



Exemptions from Overtime

Who, What, Why . . .

Who does it apply to: Overtime is governed by the Fair Labor Standards Act. Without a long discussion about the .1% of employers who might not be covered, the simple answer is – virtually everybody.

What do I have to do: Employers must pay overtime, unless the employee is exempt. There are a myriad of complete and partial exemptions. The five discussed here are the most common.

How does the “Administrative” exemption work: Administrators may qualify for this exemption if they:

- Receive a salary greater than \$455 per week;
- Have a primary duty performing office or non-manual work related to general business operations or management of customers or the business; and
- Exercise discretion and independent judgment with respect to matters of significance.

What are the two “Professional” exemptions: Professionals can be exempt under two different paths. Both have the requirement that the employee receive a salary greater than \$455 per week.

The “Creative Professional” exemption then requires:

- The employee’s primary duty is the performance of work requiring a talent recognized in a field of creative or artistic endeavor which involves invention, imagination, and/or originality.

The “Learned Professional” alternatively requires:

- The employee have a primary duty requiring advanced knowledge that is primarily intellectual and that the employee’s work involve consistent exercise of discretion and judgment.

What is the “Executive” exemption: To be eligible for this exemption, an employee must:

- Receive a salary greater than \$455 per week;

- Have a primary duty to manage the business or a customarily recognized department;
- Direct the work of two or more full time employees (or their equivalent); and
- Have authority to hire and fire or at least recommend hiring, firing, advancement, or promotion with the employee’s opinion given particular weight.

Are “Highly-Compensated” employees exempt: Employees who make over \$100,000 per year from salary (employees over the limit because of discretionary bonuses do not qualify) are exempt but they have requirements too:

- Receive a salary greater than \$455 per week (the rest could be bonus);
- Have a primary duty involving office work or non-manual labor;
- Customarily and regularly perform the duties of someone qualified under the Executive, Professional, or Administrative exemption.

What about sales people: Retail commission and “outside” sales people can be exempt. Outside sales employees must customarily work outside of the office and their primary duty must be making sales or taking orders for services or goods for which a customer will pay. Retail commission employees must work for a retail or service business, earn at least ½ of their wages from commission sales and their total pay each week must be more than 1½ times minimum wage.

What does “primary duty” mean: In case you missed it, the term comes up in almost every exemption, so it is important. Generally, an employee spending more than 50 percent of their time engaged in the primary duty will meet the exception, but other factors count too: (1) the importance of the exempt responsibility compared with others; and (2) the employee’s freedom to direct or supervise.

What other areas offer exemptions: Amusement and recreation; fish processing and canning; agriculture; motor, rail, and air carriage; household services; forestry and logging; and the newspaper industry have exemptions not covered here.

Common Situations:

Radiology Tech: Acme Imaging hires a radiology technician with specialized training from an accredited trade school. Acme characterizes the tech as exempt under the professional exemption. Unfortunately, this is one of the biggest pitfalls with overtime exemptions. The Department of Labor is very strict about this exemption. Many types of technicians, including nurses, bookkeepers, cooks, paralegals, and engineering techs, are not exempt.

Salary Deduction from Exempt Employee: The Dewy, Cheatum, & Howe law firm, closes its office due to ice on the roads and deducts a day of pay from its employees. It's office manager complains to the Department of Labor. An investigator takes away the office manager's professional exemption and charges the company for back overtime. Be careful, Exemptions are fragile. Exempt employees must usually be paid their full salary each week – rain or shine. Employers must be very careful to clear deductions from exempt employees' wages with their lawyers.

The Case of the Traveling Salesman: Mark is treated as an exempt "outside" salesman by Joe's Basket Co. He works in the office about one week a month making

calls and delivering product to customers. He travels the remainder of the time to call on customers and present at trade shows where he manages the company's booth. A Department of Labor investigator pulls the exemption and charges for back overtime. What was the cause of the charge back? Was it delivering product, working from the office, or working a company booth at trade shows? The office time did it, though each of those issues have been considered to challenge the exemption. Office time is a killer for outside salesmen.

What Should I Do:

Good: Evaluate every position in your company and implement appropriate exemptions. Be careful not to make improper deductions from an exempt employee's wages because you could lose the exemption and have to pay back overtime.

Better: Make job descriptions for all exempt positions tailored to the exception. They will be helpful if audited. Also, verify with the employees affected that they believe their job meets the requirements.

Best: Sometimes the Department of Labor disallows a claimed exemption when conducting an audit. If that happens, the employees you thought were exempt suddenly are not, and you may have to pay back overtime. To protect against wild overtime back-charges, have even exempt employees keep a time sheet.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**