

FLSA Wage and Hour Issues for the Public Sector

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December 7, 2023	2024 Employment Law Update for California Employers (Live Webinar)
December 12, 2023	Southern Nevada SHRM Year-End Legal Update

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Wage and Hour: Overview of major differences in NV and CA wage-and-hour laws.

Employee Leave: Overview of major differences in NV and CA requirements for providing paid and unpaid leave.

Forms and Recordkeeping: Overview of major differences in NV and CA employment forms and recordkeeping rules.

Additional Resources: Dive deeper for a better understanding with available CA employment law recorded webinar presentations.

Cal Neva Law Podcasts:

Answers to Your Questions About Employee Law on Apple Podcasts!

<https://podcasts.apple.com/us/podcast/answers-to-your-questions-about-employee-law-covid-19/id1506833154?i=1000471123334>



1. What You Need to Know About AB 51 Mandatory Arbitration Agreements

2. Reductions in Force/Layoffs/Reduced Hours: What Employers Need to Know Now

3. Important Actions for a Proper Workplace Investigation

4. What You Need to Know About Potential Changes in the National Labor Relations Board



Sutton Hague Blogs

- Sutton Hague prides itself on staying up to date and posting any recent and relevant labor and employment related changes for both California and Nevada. Our blogs on these topics can be found at www.suttonhague.com/blog/.

The blogs help to simplify and clarify some of the lengthy materials that come out and also provide links and updates to previous blogs for the public at no charge.

You can also be notified of updates by following any of our social media accounts.

“Welcome to Wage and Hour”

Hypothetical

- Jane works for GID as Assistant Manager, which is a salaried exempt position. She earns a salary of \$36,000. During the COVID pandemic, Jane started to work remotely and has continued to work remotely ever since. Since working remotely, she has been required to pay about \$1,500 per year in business-related expenses, including home internet, personal cell phone use, and other home office expenses.
- In September, GID eliminated several positions. As a result, Jane had to assume new tasks including data entry, scheduling appointments with business partners, and attending mandatory in-person staff meetings. She often works late into the evening and on weekends. Jane did not keep track of how much time she spent on these activities, but it felt like the new tasks dominated her workday.
- After a week of struggling through these changes, Jane complained to upper management about the issue. Soon after, GID implemented an incentive program whereby all exempt employees who work evenings or weekends receive a flat-rate incentive payment of \$50/day. GID is also providing free snacks for all on-site employees to keep them happy and energized. Jane appreciates the incentive pay and has not complained since.
- GID is also requiring Jane to attend mandatory in-person staff meetings at one of the district’s worksites across town, which is approximately twice as far away from her home as the office to which Jane would normally report. Occasionally, the meetings at the satellite office occur in the morning, and Jane drives directly there from her home. Other times, the meetings occur in the middle of her workday. Jane has decided not to complain because she is expecting a big raise when the salary threshold increases to \$55,068.



“Welcome to Wage and Hour” Hypothetical

- Overtime Exemptions: <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime>
- Salary Basis Test: <https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary>
- Final Rule re: Exempt Salary Increase:
<https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>
- Overtime and Regular Rate of Pay: <https://www.dol.gov/agencies/whd/fact-sheets/23-flsa-overtime-pay>
- Final Rule Clarifying Exclusions from Regular Rate:
<https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act>
- Compensation for Travel Time: <https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked>



Topics for Today



Hot Topics

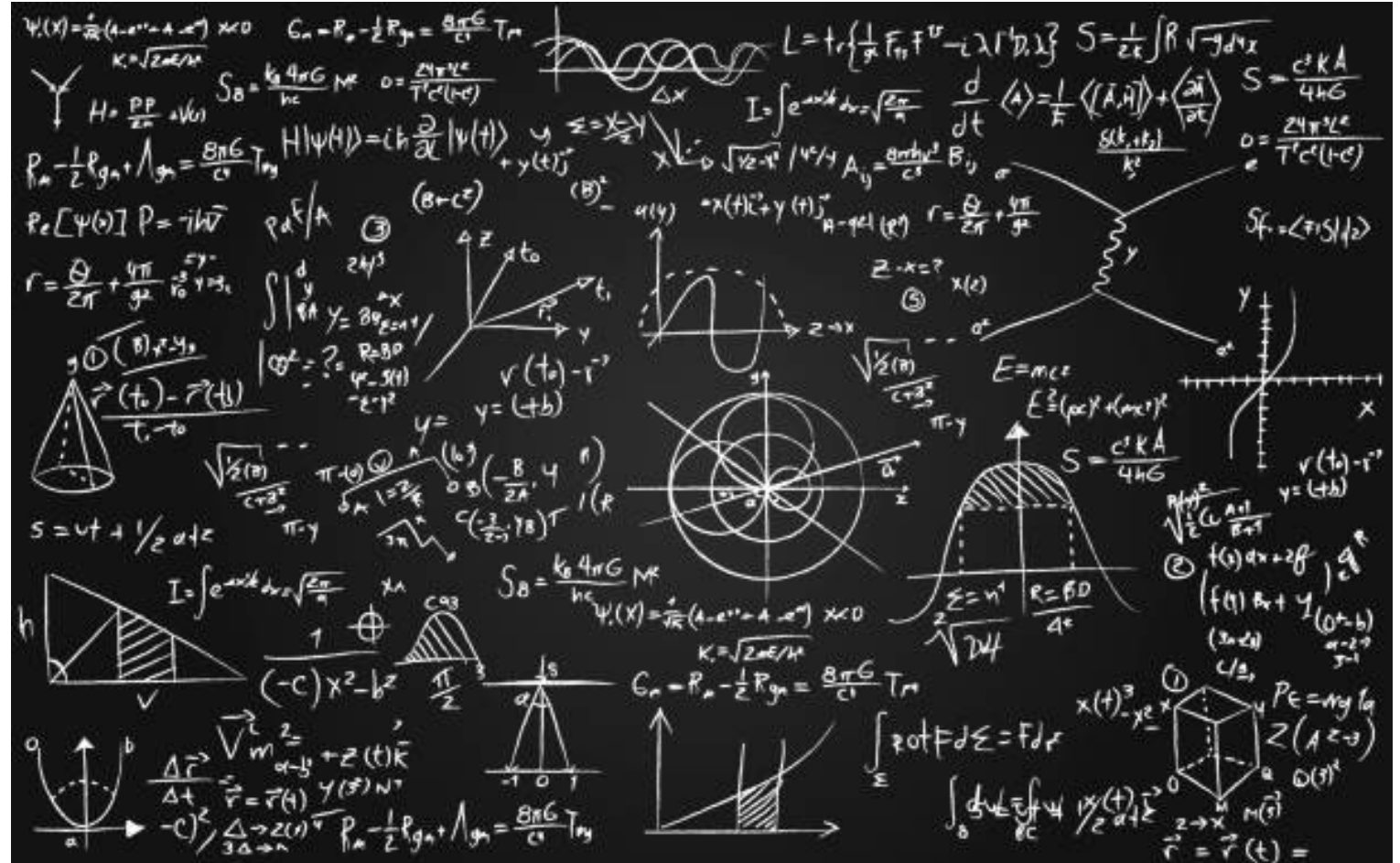
- Federal Fair Labor Standards Act (“FLSA”)
 - Regular Rate of Pay
 - Overtime Exemptions
- **Today, we will only be discussing general principles under the federal Fair Labor Standards Act (“FLSA”).**
- We will not cover special FLSA rules applicable to law enforcement, firefighters, or other specific job categories.
- We will also not cover applicable Nevada state law or the provisions of any collective bargaining agreements (CBAs).

Sources of Law

- **Federal Fair Labor Standards Act (“FLSA”)**
 - Executive orders
 - Federal case law
 - U.S. Department of Labor
 - Code of Federal Regulations
 - Opinion Letters
 - Fact Sheets
- **Remember:** Opinions of the DOL, fact sheets, as well as regulations the DOL promulgates (in the CFR), are entitled to some deference but are not binding on courts.




Regular Rate of Pay



Regular Rate of Pay

- The compensation an employee normally earns for the work they perform. (*See DOL Fact Sheet 56A*)
- “The formula to compute the regular rate is: **Total compensation** in the workweek (except for statutory exclusions) ÷ **Total hours** worked in the workweek = Regular rate for the workweek”
- It is NOT necessarily straight time
- In no case may the regular rate of pay be less than the applicable minimum wage.



A close-up photograph of a red marker with a brown tip, positioned over a series of black-outlined boxes. The marker has just finished drawing a red checkmark in the third box from the top. The first two boxes also contain red checkmarks, while the fourth and fifth boxes are empty. The background is a light, neutral color.

When to Use the Regular Rate of Pay?

- Weekly Overtime
- Federal statute requires that all hours over 40 in a workweek be compensated “at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1).
- Both the Code of Federal Regulations and the FLSA’s overtime fact sheet use the phrases “one and one-half times the regular rate of pay,” as well as “time and one-half” the regular rate. See, e.g., 29 C.F.R. § 778.203(a); <https://www.dol.gov/agencies/whd/fact-sheets/23-flsa-overtime-pay>.
- 29 C.F.R. § 778 provides examples of how to calculate the overtime in many different scenarios.

Regular Rate of Pay - Overview

- Under the FLSA, the regular rate includes “all remuneration for employment paid to, or on behalf of, the employee.”
- **Presumption** that remuneration should be included in the regular rate of pay.
- For instance, shift differential pay, standby pay, and earned bonuses must be included
- <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>



Regular Rate of Pay - Exclusions

- 1) Gifts on special occasions;
- 2) Payments for occasional periods when no work is performed (vacation, holidays, illness); reimbursable business expenses; other similar payments (perks);
- 3) Discretionary bonuses;
- 4) Employer contributions to benefit plans;
- 5) Premium pay for non-FLSA overtime;
- 6) Premium pay for Saturdays, Sundays, holidays, regular days of rest, 6th or 7th days of work;
- 7) Premium pay based on contract, CBA for work outside of established hours;
- 8) Income derived from employer-provided rights pursuant to a stock option or employee stock purchase program

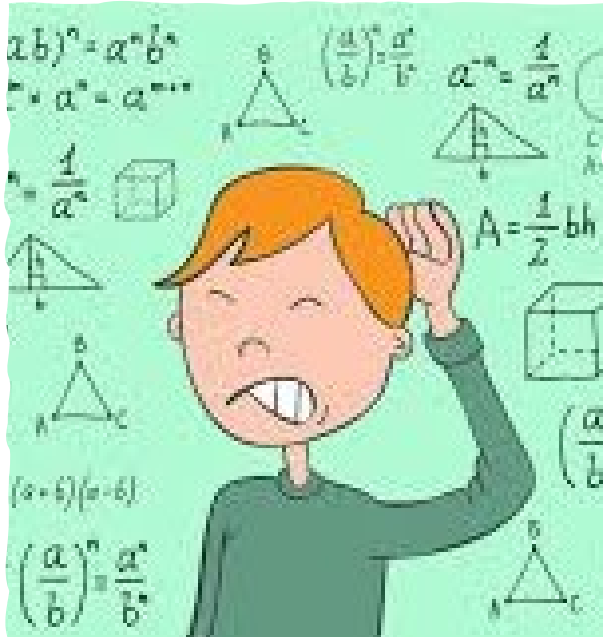
NOTE: Exclusions 6 & 7 only apply if premium pay is not less than one and one-half times the rate for like work performed during other days or hours

Effective January 15, 2020: FLSA Final Rule Regular Rate

- **The Department of Labor clarified the regulations to confirm that employers may exclude the following from an employee's regular rate of pay:**
- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred "solely" for the employer's benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the federal travel regulation system or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments";
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, **but** clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples and;
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

<https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act>

Regular Rate of Pay Calculation: Two Possible Divisors



- 40 hours per week.
 - Used for: Weekly salaries.
- **All hours worked**, including overtime hours.
 - Used for: Production bonuses, piece-rate, and commissions.
 - Amount earned increases as more hours are worked.
 - Reflects the fact that each hour contributes to earning the bonus.

29 C.F.R. 778.107–778.122 (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-778>).

Hypothetical No. 1

- Wilson works for the County as a receptionist and custodian. Upon arriving at work, he is required to pass through a guard gate to enter the parking lot. There is often a line of multiple cars ahead of him, and he commonly has to wait several minutes to pass through the gate.
- During a typical eight-hour shift, Wilson spends about half of his shift greeting the public and answering calls. While performing these tasks, Wilson is paid \$20/hour. Wilson spends the other half of his shift performing custodial duties. While performing these tasks, Wilson is paid \$22/hour. Wilson is paid bi-weekly.
- During the first workweek of the current pay period, Wilson worked 40 hours and received no overtime pay. However, during his second workweek, he works 14 hours of overtime.
- Wilson's wage statement for the pay period shows that he worked 14 hours of overtime for which he was paid at the overtime rate of \$30/hour.
- Did the County pay Wilson at the correct overtime rate?
- How many hours would be used to calculate Wilson's regular rate of pay for overtime purposes?
- Can you spot any other issues?



Hypothetical No. 2

- Marlene works for Big County. Big County provides all employees with five days of paid sick leave each year and pays eight hours pay for every observed holiday. Big County provides employees with the option of “cashing out” their unused sick leave at the end of each year, and also gives employees the option to receive additional pay if they work on a holiday.
- In 2023, Marlene only used two days of paid sick leave. Assuming that she does not use any other paid sick leave between now and the end of 2023, she will receive the equivalent of three days of pay at her regular rate of pay.
- Marlene also works her regular shift on the Christmas holiday and receives both her normal hourly pay and her holiday pay for that day.
- Will the payment for unused sick leave need to be included in the regular rate of pay?
- What about her additional pay earned for foregoing the Christmas holiday?



<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-778/subpart-C/subject-group-ECFR6ae5b919145e42b/section-778.219>

Hypothetical No. 3

- Leslie works for the Parks and Recreation Department for the City of Plainville. She works an overwhelming amount of overtime because of her passion for local government. The City participates in a health benefits plan whereby it contributes over half the cost of any enrolled employee's premiums. The City has undertaken significant efforts to ensure that its contributions are excluded from the regular rate of pay under the "bona fide benefit plan" exception to the FLSA.
- In 2023, Leslie's manager Ron, who hasn't seen a doctor in 20 years, decides that the City should take additional steps to ensure that employees who choose not to participate in health benefits plans, which he views as frivolous and wasteful, also receive some form of benefit for living healthy lifestyles. At his direction, the City adopts a policy whereby any employee who chooses not to participate in the health benefit plan will receive a substantial cash payment "in lieu of" those benefits at the end of each year.
- If Leslie chooses to receive the cash payment "in lieu," should the City incorporate that into her regular rate of pay at the end of each year?



<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-778/subpart-C/subject-group-ECFR29a4ab910b4eed8/section-778.214>

<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-778/subpart-C/subject-group-ECFR29a4ab910b4eed8/section-778.215>

Hypothetical No. 4

- Stapler and Manch are office workers for Metropolitan, and are entitled to overtime for hours in excess of 40 in a workweek.
- Metropolitan policy provides that if any office employee covers the shift of another office employee who calls out for any reason, that employee will be paid an additional 25% of his or her base rate of pay for any unscheduled covered hours.
- Manch calls in sick and Stapler agrees to fill in for him on Stapler's day off. He earns \$62.50/hour for the shift, a 25% increase from his normal hourly rate of \$50/hour. Before filling in for Manch, Stapler had already worked 40 hours that workweek. He then works an additional eight hours during that same workweek filling in for Manch.
- Metropolitan pays Stapler's overtime for the workweek at the regular rate of \$75/hour, or 1.5 times his \$50/hour rate of pay. Stapler feels he is underpaid and complains to the Payroll Department.
- Who is right? The Payroll Department or Stapler?
- What is Stapler's regular rate of pay for the workweek?



<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-778/subpart-B/subject-group-ECFR7be43dce58760d9/section-778.115>

Hypothetical No. 4

Pay Rate 1		
Rate	Hours	Total Pay
\$50/hour	40	\$2,000
Pay Rate 2		
Rate	Hours	Total Pay
\$62.50	8	\$500
Regular Rate of Pay		
Total Workweek Pay	Total Hours Worked	Regular Rate of Pay
\$2,500	48	\$52.08/hour
Overtime Due		
Overtime Hours	Overtime Premium	Overtime Due
8	\$26.04 (\$52.08 * .5)	\$208.32 (\$26.04 * 8 hrs.)



See 29 C.F.R. § 778.115; Bowen v. Target Corporation (9th Cir. 2022) 2022 WL 16570815; Abreu v. U.S. (Fed. Cir. 1991) 948 F.2d 1229; General Atomics v. Superior Court (4th App. Dist. 2021) 64 Cal.App.5th 987.



Exempt or Nonexempt Employees

Why Does it Matter?



- Under the FLSA, employees are **presumed to be non-exempt** (i.e., entitled to overtime compensation). *See* CFR 551.202.
- Employers bear the burden of proving an overtime exemption applies, by showing that both the primary duties test and salary basis test are satisfied.
 - A job title provides some evidence of the employee's job duties **but is not determinative**.
- Some federal courts have held that an employer must prove the exemption with the heightened evidentiary standard of “**clear and convincing evidence**.” *See, e.g., Carrera v. E.M.D. Sales Inc.*, 75 F.4th 345 (4th Cir. July 27, 2023).
- Others have held that the basic “**preponderance of the evidence**” standard applies. *See, e.g., Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 502 (6th Cir. 2007).
 - This circuit split may need to be resolved by the U.S. Supreme Court.



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Main Overtime Exemptions

Executive

Administrative

Professional

Salary Basis Test



- To qualify for exemption, employees generally must be paid at not less than \$684 per week on a salary basis.
- Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis.
- The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work.
- Subject to limited exceptions (discussed on the next slide), an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

<https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary>



<https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary>

Salary Basis Test

Under the salary basis test, deductions from an employee's weekly salary are only allowed in the following circumstances:

1. The employee is absent from work for one or more full days for personal reasons other than sickness or disability.
2. The employee is absent from work for one or more full days due to sickness or disability, but only if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for salary lost due to illness.
3. Deductions to offset amounts employees receive as jury or witness fees, or for military pay.
4. Deductions for penalties imposed in good faith for infractions of safety rules of major significance.
5. Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.
6. 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.

DOL Notice of Proposed Rulemaking

- Released August 30, 2023 (final rule would come into effect around July 1, 2024)
- **Raised the “standard salary level” from \$684 to \$1,059 per week** (equivalent to \$55,068 per year for a full-year worker)
- Raised the salary for “highly compensated employees” from \$107,432 to \$143,988 per year
- DOL seeks the implementation of a mechanism that would automatically update these earnings thresholds every three years

<https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>



Salary Basis Test: New U.S. Supreme Court Case

- Employee works on offshore oil rig, typically working 84 hours per week.
- Employee is paid on a daily-rate basis, with no overtime compensation. His biweekly paycheck was equivalent to his daily rate times the number of days worked in the pay period.
- Thus, employee does not receive any weekly pay guarantee, and is only paid for days he works.
- Under this compensation scheme, the employee earned more than \$200,000 per year.
- The employee sued for unpaid overtime, and the employer asserted he qualified for an overtime exemption (the executive exemption).
- The critical question is whether the employee was paid on a “salary basis” under the FLSA.

Salary Basis Test: New U.S. Supreme Court Case

- Under the salary basis test, hourly, daily, and shift-rate workers will satisfy the test only if:
 1. The employment arrangement includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts worked; and,
 2. A reasonable relationship exists between the guaranteed amount and the amount actually earned.
- The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily, or shift rate for the employee's normal scheduled workweek.

A large offshore oil rig is shown at night, illuminated by its own lights. A large flare is visible on the right side of the rig, emitting a bright orange flame. The rig is a complex of metal structures, including a crane and various platforms. The background is a dark blue sky with a hint of sunset or sunrise on the horizon.

Salary Basis Test: New U.S. Supreme Court Case

- The employee here does not meet the salary basis test and is therefore entitled to overtime compensation.
- The employee did not receive a weekly guarantee that was roughly equivalent to his usual earnings at his daily rate.

Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39, 143 S. Ct. 677 (Feb. 22, 2023).



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Administrative Exemption

<https://www.dol.gov/agencies/whd/fact-sheets/17c-overtime-administrative>

Primary Duties Must Include:

- Performance of office or non-manual work directly related to the management or general business, and
- Exercises Discretion and Independent Judgment
- Must also satisfy salary basis requirements



Primary Duties Test

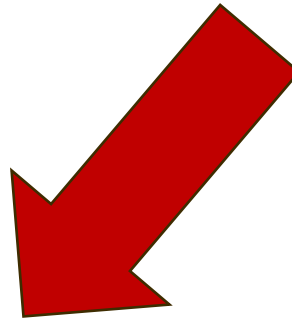


Look at...

Job Descriptions

Bonuses

Performance Evaluations



Job Creep?

The slow and progressive change or addition of job duties that ultimately changes the role's "primary duty" over time. As a result, an employee initially determined to be exempt may ultimately become non-exempt as primary duties change.



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What is a “Primary Duty”?



Definition:

Principle, Main, Major, or
Most Important



The Test Is Qualitative, NOT Quantitative:

Even if an employee only
performs a certain type of
work 20% of the time, it
could still be considered a
“primary duty,”
depending upon the facts
presented.



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Primary Duties

- Courts will likely consider “production” work to be non-exempt in nature.
- Courts may consider the employer’s “business purpose.” If the employee’s primary duty is to provide the service that the employer is in business to provide, the duties test will not be satisfied.
- *See Marcus v. Am. Cont. Bridge League*, 80 F.4th 33, 48 (1st Cir. Aug. 14, 2023) (clarifying and applying standards for determining whether duties test is met for administrative exemption).



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Executive Exemption



Primary Duties Must Include:

- Management of the enterprise or of a department/subdivision, and
- Customarily and regularly directs the work of two or more other employees,
- Authority to hire or fire (or recommendations given particular weight)
- Exercises discretion and independent judgment
- Must also satisfy salary basis requirements



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“Executive” Duties

- Setting Pay Rates
- Directing Work
- Evaluating Productivity and Efficiency
- Handling Complaints
- Disciplining Employees
- Planning the Work
- Determining the Techniques/Materials



Professional Exemption



<https://www.dol.gov/agencies/whd/fact-sheets/17d-overtime-professional>

A photograph of a person's hand writing in a notebook on a wooden desk. The desk is cluttered with various items: a laptop, a glass of iced tea, a glass of water, a cup of coffee, and some papers. The scene is lit with warm, natural light, suggesting a relaxed or creative work environment.

“Learned Professional”

OR

“Creative Professional”

FLSA “Learned Professional”

- Requires:
 - Performance of “work requiring advanced knowledge,” defined as:
 - Work which is predominately intellectual in character; and,
 - Which includes work requiring the consistent exercise of discretion and independent judgment.
- “Advanced knowledge” must be:

In a field of science or learnings; AND

Customarily acquired by a prolonged course of specialized intellectual instruction

Examples

Scientist with Ph.D.

Journalists

University Professors

Must also satisfy salary basis requirements (\$684 per week)

FLSA “Creative Professional”

- Requires:
 - Performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- “Advanced knowledge” must be:

Distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy.

Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis.

The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, etc.

Must also satisfy salary basis requirements (\$684 per week)



**Beware of Reimbursements Under
Salary Basis Test!**



**Employers Must Reimburse Exempt
Employees If Failing To Do So Would
Reduce Their Salary Below \$684/Week**



FLSA Opin. No. 2006-7



Important Evidence for Exemption Cases

- Job Description
- Performance Evaluations
- Bonus Plans



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Questions and Answers



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