

SHOULD THAT POSITION BE EXEMPT OR NON-EXEMPT?

Background

Among other things, the federal **Fair Labor Standards Act (FLSA)** requires that employers assess and categorize job positions per position duties and compensation. The Department of Labor (DOL), the federal administrative agency that administers the FLSA, has provided guidance to employers for purposes of this assessment, as have numerous experts in the industry (see the section, below, entitled Assessment Tools & Resources).

Ultimately, proper assessment results in an employer's ability to determine whether a position MAY BE categorized as "exempt" from minimum wage and overtime pay requirements, OR whether a position MUST be categorized as "non-exempt" from minimum wage and overtime pay requirements.

Please note that an employer has little to no discretion when determining whether a position is "exempt" under the FLSA; the tests are what they are, so choosing exemption to avoid paying an employee minimum wage or overtime is simply not an option.¹ As stated on the DOL's various Fact Sheets on the FLSA: *"Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations."* Finally, it is the employer that ALWAYS makes the "exempt" / "non-exempt" determination per FLSA requirements and guidance, not the worker filling that job.

Assess Positions Prudently

To reiterate, the FLSA provides an exemption from minimum hourly wage and overtime pay requirements for job positions that meet certain duty tests and compensation tests, thereby permitting a job classification of "exempt". It is prudent to take a conservative approach in determining whether to classify a position as exempt:

- Err on the side of categorizing a position as "non-exempt". Employers bear the burden of proving that a position is exempt.
- Limit legal exposure. More violations occur under the FLSA than any other employment law and mistakes are costly (e.g., court awards of back wages , liquidated damages, penalties, attorney's fees and court costs).

¹ As a critical aside, once position classification has been determined, PLEASE ALSO RECALL that **Colorado's labor laws** are currently more favorable than the federal law when it comes to the minimum hourly wage amount and overtime requirements. If you have questions on these state requirements, review your COLORADO MINIMUM WAGE ORDER 35 POSTER that should already be posted in your work place. This poster provides a succinct summary of Colorado minimum wage and overtime requirements. As well, you can always contact the Archdiocese of Denver Management Corporation's Office of Human Resources for further guidance.

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A Summary of the Assessment Process

- **Duties Test**
 - Engage in an in-depth review the job duties of each position independently.
 - The **Assessment Tools & Resources** section (please see below) can and should be used as part of this review process.
- **Compensation Test** (the salary or fee basis requirement)
 - Ensure that all jobs classified as exempt meet the required salary level threshold under the FLSA. This is a very straightforward test, and is spelled out in DOL Fact Sheet 17A, and related DOL Fact Sheet 17G. As a general matter, however, the compensation required for exempt status must be as follows:
 - Federal Threshold: Currently \$23,660 in annual compensation.²

This period of Paycom implementation provides an opportune time to re-evaluate all positions for compliance with the FLSA. Corrections to position status may need to be made.

Please contact the Archdiocese of Denver Management Corporation's Office of Human Resources if you have questions or need help in determining a position's classification.

Assessment Tools & Resources

There are multiple tools for FLSA position assessment. For purposes of this guidance, an invaluable checklist entitled **FLSA Checklist: Exempt versus non-exempt status** (developed by HR Specialist and used with its permission) is available through either Plansource (the Lockton portal), or through the AODMC's Office of Human Resources.

Not unsurprisingly, the DOL provides extensive guidance on this topic through its **DOL Fact Sheet 17A** found at web address: https://www.dol.gov/whd/overtime/fs17a_overview.htm. The tests in this Fact Sheet 17A must be met before a determination of exemption can be supported. The **FLSA Checklist: Exempt versus non-exempt status**, referenced in the previous paragraph, was clearly developed based on Fact Sheet 17A.

As an elaboration on Fact Sheet 17A, you can also reference the following **Duties Test Questions** for the various exemption position categories to help you assess positions:

² Fact Sheet 17A and 17G break this number down to weekly amounts and in some cases, an hourly amount. Additionally, note that you make recall legislation passed in 2016 to raise the compensation test requirement to \$47,476 to be effective 12/1/16. However, on 11/22/16, a temporary injunction was issued that prohibited the DOL from implementing and enforcing the new regulation. That injunction is still in effect.

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Duties Test Questions

Administrative Exemption

1. Does the employee exercise discretion and independent judgment (meaning, is the person filling the position required to compare or evaluate possible courses of conduct/action and make decisions after considering the various possibilities) with respect to matters of significance to the employer? (Note, "matters of significance" does not necessarily mean the employer will risk financial loss as a result.) If yes, list the duties which require discretion and independent judgment, describe why they concern matters of significance, and provide an approximate percentage of time spent on each listed duty.
2. Does the employee spend less than 50% of his/her time on clerical or secretarial duties (e.g. scheduling, answering phone calls, running errands or responding to directives that do not require independent judgment or skill)?
3. Does the employee spend less than 50% of his/her time selling financial products?
4. Does the employee have authority to commit the employer or negotiate on behalf of the employer in matters that have significant financial impact? If yes, explain.
5. Does the employee have authority to waive or deviate from established policies and procedures without prior approval (even if those decisions may later be reviewed or overturned)? If yes, explain.
6. Does the employee perform work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business? If yes, explain.
7. Does the employee plan long-term or short-term business objectives? If yes, explain.
8. Does the employee investigate and/or resolve significant matters on behalf of management? If yes, explain.
9. Does the employee have authority to formulate, affect, interpret, or implement management policies or operating practices? If yes, explain.

Computer Exemption

1. Does the employee work as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer field? If yes, explain.
2. Does the employee's primary/main duty consist of one of the following? If yes, explain.
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.
3. Is the employee primarily responsible for technical support, computer operations, or hardware repair/maintenance? If yes, explain.

Executive Exemption

1. Is the employee's primary/main duty management of a recognized department/area of the business? If yes, specify the department/area managed.
2. Does the employee spend less than 50% of his/her time performing the same tasks as hourly workers?
3. Does the employee regularly direct the work of at least two or more other full-time employees or their equivalent? (Note, employees cannot count toward more than one supervisor; e.g. a department with 5 full-time hourly employees could have two exempt supervisors at most. Also, those directed must be employees; contractors/subcontractors do not count.) If yes, list the positions/employees supervised.

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4. Does the employee have the authority to hire/fire? Or, it is part of their job to make such recommendations and those recommendations are made, requested, and relied upon? If yes, explain.

Professional Exemption (Learned)

1. Does the employee primarily perform work that requires advanced knowledge and is predominantly intellectual in character? Does the employee consistently exercise discretion and independent judgement?
2. Is the advanced knowledge in a field of science or learning?
3. Was the advanced knowledge acquired by a prolonged course of specialized intellectual instruction?

Professional Exemption (Creative)

1. Does the employee primarily perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine, mental, manual, mechanical or physical work?