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Exempt or Non-Exempt?

How to Answer the Question and Why to Ask

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presented by
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Employment law claims are a AAA Risk

- **Always** an issue
- **Always** an emotional as well as financial drain
- **Always** need to review update and train
- Not always avoidable
Identify risks; develop policies to reduce the risks; train staff about the policies

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What laws govern:

- FLSA – limited to workplaces engaged in interstate commerce with over \$500,000 in business volume
- State law – wage and hour regulations
- IRS and state definitions of employee vs. independent contractor

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Fair Labor Standards Act (FLSA) requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay.

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FLSA provides an **exemption** from both minimum wage and overtime pay for employees who are bona fide executive, administrative, professional or outside sales employees and who are paid more than \$455 per week on a salary basis

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To qualify for this exemption, employees generally must

- meet certain tests regarding their job duties and
- be paid not less than \$455 per week * and on a salary basis

Job titles do not determine exempt status. Responsibilities do.
*salary requirements do not apply to outside sales, teachers and those practicing law or medicine.

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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.

Exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

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For exemptions to apply, in addition to salary requirements, an employee generally must perform certain types of work that:

- is directly related to the management of his or her employer's business, or
- is directly related to the general business operations of his or her employer or the employer's clients, or
- requires specialized academic training for entry into a professional field, or is in the computer field, or
- is making sales away from his or her employer's place of business, or
- is in a recognized field of artistic or creative endeavor.

FLSA Section 13(a)(17) exempts hourly paid employees who perform certain types of work in the computer field if they are paid at a rate of not less than \$27.63 per hour.

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the **executive** exemption, all of the following tests must be met:

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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the **administrative** exemption, all of the following tests must be met:

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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the **learned professional** exemption, all of the following tests must be met:

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

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Highly compensated employees

- Highly compensated employees performing office or non-manual work and
- paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA
- if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

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Independent contractor

- Define independent contractor status with a written agreement
- Not employees so no obligation to pay minimum wage or withhold taxes
- Company may evaluate outcomes but not control method service is provided
- IRS 20 factor test
- "consultants" are independent workers

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Exempt only if

- Position matches description in regulations
- Threshold compensation of a minimum \$455 weekly
- Paid on a salary basis
- Works however many hours it takes to accomplish goal
- Does not receive premium pay for working longer hours
- Pay is not reduced for working less than a full day
- Can only deduct from the established salary for certain reasons

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Exempt staff

- Do not receive overtime payments
- Work as long as it takes to accomplish their work
- Employer must track hours
 - to prove compliance and for business planning
- May receive fringe benefits that are different from non-exempt staff (such as additional vacation)

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Handling overtime

FLSA – over 40 hours worked per week
State laws differ, but most follow federal definition of overtime

Non-exempt workers

- must request and receive authorization prior to working overtime
- pay one and half times (premium pay) hourly rate for more than 40 hours worked during a week

Exempt workers

receive no compensation or extra benefit for working extra time

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How to reward exempt staff

- Be flexible, but be fair – play no favorites
- Instead of comp time, call it flex time
- Time off should be taken in close proximity to extra time worked
- Exempt staff should not be asked to “bank” their extra time and take it as comp time hour for hour later – this risks misclassifying the worker

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Avoid misclassification by reviewing all positions

- Review job descriptions and compensation
- Review relationship with contractors and consultants
- Seek legal advice as necessary

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Approaches to reduce risk

- Review job descriptions and agreements
- Communication to staff whether exempt or non-exempt
- Treat similarly situated persons similarly
- Internal complaint mechanism
- If you discover a mistake correct it to avoid continuing violations and claims of willful misconduct
- Enforce policy that overtime be authorized in advance
- When in doubt, treat and classify as non-exempt

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How violations come to light

- Disgruntled employee files a complaint post discharge
- Random audit that covers misclassification of independent contractors or exempt employees
- Current employee who files a complaint

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Risk management principles

- Define who is exempt
- Communicate to staff
- Internal complaint procedure
- Correct mistakes
- If unsure, treat as non-exempt, and consult legal counsel

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For further information be sure to visit

Department of Labor Website on the Fair Labor Standards Act

<http://www.dol.gov/compliance/laws/comp-flsa.htm>

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Next month's seminar
October 7, 2009 2 p.m.

The Volunteer Protection Act

10 years since its passage

- discern a patterns in the ways that courts have applied the law to insulate volunteers from liability.
- Explore the lessons from this legislation and learn how to leverage those lessons into effective volunteer management practices at your nonprofit.

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