



Avoiding Common Overtime Pitfalls

Because overtime eligibility decisions are often considered only at the point of hiring, employers can be caught off guard when they receive a demand letter claiming that a former employee is owed thousands of dollars in overtime. The employer may think to themselves, "Wait, wasn't that employee paid a salary? Why are they entitled to overtime?" Let's take a minute to review how to avoid such a predicament.

FLSA Classification Overview

Under the Fair Labor Standards Act (FLSA), most employees (nonexempt employees) in the United States must be paid at least the federal minimum wage for all hours worked and overtime pay of at least 1.5x the regular rate of pay for all hours worked in excess of 40 hours in a workweek.

Certain employees (exempt employees) are exempted from this requirement because of their predetermined compensation and work duties. While there are a few "niche" exemptions (for example, certain IT and outside sales professionals), most employees qualify through one of the following – the (1) executive exemption, (2) administrative exemption, or (3) professional exemption, collectively referred to as the "EAP" or white-collar exemptions.

Except for physicians, lawyers, and teachers (who must only satisfy the duties test), to qualify for the EAP/white-collar exemptions the employee must satisfy both the salary basis test and the duties test.

A. Salary Basis Test

To satisfy the salary basis test, an employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. That salary may not be less than \$684 per week (\$35,568 annually), and must be paid in any workweek in which work is performed. The salary basis test, however, is only one component in determining whether an employee may lawfully be classified as exempt. Even employees who earn significantly more than \$684 per week are still required to satisfy the duties test by falling into at least one of the exemptions listed below.

B. Duties Test (EAP/White-Collar Exemptions)

i. Executive Exemption

To qualify for the executive exemption, an employee must satisfy the salary basis test and (1) have the primary duty of managing the enterprise or a customarily recognized department or

subdivision of the enterprise; and (2) customarily and regularly direct the work of at least **two** employees; and (3) have the authority to hire or fire, or have their recommendations about hiring and firing be accorded significant weight.

ii. Administrative Exemption

To qualify for the administrative exemption, an employee must satisfy the salary basis test and have a primary duty of performing office or nonmanual work directly related to the management or general business operations of the employer, and their primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. That final requirement – whether the employee can truly exercise discretion about matters of significance – is the impediment to many salaried office employees who would otherwise qualify for exemption.

iii. Professional Exemption

To qualify for the professional exemption, an employee must satisfy the salary basis test and have a primary duty that requires advanced knowledge of a field of science or learning customarily acquired by prolonged, specialized, intellectual instruction and study, or must specialize in a few similar fields such as teaching, computer analytics, or engineering.

iv. Highly-Compensated Employees

In addition to the three primary EAP/white-collar exemptions, certain highly-compensated employees (*i.e.*, those employees earning at least \$107,432 annually) performing office or non-manual work may be classified as exempt if they regularly perform at least one of the above-referenced duties.

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"Comp Time"

The use of comp time is an appealing strategy for employers whose employees may occasionally need to work longer than typical hours or work on days they would otherwise have off, but want to avoid incurring the additional expense of overtime wages.

For example, an employer may wish to offer comp time to an employee who generally works Monday through Friday, but has been asked to work on Saturday to assist with a one-off weekend event. Importantly, comp time for nonexempt employees must be taken in the same workweek. Thus, in the scenario described above, the employer would be responsible for paying the employee overtime unless the employee took comp time during that same workweek sufficient to keep the employee's total hours at 40 hours or less.

"Perfect" Timecards

An employer will generally not be spared from liability simply because an employee pursuing wage-and-hour claims is found to have completed a timecard each week reflecting that the employee worked 8 hours each day, Monday through Friday. Rather, judges and juries will often be skeptical of an argument that any employee worked precisely the same number of hours each day without deviation, particularly if the employee alleges that they were instructed to record hours in such a manner to avoid overtime wages. A better practice is to have nonexempt employees record the time that they begin and end each workday, including time(s) taken for break(s).

Missing/Inaccurate Job Descriptions

While job descriptions are important for all employees, they are especially necessary for employees who are classified as exempt. Because the duties test focuses on the employee's day-to-day job responsibilities, exempt employees' job descriptions should reflect the executive, administrative, or professional nature of their role. At the same time, it is important that position descriptions are accurate and up-to-date. For instance, an employer cannot classify an employee as exempt on the basis of the executive exemption if their job description reflects that they manage two direct reports, but financial difficulties have prevented them from hiring more than one direct report for several years.

Unilateral Decision-making

Decisions about whether to classify an employee as exempt should not be made in a silo. Many employees are “close calls” and decisions about their eligibility for overtime should not rest on a single decisionmaker’s judgment. Ideally, the decision about whether to classify an employee as exempt will be the product of a robust discussion between operations, payroll, finance, and human resources. These decisions may need to be revisited as the employee’s role evolves over time.

What's Next?

FLSA issues can be extremely complicated and fact specific. Please reach out to the Gallagher team if you have questions or need assistance.



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