

FLSA Compliance: Exempt vs. Non-Exempt Classification Audit

****FEDERAL****

State exemption tests may vary. When state laws differ, employers must follow the rules that most favor the employee. Please call **CEDR HR Solutions at 866-414-6056** if you have a question as to your state rules. Employers should periodically review and audit your employee classifications of exempt or non-exempt, especially after a reorganization. If employees meet the job duties and salary criteria of an exemption category, the employer is entitled to treat these employees as “exempt” from the requirement to pay overtime, record hours worked, and pay minimum wage.

- **Exempt Employees are NOT subject to Overtime, Minimum Wage or Breaks/Rest Periods.**
- **Non-Exempt employees ARE subject to Overtime, Minimum Wage and Breaks/Rest Periods.**

Employees may be classified as Exempt if they meet ALL of the following criteria:

- 1. Salary level test: Minimum of \$455/week or \$23,660/year **through November 2016.****

Important Update: The DOL has raised the salary level to \$913/week or \$47,476/year, effective as of December 1, 2016, with *automatic* increases every three years.

- 2. Salary basis test: Fixed salary per pay period**

(But can pay fee or commission basis for Professional Exempt Employees.)

- 3. Duties test: Must meet all of the criteria in one of the categories below (Administrative, Executive, or Professional).**

Be sure to look at the job duties, not just the job title to see if exempt status applies.

I. ADMINISTRATIVE EXEMPTION (Must meet all: A + B + Salary Tests)

A. The employee's primary duty is office or non-manual work that is directly related to management or general business operations of the employer or of the employer's customers; AND

Note on management or general business: Though this sounds like an easy catchall for your admin team, it is actually intended to cover only those whose activities directly relate to the

administration of high-level business processes, as distinguished from production-related work. It would include big picture strategic planning related to the direction of the company, its finances, marketing strategies, large scale budgeting, compliance, quality control, auditing, etc. Also note that primary duty means **more than 50%!**

B. Customarily and regularly exercises discretion and independent judgment with respect to matters of significance (free from immediate direction or supervision, though not necessarily without review).

Note on exercising discretion: The exercise of discretion and independent judgment must relate to the operations and policies of the company, not just in performing the duties of their position. For example, a scheduler might use discretion in determining which employees work on a day, and when patients are to be scheduled, but this is considered “production work” rather than “administrative.” Rather, discretion must pertain to issues of *significant weight* related to the running of the company on a regular basis, by someone who has the authority to make independent choices. It should not be confused with the use of skill in applying techniques, procedures or specific standards.

Examples of employees who may fit into the Administrative Exemption: COO’s, Financial Officers, human resource directors, tax specialists, supply chain managers, marketing directors, and those on the executive team.

II. **EXECUTIVE EXEMPTION (Must meet all: A + B + C + Salary tests)**

A. The employee’s primary duty consists of the management of the enterprise in which he or she is employed or of a department or subdivision of the business.

Note on primary duty: Must generally spend more than 50% of his or her time actively engaged in managerial duties.

Examples of “Managerial Duties” that count toward Primary Duty of Management:

- Interviewing, selecting, and training employees;
- Setting rates of pay and hours of work and planning work schedule;
- Maintaining production or sales records (beyond the merely clerical);
- Appraising productivity, handling employee grievances or complaints, or disciplining employees;
- Determining work techniques;
- Planning the work;
- Apportioning work among employees;
- Determining the types of equipment to be used in performing work, or materials needed;
- Planning budgets for work;
- Monitoring work for legal or regulatory compliance;
- And providing for safety and security of the workplace.

B. The employee customarily and regularly directs the work of two or more other employees.

Note on number of employees: It should actually be more than two. According to the Department of Labor, a manager supervising as few as two employees rarely spends as much as 50% of their time primarily engaged in managerial duties.

C. The employee has the authority to hire or fire other employees or provide suggestions and recommendations that will be given particular weight in the hiring, firing, advancement, or promotion.

Note on authority to hire and fire: it should be part of the employee's job duties to make such suggestions and recommendations on a regular basis.

Examples of employees who may fit into the Executive Exemption: Team leaders, office managers, and clinic administrators.

III. **PROFESSIONAL EXEMPTION (Must meet: A + B only)**

Note: Professional exempt employees may be paid on a salary OR a fee/commission basis. Medical practitioners and attorneys also do not have to meet the salary level test. That means a practice can pay an associate doctor who works part time on a commission basis, even if it is lower than \$913/week. They would still be exempt.

A. The employee's primary duty is work that requires knowledge of an advanced type in a field of science or learning.

Note on work requiring knowledge of an advanced type: This includes work predominantly intellectual in character, involving evaluating and deciding on possible courses of conduct based on varying facts and circumstances. It does not include routine mental, manual, mechanical, or physical work. Traditionally, this exemption includes professional fields of medicine, law, accounting, engineering, architecture, etc.

B. The field is one that is customarily acquired by prolonged course of specialized intellectual instruction.

Note: Typically four years is NOT prolonged enough.

Special note about hygienists: According to the US DOL, dental hygienists who have successfully completed four academic years pre-professional or professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association **may** be exempt (i.e.,

not guaranteed). However, the DOL has repeatedly advised that hygienists **do not** meet the requisite level of education or discretion to be exempt under the professional exemption. They should only be treated as exempt if they meet the criteria for a different category.

Examples of employees who may fit into the Professional Exemption: Dentists, doctors, associate doctors, lawyers, CPA's, physician assistants or nurse practitioners.

There are a few other exemption categories that may apply, but less often in a medical/dental setting. These each have different criteria that are not addressed here. Contact CEDR with questions about any of these categories:

1. Highly paid Computer Software Employees.
2. Professionals in the creative or artistic Fields (e.g. Videographer, Graphic Designer)
3. Academic Instructors/Teachers
4. Outside Sales Associates (commissioned and work primarily in the field)
5. Highly compensated employees (currently \$100,000/year, but increasing to \$134,004 as of December 1, 2016, and increasing every 3 years thereafter).

Questions? Concerns? We're here to help!

Call CEDR Solutions at 866-414-6056 with ANY questions you may have about exempt vs. non-exempt status, ANY time!

