

Exempt vs. Non-Exempt

Understanding Employee Classification Under the FLSA

Presented by: Deb Beddoe, SPHR

Founder & CEO, Your Ops Manager

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Disclaimer

Important – Please Read

Not Legal Advice

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

The written and verbal contents of this presentation are not intended to constitute legal or HR consulting advice, and no client relationship is established between the presenter and attendees.

Laws and regulations referenced may change. Always consult qualified legal counsel before making classification decisions for your organization.

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About Your Presenter

Deb Beddoe, SPHR

- Founder & CEO, Your Ops Manager (est. 2010)
- Small business operations management consulting
- B.S., Business Management — San Diego State University, 1987
- Certified Senior Professional in Human Resources (SPHR) — HRCI, 2021
- 15+ years helping employers navigate wage & hour compliance



15+
Years in HR Consulting

SPHR
Senior HR Certification

2010
Year Founded

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POLLING QUESTION

Salaried employees and exempt employees are basically the same thing.

A. True — all salaried employees are exempt

B. False — they are different concepts

C. It depends on the state

D. I'm not sure

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Today's Objectives

What we'll cover in the next 55 minutes

1

Key Definitions

Exempt vs. non-exempt — what these terms really mean

2

Costs & Penalties

The real financial risk of misclassification

3

The Exemptions

Deep dive into each white-collar exemption and its tests

4

Common Pitfalls

Frequent mistakes employers make — and how to avoid them

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2026 DOL Guidance

New opinion letters from the Dept. of Labor (Jan. 5, 2026)

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Recommendations

Practical next steps for your organization

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What Does 'Exempt' Mean?

Exempt from FLSA minimum wage and overtime protections

Key Characteristics

- Exempt from overtime pay and minimum wage requirements
- Hours worked are not 'counted' or 'comped'
- Must meet the applicable minimum salary level
- Must satisfy the duties test for the specific exemption
- Judged by performance output, not hours worked
- Employer must apply the exemption consistently

The 3-Part Test

Salary Basis

Paid a predetermined fixed salary

Salary Level

Meets the minimum threshold (\$684/wk federal)

Duties Test

Performs qualifying exempt duties

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What Does 'Non-Exempt' Mean?

The default classification under the FLSA

🚩 DEFAULT RULE: All employees are presumed NON-EXEMPT unless you can prove otherwise

Non-Exempt Employee Rights

- Subject to FLSA minimum wage requirements
- Entitled to overtime pay (1.5x) for hours over 40/week
- State rules may be more generous (e.g., California's daily OT)
- Employer must track and record all hours worked
- Entitled to meal and rest break protections (state law varies)

Typically Non-Exempt

- Hourly workers
- Blue-collar workers
- Supervisors (often)
- Office Managers (often)
- Executive Assistants
- Inside sales reps

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Exempt or Not Exempt?

Common positions — it might surprise you

✓ Typically EXEMPT

- Financial Consultant (at a firm)
- Accounting Manager
- HR Manager
- Attorney / Doctor / CPA
- Senior Software Engineer
- VP of Sales (with authority)
- Marketing Director

✗ NOT Typically Exempt

- Supervisor (who mostly does the work)
- Office Manager (clerical focus)
- Executive / Administrative Assistant
- Inside Sales Representative
- Lead Technician / Senior Mechanic
- Shift Manager (fast food / retail)
- "Working manager" (50%+ line work)

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In the News: Recent Misclassification Cases

2025 developments — the stakes keep rising

\$3.2M
2025

Massachusetts Employer — Sales Rep Misclassification

DOL secured \$3.2 million for 700+ sales reps improperly classified as exempt administrative employees. Court found their primary duty was producing wholesale sales — not performing management functions. Sound familiar? Same theory as FW Webb.

Pending
2025

Saladworks Franchise — 'Assistant Manager' Class Action

A federal court allowed a collective action to proceed against a Saladworks franchise that classified all 'Assistant Managers' as exempt. Employees alleged they spent most of their time doing the same work as hourly staff. (Melecio v. Neshaminy SW, LLC, E.D. Pa. 2025)

 **SCOTUS**
2025

E.M.D. Sales v. Carrera — U.S. Supreme Court

Jan. 15, 2025: SCOTUS unanimously ruled employers need only prove exemption by 'preponderance of the evidence' — not 'clear and convincing' evidence. A win for employers, but the burden still falls on YOU to defend every exempt classification.

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The Right Mindset: Starting Point

Approach classification with these principles

Job Title ≠ Exempt Status



The title 'Manager' or 'Director' does NOT determine exemption. Duties do.

Non-Exempt is the Default



All employees are presumed non-exempt. The burden is on the EMPLOYER to prove exemption.

Meet BOTH Tests



Salary level AND duties test must both be satisfied. Salary alone is never enough.

Attorney Privilege



Consider conducting your classification audit under the privilege protection of employment counsel.

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The Salary Test

Minimum salary requirements — federal and California

**Federal Minimum
(FLSA)**

\$684/wk

\$35,568/yr

2019 rule reinstated after Nov. 2024 court ruling

**California Minimum
(State Law)**

\$1,352/wk

\$70,304/yr

Effective Jan. 1, 2026 (2x state min. wage × 2,080 hrs)

- Proration is NOT allowed — minimum must be met regardless of actual hours worked
- If using minimum salary, there can be NO unpaid time off (docking voids the exemption)
- California formula: 2 × State Minimum Wage × 2,080 hours = Annual Minimum

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POLLING QUESTION

An employee earns \$40,000/year but manages a team of 5. Are they likely exempt under the Executive Exemption?

A. Yes — they manage people

B. No — they don't meet the federal salary test

C. It depends on their duties

D. Yes, if they have hire/fire authority

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Discretion & Independent Judgment

A critical component of most exemptions

"Customarily and regularly exercises discretion and independent judgment with respect to matters of significance."

✓ Comparing & Evaluating Options

Makes real choices between alternatives — not just following instructions

✓ Independent Choice-Making

Has authority to act — free from immediate direction or supervision

✓ Matters of Significance

Decisions have meaningful impact on the business, its operations, or its customers

✗ NOT Routine Tasks

Applying established procedures, following scripts, or checking boxes does NOT qualify

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The Working Manager Problem

One of the most common misclassification traps

⚠ Usually NON-EXEMPT if...

- Manages only a few employees (or just 1)
- Spends over 50% of time doing the same work as employees supervised
- Shared responsibility rather than directing — 'player-coach'
- Has limited hire/fire authority
- Cannot independently change employee status or pay

➡ Evaluate These Factors

- Relative importance of managerial vs. line duties
- Frequency of discretion and independent judgment
- Relative freedom from supervision
- Comparative compensation vs. subordinates
- Consistency of management duties across pay periods
- Whether management duties can be separated from line work

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The Six White-Collar Exemptions

All require meeting the salary test + a specific duties test



Executive
Exemption 1



Administrative
Exemption 2



Professional
Exemption 3



Outside Sales
Exemption 4



Commissioned Inside Sales
Exemption 5



Computer Professional
Exemption 6

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Executive Exemption

For key personnel who truly run operations

Federal Minimum Salary: \$684/week (\$35,568/yr) | CA: \$1,352/week (\$70,304/yr)

Duties Test Requirements

- Primary duty is MANAGING the enterprise, or a recognized department/subdivision
- Regularly directs the work of 2 or more full-time equivalent employees
- Has authority to hire, fire, or make effective recommendations regarding employment status
- More than 50% of time spent on exempt (management) duties

Exempt Duties Include

- Hiring / training / evaluating employees
- Scheduling and directing work
- Setting pay rates and work standards
- Controlling flow / distribution
- Planning / directing production
- Disciplining employees

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Administrative Exemption

Most common — and most commonly misapplied

Federal Minimum Salary: \$684/week (\$35,568/yr) | CA: \$1,352/week (\$70,304/yr)

Duties Test Requirements

- Primary duty: office or non-manual work directly related to management or general business operations (employer or its customers)
- Exercise of discretion and independent judgment with respect to matters of significance
- Staff (not line) function — supports business operations rather than producing the product/service directly

Qualifying Duties

- Advising management on policy
- Planning / strategy development
- Negotiating contracts or deals
- Representing the company
- Analyzing business data
- Promoting sales (not selling)
- Signing authority for purchasing
- Setting company/personnel policy

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Professional Exemption

Three distinct categories of qualifying professionals

Learned Professional

- Advanced knowledge in a field of science or learning
- Typically requires a 4-year degree or higher
- Work is predominantly intellectual in character
- Examples: Accountant, Engineer, Scientist, Pharmacist

Licensed Professional

- Holds a valid required license or certificate
- Only certain licensed fields qualify
- Law (no salary min), Teaching (no salary min), Medicine (no salary min), Dentistry, Optometry, Architecture, Accounting, Engineering

Artistic Professional

- Work in recognized artistic or creative field
- Requires invention, imagination, originality, or talent
- Cannot be mass-produced or mechanically replicated
- Examples: Actors, musicians, cartoonists, novelists




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Professional Exemption — Watch Out!

These professions are NOT automatically exempt





⚠ High responsibility ≠ automatic exemption. The duties AND salary tests must still be met.

- 
Registered Nurses (RNs)
 Generally NOT exempt if paid hourly, even with clinical responsibilities. Must be paid on a salary basis. The 2026 DOL guidance reinforces: salary basis matters.
- 
Pharmacists
 May qualify as learned professionals but must meet the salary test AND duties test. Paying hourly defeats the exemption.
- 
Physicians Paid Hourly
 Physicians have no salary minimum under the licensed professional exemption — BUT hourly pay alone does not automatically make them non-exempt either. Requires careful analysis.

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Outside Sales Exemption

Must be in the field — virtual doesn't count

- 
Must be 18+ years old
- 
51%+ of time at customer/prospect locations
- 
Virtual selling & work-from-home do NOT count
- 
No minimum salary required

⚠ Time spent on setup, delivery, and return travel varies between federal and state rules. Consult counsel for your state.

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Commissioned Inside Sales — §7(i) Exemption

Overtime exemption only — with strict requirements

⚠ This exemption only covers OVERTIME — not minimum wage. And it is narrowly applied.

- 1 **Retail or Service Establishment:**
Federal: Limited to retail establishments only. California: Limited to IWC Wage Orders 4 & 7.
- 2 **Minimum Pay Rate:**
Regular rate of pay must exceed 1.5× the FEDERAL minimum wage ($\$7.25 \times 1.5 = \$10.875/\text{hr}$). NEW 2026 guidance: state min. wage does NOT apply here — only the federal floor.
- 3 **Commission Must Exceed 50% of Pay:**
More than half of the employee's total compensation for a representative period (at least 1 month) must be from commissions.
- 4 **Commission Paid Each Period:**
Commission must be paid at least every pay period — not held until end of month or quarter.

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Computer Professional Exemption

A higher bar than most employers realize

Federal: \$35,568/yr (\$684/wk) | California: \$115,763.35/yr or \$55.58/hr (2026)

Qualifying Duties (must be primary duty)

- Systems analysis: applying techniques and procedures to identify requirements
- Design, development, documentation, analysis, testing, or modification of computer systems or programs
- Applying systems knowledge to create, test, or document software or hardware for operating systems

Does NOT Qualify

- Hardware repair or manufacturing
- Trainees / entry-level tech support
- Users of end-product software (e.g., data entry using SAP)
- IT help desk (routine troubleshooting only)
- Manufacturing of computer components

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 POLLING QUESTION

Your IT help desk manager earns \$75,000/year and oversees a team of 3. Are they exempt under the Computer Professional exemption?

A. Yes — they're in IT and earn over the threshold

B. No — managing IT doesn't mean designing software

C. Depends on their duties

D. Yes, if they also code sometimes

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The Cost of Misclassification

What happens when you get it wrong

Non-Exempt → Classified as Exempt

- All unpaid overtime owed (up to 2 or 3 years back)
- All missed paid rest break penalties
- Meal break premium penalties (state law)
- Federal and state fines, penalties, and interest
- Liquidated damages = double the back wages (willful violations)
- Attorney fees (often exceed actual damages)
- Class action exposure — one employee becomes hundreds

Exempt → Classified as Non-Exempt

- No FLSA violation — the law does NOT require claiming an exemption
- Employee receives minimum wage and overtime as required
- Employer simply pays more than legally required
- 2026 DOL confirms: employers may classify qualifying employees as non-exempt by choice
- Can be good business strategy (control hours, avoid disputes)
- No penalties or fines — it is always legal to be more generous

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Common FLSA Pitfalls

Traps that catch even well-intentioned employers

Compensatory Time ("Comp Time")

Only public agencies may offer comp time in lieu of overtime. Private employers CANNOT. Always pay OT in money.

Improper Rounding

Rounding must average out over time. Always rounding DOWN is a violation — and is flagged in audits.

Improperly Docking Salaried Exempt Pay

Generally, you CANNOT dock an exempt employee's salary for partial-day absences. A single impermissible deduction can destroy the exemption.

Off-the-Clock Work / Boot-Up Time

Non-exempt employees must be paid for ALL time worked — including boot-up time, pre-shift prep, donning/doffing, and checking work phones.

Miscalculating the Regular Rate

Overtime is based on the REGULAR RATE, which includes base pay, shift differentials, certain bonuses, commissions, and piece rates — NOT just base hourly.

Volunteer Time

Private sector employees cannot 'volunteer' their services to their for-profit employer. That is just unpaid work and it violates the FLSA.

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NEW NEW GUIDANCE

January 5, 2026 DOL Opinion Letters

The Wage and Hour Division issued 6 opinion letters — 4 FLSA and 2 FMLA — providing important guidance for employers.

- FLSA 2026-1: Voluntary Reclassification — Exempt to Non-Exempt
- FLSA 2026-2: Nondiscretionary Bonuses in Overtime Calculations
- FLSA 2026-3: Pre-Shift Roll Call as Compensable Hours
- FLSA 2026-4: Commissioned Sales — Which Minimum Wage Applies?

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DOL Opinion Letter: FLSA2026-1

Voluntary reclassification from exempt to non-exempt

Scenario: A Licensed Clinical Social Worker (LCSW) had been classified as exempt (learned professional). Following an internal restructuring that eliminated her supervisory duties, the employer reclassified her as non-exempt and switched her to hourly pay. She asked the DOL: can my employer do this even though I still qualify for the exemption?

1

Employers MAY classify qualifying employees as non-exempt

The FLSA only PROHIBITS misclassifying non-exempt employees as exempt. There is no prohibition on an employer voluntarily treating an exempt employee as non-exempt.

2

Removing supervisory duties alone doesn't defeat the exemption

If the employee's primary duties still require advanced knowledge (degree + professional license), they may still qualify as a learned professional.

3

But changing to hourly pay DOES defeat the exemption

Salary basis is one of the three required tests. Switching to hourly pay eliminates the salary basis requirement and destroys the exemption — regardless of duties.

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DOL Opinion Letter: FLSA2026-2

Nondiscretionary bonuses must be included in overtime calculations

Scenario: A waste management company's bonus plan paid drivers based on punctuality, attendance, safety tasks, driving safety, compliance, attire, and performance. Bonuses were formula-driven — once criteria were met, the employee automatically earned the bonus. Could these be excluded from overtime calculations?

DOL Answer: NO — these bonuses MUST be included in the regular rate of pay.

✓ Discretionary — May Exclude

- Bonus must not be promised or expected in advance
- Employer has sole discretion whether to award AND the amount
- Decided close to the time of payment

✗ Nondiscretionary — Must Include

- Promised or established by a plan in advance
- Tied to a formula or predetermined criteria
- Employee knows what they need to do to earn it

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DOL Opinion Letters: FLSA2026-3 & FLSA2026-4

Pre-shift time and commissioned sales

FLSA2026-3 — Pre-Shift Roll Call = Compensable Time

A union CBA required a mandatory 15-minute pre-shift 'roll call' for emergency dispatchers. The employer asked whether this time could be excluded from overtime calculations. DOL Answer: NO — when roll call is required by contract, it is compensable hours worked and MUST count toward the 40-hour overtime threshold. However, the DOL noted that under FLSA Sections 7(b)(1) or 7(b)(2), a properly structured CBA could potentially exempt the employer from overtime on hours between 40 and 56/week.

FLSA2026-4 — Commissioned Sales: Federal Minimum Wage Applies, Not State

For the Section 7(i) commissioned sales exemption, the DOL confirmed: the minimum pay test ($\$10.875/\text{hr} = \7.25×1.5) is based on the FEDERAL minimum wage — not the state minimum wage. Employers in high-minimum-wage states (like California at $\$16.90/\text{hr}$) do NOT need to use the state minimum wage for the 7(i) pay test. Note: employers still must separately comply with state minimum wage laws — the 7(i) test is just the gateway to the overtime exemption.

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POLLING QUESTION

Your company gives all employees a quarterly 'performance bonus' if they meet their goals. Do you need to include this in overtime calculations?

A. No — it's called a 'bonus' so it's discretionary

B. Yes — performance criteria make it nondiscretionary

C. Only if the bonus exceeds 10% of their pay

D. No — we only pay it quarterly, not weekly

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Impermissible vs. Permissible Salary Deductions

Docking can destroy an exemption

✗ NEVER Do These

- Dock pay for partial-day absences due to personal reasons
- Reduce salary because business is slow (no work available)
- Deduct for absences caused by employer (e.g., office closed early)
- Penalize partial-day absence for sickness if no paid sick leave plan exists

✓ These ARE Permissible

- Full-day deductions for personal leave (no accrued time)
- Full-day deductions for sickness under a bona fide sick pay plan
- Suspensions of 1+ week for workplace conduct (written policy required)
- FMLA leave (unpaid)
- First or last week of employment (partial week ok)
- Jury duty or military leave pay offsets

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Practical Recommendations

Steps to protect your organization



Conduct a Classification Audit

Review ALL exempt positions against salary and duties tests. Don't rely on old classifications — roles evolve.



When in Doubt — Non-Exempt

Be conservative. The downside of non-exempt (paying OT) is always smaller than the risk of willful exempt misclassification.



Maintain Accurate Job Descriptions

Duties tests require documentation. Job descriptions must reflect ACTUAL primary duties — not aspirational ones.



Involve Legal Counsel

Especially for borderline positions. An attorney's review can also protect the audit under attorney-client privilege.



Train Your Managers

Managers who make promises about comp time, approve 'volunteer' work, or dock exempt pay create liability.



Review Your Bonus Plans

Per FLSA2026-2: check whether performance bonuses are nondiscretionary. If so, ensure overtime calculations include them.

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 POLLING QUESTION

Which of these is the **SAFEST** approach when you're unsure whether a position qualifies as exempt?

A. Classify as exempt and document your reasoning

B. Classify as non-exempt and pay overtime

C. Pay a salary but don't designate either way

D. Ask the employee what they prefer

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Key Takeaways

What to remember from today's session

- Salaried ≠ Exempt. Three tests must all be met: salary basis, salary level, AND duties.
- Non-exempt is the default. You bear the burden of proving exemption — not the other way around.
- Job title is irrelevant. What matters is what the employee actually does, primarily.
- Misclassifying non-exempt as exempt is costly. Three years of back pay + liquidated damages + attorney fees.
- You CAN voluntarily classify exempt employees as non-exempt (FLSA2026-1). It's always safer to be generous.
- Formula-based performance bonuses are nondiscretionary (FLSA2026-2). Include them in overtime calculations.
- Pre-shift required activities are compensable (FLSA2026-3). Track them and count them toward overtime.
- The federal minimum wage governs the §7(i) commission exemption pay test — not state minimum wage (FLSA2026-4).



When in doubt: non-exempt, document everything, and involve employment counsel.

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Resources & Further Information

Where to go for more guidance

1

DOL Wage and Hour Division

dol.gov/agencies/whd | Official source for opinion letters, fact sheets, and FLSA guidance

2

DOL Opinion Letters Page

dol.gov/agencies/whd/opinion-letters | All published opinion letters including the January 5, 2026 guidance

3

FLSA Overtime Exemption FAQs

dol.gov/agencies/whd/overtime | Plain-language explanations of the white-collar exemptions

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CA DLSE (Labor Commissioner)

dir.ca.gov/dlse | California-specific wage and hour guidance, IWC Wage Orders

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Questions & Discussion

Thank you for joining today's session!

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