

Workshop: Applying the FLSA White Collar Exemption Tests

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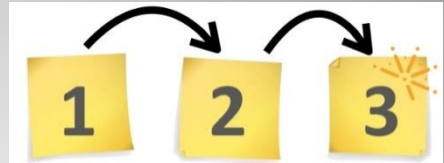
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- The material presented is designed and intended for general informational purposes only.
- It is not intended and it should not be construed or relied upon as legal advice.
- For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- Consult with your own legal counsel before taking action or making changes.



Job Evaluation Process



- Review job descriptions and pay practices for positions currently treated as Exempt
 - Observe and **interview incumbents**
 - Update to match today's reality
- Evaluate against Salary and Duties Tests
 - Compare to each White Collar Exemption
 - Identify each Exemption that applies to the job
- If No Exemptions Apply, then...
 - Change jobs to meet all parts of the Test for at least one Exemption (use duties test language, where possible; be sure changes are actually implemented)
 - If cannot, convert the job to Non-Exempt



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FLSA Exempt Categories

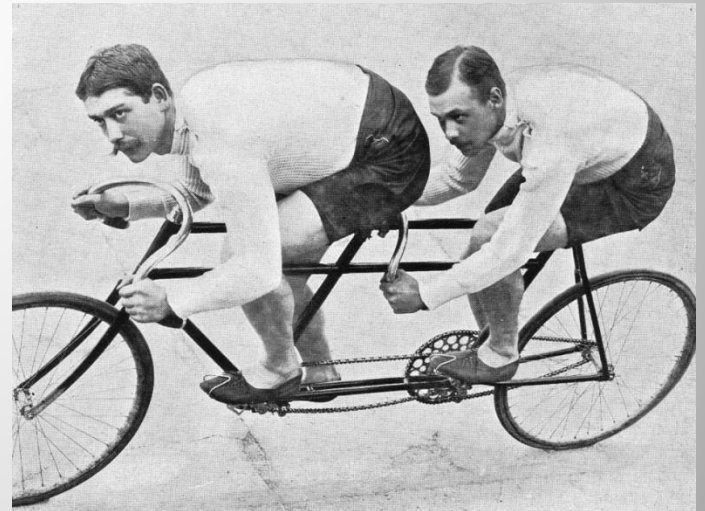
1. Executive
(Business Owner subcategory)
2. Administrative
3. Professional
(learned & creative)
4. Computer Professionals
5. Highly Compensated
Employee (a/k/a "HCE")
6. Outside Sales



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Salary and Duties Tests

1. Salary Test
 - a. Salary Amount
 - b. Salary Basis (method of payment)
2. Duties Test



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EXECUTIVE

Salary Test (2 parts)

- Amount =
\$455/week
(\$23,660/year)
- Method =
"Salary Basis"

**MUST MEET ALL
5 PARTS TO BE
EXEMPT IN THIS
CATEGORY!**

Duties Test (3 parts)

- Primary duty* is
mgmt of enterprise,
dep't, or subdivision
- Customarily &
regularly directs ≥ 2
employees (FTEs)
- Authority to
hire/fire, or
particular weight to
recommendations
for hire/fire or
other change in
status



Primary Duty

- Defined: Principal, main, major or most important duty
- Factors
 - Relative importance of EX duties as compared to NE duties
 - Amount of time spent on EX duties
 - Relative freedom from direct supervision
 - Relationship between the salary of the EX employee and wages paid to NE employees where there are overlapping NE duties



EXECUTIVE Subcategory: Business Owner

- Duties Test
 - Bona fide 20% minimum ownership in business
 - Actively engaged in the management of the enterprise
- Salary Test = None!



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LEARNED PROFESSIONAL

Salary Test (2 parts)

- Amount =
\$455/week
(\$23,660/year)
- Method =
 - Salary basis
 - Fee basis

**MUST MEET ALL
5 PARTS TO BE
EXEMPT IN THIS
CATEGORY!**

Duties Test (3 parts)

- Primary duties require advanced knowledge
- In field of science or learning
- Customarily acquired by prolonged course of specialized intellectual instruction



CREATIVE PROFESSIONAL

Salary Test (2 parts)

- Amount =
\$455/week
(\$23,660/year)
- Method =
 - Salary basis
 - Fee basis

**MUST MEET ALL
4 PARTS TO BE
EXEMPT IN THIS
CATEGORY!**

Duties Test (2 parts)

- Primary duty requires invention, imagination, originality, or talent
- In a recognized field of artistic or creative endeavor



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COMPUTER



Salary Test (2 parts)

- Amount
 - At least \$455/week OR
 - \$27.63/hour (unchanged)
- Method
 - Salary Basis
 - Fee basis
 - Hourly (at not less than \$27.63/hour)

MUST MEET ALL 4 PARTS TO BE EXEMPT IN THIS CATEGORY!

Duties Test (2 parts)

- Highly-skilled & proficient in theoretical & practical application of systems analysis, programming, software engineering, or the like
- Primary duty
 - Apply systems analysis techniques & procedures
 - Design, develop, document, analyze, test or modify computer systems, programs, or machine operating systems



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HIGHLY COMPENSATED

Comp Test (2 parts)

- \$100,000/yr in comp (salary + commission + nondiscretionary bonuses)
- Paid at least \$455/wk on a salary or fee basis (included in the \$100,000)

Duties Test (2 parts)

- Primary duty is office or non-manual work
- Customarily & regularly performs one or more of the duties identified in std. tests for Exec., Admin., or Professional exemptions

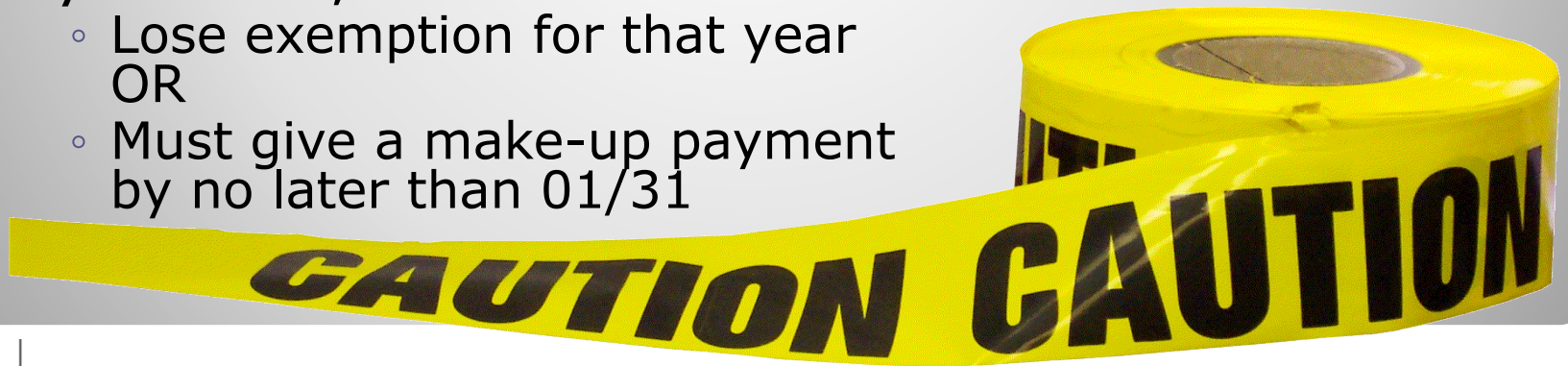
**MUST MEET ALL
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CATEGORY!**



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HIGHLY COMPENSATED

- Minimum fixed weekly salary cannot include discretionary pay at all
- Minimum total comp cannot include discretionary bonuses or E's cost of benefits
- Pro-rating
 - ONLY allowed for initial yr and final yr of employment
 - NOT allowed for unpaid leaves or being "part time"
- If minimum total comp not paid by calendar year-end, either
 - Lose exemption for that year
 - OR
 - Must give a make-up payment by no later than 01/31



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OUTSIDE SALES

- No Salary Test!
- Only a Duties Test
 - Primary duty is “sales”
 - Customarily & regularly engaged in “sales” away from the employer’s place of business (not telemarketing, making sales to walk-ins, or other Inside Sales)



OUTSIDE SALES: Driver Sales

- To be Exempt, the Primary Duty must be **making sales**, NOT: loading, driving, delivering pre-ordered product, stocking shelves, rotating stock, setting up/cleaning/arranging displays, delivering advertising material
- Factors to Consider
 - Compare to driver-only jobs & sales-only jobs
 - License to sell required
 - No customary or contractual sales agreements
 - Covered by collective bargaining agreement
 - Qualifications for the job include sales experience
 - Attends sales training and conferences
 - Paid based on sales
 - Calls on new prospects and/or is customer's only contact with the business



ADMINISTRATIVE

Salary Test (2 parts)

- Amount =
\$455/week
(\$23,660/year)
- Method =
 - Salary basis
 - Or Fee basis

**MUST MEET ALL
4 PARTS TO BE
EXEMPT IN THIS
CATEGORY!**

Duties Test (2 parts)

- Type of work:
Primary duty is office or non-manual work directly related to mgmt or general business ops
- Level of work:
Includes exercise of discretion & independent judgment regarding matters of significance



ADMINISTRATIVE: Type of Work

- Runs, services, or supports the business
 - Finance, tax, accounting, budget, audit
 - Insurance, QC, Purchasing
 - Advertising, Marketing, Research
 - HR, Safety, Gov't relations, PR, Compliance
 - Computer network, internet & DB admin.
- Not production or sales



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ADMINISTRATIVE Level of Duties

“Discretion and independent judgment”
regarding “matters of significance”

1. Compare & evaluate possible courses of action, then decide from the possibilities
 - Determined from consideration of surrounding circumstances and facts (see list)
 - Allows for review at a higher level and possible revision or reversal
2. At an important or consequential level



FACTORS: Discretion & Independent Judgment on Matters of Significance

- Form, affect, interpret, implement policies or practices
- Carry out major assignments
- Affect operations to a substantial degree
- Authority to commit employer to matters of significant financial impact
- Authority to waive or deviate from policies/procedures w/o prior approval



FACTORS: Discretion & Independent Judgment on Matters of Significance (Cont.)

- Authority to negotiate and bind on significant matters
- Consult or provide expert advice to mgmt
- Involved in planning business objectives
- Investigate and resolve matters of significance
- Represent the company in complaints, arbitration, grievances



Discretion & Independent Judgment on Matters of Significance **is NOT:**

- Applying well-established procedures or stds (e.g. as described in manuals) within closely-prescribed limits
- Clerical or secretarial work
- Recording or tabulating data
- Mechanical, repetitive, recurrent, or routine work



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ADMINISTRATIVE Examples

- Maybe
 - Advisors & Consultants
 - Insurance Claims Adjusters
 - Financial Services
 - Team Leaders
 - Executive or Administrative Assistants
- Definitely NOT
 - Primary duty is inside sales
 - Secretaries & other clerical employees
 - Investigators & Inspectors



COMBINATION

“Employees who perform a combination of exempt duties” from any two or more of the exempt categories “may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administration and exempt executive work may qualify for exemption.”

29 C.F.R. § 541.708



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Evaluation Methodologies

Mike's Method – When you know it all!

- Assess each duty listed on job description as EX or NE (subdivide, as needed)
- Then determine whether job is EX or NE
- Interview job incumbents to assess accuracy of job description and reassess

Jill's Method – When you need some key reminders

- Use WORD document to assess each job against each White Collar Exemption category and its elements
- Assess the job as EX or NE, explaining which category applies and why
- Interview job incumbents to assess accuracy of job description and reassess

Slides in this PPT – When you need detailed help



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DOL Investigator

WHD Investigator is customarily and regularly away from DOL offices interviewing employees, gathering/evaluating data, determining compliance with or violations of 14 laws (including FLSA, FMLA), issuing back pay awards, liquidated damages, civil penalties, and referring for civil or criminal action. In which Exempt Category(ies) does s/he best fit, if any:

- a. Learned Professional
- b. Administrative
- c. Outside Sales
- d. More than 1 Category
- e. None of the Above



FLSA Compliance Is Hard!

“When a model employer is in this situation, there must be something inherent in the FLSA that makes compliance elusive even for well-meaning employers.”

“The case shows that [the FLSA] can be very difficult to master. Even the most diligent and proactive employer can run afoul of the FLSA.”

Reactions of two Employment Law Attorneys to a \$7MM settlement of a 10 year-old FLSA collective action against the DOL for misclassification of employees under the Administrative Exemption, and unpaid, off-the-clock work (Aug. 23, 2016)



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Thank you!



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