

Workers' Compensation Issues/independent contractors and misclassification

Most jobs are governed by the FLSA. Some are not. Some jobs are excluded from FLSA coverage by statute. Other jobs, while governed by the FLSA, are considered "exempt" from the FLSA overtime rules.

Exclusions from FLSA coverage.

Particular jobs may be completely excluded from coverage under the FLSA overtime rules. There are two general types of complete exclusion. Some jobs are specifically excluded in the statute itself. For example, employees of movie theaters and many agricultural workers are not governed by the FLSA overtime rules. Another type of exclusion is for jobs which are governed by some other specific federal labor law. As a general rule, if a job is governed by some other federal labor law, the FLSA does not apply. For example, most railroad workers are governed by the Railway Labor Act, and many truck drivers are governed by the Motor Carriers Act, and not the FLSA. Many of FLSA exclusions are found in §213 of the FLSA.

Exempt or Nonexempt.

Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay. Exempt employees are not. Most employees covered by the FLSA are nonexempt. Some are not.

Some jobs are classified as exempt by definition. For example, "outside sales" employees are exempt ("inside sales" employees are nonexempt). For most employees, however, whether they are exempt or nonexempt depends on (a) how much they are paid, (b) how they are paid, and (c) what kind of work they do.

With few exceptions, to be exempt an employee must (a) be paid at least \$23,600 per year (\$455 per week), and (b) be paid on a salary basis, and also (c) perform exempt job duties. These requirements are outlined in the FLSA Regulations (promulgated by the U.S. Department of Labor). Most employees must meet all three "tests" to be exempt.

Salary level test.

Employees who are paid less than \$23,600 per year (\$455 per week) are nonexempt. (Employees who earn more than \$100,000 per year are almost certainly exempt.)

Salary basis test.

Generally, an employee is paid on a salary basis if s/he has a "guaranteed minimum" amount of money s/he can count on receiving for any work week in which s/he performs "any" work. This amount need not be the entire compensation received, but there must be some amount of pay the employee can count on receiving in any work week in which s/he performs any work. Some "rules of thumb" indicating that an employee is paid on a salary basis include whether an employee's base pay is computed from an annual figure divided by the number of paydays in a year, or whether an employee's actual pay is lower in work periods when s/he works fewer than the normal number of hours. However, whether an employee is paid on a salary basis is a "fact," and thus specific evaluation of particular circumstances is necessary. Whether an employee is paid on a salary basis is not affected by whether pay is expressed in hourly terms (as this is a fairly common requirement of many payroll computer programs), but whether the employee in fact has a "guaranteed minimum" amount of pay s/he can count on.

The FLSA salary basis test applies only to reductions in monetary amounts. Requiring an employee to charge absences from work to leave accruals is not a reduction in "pay," because the monetary amount of the employee's paycheck remains the same. Similarly, paying an employee more than the guaranteed salary amount is not normally inconsistent with salary basis status, because this does not result in any reduction in the base pay.

With some exceptions, the base pay of a salary basis employee may not be reduced based on the "quality or quantity" of work performed (provided that the employee does "some" work in the work period). This usually means that the base pay of a salary basis employee may not be reduced if s/he performs less work than normal, if the reason for that is determined by the employer. For example, a salary basis pay employee's base pay may not be reduced if there is "no work" to be performed (such as for a plant closing or slow period), and a salary basis employee's base pay may not be reduced for partial day absences. However, employers may "dock" the base pay of salary basis employees in full day increments, for disciplinary suspensions, or for personal leave, or for sickness under a bona fide sick leave plan (as for example if the employee has run out of accrued sick leave).

Thus, there can be "permissible" and "impermissible" reductions in salary basis pay. Permissible reductions have no effect on the employee's exempt status. Impermissible reductions may, in that the general rule is that an employee who is subjected to impermissible reductions in salary is no longer paid on a salary basis, and is therefore nonexempt. However, employers have several avenues by which they can "cure" impermissible reductions in salary basis pay, and as a practical matter these make it unlikely that an otherwise exempt employee would become nonexempt because of salary basis pay problems. The salary

basis pay requirement for exempt status does not apply to some jobs (for example, doctors, lawyers and schoolteachers are exempt even if the employees are paid hourly).

The duties tests.

An employee who meets the salary level tests and also the salary basis tests is exempt only if s/he also performs exempt job duties. These FLSA exemptions are limited to employees who perform relatively high-level work. Whether the duties of a particular job qualify as exempt depends on what they are. Job titles or position descriptions are of limited usefulness in this determination. (A secretary is still a secretary even if s/he is called an "administrative assistant," and the chief executive officer is still the CEO even if s/he is called a janitor.) It is the actual job tasks that must be evaluated, along with how the particular job tasks "fit" into the employer's overall operations.

There are three typical categories of exempt job duties, called "executive," "professional," and "administrative."

Exempt executive job duties.

Job duties are exempt executive job duties if the employee

1. regularly supervises two or more other employees, and also
2. has management as the primary duty of the position, and also,
3. has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

Supervision means what it implies. The supervision must be a regular part of the employee's job, and must be of other employees. Supervision of non-employees does not meet the standard. The "two employees" requirement may be met by supervising two full-time employees or the equivalent number of part-time employees. (Two half-time employees equal one full-time employee.)

"Mere supervision" is not sufficient. In addition, the supervisory employee must have "management" as the "primary duty" of the job. The FLSA Regulations contain a list of typical management duties. These include (in addition to supervision):

- interviewing, selecting, and training employees;
- setting rates of pay and hours of work;
- 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;
- providing for safety and security of the workplace.

Determining whether an employee has management as the primary duty of the position requires case-by-case evaluation. A "rule of thumb" is to determine if the employee is "in charge" of a department or subdivision of the enterprise (such as a shift). One handy clue might be to ask who a telephone inquiry would be directed to if the called asked for "the boss." Typically, only one employee is "in charge" at any particular time. Thus, for example, if a "sergeant" and a "lieutenant" are each at work at the same time (in the same unit or subunit of the organization), only the lieutenant is "in charge" during that time.

An employee may qualify as performing executive job duties even if s/he performs a variety of "regular" job duties as well. For example, the night manager at a fast food restaurant may in reality spend most of the shift preparing food and serving customers. S/he is, however, still "the boss" even when not actually engaged in "active" bossing duties. In the event that some "executive" decisions are required, s/he is there to make them, and this is sufficient.

The final requirement for the executive exemption is that the employee have genuine input into personnel matters. This does not require that the employee be the final decision maker on such matters, but rather that the employee's input is given "particular weight." Usually, it will mean that making personnel recommendations is part of the employee's normal job duties, that the employee makes these kinds of recommendations frequently enough to be a "real" part of the job, and that higher management takes the employee's personnel suggestions or recommendations seriously.

Exempt professional job duties.

The job duties of the traditional "learned professions" are exempt. These include lawyers, doctors, dentists, teachers, architects, clergy. Also included are registered nurses (but not LPNs), accountants (but not bookkeepers), engineers (who have engineering degrees or the equivalent and perform work of the sort usually performed by licensed professional engineers), actuaries, scientists (but not technicians), pharmacists, and other employees who perform work requiring "advanced knowledge" similar to that historically associated with the traditional learned professions.

Professionally exempt work means work which is predominantly intellectual, requires specialized education, and involves the exercise of discretion and judgment. Professionally exempt workers must have education beyond high school, and usually beyond college, in fields that are distinguished from (more "academic" than) the mechanical arts or skilled trades. Advanced degrees are the most common measure of this, but are not absolutely necessary if an employee has attained a similar level of advanced education through other means (and perform essentially the same kind of work as similar employees who do have advanced degrees).

Some employees may also perform "creative professional" job duties which are exempt. This classification applies to jobs such as actors, musicians, composers, writers, cartoonists, and some journalists. It is meant to cover employees in these kinds of jobs whose work requires invention, imagination, originality or talent; who contribute a unique interpretation or analysis.

Identifying most professionally exempt employees is usually pretty straightforward and uncontroversial, but this is not always the case. Whether a journalist is professionally exempt, for example, or a commercial artist, will likely require careful analysis of just what the employee actually does.

Exempt Administrative job duties.

The most elusive and imprecise of the definitions of exempt job duties is for exempt "administrative" job duties.

The Regulatory definition provides that exempt administrative job duties are

- (a) office or nonmanual work, which is
- (b) directly related to management or general business operations of the employer or the employer's customers, and
- (c) a primary component of which involves the exercise of independent judgment and discretion about
- (d) matters of significance.

The administrative exemption is designed for relatively high-level employees whose main job is to "keep the business running." A useful rule of thumb is to distinguish administrative employees from "operational" or "production" employees. Employees who make what the business sells are not administrative employees. Administrative employees provide "support" to the operational or production employees. They are "staff" rather than "line" employees. Examples of administrative functions include labor relations and personnel (human resources employees), payroll and finance (including budgeting and benefits management), records maintenance, accounting and tax, marketing and advertising (as differentiated from direct sales), quality control, public relations (including shareholder or investment relations, and

government relations), legal and regulatory compliance, and some computer-related jobs (such as network, internet and database administration). (See [Computer employees.](#))

To be exempt under the administrative exemption, the "staff" or "support" work must be office or nonmanual, and must be for matters of significance. Clerical employees perform office or nonmanual support work but are not administratively exempt. Nor is administrative work exempt just because it is financially important, in the sense that the employer would experience financial losses if the employee fails to perform competently. Administratively exempt work typically involves the exercise of discretion and judgment, with the authority to make independent decisions on matters which affect the business as a whole or a significant part of it.

Questions to ask might include whether the employee has the authority to formulate or interpret company policies; how major the employee's assignments are in relation to the overall business operations of the enterprise (buying paper clips versus buying a fleet of delivery vehicles, for example); whether the employee has the authority to commit the employer in matters which have significant financial impact; whether the employee has the authority to deviate from company policy without prior approval.

An example of administratively exempt work could be the buyer for a department store. S/he performs office or nonmanual work and is not engaged in production or sales. The job involves work which is necessary to the overall operation of the store -- selecting merchandise to be ordered as inventory. It is important work, since having the right inventory (and the right amount of inventory) is crucial to the overall well-being of the store's business. It involves the exercise of a good deal of important judgment and discretion, since it is up to the buyer to select items which will sell in sufficient quantity and at sufficient margins to be profitable. Other examples of administratively exempt employees might be planners and true administrative assistants (as differentiated from secretaries with fancy titles). Bookkeepers, "gal Fridays," and most employees who operate machines are not administratively exempt.

Merely clerical work may be administrative, but it is not exempt. Most secretaries, for example, may accurately be said to be performing administrative work, but their jobs are not usually exempt. Similarly, filing, filling out forms and preparing routine reports, answering telephones, making travel arrangements, working on customer "help desks," and similar jobs are not likely to be high-level enough to be administratively exempt. Many clerical workers do in fact exercise some discretion and judgment in their jobs. However, to "count" the exercise of judgment and discretion must be about matters of considerable importance to the operation of the enterprise as a whole.

Routinely ordering supplies (and even selecting which vendor to buy supplies from) is not likely to be considered high- enough to qualify the employee for administratively exempt status. There is no "bright line." Some secretaries may indeed be high-level, administratively exempt employees (for example, the secretary to the CEO who really does "run his life"), while some employees with fancy titles (e.g., "administrative assistant") may really be performing nonexempt clerical duties.

Rights of exempt employees.

An exempt employee has virtually "no rights at all" under the FLSA overtime rules. About all an exempt employee is entitled to under the FLSA is to receive the full amount of the base salary in any work period during which s/he performs any work (less any permissible deductions). Nothing in the FLSA prohibits an employer from requiring exempt employees to "punch a clock," or work a particular schedule, or "make up" time lost due to absences. Nor does the FLSA limit the amount of work time an employer may require or expect from any employee, on any schedule. ("Mandatory overtime" is not restricted by the FLSA.)

Keep in mind that this discussion is limited to rights under the FLSA. Exempt employees may have rights under other laws or by way of employment policies or contracts.

Rights of nonexempt employees.

Nonexempt employees are entitled under the FLSA to time and one-half their "regular rate" of pay for each hour they actually work over the applicable FLSA overtime threshold in the applicable FLSA work period. (See, "[FLSA Overtime](#)")

Anne M. Noonan
Commissioner
Vermont Department of Labor