

Exempt or Nonexempt? Making the Determination
under the Current and (Proposed) New FLSA Regulations

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All employees must be paid time-and-one-half
overtime pay when they work over 40 hours in a
single workweek.

Employees who do not have to be paid overtime pay
are called exempt employees because they are
exempt from the overtime requirement.

Employees who must paid overtime pay are therefore called nonexempt employees.

All employees are nonexempt employees

unless they satisfy three requirements

To be exempt from overtime, the employee must satisfy all three requirements.

If an employee satisfies two of the three requirements, the employee remains nonexempt.

Exempt Employees

1. Must be salaried -- paid on a salary-basis
2. Must earn a minimum weekly salary: \$455/week or \$23,660/year
3. Must satisfy one of the three duties tests
 - Executive
 - Administrative
 - Professional

SALARIED EMPLOYEE

What is meant by "salaried"?

- Regularly receives a predetermined amount of compensation each pay period
- That is, paid a fixed amount of money each week or paid a fixed amount on pay day

Exempt Employees

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Minimum Salary

\$455 per week

\$23,660 on an annualized basis

Exempt Employees

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Position Must Satisfy One of Three Duties Tests:

- **Executive**
- **Administrative**
- **Professional**

Executive Duties Test

1. **Management** as primary duty

What is Management?

- interviewing, training, selecting employees
- setting and adjusting pay and hours
- planning, apportioning, directing subordinates' work
- evaluating employee productivity and efficiency
- recommending promotions
- handling complaints and grievances

What is Management?

- planning and controlling the budget
- monitoring legal compliance
- imposing penalties for violation of rules
- implementing training programs
- handling community complaints
- coordinating operations at crime, fire, accident scenes

Executive Duties Test

1. **Management** as primary duty

Primary Duty

- The “principal, main, major or most important duty that the employee performs.”
- The “character of the employee’s job as a whole.”
- No minimum time requirement.

Is the Primary Duty Management or Not?
Consider:

- Relative importance of the employee’s management duties compared with his or her other duties;

Is the Primary Duty Management or Not?
Consider:

- Amount of time spent performing management work;

Is the Primary Duty Management or Not?
Consider:

- Employee's relative freedom from direct supervision; and

Is the Primary Duty Management or Not?
Consider:

- Relationship between employee's salary and wages paid to other employees for the same kind of nonexempt work.

Executive Duties Test

2. Supervision of two or more employees

Executive Duties Test

3. Hiring, firing or promotion authority or hiring, firing or promotion recommendations are given particular weight.

“Particular Weight”

- Is making recommendations about hiring, firing or promotions part of employee’s job duties?
- How frequently does employee make recommendations?
- How frequently does employee’s supervisor ask for such recommendations?
- How frequently are employee’s recommendations followed?

Executive Duties Test

1. Management as primary duty
2. Supervision of two or more employees
3. Hiring, firing or promotion authority or hiring, firing or promotion recommendations given particular weight.

Job Title Not Determinative
Look to Actual Duties of Particular Position

The Professional Exemption

Four Separate Tests:

- Learned Professional
- Creative or Artistic Professional
- Teacher
- Computer Professional

The Learned Professional

1. Performs work requiring advanced knowledge

- Intellectual in character
- Requires consistent exercise of discretion and independent judgment

The Learned Professional

2. Advanced knowledge must be in a field of science or learning

The Learned Professional

3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Some DOL Examples

- Doctors **always** With 3/4 year pre-professional degree programs & appropriate certification:
- Registered nurses **always**; LPNs **never**
 - Medical Technologists
- Lawyers **always**
 - Dental Hygienists
- Paralegals, Legal Assistants: **never**
 - Physician Assistants

Professional Computer Employee

1. **Employee must be paid on a salary-basis or must be paid a minimum of \$27.63/hour.**

Professional Computer Employee:

Work Must Focus On:

- the application of systems analysis, techniques and procedures to determine hardware, software or system functional specifications (this may include consulting with users); or

Professional Computer Employee:

Work Must Focus On:

- the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, either based on and related to user or system design specifications, or related to machine operating systems; or

Professional Computer Employee:

Work Must Focus On:

- a combination of the two

Administrative Exemption

1. Primary duty is performance of **office or nonmanual work** directly related to management or general business operations of the employer

Work Directly Related to
Management or General Business Operations

Finance, accounting, auditing

Purchasing & procurement

Work Directly Related to
Management or General Business Operations

Safety of the government premises

Occupational health risks

Work Directly Related to
Management or General Business Operations

Public relations

Public information

Advertising

Marketing

Work Directly Related to
Management or General Business Operations

- Personnel management**
- Human resources**
- Employee benefits**

Work Directly Related to
Management or General Business Operations

- Computer network, database and
internet administration**

Administrative Exemption

- 2. Performance of this work includes the exercise of
discretion and independent judgment on matters of
significance to the employer**

Discretion and Independent Judgment
on Matters of Significance

**Formulates or implements management policies or
operating practices**

Discretion and Independent Judgment
Matters of Significance

**Recommends decisions that have a significant impact on
general business operations or finances**

Discretion and Independent Judgment
on Matters of Significance

**Involved in planning long-term and/or short-term
objectives for the organization**

Discretion/Independent Judgment: Other Factors

- freedom from direct supervision;
- personnel responsibilities;
- trouble-shooting or problem-solving responsibilities;

Discretion/Independent Judgment: Other Factors

- authority to set budgets;
- degree of public contact; and
- advertising and promotion work

Does not include:

Applying well-established techniques, procedures or specific standards described in manuals or other sources

Does not include:

Recording or tabulating data

Does not include:

Clerical or secretarial work

Does not include:

Performing mechanical, repetitive, recurrent or routine work

Human Resources

- Human resource managers who formulate, interpret or implement employment policies generally meet the administrative duties requirements

Human Resources

- Personnel clerks who “screen” applicants to obtain data regarding minimum qualifications and fitness for employment generally are not exempt administrative employees

Non-exempt Positions

- Ordinary inspection work involving well-established techniques and procedures
- Examiners and graders who perform work involving comparison of work with established standards
- Public sector inspectors or investigators

Staff or Production Worker?

“An employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.”

The reason an organization exists

The mission work of a department or agency

Seven horizontal lines for notes.

The Land Use Planner

- 1. Handle the short-plat process;
- 2. Administer zoning, subdivision, open space and other planning regulations;
- 3. Work with applicants, citizens, and industrial and commercial representatives in preparing short plat applications;
- 4. Appear before Planning Commission and other boards, and
- 5. Provide assistance to planning division as required, and undertake special projects.

Seven horizontal lines for notes.

Director of Public Affairs

- 1. Develop informational and promotional material for the general public and the media about the operations, programs and services of the city;
- 2. Write and arrange for the publication and distribution of press releases, newspaper articles and advertisements concerning the city's programs and accomplishments and its public events;
- 3. Act as spokesperson for the city and arrange press conferences for management;
- 4. Attend high-level meetings and strategy sessions to remain informed of major programs and activities; and to
- 5. Provide guidance to management on how to address complex, sensitive or controversial matters with the public and the media.

Seven horizontal lines for notes.

Accountant

- 1.Prepare financial statements;
- 2.Supervise the preparation of bills and analyze and reconcile accounts receivable;
- 3.Serve as a financial resource person and meet with persons throughout the organization to explain procedures necessary to fulfill government accounting requirements;
- 4.Make recommendations for better financial management and efficiency; and
- 5.Aassist outside auditors during audits.

The Position with Many Names

- 1.Post and balance the general ledger, the subsidiary ledger, and other reports and financial statements;
- 2.Prepare a variety of financial records, reports and analyses;
- 3.Update fixed asset system, assign asset numbers and reconcile fixed asset detail
- 4.Interpret and enforce fiscal policies and practices;
- 5.Assist and respond to requests by external auditors;
- 6.Supervise the processing and accounting of payroll and related reports such as state and federal withholding reports, balancing and calculating payments by fund category; calculate health insurance payments;

The Position with Many Names

- 1.Issue tax reports and W-2 yearly withholding for employees;
- 2.Prepare quarterly fuel tax reports, and prepare oil and gas analysis;
- 3.Review and sign all requisitions, check price quotes, sources, and existing maintenance warranties;
- 4.Review and distribute end-of-the-month reports to department heads;
- 5.Supervise the work of the collection/accounting clerk and payroll technician;
- 6.Participate in budget preparation as requested by finance director; and
- 7.Serve as acting finance director in the absence of the finance director.

Patrol Officer (Road Deputy)

- 1. Patrol assigned area on foot and by car and respond promptly to calls for assistance in the patrol area;
- 2. Investigate suspicious persons, safety hazards, dangerous situations and unusual or illegal activity in his assigned patrol area;
- 3. Pursue and arrest those who are suspected of having engaged in criminal acts;
- 4. Aid accident victims and others requiring assistance for physical injuries;
- 5. Investigate traffic and other accidents;
- 6. Prepare reports that document incidents; and
- 7. Testify in court in traffic and criminal cases.

A patrol officer is always nonexempt.

Sergeant/ Lieutenant / Captain /Assistant Chief

- 1. Supervise all shift patrol work and all investigations;
- 2. Review and approve all police reports;
- 3. Evaluate performance of sergeants and patrol officers on day-shift;
- 4. Approve requests for vacation and sick leave;
- 5. Approve overtime assignments;
- 6. Evaluate equipment and supply needs and prepare day-to-day requisitions and budget requests for same;
- 7. Respond to citizen requests and complaints; and
- 8. Participate in patrol functions when necessary.

Public Works Supervisor

- 1.Perform skilled carpentry, masonry, and construction work in the installation and routine maintenance of city buildings, streets, drainage, grounds, parks and facilities;
- 2.Perform skilled mechanical work on vehicles, equipment, facilities, etc.;
- 3.Assess damage to buildings, facilities, and equipment and make necessary repairs;
- 4.Plan, organize, and supervise daily activities of public works personnel;
- 5.Receive and coordinate needed response to complaints and work orders.
- 6.Operate a variety of tools, various mowers, tractors and other heavy equipment;
- 7.Perform other related duties as assigned; and
- 8.Prepare and make annual budget recommendations.

Clerk A

- 1.Give notice of meetings of governing board and of other public bodies;
- 2.Prepare agenda and supporting materials for governing board meetings;
- 3.Prepare minutes of governing board meetings and keep an accurate minutes book;
- 4.Prepare and maintain the jurisdiction's ordinance book;
- 5.Serve as the custodian of all city records,
- 6.Administer oaths of office;
- 7.Enforce the law governing going-out-of-business sales; and
- 8.Perform any other duties that may be required by law or the governing board.

Clerk B

- 1.Give notice of meetings of governing board and other public bodies;
- 2.Prepare agenda and supporting materials for meetings of the governing board;
- 3.Prepare minutes of governing board meetings and keep an accurate minutes book;
- 4.Prepare and maintain the jurisdiction's ordinance book;
- 5.Serve as the custodian of all city records, including personnel records
- 6.Administer oaths of office;
- 7.Determine the job classification, compensation and benefits for all positions;
- 8.Administer personnel policies; and
- 9.Advertise job vacancies and coordinate interviews of job candidates.

Proposed New Overtime Regulations

or

The Department of Labor's Proposed New **Budget-Busting** Overtime Regulations

Exempt Employees

1. Must be salaried -- paid on a salary-basis
2. Must earn a minimum weekly salary: \$970/week or \$50,440/year
3. Must satisfy one of the three duties tests
 - Executive
 - Administrative
 - Professional

\$970 per week or \$50,440 annually

The Current v. the Proposed New Salary Threshold

Current

- \$455/week or \$23,660/year
- Below current poverty level for family of 4
- 12th percentile of F/T salaried workers
- 1975: \$250/week or \$13,000/year threshold was at the 65th percentile of F/T salaried workers.

Proposed

- \$970/week or \$50,440/year
- Projected 40th percentile of F/T salaried workers
- Annual and automatic updating of salary threshold

Some Examples of City and County Positions Likely to Be Affected

- Town Manager or Town Administrator (very small municipality)
- Assistant Manager / Assistant to the Manager
- Human Resources Director / Human Resources professionals
- Risk Manager
- Solid Waste Director

Additional Examples

- Planner II / Associate Planner
- Chief Deputy Sheriff / Assistant Chief of Police
- Law Enforcement and Firefighter Training Officers
- Public Safety Communications Supervisor

Possible Changes to the Duties Tests

- General changes
- Single standard duties test v. long and short duties tests
- Possible requirement that any exempt position spend a minimum percentage of time on exempt duties
- Possible upper limit on the amount of time any exempt position may spend on nonexempt duties
- Prohibition on concurrent performance of exempt and nonexempt duties

Remember

- Minimum salary for all exempt status positions going to approximately \$50,440 per year. **NO EXCEPTIONS!**
- Positions that make less than that minimum **CANNOT** be exempt, regardless of duties.
- Positions that were exempt but become nonexempt because of salary must be compensated for working overtime.

Next Steps to Take

- Make sure you have current, accurate job descriptions, at least for positions currently classified as exempt. If not, get them.
- Look at all currently exempt positions and see which ones fall below the new salary minimum.
- List these positions and enter current salary and amount needed to bring these positions to new minimum.

Next Steps – Part II

- Have department and division heads survey currently exempt employees to determine (roughly) how many hours per week these employees work on average. *Get individual weekly totals, not an aggregate.*
- Individual totals will show you who the individuals in danger of becoming non-exempt (salary) are with their current average workweek. This will help determine how much potential overtime exposure there will be and whether you will need to change to their duties to keep them under 40 hours per week.

Next Steps – Part III

- Determine which employee salaries you can / should raise to retain exempt status and which you cannot / will not.
- Determine what it would cost if exempt employees who are below new salary minimum had their current salary converted to an hourly figure and they continue to work the same number of hours.

Questions?

Answers!

1. Go to canons.sog.unc.edu
2. Click on “**Employment Law**” in the box labelled topics on the upper right-hand side
3. Click on “**Fair Labor Standards Act**”
4. Feast upon my FLSA blog posts!
