❖ **Mandating that exempt employees work a specified schedule**

Step 2: Applicable Exemptions

- ❖ **Employee must perform one of below types of jobs**
 - ❖ **Executive** – Manages the company or department and has the authority to hire or fire other employees
 - ❖ **Administrative** – Performs office or clerical work
 - ❖ **Outside Sales** – Makes sales or takes orders which influence outside sales
 - ❖ **Computer Professional** – Involved in design or application of computers or related systems
 - ❖ **Nonexempt!!** – If employee does not do one of these types of jobs, employee is nonexempt!!

Step 2: Basic Considerations

- ❖ **Based on primary duties, *not* title**
- ❖ **Regularly exercises discretion and independent judgment**
- ❖ **Paid on a salaried basis for quality of work, *not* number of hours worked**

Step 2: Executive

- ❖ **Primary duty is management of enterprise or department or subdivision; *and***
- ❖ **Customarily and regularly directs work of two or more other full-time employees; *and***
- ❖ **Authority to hire, fire and discipline or suggestion given particular weight**
 - ❖ **Not specifically required under Connecticut law**
- ❖ **Examples**
 - ❖ **Payroll Manager**
 - ❖ **HR Manager**
 - ❖ **Accounting Manager**
 - ❖ **Building & Grounds Director**
 - ❖ **Business Operations Manager**

Step 2: Administrative

- ❖ **Primary duty must be office or non-manual work; *and***
- ❖ **Directly related to management policies or general business operations; *and***
- ❖ **Customarily and regularly requires exercise of discretion and independent judgment with matters of significance**
- ❖ **Examples**
 - ❖ **HR Generalist**
 - ❖ **Internal Auditor**
 - ❖ **Budget Analyst**
 - ❖ **Grants Specialist**

Step 2: Learned Professional

- ❖ **Primary duty must be in performance of work requiring advanced knowledge in field of science or learning**
- ❖ **Customarily acquired by prolonged course of specialized instruction**
- ❖ **Examples**
 - ❖ **Physician (M.D., D.D.S.)**
 - ❖ **Certified Nurse Practitioner**
 - ❖ **RN**
 - ❖ **Architect**
 - ❖ **Lawyer**
 - ❖ **Teachers & Professors**
 - ❖ **Clinical Social Worker**
 - ❖ **Executive Chef**

Step 2: Creative Professional

- ❖ **Primary duty must be performance of work requiring invention, imagination, originality, or talent**
- ❖ **Performs work in recognized field of artistic or creative endeavor**
- ❖ **Examples**
 - ❖ **Musicians and composers**
 - ❖ **Actors and painters**
 - ❖ **Writers**

Step 2: Computer Professional

- ❖ **Compensated at a rate not less than \$455* per week or \$27.63 an hour**
- ❖ **Employed as computer systems analyst, programmer or software engineer or similar skilled worker**
- ❖ **Primary duties consist of:**
 - ❖ **Applications of systems analysis techniques or**
 - ❖ **Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs**
 - ❖ **Design, documentation, testing, creation, or modification of computer programs related to machine operating systems**
- ❖ **Connecticut does not recognize this exemption!!!**

Step 2: Outside Sales

- ❖ **Performs sales work off company's premises**
 - ❖ Inside sales specifically excluded from exemption
- ❖ **Primary duties include making sales or obtaining order or contracts for services or for use of facilities for which client or customer pays**
- ❖ **Examples**
 - ❖ Sales Representative
 - ❖ Account Manager
 - ❖ Business Development Representative

Step 2: Highly Compensated

- ❖ **Must perform non-manual work and**
- ❖ **Paid more than \$100,000 per year and**
- ❖ **Perform at least one of the duties of an executive, administrative or professional employee**
- ❖ **Connecticut does not recognize this exemption!!!**

Step 2: Typical Non-Exempt Jobs

- ❖ **Office Services Assistant/Office Services Specialist/Executive Secretary**
- ❖ **Carpenter/Electrician/HVAC Tech**
- ❖ **Police Dispatcher/Police Officer**
- ❖ **Enrollment Services Assistant/Specialist**
- ❖ **Fiscal Technician**
- ❖ **Sous Chef**
- ❖ **CNA**

Step 3: Job Duties Analysis

- ❖ If employee passes Step 1 and Step 2, HR should do complete job analysis. If employee is not exempt, then employee is salaried.
- ❖ Job analysis is NOT the same as an exemption determination. Exempt employee is not salaried.

US DOL Penalties

- ❖ **Misclassification determined**
 - ❖ **Good faith mistake (typically only once)**
 - ❖ 2 years of back pay
 - ❖ Same amount in “liquidated damages”
 - ❖ **Willful violation**
 - ❖ 3 years of back pay
 - ❖ Same amount in “liquidated damages”
 - ❖ Attorney’s fees if lawyers involved in employees’ side
- ❖ **Connecticut - Typically only assesses fine for one violation in first time offenses**

Is this employee exempt?

- ❖ **Restaurant Employee**
 - ❖ **Title: Sous Chef**
 - ❖ **Supervised by Executive Chef and Chef De Cuisine**
 - ❖ **Paid on salary basis (above \$600/week)**
 - ❖ **Executes menu set by Executive Chef**
 - ❖ **Not required to have degree in culinary arts but is continually instructed at restaurant**
 - ❖ **Required to have 5-10 years of experience**
 - ❖ **Oversees work of three less experienced part-time sous chefs**
 - ❖ **Gives opinion on hiring, firing, promotions or discipline for lower level chefs, but no one listens**

Is the sous chef exempt?

A. Exempt under Executive Exemption

B. Exempt under Professional Exemption

C. Exempt

D. Non-Exempt

Nonexempt!!!



Proposed FLSA Changes

Salary Basis Increase

- ❖ **Increase salary basis from \$455/week to an amount equal to weekly earnings of 40th percentile of full-time salaried U.S. employees**
 - ❖ **Would have been \$921/week (\$47,892), using 2013 data**
 - ❖ **Estimated to be \$970/week (\$50,440) in 2016**
 - ❖ **Would be variable and change annually based on CPI**
- ❖ **Highly Compensated Employees**
 - ❖ **Increase from \$100,000 to \$122,148**
 - ❖ **Based on 90th percentile of U.S. earners**
- ❖ **Does not apply to doctors, lawyers teachers or outside sales employees**

Salary Basis Increase

- ❖ **What employees will be affected?**
 - ❖ **Hotel manager paid \$35,000 a year, working 50-60 hours a week**
 - ❖ **Town Manager, Town Administrator or Human Resources Director of a small municipality earning \$45,000 working well in excess of 40 hours a week**
 - ❖ **Manager of fast food restaurant earning \$40,000 a year, working 60-70 hours a week**

Timeline

- ❖ **March 2014 –President Obama directs DOL to update and simplify FLSA exemptions to make more employees eligible for overtime pay**
- ❖ **Proposed regulations originally due by end of 2014**
 - ❖ **Then in the first quarter of 2015**
 - ❖ **Then by June 22, 2015**
 - ❖ **Finally issued July 6, 2015**
- ❖ **Currently DOL reviewing comments received on proposed rule change**
- ❖ **Likely to come out in July 2016, best guess, no guarantee**
- ❖ **Effective date could be 60 days after publication of change**
 - ❖ **Changes will not be retroactive**

Other Questions Asked By DOL

- ❖ **Requests for comments on duties tests**
 - ❖ **Whether a time-based test like California is the better approach**
 - ❖ **How to deal with “concurrent duties”**
- ❖ **Request for comment on use of nondiscretionary bonuses to satisfy salary level**

Plan For Changes NOW!

- ❖ **1st – Review and confirm each exempt employee properly classified**
 - ❖ **Consider analyzing each job in your organization, both exempt and nonexempt**
 - ❖ **Does employee's job description meet exemption requirement?**
 - ❖ **Describe how employee's actual job duties meet exemption requirement?**
 - ❖ **Do not forget to evaluate current job postings**
- ❖ **2nd – Identify any exempt employee earning less than \$455 a week**

Plan For Changes NOW!

- ❖ **3rd – Determine Appropriate Course for Your Business**
 - ❖ **Convert employees to hourly, non-exempt**
 - ❖ **Analyze potential overtime exposure by tracking exempt employees' hours for period of time**
 - ❖ **“Hidden Overtime”**
 - ❖ **Increase all exempt employees' weekly salary to \$970**
- ❖ **4th – Implement Changes**
 - ❖ **Discussion with employees**
 - ❖ **Move from exempt to non-exempt will heighten awareness of FLSA classifications and possibility that previously “exempt” employee misclassified**
 - ❖ **If moving to non-exempt, ensure no after-hours work (no email)**

Plan For Changes NOW!

❖ 4th – Implement Changes

❖ Potential language for employee letter

“ Following a routine audit of positions within our organization we have determined that your duties no longer meet the criteria of an exempt employee. Therefore, as of the date of this letter your position will be reclassified as nonexempt, and you will now be eligible for overtime pay for any hours worked over 40 in a workweek. As a nonexempt employee, you will be required to record all hours worked and to get prior approval from your supervisor before working any overtime hours. Other policies you need to be aware of are [insert any policies that may cause a change in benefits or employment practices for employees due to their reclassification]. While your status is changing, it is important to understand that we greatly value your contributions to our organization. This status change in no way implies that your performance is in question. Rather, we are committed to ensuring that all of our employees correctly compensated for their work.”

Plan For Changes NOW!

- ❖ **5th – Plan for “duties test” changes on the horizon**
 - ❖ **Think about effect of potential duties test changes on operations**
 - ❖ **California-style duties test?**
 - ❖ **Is it possible to eliminate or limit non-exempt duties performed by managers?**
 - ❖ **Review manager training, evaluations, and other documents to ensure they evidence reality of management duties and responsibilities**



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