Exempt vs. Non-Exempt

Presented by: Deb Beddoe, SPHR
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YOUROPSMANAGER
THE KEY TO YOUR BUSINESS SUCCESS

Disclaimer

The information presented is general in nature and is intended to present an overview of employment practices.

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- Graduate, Bachelor's Degree in Business Management, San Diego State University , 1987.
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Polling Question

Salaried and exempt employees are basically the same thing.

A. True
B. False

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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

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

- **Tik-Tok (2024) –** A group of inside sales representatives filed a lawsuit against TikTok in November, alleging they were denied overtime pay in violation of the Fair Labor Standards Act. The case is pending.
- **F W Webb Corp (2024)** - $4.2 million in back wages is owed to 700 employees for violating the Fair Labor Standards Act by treating its inside sales representatives as exempt administrative employees and failing to pay them overtime premiums for their hours worked over 40 hours in a workweek..
- **Pittsburgh Skilled Nursing Facilities (2024) –** In one of the nation's largest wage recovery judgments, a Pennsylvania federal court has awarded $35.8 million in overtime back wages and liquidated damages to 6,000 current and former workers employed by the operators of 15 residential skilled nursing, rehabilitation and assisted living facilities in western Pennsylvania that willfully denied them overtime pay..

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

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Professional Exceptions

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

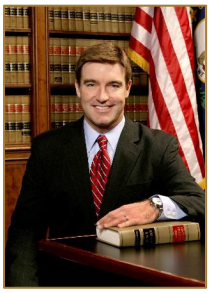
Learned Professionals

- 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

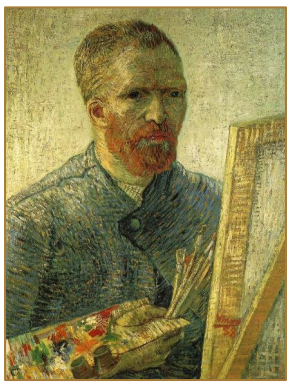
Licensed Professionals

- 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 of $57,470.40/year
    - Changes every year
- California law
  - Minimum salary of over $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?