Exempt vs. Non-Exempt

Presented by Heffernan Consulting

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Polling Question

Salaried and exempt employees are basically the same thing.

A. True

B. False

Today's Objectives

- Definitions
- Penalties
- Exemptions

Definition of Exempt

- Exempt from overtime pay and meal/rest breaks
- Hours not counted or "comped"
- Must meet salary minimum, per exemption
- Must meet duties test of the exemption
- Judged by performance rather than hours worked

Definition of Non-Exempt

- 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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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

The News

- **AT&T/Pac Bell (2009) –** Settled for $28 million in class and collective actions for failure to pay overtime to its "First-Level Managers".
- **City Gear LLC (2012) –** Accused of withholding over $25 million in OT for 200 Store Managers and Assistant Managers. They pay a fixed salary basis but, when store managers and assistant managers work less than the company's mandatory 45-hour minimum workweek, they receive prorated paychecks that subtract the hours they failed to work.
- **Alaska Communications Systems Group (2014) –** Misclassified as exempt Client Account Managers, Account Executives, and Senior Managers. In 2018, Court certified the class and is looking back to 2010. The case is pending.

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Starting Point

- Job title does NOT make them exempt
- ALL employees are non-exempt … unless you can prove otherwise
  - Meets an exemption salary and duties tests
- Consider putting your audit under the privilege protection of your attorney

Salary Test

- Minimum salary is a calculation
  - 2 X state minimum X 2,080 = Minimum Annual Salary
  - 2,080 Hours are the full-time equivalent

- Proration is not allowed; minimum must be met regardless of actual hours worked
- If using minimum salary, there can be NO unpaid time off

Discretion and Judgment

- "Customarily and regularly exercises discretion and independent judgment."
  - Compares and evaluates options when making a decision
  - Has authority or power to make an independent choice that is
    - Free from immediate direction or supervision
    - A matter of significance
- May vary slightly with each exemption

Working Managers

- Usually non-exempt
  - Manages only a few employees
  - Spends 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.)

Exemptions

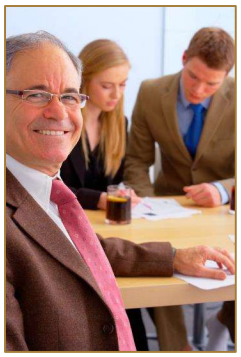
- Executive
- Administrative
- Professional
- Outside Sales
- Commissioned Inside Sales
- Computer Professional

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
  - Controlling flow / distribution of products
  - Planning / directing work
  - Setting pay rates and hours

Chief Executive

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

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

Professional Exemption

- Three categories
  - Learned
  - Licensed
  - Artistic

Professional Exceptions

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

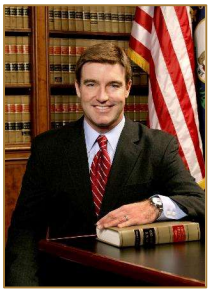
Learned Professionals

- 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

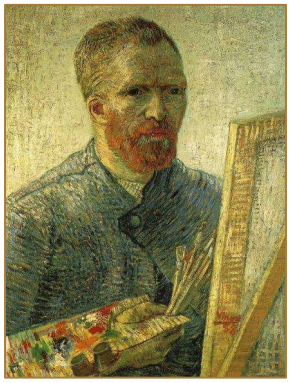
Licensed Professionals

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



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



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

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 paid every pay period
  - Commission must be for selling
- Limited industries
  - Federal: limited to retail establishments
  - CA: limited to IWC Wage Orders 4 & 7

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

Differences in Computer-Related

- Federal (FLSA)
  - Minimum salary
- California law
  - Minimum salary of approximately $100,000/year
    - Changes every year
  - May still receive overtime

When you Misclassify as Non-Exempt

- Zip, nada, nothing

No Worries

When You Misclassify as Exempt

- Company totally held responsible for the misclassification
  - Penalties and fines
- Employee has upper hand with what wasn't paid for work "off the clock".

Costs and Penalties

- Company pays … a lot
  - 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

Other FLSA Common Pitfalls

- Travel time, time spent on call, work provided cell phones, walk time, boot up time, donning and doffing.
- Compensatory time in lieu of overtime.
- Improper rounding.
- Improper docking of salaried exempt employees.
- Deductions for breaks and meal periods.
- Miscalculating overtime.
- Volunteer time.
- Outside v. Inside Sales.

Recommendations

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

Additional Questions?