

# Employment Law Corner

## Monthly Report



FOLEY & FOLEY<sup>PC</sup>  
ATTORNEYS AT LAW

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### July Updates

[Vanna White is M-A-D](#)

[Holy Guacamole! Tacos, a Priest and the DOL](#)

[Nobody Likes Independent Contractors Anymore](#)

### Exempt v. Nonexempt: To Pay or Not to Pay (Overtime)?

**Wage and hour laws are trickier than they appear. Workplaces often grow organically and over time, positions morph and change. Keeping an eye on your wage and hour compliance is crucial to avoid costly claims or audits. Here is a good overview of the law, which is worth a read and maybe a forward to key players in your organization.**

#### **Exempt or Nonexempt-The Basics:**

Exempt and nonexempt are classifications under federal and state law that apply to every employee in every workforce. Proper classification of employees as exempt or non-exempt is important in any workplace, large or small. An employee classified as "exempt" allows employers to avoid paying overtime when the employee works over 40 hours in a given workweek. An employee who is classified as "non-exempt" is entitled to the protections of overtime more than 40 hours in a given workweek. The failure to properly classify an employee comes with risks beyond the law: negative morale and quick turnover. The continuous failure to pay overtime can make employees feel underappreciated, overworked, and underpaid. Just as bad, and awfully expensive, the failure to properly classify employees can end in back wages, fines, and penalties for employers. Some states include attorneys' fees too.

#### **Federal Law: The All-Important Tests:**

Generally, exempt employees are paid on a salary basis and non-exempt employees are paid on an hourly basis. Yet, the method of payment (hourly or salary) does not determine whether an employee is exempt or non-exempt. In fact, employees are often improperly paid on a salary basis (causing them to miss out on overtime), when they do not qualify as an exempt employee. To properly classify an employee as "exempt," the position must meet both the primary duty test and the salary basis test. If a position only meets one of the tests, then it does not qualify for exemption under federal law (unless it is otherwise an exempt occupation). We find employers sometimes neglect to use the primary duty test, thinking that a good salary is enough to pass the exempt test. This is a costly mistake and we urge employers to use the primary duty test with each salaried position.

**Primary Duty Test-** The exempt classification is based on the job duties of a position rather than the title of the position. Full stop. To qualify for the exempt classification, an employee's primary duty must fall within one of the exempt categories. The Department of Labor defines primary duty as the "*principal, main, major or most important duty that the employee performs... based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole*".

To determine the employee's primary duty, the following factors are considered:

1. Proportion of time spent on the duty;
2. The duty's importance to the role;
3. The freedom from supervision; and
4. The pay being more than other roles that are nonexempt.

**Remember: it is the duties and not the job title that matters!**

Federal law has created various "exempt categories" to satisfy the primary duty test. We will not review them all here but any position must actually meet the requirements of the exemption. For instance, claiming an employee is exempt under the Executive category based on pay and not duties still will not cut it. Applying the categories correctly can be difficult, but we are here to help! Check out our fixed fee service **classification service.**

**Salary Basis Test-** The Salary Basis Test is the second test that must be satisfied for a position to be classified as exempt. This is the test most people think matters most but the duties test must also be met! Generally, the salary basis test consists of two requirements:

1. The employee must be regularly paid a set minimum of compensation of \$684 per week; and
2. The amount of compensation may not be reduced because of the quality or quantity of the employees' work.

There are several occupations that are exempt from the Salary Basis Test, and those include: Teachers, Lawyers, Doctors, Certain Computer Employees, Outside Salespersons, Administrators and Professionals Paid on a Fee Basis, and Employees in the Motion Picture Industry.

### **Highly Compensated Employees**

You cannot pay your way out of providing overtime with high compensation alone! For instance, the highly compensated employees' category applies to those employees who are paid at least \$107,432 (including commissions and other nondiscretionary compensation and bonuses) and are not required to satisfy one of the exempt categories of the primary duties test. But these employees need to still meet the following requirements to be exempt:

1. The primary duty must not be the performance of manual or office work; and
2. The employee must “customarily and regularly” perform at least one of the exempt duties of an exempt executive, administrative, or professional employee.

**Watch Out for State Specific Laws:** Are we having fun yet? There is more! State laws can vary from the FLSA requirements by providing different or more strict employee classification tests. The differences can range from variations in the duties test to an increased minimum salary level. Though some states have tests that are the same or similar to the federal tests, many have unique tests of their own.

**Pay attention to your individual state and local laws to determine how to classify your positions in your workplace. The federal law is the floor, not the ceiling for wage and hour laws.**

If that seems like a lot of work – *we are looking at you multi-state employers* – we can help. We keep up with all the state and even local laws, so you do not have to. We have the resources to help you evaluate the state laws, evaluate your classified positions, and advise you on classifying new roles. Check out our **[Exempt or Nonexempt Classification Service!](#)**

**[Contact us!](#) We can help!**

## Contact Us



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## **[Meet Julia Pomella-Griggs](#)**

We are happy that Attorney Julia Pomella-Griggs has joined our team! Julia has both employment law and HR experience. For more info, check out her bio [here!](#)

