



EXEMPT OR NON-EXEMPT

EMPLOYEE CLASSIFICATION



An extremely common misconception is that paying someone on a salary basis means they don't receive overtime. The reality is that you can put *anyone* on a salary. How someone is paid is completely separate from how they are classified for overtime purposes. In other words, salary alone doesn't get you off the hook from tracking hours and paying overtime.

Under the federal Fair Labor Standards Act (FLSA), the rule is that an employer is required to track and keep records of an employee's time, pay the employee at least minimum wage for all hours worked, and pay overtime if they work over 40 hours in a workweek.

This means that you can only avoid those requirements if an employee's position fits an exception to the FLSA requirements, making them *exempt* from those rules.¹ There are very specific tests that must be met for someone to be exempt, and the requirements go beyond salary. **Generally speaking, most employees are non-exempt.**

Being wrong about employee classification is expensive! **Employers who mistakenly classify someone as exempt are liable for unpaid wages, additional fines and penalties, the employee's litigation costs, the employee's attorneys' fees, and the employer's own litigation costs and attorneys' fees.** What's more, employees may band together to file a collective action if misclassification has happened to more than one individual in the workplace. In the end, what may seem like a few harmless hours of missed overtime can balloon into a several thousand-dollar nightmare.

You can avoid such a nightmare by being clear on exempt versus non-exempt status.

EXEMPT EMPLOYEES

Exempt employees are exempt from the FLSA. They meet the test described in this guide for falling into an exception to the FLSA rules. Therefore, the employer does NOT have to follow FLSA rules for that employee, such as paying overtime or tracking hours worked.

NON-EXEMPT EMPLOYEES

Non-Exempt Employees are not exempt from the FLSA. They do not meet the test for falling into an exception to the FLSA rules. Therefore, the employer DOES have to follow all of the FLSA rules for that employee, including paying overtime and tracking hours worked.

¹The rules are a bit different for an "agricultural employee." Even though the FLSA applies to them in terms of minimum wage and tracking time, a true agricultural employee does not have to be paid overtime under federal law. Please contact CEDR if you believe you have an agricultural employee, as their job duties need to fit into the federal government's definition of agriculture, and some states have their own overtime rules.

There are 3 tests that must be met for an employee to be exempt:

- 1 [Paid a fixed salary each pay period](#)
- 2 [Paid a minimum salary level \(currently set at \\$455/week or \\$23,660/year\)](#)
- 3 [Meets the job duty requirements for being an Administrator, Executive, or Professional²](#)

This guide will go over each of the tests in detail.

As you read through our discussion of each test, employers in California and New York please pay special attention. Your states have some additional requirements that need to be met, and we've noted them throughout.

TEST 1: PAID A FIXED SALARY EACH PAY PERIOD

To be exempt, the employee must be paid on a set, consistent salary each pay period. This means that they get the same amount of pay regardless of actual hours worked—since an exempt employee is being paid for the *job they perform* rather than the *hours they work*.

There is a unique exception to this rule—licensed, practicing doctors and lawyers can be exempt *even if they are not paid a salary*. For those individuals, the government won't make you pay overtime regardless of how they're paid. For more information on this unique exception to the salary test, see the section below on the Professional Exemption.

If the employee is not a doctor or a lawyer, the salary requirement is non-negotiable. If the employee is paid using *any method other than salary*, they are non-exempt (hourly rate, commission, daily rate, per diem, etc.).

TEST 2: PAID A MINIMUM SALARY LEVEL

Under federal law, an exempt employee must receive a salary of at least **\$455 per week (\$23,660 per year)**. The only exception to this is for employees in California and New York, where the salary amount has to be higher. **There's no way to get out of the minimum salary requirement.³ If the employee's salary doesn't meet the required minimum, they're non-exempt.**

²These are the most common "white collar" exemptions that CEDR members may encounter. Be aware that there are additional exemptions available, including the following: business owners, highly paid computer software employees, professionals in creative or artistic fields (e.g. videographer, graphic designer), academic instructors/teachers, outside sales associates (commissioned and work primarily in the field), highly compensated employees, and first responders. Please contact CEDR with questions about any of these exemptions.

³Unless the employee falls within the exception for doctors and attorneys detailed above and in the Professional Exemption section below.

In California, the minimum salary level an employee must be paid to be exempt is two-times the state minimum wage. Note that the applicable minimum wage depends on an employer's size, and the rates have scheduled increases in the coming years. City or local minimum wage rates may differ, but the rate that matters here is the state rate. Please see the chart below for the minimum exempt salary levels that are currently scheduled to go into effect:

EFFECTIVE DATE:	California employers with 25 or fewer employees:	California employers with 26 or more employees:
January 1, 2019	\$45,760/year (\$880/week)	\$49,920/year (\$960/week)
January 1, 2020	\$49,920/year (\$960/week)	\$54,080/year (\$1,040/week)
January 1, 2021	\$54,080/year (\$1,040/week)	\$58,240/year (\$1,120/week)
January 1, 2022	\$58,240/year (\$1,120/week)	\$62,400/year (\$1,200/week)
January 1, 2023	\$62,400/year (\$1,200/week)	

In New York, the minimum exempt salary level depends upon the employer's location, and, in New York City, on its size. Please see the chart below for the minimum exempt salary levels that are currently scheduled to go into effect:

EFFECTIVE DATE:	New York City employers with 11 or more employees:	New York City employers with 10 or fewer employees:	Nassau, Suffolk, and Westchester Counties:	Remainder of State:
December 31, 2018	\$1,125/week	\$1,012.50/week	\$900/week	\$832/week
December 31, 2019		\$1,125/week	\$975/week	\$885/week
December 31, 2020			\$1,050/week	\$937.50/week
December 31, 2021			\$1,125/week	

TEST 3: MEETS THE JOB DUTY REQUIREMENTS FOR BEING AN ADMINISTRATOR, EXECUTIVE, OR PROFESSIONAL

There are specific rules for each of these categories, which the rest of this guide covers. To try to make it easier to identify which category might apply to a particular employee, here are some common examples:

- **Administrative Exemption:** Chief Operating Officer, Financial Director, Human Resources Director, Financial Consultant, Supply Chain Manager, and those on the company's Executive Team.
- **Executive Exemption:** Office Manager, Department Manager, Practice Manager, Store Manager, and Clinic Administrator.
- **Professional Exemption:** Dentist, Doctor, Lawyer, Accountant, Scientist, Physician Assistant, and Nurse Practitioner.

When considering someone's exemption status, it's important to ensure you are looking at the *position* and not the *person*. If three people have the same job description but you are only calling one of them exempt, something's probably wrong. **The DOL is going to look at whether the job duties and authority of a position meet the exempt requirements, as that shouldn't vary based on the individual in the role.**

A. ADMINISTRATIVE EXEMPTION

A word of caution: this is NOT an easy catchall for your administrative team. It may be *called* an "Administrative" exemption, but it is not in any way referring to basic administrative work.

Instead, this exemption covers employees whose work directly relates to the administration of high-level business processes—being actively engaged in big picture strategic planning related to the direction of the company, its finances, marketing strategies, large scale budgeting, compliance, quality control, auditing, etc. This type of work should be the employee's primary duty. This exemption is generally for a high-level employee who is most often an administrator of a department, or an officer of a company. It may be helpful to review the government's [examples and explanations](#) of the Administrative exemption, as this is the most commonly misunderstood category.

The chart below provides the federal law requirements, and the additional requirements for California and New York employers.

FEDERAL

To be an exempt Administrator, an employee must meet each of the following requirements:

1. 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
2. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

CALIFORNIA	<p>Pass the Federal test <u>AND one</u> of the following:</p> <ol style="list-style-type: none"> 1. The employee regularly and directly assists an employer (or an employee employed in a bona fide executive or administrative capacity), or 2. The employee performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge, or 3. The employee executes, under only general supervision, special assignments and tasks.
NEW YORK	<p>Pass the Federal test <u>AND one</u> of the following:</p> <ol style="list-style-type: none"> 1. The employee regularly and directly assists an employer (or an employee employed in a bona fide executive or administrative capacity), or 2. The employee performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge.

A common risk area in this category is employees who make big decisions but are restricted to certain guidelines when making those decisions. You need to be able to show actual discretion, where the employee is using independent judgment, in order to meet the Administrative test. Before making a decision about this exemption, we recommend you also review [the DOL's guidance on all of the Administrator requirements](#).

B. EXECUTIVE EXEMPTION

An employee meeting the Executive exemption test is most commonly a high-level manager. However, be careful not to assume that anyone in a supervisory role can meet this test.

It's critical that management is the employee's primary duty. According to the DOL's findings, a manager supervising only two other employees rarely spends 50% or more of their time primarily engaged in managerial duties. Therefore, we only recommend using this exemption if the "Executive" is truly engaged in high-level management work during the **majority** of their work day, and they have at least three full-time employees who they are managing.

The chart below provides the federal law requirements, and an additional requirement for California and New York employers.

FEDERAL	<p>To be an exempt Executive, an employee must meet <u>each</u> of the following requirements:</p> <ol style="list-style-type: none"> 1. The employee's primary duty must be managing the business, or managing a recognized department or subdivision of the business, and 2. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent, and 3. 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.
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Pass the Federal test AND the following must also be true:

The employee must customarily and regularly exercise discretion and independent judgment.

Here are some examples of managerial duties that may count toward primary duty of management:

- Interviewing, selecting, and training employees
- Setting rates of pay, hours of work, and planning work schedules
- 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

A common risk area in this category is an employee who is a “working manager,” someone who may supervise others but spends most of their time completing productive tasks (as opposed to spending most of their time completing managerial tasks). Before making a decision about this exemption, we recommend you also review [the DOL’s guidance on all of the Executive requirements](#).

C. PROFESSIONAL EXEMPTION

The Professional exemption classification is often referred to as the “Learned Professional” exemption, because it focuses on a high level of education in fields such as medicine, law, science, accounting, engineering, and architecture. Note that four years of college education is usually NOT prolonged enough to meet this educational standard.

The chart below provides the federal law requirements, and the standalone tests for California and New York employers.

Under federal law, for an employee who is NOT in California or New York to be an exempt Professional, they must meet each of the following requirements:

1. The employee’s primary duty must be the performance of work requiring advanced knowledge (work which is predominantly intellectual in character and requires the consistent exercise of discretion and judgment), and
2. The employee’s advanced knowledge must be in a field of science or learning, and
3. The employee’s advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

CALIFORNIA	<p><u>Each of the following must be true (federal test does NOT apply):</u></p> <ol style="list-style-type: none"> 1. The employee is either: <ol style="list-style-type: none"> a. Licensed or certified by the State of California and is primarily engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or b. Primarily engaged in an occupation commonly recognized as a learned or artistic profession. <p>AND 2. The employee customarily and regularly exercises discretion and independent judgment in the performance of their duties.</p>
NEW YORK	<p><u>Each of the following must be true (federal test does NOT apply):</u></p> <ol style="list-style-type: none"> 1. The employee's primary duty consists of the performance of work that either: <ol style="list-style-type: none"> a. Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, or b. Is original and creative in a recognized field of artistic endeavor and produces a result that depends primarily on the invention, imagination, or talent of the employee. <p>AND 2. The employee's work: <ol style="list-style-type: none"> a. Requires the consistent exercise of discretion and judgment in its performance, and b. Is predominantly intellectual and varied in character, and c. Is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. </p>

This category has a unique exception *applying to licensed, practicing doctors⁴ and attorneys only*: they do not necessarily need to be paid on a salary basis, and can be paid by another method (commission, fee, hourly, etc.). **Note that in California, a licensed physician's pay must equate to a minimum of \$82.72 per hour.**

We frequently receive questions about whether the following positions can fit into the Professional exemption:

- **Nurses:** Registered nurses may meet the Professional Exemption, *except in California⁵*. However, licensed practical nurses and other similar healthcare employees generally will not meet the requirements because having a specialized advanced degree is not a standard requirement for those occupations.

⁴CEDR gets questions about what type of healthcare provider can be exempt even if they are NOT paid on a salary. This unique exception to the salary requirement applies to someone who is engaged in the "practice of medicine," which they consider to be: "physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term 'physicians' includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry)." 29 CFR § 541.304. If you have a question about a different type of provider, please contact CEDR so we can try to assist you in considering their exempt status.

⁵California law is very specific about excluding registered nurses from the Professional exemption, but the state has clarified that certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners can meet the Professional exemption.

- **Hygienists:** CEDR does not recommend classifying a hygienist as a Professional. Federal law states that a hygienist *could* potentially meet the Professional exemption if they meet strict educational requirements⁶, but in practice the DOL repeatedly finds that a hygienist’s work is more of a routine, mechanical nature than that of the discretion used by a high-level provider such as a dentist. And, in California, state law is clear that hygienists are not “practicing medicine,” so a hygienist can only be exempt if they meet the requirements of the Administrative or Executive exemptions.

A common risk area in this category is a position where an advanced degree is not actually required, or where the degree is not in a category of true “intellectual” instruction (hands-on training versus intellectual instruction). Before making a decision about this exemption, we recommend you also review [the DOL’s guidance on all of the Professional requirements](#).

⁶The DOL has published material stating a dental hygienist who has completed four academic years of 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. However, the DOL evaluates exemptions by position rather than by person. Therefore, calling one hygienist exempt when they are performing the same work as non-exempt hygienists is not appropriate.



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