



Exempt v. Non-Exempt

Avoiding the Confusion



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About CPEhr...

Founded in 1982, CPE HR is the oldest privately held outsourced Human Resources Company in California.

Dedicated to meeting the employment-related needs of outstanding businesses, CPE HR offers the human resource services, expertise and products necessary for our clients to be competitive and successful in today's complicated, volatile and ever-changing business environment.



About CPEhr...

Industry Commitment

- Board Member NAPEO
- Member, Professionals In Human Resources Association (PIHRA)
- Member, Society for Human Resource Management (SHRM)
- California Chamber of Commerce
- Other California Chamber's
- Clients in 39 States

Specialize in California Employment Environment



Course Outline

- Exempt versus Non-Exempt
- Determining Exemption Status
- Types of Exemptions
 - Executive
 - Professional
 - Administrative
 - Other Exemptions
- The High Cost of Ignoring the Law



Exempt v. Non-Exempt Basics

Exempt

- Salaried
- Not eligible for overtime
- Must earn a minimum of two times the minimum wage (\$33,280) in CA
- Must meet exemption test

Non-Exempt

- Generally hourly
- Overtime regulations apply
- Meal & rest periods regulations apply
- Must be paid at least minimum wage (\$8.00/hr in CA)



Determining Exemption Status

- All employees can be classified as non-exempt; however, not all employees can be classified as exempt
- Exemption status is based on job duties, not job title
- Conduct a job analysis to determine exemption



Job Analysis

- Separates primary duties from secondary duties
- Determines the percent of time generally spent performing each of the duties



Executive Exemption

- Applies principally to employees who supervise other employees
- Must satisfy a three-part standard



Three-Part Standard

- Must have the “***primary duty***” of management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof;
- Must customarily and regularly direct the work of ***two or more other employees*** (two full-time or their equivalent); and
- Must have the authority to hire or fire other employees or have “***particular weight***” given to suggestions and recommendations as the hiring, firing, advancement, promotion or any other change of status of other employees



“Particular Weight” Defined...

Factors 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 the employee’s suggestions and recommendations are made or requested; and
- The frequency with which the employee’s suggestions and recommendations are relied upon



Executive Functions

- Interviewing, selecting, and training employees;
- Setting and adjusting employees' rates of pay and hours of work;
- Directing employees' work;
- Maintaining employees' production or sales records for use in supervision or control;
- Appraising employees' productivity and efficiency



Functions Continued...

- Handling employee complaints and grievances;
- Disciplining employees when necessary;
- Planning and controlling the budget;
- Monitoring or implementing legal compliance issues



Professional Exemption

This exemption includes:

- *Learned* Professionals
- *Creative* Professionals



Learned Professional

- Employee must perform work requiring advanced knowledge;
- The advanced knowledge must be in field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction



Advanced Learning Means...

Work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished, from performance of routine mental, manual, mechanical or physical work



Field of Science or Learning Includes...

- Law
- Accounting
- Teaching
- Medicine
- Engineering
- Pharmacy
- Theology
- Architecture
- Actuarial
Computation



Creative Profession

Typically requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor



Examples

- Actors

- Musicians

- Composers

- Cartoonists

- Writers

- Conductors



Administrative Exemption

- His/her “primary duty” is 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
- His/her “primary duty” includes the exercise of discretion and independent judgment with respect to matters of significance.



“Directly Relating to Management or General Business Operations”

- 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.



Functional Areas Include:

- Tax/Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Advertising
- Marketing
- Labor Relations
- Human Resources
- Public Relations



“Discretion and Independent Judgment” Factors

Relevant Factors Include:

- whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- whether the employee carries out major assignments in conducting the operations of the business;
- whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business



“Discretion and Independent Judgment” Factors

- 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;
- whether the employee provides consultation or expert advice to management;



“Discretion and Independent Judgment” Factors

- whether the employee is involved in planning long or short-term business objectives;
- whether the employee investigates and resolves matters of significance on behalf of management; and
- whether the employee represents the company in handling complaints, arbitrating, disputes or resolving grievances



Exercise of Discretion & Independent Judgment

- Must have the authority to make an independent choice, free from immediate direction or supervision

Examples include:

- A Buyer who evaluates reports on competitor prices to set the employer's prices
- Human Resources Managers
- Purchasing Agents
- Executive Assistants of a large business if they, without specific instructions or prescribed procedures, have been delegated authority regarding matters of significance.



Exercise of Discretion & Independent Judgment

- Is distinguished from the mere use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.



Other Exemptions

- Highly Skilled Computer Occupations
- Outside Salespersons



Highly Skilled Computer Employee Exemption

- Computer Analysts
- Computer Programmers
- Software Engineers
- Must earn a minimum of \$37.94/hour (\$78915.20/year)



Outside Salespersons

- Must regularly work more than half the working time outside the workplace
- Must sell tangible or intangible items or obtain orders or contracts for products, services or use of facilities
- Outside salespersons are exempt for both minimum wage, overtime, and meal & rest period regulations



Pitfalls of Misclassification...

- Payment of back wages (up to 3 years)
- Meal and rest period penalties
- Additional fines and/or sanctions
- Domino effect



High Cost of Ignoring the Law...

According to the Department of Labor:

Collection of Back Wages

2010 - \$175,652,665

2009 - \$172,373,875

Number of Employees Receiving Back Wages

2010 – 208,615

2009 – 219,560



Class Action Law Suits

- 4.8 million for Customer Services Representatives
- 10 million for managers and assistant managers of a convenience store chain
- 14 million against a travel company
- 11 million against drug store chain
- 22.4 million against grocery store chain
- 19.5 million for sales agents of a major trade association
- 255 million against two insurance agencies