

Understanding Administrative and Executive Exemptions under the Fair Labor Standards Act

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What does it mean to be “exempt”

- The Fair Labor Standards Act (“FLSA”) requires that most employees be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.
- However, the FLSA also provides an exemption from both minimum wage and overtime pay for employees employed as bona fide “executive” or “administrative” employees.

Significance of categorizing employees as “exempt” or “non-exempt”

- If a non-exempt employee is improperly categorized as exempt and does not receive overtime pay and/or minimum wage when entitled:
- Employee can sue employer for the unpaid wages, an additional equal amount as liquidated damages and their attorneys’ fees.
- U.S. Department of Labor can seek payment of additional civil money penalties.
- DOL can also seek criminal penalties, including fines and imprisonment, for willful violations of the law.

When does the issue typically arise?

- DOL Audits
- Disgruntled current employee
- Former employee who is looking to sue the Company for something
- For large employee groups, a class action claim is a possibility

Some Practical Realities

- An employee cannot waive their right to be treated as a non-exempt employee.
- Often the employee(s) in question are biased, meaning that they may have a grudge against the employer and, regardless, they stand to gain financially if it is determined that they were misclassified.
- The “benefit of the doubt” goes to the employee.

Qualifying as “exempt”

- Employees who are paid on a salaried basis are not automatically exempt.

Qualifying as “exempt,” continued

- To qualify for exemption, employees generally must meet certain tests regarding their job duties

And

- Be paid “on a salary basis” at not less than \$684 per week (under federal law).
- \$845 per week (\$43,951 annually) in Maine.

Exemptions and “being paid on a salary basis”

- Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period.
- The amount cannot be reduced because of variations in the quality or quantity of the employee’s work.
- Generally, an exempt employee must receive their full salary for any week in which they perform any work, regardless of the number of days or hours worked, however . . .
- Exempt employees do not need to be paid for any workweek in which they perform no work.

And . . .

When does an exempt employee not have to receive their full salary?

Employer can make deductions if the exempt employee:

- Is absent from work for one or more full days for personal reasons other than sickness or disability;
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- To offset amounts employees receive as jury or witness fees, or for military pay;
- For penalties imposed in good faith for infractions of safety rules of major significance; and/or
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

Exemptions and “being paid on a salary basis,” continued

- If the employer makes deductions from an employee’s predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.”
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Effect of Improper Salary Deductions

- The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary.

Factors to consider when determining whether an employer has an actual practice of making improper deductions include:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting deductions;
- The time period during which the employer made improper deductions;
- The number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

Effect of Improper Salary Deductions, continued

- If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.
- Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

“Safe Harbor” Provisions and Improper Salary Deductions

If an employer:

- Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
- Reimburses employees for any improper deductions; and
- Makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Executive Employee Exemption

To qualify, all the following tests must be met:

- The employee must be compensated on a salary basis;
- The employee's **primary duty** must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; **and**
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Executive Employee Exemption—Primary Duty of Management

- "Primary duty" means the principal, main, major or most important duty that the employee performs, based on all the facts, with the major emphasis on the character of the employee's job as a whole.

Generally, "management" includes, but is not limited to, activities such as:

- Interviewing, selecting, and training of employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;

Executive Employee Exemption—Primary Duty of Management, continued

Generally, "management" includes, but is not limited to, activities like:

- Handling employee complaints and grievances;
- Disciplining employees;
- Planning the work;
- Determining the techniques to be used;
- Apportioning the work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;
- Providing for the safety and security of the employees or the property;
- Planning and controlling the budget; and monitoring or implementing legal compliance measures.

Executive Employee Exemption—“Managing a Customarily Recognized Department or Subdivision”

- The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Executive Employee Exemption—Customarily and Regularly Directing the Work of Two or More Other FTEs

- “[C]ustomarily and regularly” means greater than occasionally but less than constantly; it includes work normally done every workweek, but not isolated or one-time tasks.
- “[T]wo or more other employees” means two full-time employees or their equivalent.
- One full-time and two half-time employees are equivalent to two full-time employees.
- The supervision can be distributed among two, three or more employees, but each employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent.
- Example: a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Executive Employee Exemption—Employee's Suggestions as to Hiring, Firing, etc. are Given “Particular Weight”

- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given “particular weight.”

Factors to be considered include:

- Whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon.
- Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs.
- Does not include occasional suggestions.
- An employee's recommendations may still be deemed to have “particular weight” even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Case Study: Shift Supervisor

- The EE is a shift supervisor with 6 employees on the shift
- As a shift supervisor the EE is to assign tasks and monitor performance and behavior
- At various times during the shift the EE works along side of the other employees performing many of the same tasks on the production line
- Does the EE qualify for the Executive Exemption?

Business Owners' Exemption

- An employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.
- The salary level and salary basis requirements do not apply.

Administrative Employee Exemption

To qualify, all the following tests must be met:

- The employee must be compensated on a salary basis;
- The employee's **primary duty** must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Administrative Employee Exemption—Primary Duty

- "Primary duty" means the principal, main, major or most important duty that the employee performs.
- Determination of an employee's primary duty must be based on all the facts in a particular situation, with the major emphasis on the character of the employee's job as a whole.

Administrative Employee Exemption—Directly Related to Management or General Business Operations

- Employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment.
- Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Administrative Employee Exemption—Directly Related to Management or General Business Operations of Employer's Customers

- Exemption can apply if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers.
- Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

Administrative Employee Exemption—“Matters of Significance”

- Refers to the level of importance or consequence of the work performed.
- An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.
- Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Case Study—Business Development Manager

- Job Description—Generates leads, determines needs of potential customers, designs sales approach, interfaces with customers and dealerships
- Questions:
 - Does the business development manager (BDM) have the authority to make an independent choice, free from immediate direction or supervision, even though their choices may still be subject to review, revision, or reversal?
 - Does the BDM's work involve more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources, and/or is the BDM's work mechanical, repetitive, recurrent or routine in nature?
 - Does the BDM's work involve "matters of significance" which refers to the level of importance or consequence of the work performed?

Brown v. Nexus Bus. Solutions, LLC, 2022 U.S. App. LEXIS 8777 (11th Cir. Apr. 1, 2022).

- 11th Circuit found that the BDMS were properly classified as exempt.
- Court found that the BDMS had a hand in choosing which leads to develop, performed customized research before meeting with selected leads, and delivered presentations that necessarily required some amount of customization.
- Considered a matter of significance for the employer's business, because the business depended on bringing in new customers for its financial success.

Major Take Aways

- “Primary Duty” is an important concept
- The Administrative Exemption is not a convenient “catch-all”
- Watch out for the “slippery slope” when duties are added or taken away
- What the EE says will be given a lot of weight and therefore if the applicability of the exemption is not obvious, then to prevail in a dispute you will need:
 - A well-crafted job description
 - Specific examples of why the exemption applies
 - And good documentation to support those specific examples

QUESTIONS?

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