



POMS
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PROPERLY CLASSIFYING WORKERS UNDER THE NEW USDOL FLSA, AND INDEPENDENT CONTRACTOR RULES

Exempt & Non-Exempt Status, Employee v. Independent Contractor





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TODAY'S PRESENTER

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THE BASICS OF THE FLSA AND THE NEW RULE



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POMS FLSA OVERVIEW

- The Fair Labor Standards Act of 1938 (FLSA) establishes employment standards affecting “covered” employees working for “covered enterprises” in the private sector and in Federal, State, and local governments.
 1. Minimum Wage
 2. Overtime Pay and Compensatory Time
 3. Hours Worked and “Regular Rate of Pay”
 4. Recordkeeping
 5. Child Labor
 6. Classification as Exempt or Non-Exempt
 - Also, *Classification as Employee v. Independent Contractor*
- Enforced by the U.S. Department of Labor Wage & Hour Division (WHD)
- **NOTE:** The FLSA allows for individual liability, which means that a supervisor who plays a key role in causing an FLSA violation may be held personally liable.
- State Wage & Hour Law don’t always track the FLSA
 - For example, FLSA allows employers to use the “fluctuating workweek” method of pay for nonexempt employees, but New Mexico law prohibits its use.



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POMS WHY BE CONCERNED ABOUT WAGE & HOUR ISSUES?

- FLSA rules and regulations are confusing even to seasoned HR professionals and attorneys
- Wage and hour lawsuits outpaced all other types of workplace class actions
- FLSA collective actions in federal court outnumbered all other types of private class actions
- Sometimes, employment practices liability insurance (EPLI) excludes wage and hour claims from coverage
 - Check with your Poms broker about your EPL insurance policy for coverage and possible exclusions



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WHY BE CONCERNED ABOUT WAGE & HOUR ISSUES?

POSSIBLE PERSONAL LIABILITY FOR:

- “Any person acting directly or indirectly in the interest of the employer in relation to the employee” ...
 - Power to hire and fire, and/or
 - Control over schedule of work or conditions of employment, and/or
 - Maintenance of records, and/or
 - Control over method or rate of payment, and/or
 - Control over business enterprise or subdivision thereof.
- Possible criminal penalties too
- Check your professional liability insurance policy for coverage - often excluded

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COMMON FLSA MISCLASSIFICATION MISTAKES

1. **Classifying all "salaried" employees as exempt** - Many employers incorrectly assume that employees who are paid on a salary basis automatically qualify for an FLSA exemption.
2. **Making classification determinations based on position titles, instead of actual duties** - A common mistake made during the classification process is to place undue reliance on position titles, or even job descriptions that do not accurately reflect an employee's day-to-day duties and responsibilities. The job duties test looks to the actual work performed by the employee.
3. **Assuming that all "administrative" positions qualify for the Administrative Exemption** - One of the most commonly mis-applied exemptions under the FLSA is the Administrative Exemption.
 - The duties test of the Administrative Exemption requires that the primary duty of the position be the performance of office or non-manual work *directly related to management or general business operations of the employer or the employer's customers*.
 - Many companies incorrectly assume that all of their administrative and office staff qualify for this exemption because of its name. However, administrative staff typically do not qualify for the Administrative Exemption because the second prong of the duties test for this exemption further requires that the employee's primary duty involve the exercise of discretion and independent judgment with respect to matters of significance.

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COMMON FLSA MISCLASSIFICATION MISTAKES

4. **Assuming that all employees who work with computers qualify for the Computer Employee Exemption** - Yet another common mistake is based on the misunderstanding of the Computer Employee Exemption. This exemption is available to employees whose primary duty involves the

- (1) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- (2) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- (3) design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- (4) some combination of these criteria.

Many employers incorrectly assume that an employee qualifies for this exemption simply because the employee regularly works with computers or because their job is highly dependent on computers and computer software programs.

Employees whose primary duty involves repair or general servicing of computer systems, including "help desk" technicians, and most "network administrators" will generally fall outside the scope of this exemption.

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COMMON FLSA MISCLASSIFICATION MISTAKES

5. **Assuming that all supervisors qualify for the Executive Exemption** - An employee may qualify for the Executive Exemption if the employee's primary duty involves managing the business or a customarily recognized department or subdivision of the business.
- ALSO, however, to qualify for the Executive Exemption, the employee must also customarily and regularly direct the work of at least two or more full-time employees or their equivalent and have the authority to make hiring and firing decisions (or the manager's hiring and firing decisions must be accorded "particular weight" by the company decision maker).
6. **Relying on incidental or occasional duties in making classification determinations** - Many employees will perform a mix of both "non-exempt" work, and "exempt" work that meets the criteria for one of the duties tests. Employers often make the mistake of assuming that a position is exempt because it involves incidental responsibilities that satisfy one of the duties tests, without properly considering whether such responsibilities are truly the "primary duty." An "Assistant Manager" is most often a good example of this.
7. **Failing to consider state law** - Many state and local jurisdictions have enacted their own laws governing employee classifications, some of which impose different or more restrictive standards or obligations. For example, some states require that, in order to be exempt from applicable state wage and hour law, an exempt employee's salary must be higher than the salary threshold required by the FLSA. Employers should always verify that their classifications are consistent not only with the FLSA, but with any applicable state and local laws.

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POMS FLSA PENALTIES AND ASSISTANCE

Penalties

- Willful violations may be prosecuted with fines amounting to thousands of dollars
- Violators of youth employment are subject to civil money penalties
- Willful, repeat violations of minimum wage or overtime requirements subject to civil money penalties for each violation

FLSA Compliance Assistance

- [Fair Labor Standards Act of 1938](#)
- [Regulations](#)
- [FLSA Poster.pdf](#)
- [Handy Reference Guide.pdf](#)
- [Frequently Asked Questions \(FAQs\)](#)
- [Fact Sheets](#)
- [Opinion Letters](#)
- Visit the WHD home page: www.dol.gov/agencies/whd

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POMS NOTE: USDOL ISSUED FINAL RULE RAISING MINIMUM SALARY LEVEL THRESHOLDS FOR FLSA OT EXEMPTIONS

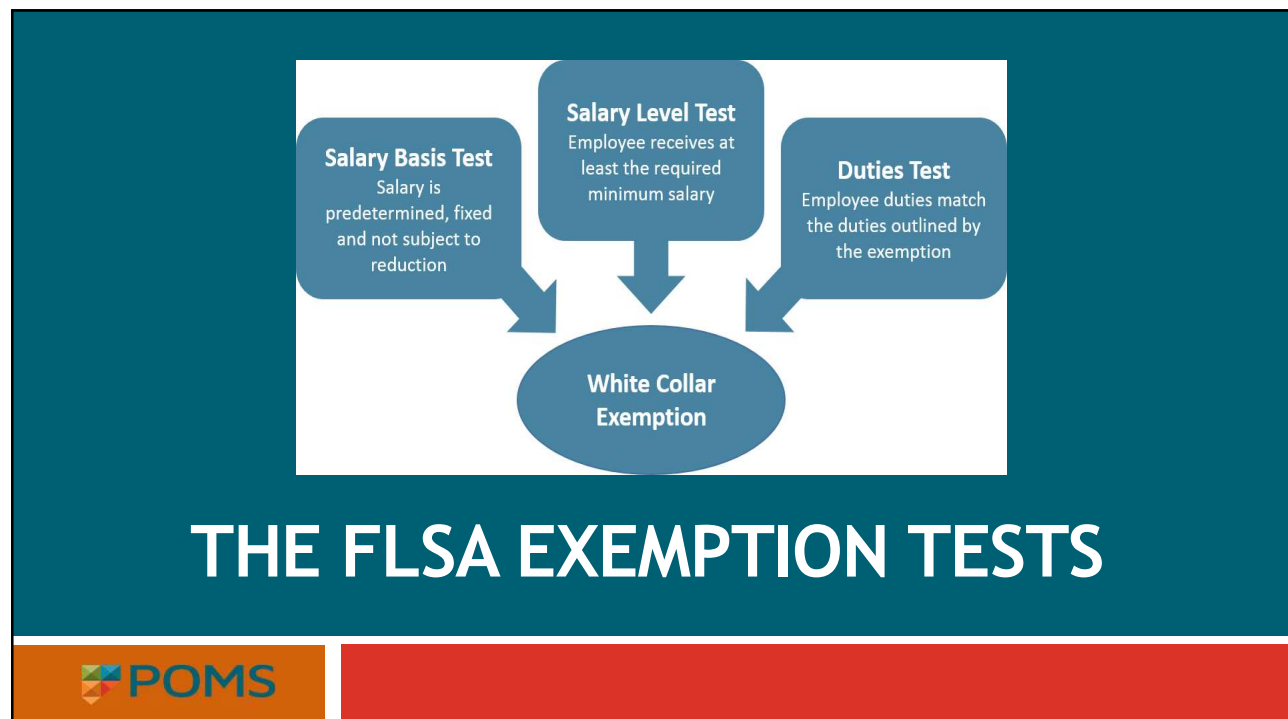
- On April 23, 2024, the U.S. DOL announced its final rule increasing the salary thresholds for the Fair Labor Standards Act's (FLSA) overtime exemptions for executive, administrative, professional, and highly compensated employees.
- The new rule raises those salary thresholds from the current levels of \$684 per week (\$35,568 annually) to:
 - \$844 per week (\$43,888 annually) beginning on July 1, 2024; and
 - \$1,128 per week (\$58,656 annually) beginning on January 1, 2025.
- The new rule also raises the salary thresholds for the FLSA's highly compensated employee exemption (HCE) - or employees who are exempt from the FLSA's overtime requirements because of their compensation without consideration of the duties they perform - from \$107,432 annually to:
 - \$132,964 beginning on July 1, 2024; and
 - \$151,164 beginning on January 1, 2025.

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NOTE: USDOL ISSUED FINAL RULE RAISING MINIMUM SALARY LEVEL THRESHOLDS FOR FLSA OT EXEMPTIONS

- Finally, the new rule provides that these salary thresholds will update automatically every three years, beginning July 1, 2027. According to the DOL, the final rule will impact approximately four million workers by transferring approximately \$1.5 billion from employers to employees.
- *DOL will likely face legal challenges to the rulemaking, so keep your eye on this.*
- *Employers should commence preparations to comply with the final rule beginning July 1, 2024. Employers can do so by identifying employees in their workforce who are currently exempt, but after the final rule goes into effect, may become non-exempt because of the increased salary thresholds.*
- *For those affected employees, employers should begin crafting strategies to ensure their workforce remains compliant with the FLSA, including by increasing the affected employees' salaries to make them exempt once again, reclassifying the affected employees from exempt to non-exempt, and/or limiting overtime opportunities for the affected employees.*

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POMS FLSA CLASSIFICATION - Exempt or NON-Exempt?

FLSA exemptions are commonly misunderstood by employers. Here are some common mistakes and fallacies regarding FLSA exemptions:

- “If I put an employee on salary, they become exempt.”
- “If an employee has a manager, supervisor, or administrator title, they are exempt.”
- “If an employee has an advanced degree, they are exempt.”
- “If an employee is performing inside sales work, they are exempt.”
- “I have an employee who wants to be paid on salary, rather than hourly, and does not want to record his time. Based on his wishes, it is OK for me to treat him as exempt.”
- “Everyone else in my industry classifies this position as exempt; so I can make it exempt.”
- “The employees who I have classified as exempt don’t work overtime, so it doesn’t matter if I have misclassified them.”
- All these assumptions are, simply, incorrect, and if you have classified employees as exempt on any of these bases, you need to look again.

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POMS EVERYONE ELSE IS NON-EXEMPT

- Nonexempt employees are employees who do not meet the FLSA exemption tests
- **ALL** non-exempt employees *in the private sector* must be paid overtime for all hours worked over 40 in a workweek of how or where worked.
- Non-exempt employees are generally paid on an ☒ hourly basis
- Non-exempt employees *may be paid on a salary* ☒ but they are still subject to overtime pay for hours over 40 a workweek. ☐



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POMS WHO IS SALARIED AND WHO IS HOURLY?

- Not the question to ask! The real question is:
- **WHO IS EXEMPT AND WHO IS NON-EXEMPT?**
- Under the Fair Labor Standards Act, an employee must meet all 3 tests to be exempt from OT pay:
 1. Salary Basis Test
 2. Salary Level Test
 3. The Duties Test



EXEMPT

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POMS FLSA WHITE COLLAR EXEMPTION TESTS

1. The Salary Basis Test
 - 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.
2. The Salary Level Test - *NOTE - \$ amounts are current as of May 9, 2024, but are set to increase in the final rule.*
 - Generally, \$684 per week or \$35,568 per year (some states have higher threshold)
 - Highly Compensated Employees Exemption: \$107,432/yr.
 - These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine.
 - Exempt computer employees may be paid at least \$684/week on a salary basis, or on at a rate not less than \$27.63 an hour.
 - Employers can use annual nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.

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POMS FLSA WHITE COLLAR EXEMPTION TESTS

3. Primary Duty Test

- Definition does not strictly require 50% of time
- Primary = principal, main, major or most important
- As provided by the FLSA, the Department of Labor (DOL) enforces seven classes of potentially exempt workers:
 1. Executive Employees
 2. Administrative Employees
 3. Learned Professionals
 4. Creative Professionals
 5. Computer Employees
 6. Outside Sales Employees
 7. Highly Compensated Employees
- Within each of these classes, an employee's responsibilities and role within the broader organization are considered. Each has its own specific set of rules, exceptions, and pitfalls.

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POMS EXEMPTION TEST PART ONE: SALARY BASIS TEST

- Weekly pay must be predetermined, fixed and not subject to reduction because of variations in the quality or quantity of work performed.
 - Regular Paycheck
 - Predetermined / Set amount
 - Not Hourly
- The salary may not be calculated and paid less frequently than weekly.
- Compensation reduced because of absences less than a full day due to personal reasons other than sickness or disability - Bona fide leave bank policy



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POMS EXEMPTION TEST PART ONE: SALARY BASIS TEST

Exempt employees may not be paid less than their full salary due to, for example:

- Substandard work;
- Absences of less than a full day (such as showing up late or leaving early);
- Absences caused by the operating requirements of the business (such as an annual plant shut-down); and
- Absences for jury or witness duty, or temporary military leave, if the employee performs some work during the same week during which the absence occurs.

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POMS EXEMPTION TEST PART ONE: SALARY BASIS TEST

Partial Day Absences - Deductions for partial day absences generally violate the salary basis rule

- The exempt employee must receive a full day's pay for the partial day worked. Full- or partial-day deductions are permitted from exempt employees' leave accounts to cover absences.

Deductions from Pay - There are some allowable deductions from an exempt employee's salary including but not limited to:

- Partial workweek in the first or final week of an exempt employee's employment
- Unpaid leave under the Family and Medical Leave Act.
- Absence from work for full days for personal reasons other than sickness or disability.
- Full-day absences after exhausting accrued leave under a bona fide leave plan
- Full- or partial-day deductions for violating safety rules of major significance.
- Unpaid disciplinary suspensions of one or more full days for infractions of workplace conduct rules, as long as there is a written policy

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EFFECT OF IMPROPER DEDUCTIONS

- An actual practice of making improper deductions from salary will result in the loss of the exemption:
 - During the time period in which improper deductions were made
 - For employees in the same job classifications
 - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee



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SAFE HARBOR FOR IMPROPER PAY DEDUCTIONS

Safe harbor for inadvertent and isolated improper deductions if:

- Written, clearly communicated policy concerning deductions
 - Providing a copy of the policy to employees at the time of hire
 - Publishing the policy in an employee handbook
 - Publishing the policy on the employer's Intranet
- Policy contains complaint procedure
- Employer responds and rectifies errors
- Full reimbursement made

Tip - Employers should also include in their Employment Policy Manuals, an "open door" policy encouraging employees to raise improper pay deductions to the attention of management and require employees to acknowledge receipt of the Handbook.



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EXCEPTIONS TO SALARY BASIS/SALARY LEVEL TEST

Teachers

- This includes not just teachers of children enrolled in public and private schools and colleges, but also, for example, music instructors, athletic coaches and flight instructors. 29 C.F.R. 541.303; *See Professional Employees.*

Lawyers and Doctors

- Any licensed attorney actually engaged in the practice of law, and anyone holding a license to practice medicine who is actually practicing medicine, as well as those employed in internship and residency programs, qualifies for this exception.
- However, pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists or other employees engaged in professions which service the medical profession are excluded. 29 C.F.R. 541.304; *See Professional Employees.*

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EXCEPTIONS TO SALARY BASIS/SALARY LEVEL TEST

Certain Computer Employees

- Computer employees who meet certain duties requirements are "professional" employees eligible for exemption under the FLSA if they are paid on a salary or fee basis of at least \$684 per week or at an hourly rate of at least \$27.63 per hour. *(Current Regulations)* 29 C.F.R. 541.400;

Outside Salespersons

- Employees who qualify as outside salespersons under the FLSA are exempted from the salary basis requirement. 29 C.F.R. 541.500; *See Outside Salespersons.*

Administrators and Professionals Paid on a Fee Basis

- Administrators and professionals may be paid on a fee basis rather than a salary basis under certain circumstances. 29 C.F.R. 541.605; *See Fee Basis.*

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EXCEPTIONS TO SALARY BASIS/SALARY LEVEL TEST

Employees in the Motion Picture Industry

- The salary requirement does not apply to otherwise-exempt employees in the motion picture-producing industry who are paid a base rate of at least \$1,043 per week exclusive of board, lodging or other facilities for a maximum of six workdays per week. *(Current Regulations)*
- Employees in this industry may be paid a proportionate amount for any week in which the employee does not work a full workweek. Furthermore, otherwise-exempt employees may be paid at a daily rate if either:
 - The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least the minimum weekly amount if 6 days were worked; or
 - The employee is in a job category having the minimum weekly base rate and the daily base rate is at least one-sixth of such weekly base rate. 29C.F.R. 541.709.

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EXCEPTIONS TO SALARY BASIS/SALARY LEVEL REQUIREMENT

Residents of American Samoa

- Employees in American Samoa need only be paid \$380 per week on a salary basis if employed by any entity other than the federal government. 29 C.F.R. 541.600. *(Current Regulations)*

Minimum Guarantee Plus Extras

- Employers who want to motivate their employees to perform by providing additional - and often variable - compensation over and above the employees' salary, as long as the exempt employee is guaranteed at least \$684 per week as salary. *(Current Regulations)*

Fee Basis

- Administrative and professional employees may be paid on a fee basis instead of salary basis. "Fee basis" means a set amount will be paid to the employee for a single task regardless of the time required for completion, if the fee they are paid is equivalent to or greater than the amount of the salary level test.

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EXEMPTION TEST PART TWO: SALARY LEVEL TEST

Current Regulations:

- Generally, \$684 per week or \$35,568 annually based on a 12-month work year, excluding lodging, board, and other benefits *(Current Regulations)*
- Highly Compensated Employees Exemption: \$107,432/yr. *(Current Regulations)*
- These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine.
- Exempt computer employees may be paid at least \$684/week on a salary basis, or on at a rate not less than \$27.63 an hour. *(Current Regulations)*
- Employers can use annual nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.

NOTE that for the FLSA, and all state statutes, the same salary level thresholds apply to part-time employees; it is not pro-rated for employees who are less than full-time. This means, for example, that a 50% (half-time) employee whose weekly salary is \$70,000 would be overtime eligible because their actual, half-time salary would be \$35,000, which is less than the current FLSA \$35,568 threshold. Calculations for part-time should be based on the weekly salary threshold.

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EXEMPTION TEST PART TWO: SALARY LEVEL TEST

April 23, 2024, USDOL Final Overtime Rule:

- The standard salary level will increase in two phases from the current \$684 per week (\$35,568 per year) to:
 - July 1, 2024: \$844 per week (\$43,888 annually)
 - Jan. 1, 2025: \$1,128 per week (\$58,656 annually)
- The highly compensated exemption (HCE) total annual compensation level will increase from its current \$107,432 per year to:
 - July 1, 2024: \$132,964 per year
 - Jan. 1, 2025: \$151,164 per year
- The salary thresholds will be updated every three years to reflect current earnings data, beginning July 1, 2027.
- Remember that many states have their own salary thresholds for exempt status and these thresholds are not impacted by the DOL's proposal.

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EXEMPTION TEST PART THREE: THE DUTIES TEST

- If employee does not meet the salary basis or salary level tests, the employee is Non-Exempt, no matter what the duties are.
- If the employee meets the salary test, move on to the Duties Test.
- Consider the employee's **PRIMARY DUTY**:
 - “Principal, main, major or most important duty that the employee performs.”
 - Each of the Executive, Administrator and Professional Tests uses a different analysis to determine the “primary duty.”

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EXEMPTION TESTS AT THE STATE LEVEL

NOTE: State laws/regulations may be different from the FLSA regulations

- Multistate employers should look at compliance on a state-by-state basis
- In states that have their own exemption tests—such as California—the employer must satisfy whichever salary threshold is greater, whether it's the federal or state.

CALIFORNIA

- California covers the same general areas of exemption as the FLSA, but it divides the areas somewhat differently and places additional requirements on some of the exemptions.
- **Minimum Salary Level:** The employee must be paid a salary that is at least twice the state minimum wage for full-time employment. An employee must earn no less than two times the state's minimum wage for full-time work to meet this initial requirement of the exemption test. As of January 1, 2024, employees in California must earn an annual salary of no less than \$1,280 per week, or \$66,560 to meet this threshold requirement.
- **NOTE TOO:** California doesn't recognize the Highly Compensated Employee as a legitimate excuse for exemption.

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EXEMPTION TESTS AT THE STATE LEVEL

COLORADO

- **Minimum Salary Level:** As of January 1, 2024, Colorado's salary requirements for exemption status are: \$55,000 per year (\$1,057.69 per week), and if highly technical computer professionals are paid on an hourly basis and meet the duties requirements, they must be paid at least \$31.41 per hour (the 2024 rate has not been published yet)
- Colorado's threshold has an indexed increase slated for 2025.

MAINE

- **Minimum Salary Level:** The annual salary for exempt workers must be at least 3,000 times the state minimum wage divided by 52, but, if the salary basis is higher under the FLSA, then the employer must meet the FLSA's threshold. Due to an increase in the state's minimum wage, the minimum salary required for the administrative, professional and executive exemptions from overtime under state law increased to \$816.35 per week (42,450.20 annualized) on January 1, 2024.

ALASKA

- **Minimum Salary Level:** exempt employees must be paid two times the state minimum wage for the first 40 hours worked each week, excluding board or lodging from the employer. As of January 1, 2024, the threshold is \$458,796.80 annually (\$938.40 per week)

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EXEMPTION TESTS AT THE STATE LEVEL

WASHINGTON

- The Washington state minimum wage effective January 1, 2024 is \$16.28 per hour.
- The Washington state overtime threshold for exempt jobs as of January 1, 2024, is set by state rule at 2 times the state minimum wage (\$16.28) and is now \$1,302.40 per week. The annualized amount is \$67,728.00. *Note: WA rounds up to compute annualized salary.*
- Note: Employers may pay exempt computer professionals by the hour, provided they pay at least 3.5 times the minimum wage (\$56.98 per hour in 2024).

When the rule takes effect		July 1, 2020	Jan. 1, 2021	Jan. 1, 2022	Jan. 1, 2023	Jan. 1, 2024	Jan. 1, 2025	Jan. 1, 2026	Jan. 1, 2027	Jan. 1, 2028
For small employers with 1-50 employees	Multiply minimum wage by...	1.25x	1.5x	1.75x	1.75x	2x	2x	2.25x	2.25x	2.5x
	Projected salary threshold Weekly (Annual)	\$675 (\$35,100.00)	\$821.40 (\$42,712.00)	\$1,014.30 (\$52,743.60)	\$1,101.80 (\$57,293.60)	\$1,302.40 (\$67,724.80)	\$1,337.60* (\$69,555.20)	\$1,538.10* (\$79,981.20)	\$1,568.70* (\$81,572.40)	\$1,780.00* (\$92,560.00)
For large employers with 51 or more employees	Multiply minimum wage by...	1.25x	1.75x	1.75x	2x	2x	2.25x	2.25x	2.5x	2.5x
	Projected salary threshold Weekly (Annual)	\$675.00 (\$35,100.00)	\$958.30 (\$49,831.00)	\$1,014.30 (\$52,743.60)	\$1,259.20 (\$65,478.40)	\$1,302.40 (\$67,724.80)	\$1,504.80* (\$78,249.60)	\$1,538.10* (\$79,981.20)	\$1,743.00* (\$90,636.00)	\$1,780.00* (\$92,560.00)

Note 1: The asterisks on the salary thresholds after 2024 are projections based on forecasted changes in the Consumer Price Index. These projections have been updated from previous versions.

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EXEMPTION TESTS AT THE STATE LEVEL

NEW YORK

- Effective Dec. 31, 2023, the new minimums are \$1,200 per week in New York City and Nassau, Suffolk and Westchester counties, and \$1,124.20 per week for the rest of the state.
- **Executive and Administrative Employees:** The NYDOL has set yearly increases to those thresholds for the next three years starting in 2024 as follows:
 - New York City and the rest of “downstate” (Nassau, Suffolk, and Westchester counties):
 - \$1,200 per week (\$62,400 per year) on Jan. 1, 2024.
 - \$1,237.50 per week (\$64,350 per year) on Jan. 1, 2025.
 - \$1,275 per week (\$66,300 per year) on Jan. 1, 2026.
 - The rest of New York State (areas outside of New York City and Nassau, Suffolk and Westchester counties):
 - \$1,124.20 per week (\$58,458.40 per year) on Jan. 1, 2024.
 - \$1,161.65 per week (\$60,405.80 per year) on Jan. 1, 2025.
 - \$1,199.10 per week (\$62,353.20 per year) on Jan. 1, 2026.

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EXEMPTION TESTS AT THE STATE LEVEL

NEW YORK

- **Professional Employees** - New York does not have a higher salary threshold than federal law with respect to an “employee employed in a bona fide professional capacity.” As such, the professional exemption under New York law will continue to be subject to the federal professional exemption salary threshold, currently set at \$684.00 per week (\$35,568.00 per year).
- **Pay Frequency** - Related to pay frequency, New York law requires “manual workers” (a term broadly defined by the NYDOL) to be paid at least weekly. Other employees who do not meet the executive, administrative, and professional salary exemptions and other nonmanual employees must be paid at least semimonthly. There has been a significant increase in pay frequency litigation, including class/collective actions.
 - **BE SURE TO CHECK THE LAW IN ALL STATES WHERE YOU HAVE OPERATIONS, INCLUDING REMOTE WORKERS**

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FLSA EXEMPT “DUTIES TEST” DEFINITIONS



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IMPORTANT TERMS IN THE DUTIES TEST

1. Primary Duty
2. Management
3. Department or Subdivision
4. Two or more employees
5. Particular Weight
6. Directly Related to Management or General Business Operations
7. Discretion and Independent Judgement
8. Matters of Significance
9. Work Requiring Advanced Knowledge
10. Field of Science or Learning
11. Prolonged Course of Specialized Intellectual Instruction
12. Invention, Imagination, Originality, or Talent
13. Field of Artistic or Creative Endeavor
14. Making Sales
15. Obtaining Orders or Contracts for Services or for the Use of Facilities



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1. PRIMARY DUTY

- To qualify for almost all of the FLSA's overtime exemptions, an employee's primary duty must be the performance of exempt work.
- In other words, if an employee performs *some* exempt work but it is not the employee's primary duty, then the employee will not be exempt
- The DOL defines primary duty as the
 - *"principal, main, major or most important duty that the employee performs." 29 C.F.R. 541.700. Determining an employee's primary duty is to be "based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole."*

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1. PRIMARY DUTY

- Relevant factors in making a determination regarding the "primary duty" of an employee are as follows:
 - The relative importance of the employee's exempt duties compared to their other duties;
 - The amount of time spent performing exempt work;
 - An employee **who spends more than 50 percent of their time on exempt work** will generally qualify for an exemption. Time alone, however, is not sufficient for determining exemption status.
 - The employee's relative freedom from direct supervision; and
 - The relationship between the employee's salary as compared to wages paid to other employees for the same type of nonexempt work.

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1. PRIMARY DUTY - COMBINATION EXEMPTIONS

- Some employees may not be able to satisfy the primary, or main, duty requirement of any one of the specific exemptions discussed in this section.
- However, such employees may still qualify for exemption if their primary duty involves a combination of exempt duties under one or more of the executive, administrative, professional, outside sales and computer employee exemptions. 29 C.F.R. 541.708.
 - *In other words, two or more sets of duties that separately would be exempt under an individual exemption if they were the employee's primary duty may be combined to form the employee's primary duty of exempt work.*

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1. PRIMARY DUTY - EMERGENCIES AND OCCASIONAL TASKS

- Employees who are otherwise exempt will not lose exempt status because they perform nonexempt work due to an emergency situation. 29 C.F.R. 541.706.
- Emergencies generally include situations that are beyond the control of the employer and will occur only rarely. Emergencies do not include, for example, periods of heavy workload during which an exempt employee assists nonexempt employees.
- An occasional and infrequent recurrent (repeating) task that cannot practicably be performed by a nonexempt employee will not cause an otherwise-exempt employee to lose exempt status, if that task is necessary for an exempt employee to properly carry out exempt duties. 29 C.F.R. 541.707.

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POMS 2. MANAGEMENT

Generally, “management” includes, but is not limited to activities such as:

- interviewing, selecting, and training of employees;
- setting and adjusting their rates of pay and hours of work;
- directing the work of employees;
- maintaining production or sales records for use in supervision or control;
- appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status;
- handling employee complaints and grievances;
- disciplining employees; planning the work;
- determining the techniques to be used; apportioning the work among the employees;
- determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- controlling the flow and distribution of materials or merchandise and supplies;
- providing for the safety and security of the employees or the property;
- planning and controlling the budget; and monitoring or implementing legal compliance measures.

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POMS 3. DEPARTMENT OR SUBDIVISION

The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

A customarily recognized department or subdivision must have a permanent status and a continuing function.

- When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.
- A recognized department or subdivision need not be physically within the employer’s establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.
- Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function.

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4. TWO OR MORE EMPLOYEES

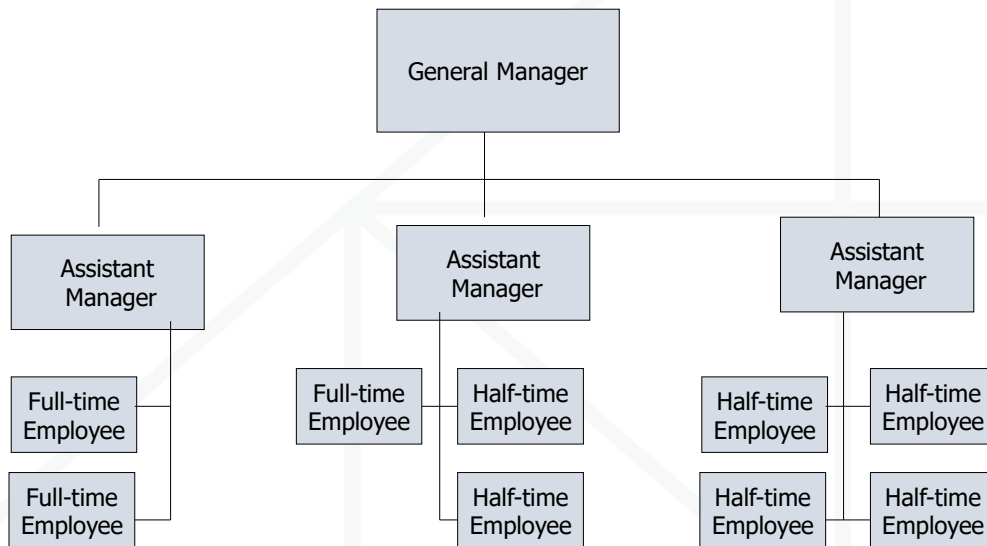
To qualify as an exempt executive, the employee must customarily and regularly direct the work of two or more other employees.

- The phrase “two or more other employees” means two full-time employees or their equivalent.
- One full-time and two half-time employees, for example, are equivalent to two full-time employees.
- Four half-time employees are also equivalent.
- An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager’s absence does not meet this requirement.

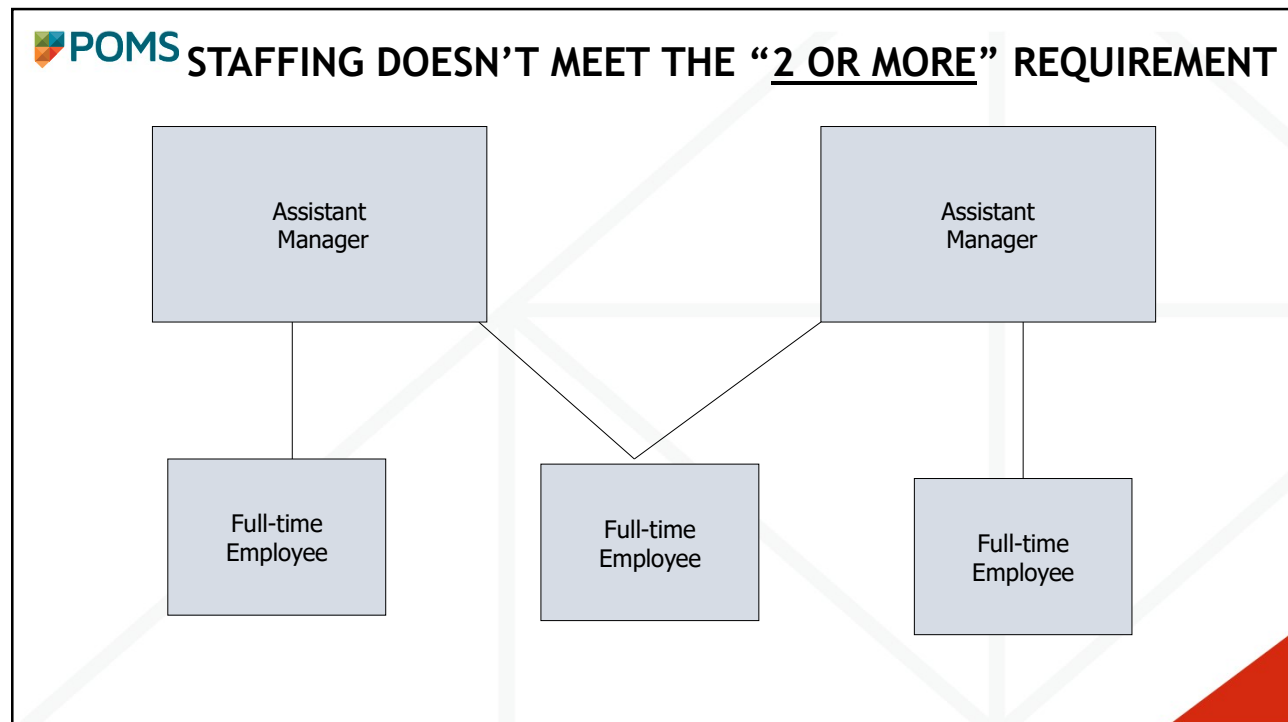
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STAFFING MEETS THE “TWO OR MORE” REQUIREMENT



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 **5. PARTICULAR WEIGHT**

To determine whether an employee’s suggestions and recommendations are given “particular weight,” factors to be considered include, but are not limited to:

- whether it is part of the employee’s job duties to make such suggestions and recommendations;
- the frequency with which such suggestions and recommendations are made or requested;
- and the frequency with which the employee’s suggestions and recommendations are relied upon.
- Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker.

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6. DIRECTLY RELATED TO MANAGEMENT OR GENERAL BUSINESS OPERATIONS

To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers.

- The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee.
- To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished,
 - For example, from working on a manufacturing production line or selling a product in a retail or service establishment.

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7. DISCRETION AND INDEPENDENT JUDGMENT

To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

- In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.
 - The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision.
 - However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.
- The term "matters of significance" refers to the level of importance or consequence of the work performed.
- The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.

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7. DISCRETION AND INDEPENDENT JUDGMENT

- The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. It also *“does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.”* 29 CFR § 541.202(e).
- Independent judgment is the ability to make an independent choice without immediate supervision or direction. It can include:
 - **Administrative:** Negotiating and binding the department on important matters.
 - **Consulting:** Providing expert advice to management.
 - **Planning:** Long- or short-term business objectives.
 - **Investigation:** Resolving matters of significance on behalf of management.
 - **Waiver:** Waiving or deviating from established policies and procedures without prior approval.
 - **Representation:** Representing the company in handling complaints, arbitrating disputes, or resolving grievances.

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7. DISCRETION AND INDEPENDENT JUDGMENT

Discretion and Independent Judgement also involves:

- Taking account of context, such as objectives, precedents, relevant comparisons, legal requirements, ethical issues.
- The employee’s level of authority to formulate, affect, interpret, or implement management policies or operating practices.
- If the employee carries out major assignments in conducting the operations of the business.
- If the employee performs work that affects business operations to a substantial degree.
- whether the employee has authority to commit the employer in matters that have significant financial impact.
- whether the employee has authority to waive or deviate from established policies and procedures without prior approval.
- whether the employee has authority to negotiate and bind the company on significant matters; and
- other similar factors identified in the regulation.

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8. MATTERS OF SIGNIFICANCE

The term “matters of significance” refers to the level of importance or consequence of the work performed. 29 CFR § 541.202(a).

- The wider the scope of impact of an action or decision, the more likely an issue is a matter of significance.
- A “matter of significance” means that the decision the employee makes has a high level of importance or consequence to management or to the overall business operations of the employer or of the employer’s customers. For example:
 - a Project Manager who evaluates possible options and formulates a plan and selects necessary tools to meet the project objective of implementing an enterprise-wide system upgrade would be doing so on a “matter of significance.”
- An employee does not exercise discretion and independent judgment with respect to matters of significance just because the employer will experience financial losses if the employee fails to perform the job properly. 29 CFR § 541.202(f). For example:
 - An employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

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9. WORK REQUIRING ADVANCED KNOWLEDGE

The phrase “work requiring advanced knowledge” means work which is predominantly intellectual in character.

- It includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.
- An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.
- Advanced knowledge cannot be attained at the high school level.

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10. FIELD OF SCIENCE OR LEARNING

The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status.

- These occupations are distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of an advanced type but is not in a field of science or learning.



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11. PROLONGED COURSE OF SPECIALIZED INTELLECTUAL INSTRUCTION

The phrase “*customarily acquired by a prolonged course of specialized intellectual instruction*” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession.

- The best prima facie evidence that an employee meets this requirement is possession of the appropriate 4-year academic degree.
- However, the word “customarily” means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.
- For example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.
- However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes.
- The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

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12. INVENTION, IMAGINATION, ORIGINALITY, OR TALENT

The requirement of “invention, imagination, originality or talent” distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy.

- The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee.



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13. FIELD OF ARTISTIC OR CREATIVE ENDEAVOR

To qualify for exemption as a creative professional, the work performed must be “in a recognized field of artistic or creative endeavor.” This includes such fields as music, writing, acting and the graphic arts.



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14. MAKING SALES

“Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition.

It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.



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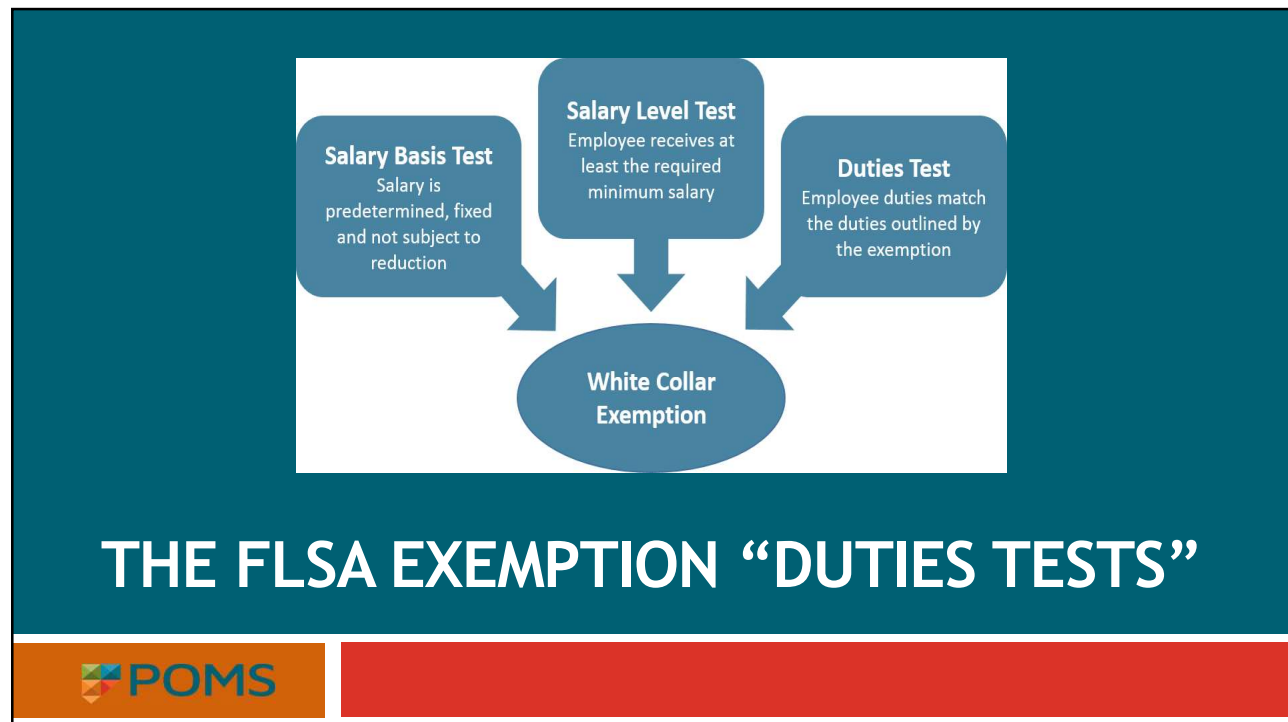
15. OBTAINING ORDERS/CONTRACTS FOR SERVICES, OR THE USE OF FACILITIES

Obtaining orders for “the use of facilities” - includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

- The word “services” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.



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POMS EXECUTIVE EXEMPTION

To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than \$684 per week, or \$35,568 annually (*Current Regs*);
- Have a primary duty of managing the enterprise, or “managing work customarily recognized as a subdivision or department” of the enterprise;
- Customarily and regularly supervise the work of at least two other full-time employees or equivalent;
- Have the authority to hire, promote, or fire others—or have their suggestions be given “particular weight” in those decisions
- All of the above conditions must be fulfilled for the employee to be considered exempt.
- **Stand Alone:** Business owner - 20% or more equity interest in business and actively engaged in management

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EXECUTIVE EXEMPTION

- If the above activities account for a majority of the manager's day-to-day tasks, they can be considered exempt.
- While the law does not define a specific methodology for determining what an employee's "primary duties" are, the DOL seems to prefer the 50 percent or more model.
- Note that job titles have no bearing on whether an employee is exempt from overtime.
 - A "manager" job title doesn't necessarily mean exempt.
 - Day-to-day responsibilities must align with the criteria set by the DOL above.
 - **EXAMPLE:** Jim earns about \$41,000 as an assistant manager at a local restaurant. While he oversees and sometimes coaches other restaurant employees, he spends the vast majority of his time working the register and in the kitchen.

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EXECUTIVE EXEMPTION

Owner Executives:

- An employee with *at least 20% equity interest in the company* by which he or she is employed can be exempt as an executive if the employee is actively engaged in the management of the business, regardless of the type of business, corporate or otherwise.
- The salary requirements for exemption do not apply to business owners who meet these qualifications. 29 C.F.R. 541.101; See Management.



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ADMINISTRATIVE EXEMPTION

- To qualify as exempt from overtime under the administrative exemption, an employee must:
 - Earn more than \$684 per week, or \$35,568 annually (*Current Regs*)
 - **Primary Duty** - perform office or non-manual work “directly” related to “the management or general business operations” of the employer or the employer’s customers/clients
 - The employee’s primary duty includes the exercise of “discretion and independent judgment” with respect to matters of significance.
 - *All of the above conditions must be fulfilled for the employee to be considered exempt.*
 - **Examples:** typically applies to claims adjusting, financial services, HR, auditing, tax, marketing, and quality control employees

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ADMINISTRATIVE EXEMPTION

- The administrative exemption is the most misunderstood and misapplied exemption.
- Employees qualifying for the administrative exemption should be empowered to make decisions that can be directly tied to the performance of the business, or per the FLSA’s language, “matters of significance.”
 - Importantly, the potential for an employee blunder to financially impact the company does not play into the so-called significance test.
 - employers are best served erring on the side of caution when making classification decisions for grey-area employees.
- If the employee’s decisions impact a client’s business, that too can qualify him or her under the exemption.
 - A financial consultant, for example, would likely qualify for exemption under these rules.

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ADMINISTRATIVE EXEMPTION

- In addition, work that is directly related to the management or general business operations of employers' customers is also exempt work when applying the administrative exemption.
 - Such work would include performing any of the types of work listed above for the employer's customers, such as advising or consulting them in that regard. **29 C.F.R. 541.201.**



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ADMINISTRATIVE EXEMPTION

- An exempt administrator must exercise "***discretion and independent judgment with respect to matters of significance***" in fulfilling their primary duty.
- In making such a determination, there are two major factors to be satisfied:
 - The employee has the authority to make decisions regarding matters of significant importance to the enterprise.
 - The employee has the responsibility to weigh and compare the possible courses of conduct for each decision

AUTHORITY

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ADMINISTRATIVE EXEMPTION

- The following are some of the duties that indicate an employee is exercising discretion and independent judgment with respect to matters of significance:
 - Formulating, affecting interpreting or implementing management policies or operating practices;
 - Carrying out major assignments in conducting the operations of the business;
 - Performing work that affects business operations to a substantial degree even if only related to a segment of the business;
 - Possessing the authority to commit the employer in matters of significant financial impact;
 - Possessing authority to waive or deviate from established policies and procedures without prior approval;

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ADMINISTRATIVE EXEMPTION

- Possessing authority to negotiate and bind the company on significant matters;
- Providing consultation or expert advice to management;
- Involvement in planning long-term or short-term business objectives;
- Investigating and resolving matters of significance on behalf of management; and
- Representing the company in the handling of complaints, arbitration of disputes or resolution of grievances. *29 C.F.R. 541.202; See Primary Duty.*
- The more of these duties an employee performs as part of their primary duties, the better the chance the employee will qualify for the administrative exemption. Federal courts have generally determined that two or more is sufficient.

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ADMINISTRATIVE EXEMPTION

- The factors listed above imply that this type of employee should have a level of independence and is not taking direction from an immediate supervisor.
 - Employees can, be determined to exercise discretion or independent judgment despite the fact that their decisions are reviewed by a higher level of management.
 - The discretion and independent judgment can be in the form of recommendations, whether followed or not.
- Merely applying well-established techniques, procedures or standards described in manuals or recognized sources is not the exercise of discretion and independent judgment required for an administrative exemption.
 - However, the use of a manual containing highly complex matters, which can only be understood by one with an advanced or specialized knowledge or skill, will not compromise the exemption status of an otherwise-qualified individual.

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ADMINISTRATIVE EXEMPTION

Educational Establishments

Employees employed in educational establishments may also qualify as exempt administrators. There are two major requirements for this exemption:

- The employee must be compensated on a salary or fee basis at a minimum of \$684 per week (*Current Regs*), not to include board, lodging and other facilities, or a salary that is at least equal to the entrance salary of teachers in the particular educational establishment. *See The Salary Basis Test.*
- 1. The employee's primary duty must be to perform *"administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof."*



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ADMINISTRATIVE EXEMPTION

"Administrative functions directly related to academic instruction or training" is work related to academic operations and functions in the school as opposed to general business operations, such as:

- Superintendents or other heads of an elementary or secondary school system;
- Assistants responsible for curriculum, methods and quality of instruction, measurement and testing the learning potential and achievements of students, establishment and maintenance of academic and grading standards, or other aspects of a teaching program;
- Principals of elementary or secondary schools;
- Vice principals responsible for an elementary and secondary school;
- Department heads in institutions of higher education responsible for the administration of mathematics, English, foreign languages and other similar departments; and
- Academic counselors performing work such as administering school testing, assisting students with academic problems and advising students regarding degree requirements.

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ADMINISTRATIVE EXEMPTION

John is an insurance claims analyst, earns a salary of \$70,000, and has no direct reports. Some of his duties include interviewing insured clients, reviewing damage reports, preparing estimates, and helping determine eligibility for coverage.

- **EXEMPT** - John's employer has given him say over matters of significance, and his decisions have a direct impact on the company and clients' financial well being.

Jenny is a city building inspector who earns \$72,000 per year. She reports directly to the building commissioner and has one direct report, an administrative assistant. Her primary responsibility is surveying commercial properties and determining whether they're structurally stable and sanitary.

- **NON-EXEMPT** - While Jenny is granted some leeway to make her own decisions, her work is highly regulated and must abide by building code. This reliance on pre-established rules makes her a weak candidate for overtime exemption.

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LEARNED PROFESSIONAL EXEMPTION

To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than \$684 per week, or \$35,568 annually (*Current Regs*)
- **Primary Duty** - performance of work requiring “advanced knowledge” or work that is predominantly intellectual in nature.
 - The employee’s area of expertise must be related to a field of science or learning, and come from a prolonged course of study
 - “Prolonged” course in specialized intellectual instruction (B.A. or B.S., or beyond)
 - “Consistent” exercise of discretion and judgment in science or learning
 - Examples: Accounting, law, education, medicine, engineering, theology, architecture, chemistry, pharmacy, etc.

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LEARNED PROFESSIONAL EXEMPTION

• Examples of Learned Professionals:

- **Teachers** who have a primary duty of "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge" and are employed in an educational establishment.
- **Physicians** who have a valid license or certificate to practice medicine or any of its branches and are actually practicing medicine.
- **Attorneys** who have a valid license or certificate to practice law or any of its branches and are actually practicing law.
- **Registered or certified medical technologists** who have completed three academic years of professional study from an accredited college and a fourth year of professional course work in a school approved by the American Medical Association.
- **Certified Public Accountants (CPAs) or accountants** who are not CPAs but perform similar job duties. Accounting clerks will not meet the exemption requirements.

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LEARNED PROFESSIONAL EXEMPTION

Michael, a certified public accountant (CPA) is an audit associate for a major accounting firm. As part of his job responsibilities, he provides tax and advisory services to client companies.

- **EXEMPT:** Michael, whose job requires “advanced knowledge,” in the form of CPA certification, is a strong candidate for OT exemption. His decisions’ impact on client operations help substantiate his case under the administrative exemption, too.

After graduating from college with a major in education, Gillian accepted a job as a teacher’s aide at a local elementary school. Her primary responsibilities include helping teachers prepare for their lessons, printing classroom assignments, and recordkeeping.

- **NON-EXEMPT:** Though Gillian has some education in her field, her undergraduate degree is unlikely to meet the DOL’s interpretation of “prolonged study.” Additionally, she largely carries out tasks assigned by another teacher—meaning her independent discretion on day-to-day affairs is limited.

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CREATIVE PROFESSIONAL EXEMPTION

To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than \$684 per week, or \$35,568 annually (*Current Regs*)
- **Primary Duty** - the performance of work requiring “invention, imagination, originality, or talent” in a recognized field of artistic or creative endeavor
- The “creative professionals” exemption applies to the fields of music, writing, acting, or visual arts, and requires that qualifying employees are granted creative license in their work.
- **Consider this example:** *a company employs two graphic designers and assigns the same task to both. If the end results are nearly identical because of preexisting limitations put in place by the employer, the designers may not qualify for the exemption.*

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COMPUTER PROFESSIONAL EXEMPTION

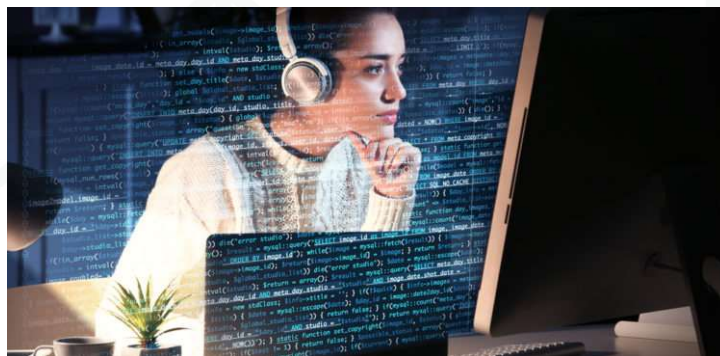
To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than \$684 per week, or \$35,568 annually; (*Current Regs*) or
- Be paid \$27.63 per hour or more (*Current Regs*)
- Employee's **Primary Duty**:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
 - The design of computer systems based on and related to user or system design specifications
 - The creation or modification of computer programs related to machine operating systems
- This exemption does not apply to computer manufacturing or repair positions. An employee whose work is dependent on the use of computer programs (e.g., a structural engineer using drafting software) does not qualify, either.

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COMPUTER PROFESSIONAL EXEMPTION

- **NOTE:** Since the FLSA contains a specific test that must be satisfied for computer employees to qualify for exempt status, the highly compensated employee exemption may not apply to employees in computer-related jobs.



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COMPUTER PROFESSIONAL EXEMPTION

Paulina is a systems engineer at a global aerospace and defense company. Her primary responsibilities include the development, testing, and management of missile guidance systems.

- **EXEMPT:** Paulina is directly involved in the development of her company's technology. Her job responsibilities and specialized knowledge makes her a probable candidate for exemption.

Eugene is a help desk associate who earns an annual salary of \$65,000. He installs and troubleshoots company software, manages the phone system, and helps keep the business's data secure.

- **NON-EXEMPT:** Eugene is not a systems analyst, programmer, or software engineer, as defined by the FLSA. Additionally, he only manages existing hardware and software—he is not involved in its development or testing.

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OUTSIDE SALES EXEMPTION

To qualify as exempt from overtime under this exemption, an employee must:

- **Primary Duty** - making sales or obtaining orders for services or for use of facilities, and
- Employee customarily and regularly engages in work away from the employer's place of business
- This exemption only applies to salespeople who spend 50 percent or more of their working hours off-premises making sales.
- No salary requirement or particular salary level
- Regulations explicitly exclude from the exemption "Inside Sales"
- Note that a sales employee working remotely from home does not qualify as "outside sales" under the rule.
 - "Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property."

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POMS OUTSIDE SALES EXEMPTION

- The FLSA defines "sales" to include any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition, including the transfer of title to tangible property. **29 U.S.C. 203(k)**.
- Drivers who both deliver and sell products may qualify as exempt outside salespersons only if their primary duty is making sales. The following factors determine whether a driver's primary duty is making sales:
 - A comparison of the employee's duties with those of other employees engaged as drivers and salespersons;
 - The presence or absence of customary or contractual arrangement concerning amounts of products to be delivered;
 - Whether the employee has a seller's/solicitor's license (if required by law)
 - The employee's job description in any collective bargaining agreements.

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POMS OUTSIDE SALES EXEMPTION

Commissioned Salespersons / Inside Salespersons

- Certain employees of retail and service establishments who are paid in whole or in part on a commission basis are exempt from the OT requirements of the FLSA, but not the minimum wage requirements.
- To qualify for this exemption, (*the "inside sales" exemption*," an employee must:
 - Be employed by a retail or service establishment;
 - Have a regular pay rate that is more than one and one-half times the minimum wage for every hour worked in a workweek in which overtime hours are worked; and
 - Derive more than 50 percent of their total compensation during a representative period (that can be between one month and one year long) from commissions.

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POMS OUTSIDE SALES EXEMPTION

Ashley is a sales representative for a local beverage distributor. She spends most of her time pitching her company's products to hospitals and supermarkets, on location.

- **EXEMPT:** Success in Ashley's role requires that she spend most of her time away from the office, meeting and building relationships with prospective buyers. Because this meets the DOL's interpretation of "outside sales," she can be exempted from overtime.

Mary is a sales development representative who spends most of her day making cold calls to prospective buyers. While an hourly employee, she receives a commission for every client that ends up purchasing her company's services.

- **NONEXEMPT:** Though Mary is in sales, she does not meet the FLSA definition of "outside sales"—she does not spend most of her working time off company premises or at a prospective buyer's place of business.

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POMS HIGHLY COMPENSATED EMPLOYEES

To qualify as exempt from overtime under this exemption, an employee must:

Earn \$107,432 or more annually (*Current Regs*)

- Primarily perform office or non-manual work
- Regularly perform at least one duty that classifies under the other exemptions - executive, administrative, or professional duties
- Some exceptions do apply, depending on the work done (it must be non-manual), but these are few and far between.
- Bonuses and commission can count towards the annual \$107,432 requirement.
 - Income may not include board, lodging or other facilities (as defined at 29 C.F.R. 541.606), or payments for medical or life insurance, retirement contributions or the cost of fringe benefits.

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HIGHLY COMPENSATED EMPLOYEES

- The regulations permit employers to take advantage of this provision even if they are uncertain whether or not their employees will meet or exceed the minimum threshold by the end of the compensation year.
 - If the employee's total annual compensation does not reach the minimum level by the last pay period of the compensation year, the employer may make a final payment sufficient to achieve the minimum level either during the last pay period or within one month after the end of the compensation year, and still take advantage of this provision.
- Employees who work for only a portion of the year because they are:
 - hired during the year; or
 - terminated prior to the end of the year, may nonetheless be considered "highly compensated employees" under this provision if they are paid a pro rata portion of the minimum salary level based upon the portion of the compensation year actually worked.

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SPECIAL FLSA EXEMPTION RULES



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SPECIAL EXEMPTION RULES FOR PUBLIC SECTOR

EXCLUSIONS

- A few classes of individuals employed by public agencies are specifically excluded from coverage under section 3(e)(2)(C) of the Act. These exclusions apply to
 - Elected Public Officials,
 - the Personal Staff of Elected Public Officials,
 - Policy-Making Appointees and
 - Legal Advisors.
 - Employees of legislative branches of state and local governments are also excluded from coverage.
- A condition for all the above exclusions is that the employee not be subject to the civil service laws of the employing State or local agency
- **Volunteers** - Section 3(e) of the Act, as amended in 1985, provides that individuals performing volunteer services for units of state and local governments will not be regarded as "employees" under the Statute.

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SPECIAL EXEMPTION RULES FOR PUBLIC SECTOR

Police Officers, Firefighters, and Other First Responders are Generally Non-Exempt

- First responders generally do not qualify as exempt employees, because their primary duty is not management, non-manual administrative work, etc.
- Employees engaged in law enforcement activities may perform some nonexempt work which is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.
- Police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees ("first responders") who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and other similar work are not exempt under Section 13(a)(1) or the regulations and thus are protected by the minimum wage and overtime provisions of the FLSA.

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SPECIAL EXEMPTION RULES FOR PUBLIC SECTOR

Special Provisions for Public Safety - Fire and Law Enforcement

- Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who are trained in fire suppression; have the legal authority and responsibility to engage in fire suppression; are employed by a fire department of a municipality, county, fire district, or State; and are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.
- Law enforcement personnel are employees who are empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.



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SPECIAL EXEMPTION RULES FOR PUBLIC SECTOR

Special Provisions for Public Safety - Fire and Law Enforcement

- The “small departments” exemption - Section 13(b)(20) of the FLSA provides an overtime (but not minimum wage) exemption to law enforcement or fire protection employees of a public agency that employs less than five employees during the workweek in law enforcement or fire protection activities.
- Section 7(k) of the FLSA provides fire protection or law enforcement employees may be paid overtime on a “work period” basis.
 - A “work period” may be from 7 consecutive days to 28 consecutive days in length.
 - For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28.
 - For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.

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OTHER SPECIAL EXEMPTIONS AND RULES

Non-management “Blue-collar” workers

- Production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenter, electricians, mechanics, plumbers, iron workers, craft workers, operating engineers, and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt no matter how highly paid they are.

Practice of Law of Medicine

- An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if they are engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.
 - This exception, however, does not apply to nurses, dietitians, etc.

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OTHER SPECIAL EXEMPTIONS AND RULES

Educational Establishments and Administrative Functions Exemption

- The administrative exemption is available to employees compensated on a salary or fee basis at a rate not less than the current “salary level test and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.
- Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field.
- Employees engaged in academic administrative functions include:
 - the superintendent or other head of an elementary or secondary school system and any assistants responsible for administration of such matters as:
 - curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program.
 - the principal and any vice-principals responsible for the operation of an elementary or secondary school;
 - Department heads in institutions of higher education responsible for the various subject matter departments; and
 - academic counselors and other employees with similar responsibilities.

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OTHER SPECIAL EXEMPTIONS AND RULES

Teachers

- Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment.
 - Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery schoolteachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers.
 - The salary and salary basis requirements do not apply to bona fide teachers.
 - Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

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OTHER SPECIAL EXEMPTIONS AND RULES

Drivers Who Sell

- Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales.
- Several factors should be considered in determining whether a driver has a primary duty of making sales, including:
 - a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons,
 - The presence or absence of customary or contractual arrangements concerning amounts of products to be delivered,
 - whether or not the driver has a selling or solicitor's license when required by law,
 - the description of the employee's occupation in collective bargaining agreements,
 - and other factors set forth in the regulation.

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POMS EXTENDED WORKWEEK EXEMPTIONS

Police officers and firefighters (*public safety workers*)

- Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis. A “work period” may be from 7 consecutive days to 28 consecutive days in length.
- For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28.
 - For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.

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POMS OTHER CLASSES OF EXEMPT EMPLOYEES

There are a variety of other exemptions (full or partial) that are narrower in scope, including but not limited to:

- Employees involved in transportation, such as truck drivers, pilots and railroad employees
- Farmers and other agricultural employees
- Employees of “seasonal and recreational establishments” such as amusement parks, carnivals, summer camps and circuses
- Companionship services providers
- Live-in domestic help
- Casual babysitters
- Railroad employees
- Seamen on American vessels, and seamen on other than American vessels
- Houseparents in non-profit educational institutions
- Some employees of the video and filmmaking industry are also exempt regardless of salary

There are very specific issues with each of these that you need to research if they apply to your organization.

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A FINAL REMINDER - REMEMBER!

***CHECK WAGE AND HOUR, AND OTHER
EMPLOYMENT LAWS FOR ALL STATES WHERE YOU
HAVE OPERATIONS, INCLUDING REMOTE WORKERS!***



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INDEPENDENT CONTRACTOR OR EMPLOYEE CLASSIFICATION



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POMS EMPLOYEE, OR INDEPENDENT CONTRACTOR?

- **Note:** On January 9, 2024, the USDOL issued a final rule on classification of independent contractors. (See supplemental handout) Note: The IRS also addresses IC classification.
- An independent contractor, or self-employed person, differs from a regular employee. One of the main differences between the two is that an employee is on the payroll and receives a steady paycheck from the employer.
- The test used under the FLSA is the “economic realities” test, which examines the totality of the circumstances in determining the economic reality of the relationship. The following factors are relevant considerations in determining employee status:
 - Degree of control;
 - Investment in facilities, tools, equipment;
 - Opportunity for profit and loss;
 - Permanency of the relationship;
 - Required skill; and
 - Whether the services rendered are an integral part of the company’s business.
- In making the determination, the degree of control continues to be a major component of the analysis.
- It is very important for companies to review independent contractor status on a regular basis, and not to assume that previous analyses of the situation were correct.

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POMS EMPLOYEE, OR INDEPENDENT CONTRACTOR?

Vendors v. Independent Contractors - The main difference between a vendor and an independent contractor is that while vendors sell products and remain in touch with the organization for a longer time period, independent contractors are typically just a part of the organization to complete a specific task assigned to them and hence have a very short-term touch with the organization.

NOTE: Neither vendors nor Independent Contractors are employees.

“Contract Employees” are employees with employment contracts.

VENDORS:

- A vendor is an individual who sells products to various other individuals or businesses.
- Vendors typically sell identical or similar products to different customers as part of their regular operations.
- A vendor aims to provide good quality goods timely while a contractor aims to complete the assigned task efficiently and on time.

INDEPENDENT CONTRACTORS:

- An Independent Contractor is a person hired by an individual or a person to provide a professional service which is to be completed within the given time period.
- In most cases, these services are of a specific project nature, and are not a continuing, ongoing responsibility of the organization.
- Organizations typically enter into Contractor agreements, because they do not have the expertise in-house, and they need the services for a period that is not long enough to justify hiring a full-time person.

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USDOL FINAL RULE ON WORKER CLASSIFICATION

- On January 9, 2024, the United States Department of Labor (DOL) issued its long-awaited final rule (“Final Rule”) regarding worker classification under the Fair Labor Standards Act (FLSA or the “Act”).
- The Final Rule – which took effect March 11, 2024 – outlines the DOL’s “new” test for determining whether a worker is an employee (and is thus covered by the Act’s overtime and minimum wage protections) or an independent contractor for purposes of the FLSA.
- While the Final Rule is not itself “controlling” precedent, it reflects the DOL’s take on worker classification, which courts and other stakeholders use as guidance when addressing classification questions.
- The new rule aims to reduce the risk of misclassifying employees as independent contractors while providing a consistent approach for businesses. It considers whether a worker is economically dependent on the employer for work.

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USDOL FINAL RULE ON WORKER CLASSIFICATION

- The DOL’s final rule on independent contractor status rescinds the prior 2021 rule and replaces it with an analysis that aligns more closely with longstanding judicial interpretations.
- The Final Rule returns to the previous “totality of circumstances” approach to determine a worker’s status as an employee v. an independent contractor.
- Under the “Totality of” approach, six factors are considered:
 1. opportunity for profit or loss depending on managerial skill;
 2. investments by the worker and the potential employer;
 3. degree of permanence of the work relationship;
 4. nature and degree of control;
 5. extent to which the work performed is an integral part of the potential employer’s business; and
 6. skill and initiative.
- None of these factors carries any pre-determined weight, none are dispositive, and other circumstances indicative of economic dependence may also be considered.

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USDOL FINAL RULE ON WORKER CLASSIFICATION

- The DOL's Final Rule returns to the more holistic analysis used before the most recent rule which focused on two “core factors” (control and opportunity for profit or loss) in its analysis.
- The new Rule is generally seen as making it more difficult to classify workers as independent contractors,
- The DOL's Final Rule FAQ page is helpful in explaining the general, and more substantive elements of the Rule. This FAQ page can be found at:
 - <https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs>
- Note that the Final Rule does not go as far as the strict “ABC” tests – which start from a presumption of employment status – that govern under some state wage & hour laws, such as California and New Jersey. Employers in states with stricter rules must meet whichever standard provides the greatest protection for workers.
- Regardless of the analysis applied, remember that workers cannot “waive” their status as an employee and voluntarily elect to be an independent contractor.

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USDOL FINAL RULE - Totality of the Circumstances

To classify a worker as a contractor, organizations must understand the new US DOL guidance. The US DOL will now examine the “totality-of-the-circumstances” economic-reality test with six factors. No one factor has more weight than another. The six factors are:

1. **Opportunity for profit or loss depending on managerial skill:** This factor refers to whether there is potential for economic success or failure based on the individual's business acumen, judgment, and/or initiative.
2. **Investments by the worker and the potential employer:** This factor is based on whether the worker is investing money in capital (i.e., equipment) or is entrepreneurial and supports a business function like expanding their market base like a potential employer would be doing.
3. **Degree of permanence of the work relationship:** This factor refers to whether the working relationship is definite in duration, non-exclusive, project-based, or sporadic.

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USDOL FINAL RULE - Totality of the Circumstances

4. **Nature and degree of control**: This factor is based on how much control an individual has over the performance of their work, their schedule, and the economics of the relationship.
5. **Extent to which the work performed is an integral part of the potential employer's business**: This factor refers to whether the function performed is critical, necessary, or central to the business - or an independent function, service, product, etc.
6. **Skill and initiative**: This factor is based on whether the worker brings specialized skills to the relationship or obtains them from the potential employer.

The new US DOL guidance also explains that the rule will consider additional factors that may be relevant if such factors indicate whether the worker is in business for themselves.

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USDOL FINAL RULE - Totality of the Circumstances

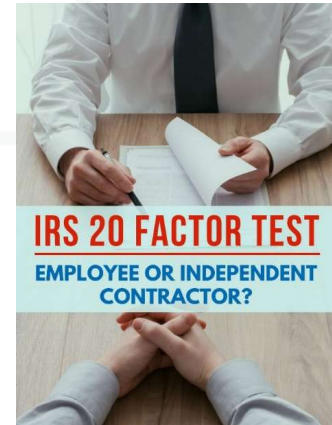
Under the Final Rule's guidance, it behooves businesses to proceed with caution when classifying an individual as an independent contractor. Companies should ask themselves (among other key questions relevant to the Final Rule's six-factor test):

1. Can the worker negotiate their pay? Does the worker market their services to multiple entities?
2. Is the worker making entrepreneurial or capital investments, suggesting they are operating independently?
3. Is the relationship with the worker non-exclusive? Is it project-based or sporadic, rather than indefinite or continuous in duration?
4. Does the company set the worker's schedule, supervise their performance, or control the economic aspects of the relationship (like setting rates for their services)? Importantly, even the reserved right to control these things can suggest employee status.
5. Is the function that the worker performs critical, necessary, or central to the company's principal business?
6. Is the worker dependent on training for the employer to perform the work? Is the worker using specialized skill in connection with business-like initiative?

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POMS THE IRS TEST - Employee v. Independent Contractor

- IRS Publication 15-A, Employer's Supplemental Tax Guide (2020) (Dec 23, 2019), ("Pub. 15-A")
<https://www.irs.gov/pub/irs-pdf/p15a.pdf>
- New or changed standards to be used by the Internal Revenue Service in making these determinations for tax year 2020.
- Pub. 15-A announces a policy of the IRS to focus on three "areas" of criteria in applying the preexisting "control test."
- Significantly, the fundamental "control test" and its prior explication set out by the Service in the so-called "20 Factor" test remain valid.



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POMS THE IRS TEST - Employee v. Independent Contractor

- An employee is generally considered anyone who performs services, if the business can control what will be done and how it will be done.
- What matters is that the business has the right to control the details of how the worker's services are performed.
- Independent contractors are normally people in an independent trade, business or profession in which they offer their services to the public.
- Whether a worker is an independent contractor, or an employee depends on the relationship between the worker and the business. Generally, there are three categories to consider.
 1. **Behavioral control** – Does the company control or have the right to control what the worker does and how the worker does the job?
 2. **Financial control** – Does the business direct or control the financial and business aspects of the worker's job. Are the business aspects of the worker's job controlled by the payer? Things like how the worker is paid, are expenses reimbursed, who provides tools/supplies, etc.
 3. **Relationship of the parties** – Are there written contracts or employee type benefits such as pension plan, insurance, vacation pay? Will the relationship continue and is the work performed a key aspect of the business?

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THE IRS TEST - Employee v. Independent Contractor

- The IRS uses common law principles to determine if a worker is an independent contractor or an employee. This IRS review relates to federal employment taxes—federal income tax, FICA taxes for Social Security and Medicare, and federal unemployment taxes.
- In the past, a "20 Factor Test" was used to evaluate workers to determine whether they were independent contractors or employees. These factors have been compressed into three general categories for IRS review of the specific situation:
 - Behavioral control
 - Financial control
 - Relationship of the parties
- **NOTE:** The IRS presumes that a worker is an employee unless proven otherwise. So the burden of proof is on the employer to show that it has classified a worker correctly.
- As you look at the factors on the following slides, you should be aware that the IRS does not look specifically at any one factor, but one factor can be enough to cause the IRS to determine that a worker is an employee. There is no "magic number" of factors that determine status.

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THE IRS FACTORS FOR DETERMINING WORKER STATUS

The IRS no longer uses this specific 20-question test to determine worker status, but it might help you to understand the details of what is being evaluated.

1. **Actual instruction or direction of the worker.** A worker who is required to comply with instructions about when, where, and how to work is ordinarily an employee. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished.
2. **Training.** Training of a worker by an experienced employee working, by correspondence, by required attendance at meetings, and by other methods is a factor indicating control by the employer over the particular method of performance.
3. **Integration of services.** Integration of the person's services in the business operations generally shows that he or she is subject to direction and control.
4. **Personal nature of services.** If the services must be rendered personally, it indicates an interest in the methods, as well as the results. Lack of control may be indicated when the person has the right to hire a substitute with the permission or knowledge of the employer.

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POMS THE IRS FACTORS FOR DETERMINING WORKER STATUS

5. **Similar workers.** Hiring, supervising, and payments to assistants on the same job as the worker generally show employer control over the job.
6. **Continuing relationship.** The existence of a continuing relationship between an individual and the person for whom he or she performs services tends to indicate an employer-employee relationship.
7. **Hours of work.** The establishment of set hours of work by the employer prevents the worker from being masters of their own time, which is the right of the IC.
8. **Full-time work.** Full-time work required for the business indicates control by the employer since it restricts the worker from doing other gainful work.
9. **Work on the premises.** If the worker is required to do the work on the employer's premises, employer control is implied, especially where the work is of such a nature that it could be done elsewhere.
10. **Order of performance.** If the order of the performance of services is or may be set by the employer, control by the employer may be indicated.

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POMS THE IRS FACTORS FOR DETERMINING WORKER STATUS

11. **Submitting reports.** The submission of regular oral or written reports indicates control since the worker must account for their actions.
12. **Method of payment.** If the manner of payment is by the hour, week, or month, an employer-employee relationship probably exists; whereas, payment on a commission or job basis is customary where the worker is an IC.
13. **Payment of expenses.** Payment of the worker's business expenses by the employer indicates control of the worker.
14. **Tools and materials.** The furnishing of tools, materials, etc., by the employer, indicates control over the worker.
15. **Investment.** A significant investment by the worker in facilities used in performing services for another tends to show an independent status.
16. **Profit or loss.** The possibility of a profit or loss for the worker as a result of services rendered generally shows IC status.

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POMS THE IRS FACTORS FOR DETERMINING WORKER STATUS

17. **Exclusivity of work.** Work for a number of persons at the same time often indicates IC status because the worker is usually free, in such cases, from control by any of the firms.
18. **Available to the general public.** The availability of the services of the worker to the general public usually indicates IC status.
19. **Right of discharge.** The right of discharge is that of an employer. An IC, on the other hand, cannot be "fired" without incurring liability if they are producing a result that measures up to their contract specifications.
20. **Right to quit.** The right to quit at any time without incurring liability indicates an employer-employee relationship.



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POMS RECOMMENDATIONS FOR PROPER WORKER CLASSIFICATION

- Comprehensive review of current employee classification system and independent contractor relationships
- Follow and understand how new state and federal legislation will impact the company's classification system
- Review industry and position classification standards and best practice guidelines
- Implement internal reviews in preparation for audits and employee litigation
- Review language used in written independent contractor agreements
- Maintain records of hours worked, even for IC's, to aid in potentially defending against large lawsuits
- Consult legal counsel

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POMS USDOL REFERENCE & RESOURCE SITES

1. Fair Labor Standards Act Advisor -
<https://webapps.dol.gov/elaws/whd/flsa/screen75.asp>
2. Overtime Pay: General Guidance -
https://www.dol.gov/whd/overtime/general_guidance.htm
3. Overtime Pay: Fact Sheets -
https://www.dol.gov/whd/overtime/fact_sheets.htm
4. Overtime Pay: E-Tools - <https://www.dol.gov/whd/overtime/etool/>
5. Overtime Pay: Posters - <https://www.dol.gov/whd/overtime/poster/>
6. Overtime Pay: Interpretive Guidance -
Administrator Interpretations, Opinion and Ruling Letters, Field Operations Handbook
https://www.dol.gov/whd/overtime/interpretive_guidance.htm
7. Overtime Pay: Laws & Regulations -
https://www.dol.gov/whd/overtime/applicable_laws.htm
8. U.S. DOL Resources for Employers -
<https://www.dol.gov/whd/foremployers.htm>



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POMS


QUESTIONS

- This is the chance to address issues that may not have been covered to your satisfaction; or
 - To expand a point; or
 - To clarify a point.
- If there are any further questions which we were not able to get to today, please feel free to contact the instructor.




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