

# Exempt vs. Non-Exempt



**Presented by: Heffernan Consulting**



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- National Certification through the Human Resources Certification Institute (HRCI) as a Senior Professional in Human Resources (SPHR) since 2002
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- Former President of National Human Resources Association (NHRA) – San Diego Chapter



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## Today's Objectives

- Definitions
- Penalties
- Exemptions



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## The News

- **Oil States Energy Services (PA)** “willfully and recklessly” failed to pay overtime wages to the operators. The jury awarded each of the plaintiffs tens of thousands of dollars in compensation and the judge doubled the award.

Judge wrote “Oil States argued paying crane operators a salary and a job bonus, instead of hourly with overtime, conformed to industry standard practice and thus shows good faith. ... Oil States offered no evidence it independently researched whether the industry standard salary and job pay plan for crane operators complied with the act.”

The judge also found that Oil States did not act in good faith by determining that the employees were exempt under the highly compensated exemption.



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## Exemptions Covered

- Executive
- Administrative
- Professional
- Outside Sales
- Commissioned Inside Sales
- Computer Professional



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## Starting Point

- Job title does NOT make them exempt
- ALL employees are non-exempt  
... unless you can prove otherwise
  - Meets one of the exemptions
    - Salary test
    - Duties test
- Consider putting your audit under the privilege protection of your attorney



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## Definition of Non-Exempt Personnel

- Everyone ... unless they meet exemption tests
  - Paid for overtime hours (varies by state)
  - Must meet minimum wage rules
  - Company controls hours and work



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## Definition of Exempt Personnel

- Exempt from overtime pay and meal/rest breaks
- Hours not counted or “comped”
- Must meet salary minimum
  - Federal = \$455/week = \$23,660/year
  - California = \$800/week = \$41,600/year
- Meets duties test of one of the exemptions



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## Definition of Discretion & Judgment

- “Customarily and regularly exercise discretion and independent judgment.”
  - Comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and **with respect to matters of significance**
- May vary slightly with each exemption



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## Penalties

- Company pays
  - All unpaid overtime worked
  - All missed paid rest breaks
  - Any penalty pay for missed meal and/or rest breaks
  - Federal / state fines, penalties, and interest
  - Attorney fees
- Employee gets to decide what wasn't paid



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## Executive Exemption

- Key personnel running the company or a department
- Usually directly manages at least 2 FTE
- Power to hire, fire, or change the status of employees
- More than 50% of time spent on exempt and related duties
  - Hire / train / evaluate / fire employees
  - Planning / directing work
  - Setting pay rates and hours
  - Controlling flow / distribution of products

Chief  
Executive



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## Administrative Exemption



- Most common
- Office work directly related to management policies or general business operations or those of your customers
- Discretion and independent judgment
- Staff employees who are functional rather than department heads, using specialized training, experience, or knowledge



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## Administrative Duties

- Examples of exempt duties:
  - Advising management
  - Planning / strategy
  - Negotiating deals
  - Representing the company
  - Signing authority when purchasing materials and supplies
  - Promoting sales
  - Researching business opportunities
  - Analyzing business data
  - Determining company and/or personnel policies



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## Examples of Exempt Positions

- Exempt
  - Financial consultant working for a firm
  - Accounting manager
  - HR Manager
- Not typically exempt
  - Supervisor
  - Office Manager
  - Executive or Administrative Assistant



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## Working Managers

- Usually non-exempt
  - Manages only a few employees
  - Spend over 50% of time doing same work as employees
  - Shared responsibility rather than directing employees



- Consider
  - Relative important of managerial duties
  - Frequency of discretion and independent judgment
  - Relative freedom from supervision
  - Comparative compensation (wage, benefits, perks, etc.)



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## Professional Exemption



- Three categories
  - Learned
  - Licensed
  - Artistic
- Salary test
  - \$455/week Federal or state minimum



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## Learned Professionals

- Advanced knowledge (degree) in a field of science or learning
  - Law, medicine, theology, accounting, engineering, sciences, etc.
- Prolonged course of specialized intellectual instruction
- Work is predominantly intellectual in character
- Generally analyzes, interprets, deduces
- Meets minimum salary test
  - \$455/week federal or state minimum



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## Licensed Professionals

- Holds a valid license or certificate
- Meets minimum salary test
- Certain fields
  - Medicine (no minimum salary)
    - Includes degreed medical interns/residents
  - Law (no minimum salary)
  - Teachers (no minimum salary)
  - Dentistry
  - Optometry
  - Architecture
  - Engineering
  - Accounting



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## Professional Exceptions

- Not automatically considered exempt
  - Pharmacists
  - Nurses
  - Physicians paid hourly



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## Artistic Professionals

- Work in recognized field of artistic or creative endeavor
  - Requires invention, imagination, originality, or talent
  - Fields such as music, writing, acting, and graphic arts
- Examples
  - Actors, musicians, cartoonists, novelists, etc.
- Meets minimum salary test



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## Outside Sales Exemption

- Must be at least 18 years old
- Must spend 51%+ of time at customer / prospect locations selling for company
  - Not time spent selling virtually or working from home
  - Time spent on setup, delivery varies between feds and state
- No minimum salary



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## Commissioned Inside Sales

- No exemption from anything other than overtime
- Minimum pay of 1.5 x minimum wage
- Commissions must be more than half of pay
  - Commission must be for selling
- Limited industries
  - Federal is limited to retail establishments
  - CA limited to IWC Wage Orders 4 and 7



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## Computer-Related Exemption

- Meets minimum salary test
- Degree not required
- Work is intellectual or creative
  - Applying systems analysis techniques and procedures
  - Designing, developing, testing systems or programs
  - Documenting, testing, creating related to design of software or hardware for operating systems
  - NOT repair or manufacturing of hardware, trainees, or those using a final product software
- Positions include
  - Computer systems analysts, programmers, software engineers



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## Differences in Computer-Related

- Federal law
  - Minimum salary of \$455/week (\$23,660/year)
- California law
  - Minimum salary of \$1,696.76/week (\$88,231.36/year)
    - Changes every year
  - Could still receive overtime



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## When You Misclassify as Exempt



- Meal and rest breaks
  - (CA) You'll pay for any days the employee dictates
- Overtime
  - (CA) Over 8 hours in a day OR over 40 regular hours in a week
  - (Other states) Over 40 hours in a week
- Travel Pay
  - Door to door time
  - (CA) May be paid at minimum wage
- Fines and penalties



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## When you Misclassify as Non-Exempt

- Zip, nada, nothing

*No Worries*



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## Recommendations

- Be conservative
- Train managers
- Educate senior management on risks
- Have an attorney approve your choices



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## Additional Questions?



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