

# Employment Law Corner

## Monthly Report



FOLEY & FOLEY<sup>PC</sup>  
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### July Updates

1. [ADA Reminder: Summer Help Count](#)
2. [Comply Don't Buy: New Mandatory Posters](#)

### FLSA 101 – Exempt v. Non-Exempt Classifications

One of the most frequent compliance issues we see as employment law attorneys is classifying employees based on exempt v. non-exempt status. While this law has been around for some time, it still trips up many employers. So here is the basic breakdown of Exempt v. Non-Exempt classifications and some Massachusetts specific issues.

### What is the difference between exempt v. non-exempt employees?

#### Non-Exempt:

- Entitled to overtime pay (1.5x regular rate) for any hours worked over 40 within a defined workweek.
- Pay is based on actual hours worked.
- Subject to the minimum wage requirements as defined by both federal and state law.

#### Exempt:

- Never entitled to overtime, no matter the amount of hours worked.
- Paid a set salary each week regardless of the hours worked.
- Subject to the DOL compensation test (at least \$684 per week).

In some cases, you can have a salaried, non-exempt employee. This would mean you pay the employee a fixed amount each week. You would still be required to track the employee's hours and ensure overtime is being paid on the weeks the employee works over 40 hours.

Non-exempt employees have more rights under the law. Therefore, it is never an issue moving an exempt employee to a non-exempt status. Where the compliance issues lie is when a non-exempt becomes an exempt employee.

### When can an employee be exempt?

An employer is required to meet two tests in order to determine an employee can be classified as exempt: the Compensation Test and the Duties Test.

### **The Compensation Test:**

- The employee must earn at least \$684 per week (\$35,568 per year).
- Nondiscretionary and incentive bonuses (including commissions) can make up 10% of this requirement.

### **The Duties Test:**

The duties of the position must fall into one of these categories – administrative, executive, professional, or computer employee.

- Administrative: The primary duty must be the performance of: 1) non-manual work; 2) directly related to the management of the business; and 3) includes the exercise of discretion and independent judgement in matters of significance.
- Executive: The primary duty must be: 1) managing the business or a recognized department of the business; 2) customarily and regularly directs the work of at least two or more full time employees; and 3) has the authority to hire or fire an employee or their opinion is given significant weight.
- Professional: The primary duty is: 1) the performance of work requiring advanced knowledge (intellectual in nature); 2) in a field of science or learning; and 3) knowledge is acquired by a prolonged course of specialized instruction.
- Computer Employee: The primary duties must consist of: 1) application of systems analysis techniques; 2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs; 3) the design, documentation, testing, creation or modification of computer programs related to machine operating system; or 4) a combination of the above three requiring the same skill set.

#### **Contact Us**



**FOLEY & FOLEY** P C  
ATTORNEYS AT LAW

[www.foleylawpractice.com](http://www.foleylawpractice.com)

[info@foleylawpractice.com](mailto:info@foleylawpractice.com)

(508) 548-4888

The one outlier to the compensation and duties test is the Outside Sales category. Outside Sales does not have a compensation limitation but does have a duties requirement. In order for a position to be classified as Outside Sales, it must: 1) have a primary duty of making sales or acquiring orders or contracts of service and 2) be customarily and regularly engaged away from the employer's places of business.

So, if you do want to create a new position or move a position to an exempt status, it's important to make sure it meets one of the above categories.

### **Massachusetts Considerations**

In the *Sleepy's* case, decided in 2019, a Massachusetts Court held that commission paid retail sales employees must be compensated for all hours worked and commission payments must compensate employees at least the minimum wage for all hours worked. Commission paid employees must now be paid at least time and a half the minimum wage for all overtime hours, Sunday, and holiday work on top of their commission payment. **Commissions can no longer be credited**

**toward meeting the overtime and Sunday or Holiday pay obligations.**

It is also important to add that Massachusetts wage and hours claims are subject to treble damages, which means that any violation for non-payment of overtime or minimum wage would be tripled and owed to the employee. Wage and hour claims are also ripe for class action law suits because it is likely that other employees have been paid incorrectly as well.

We have a solution that can help! Our **Exempt or Non-Exempt Classification Service** is a helpful resource to determine if the position is classified correctly or compliant.

**Wendy Hansen**

Wendy has a background in both employment law litigation and human resources. At Foley & Foley, she helps manage the firm's On-Call Triage Service which helps support over 3,000 clients across the country manage difficult employment law questions. She has also conducted over 50 webinars on several Employment Law topics.

