

Salaried Employees May be Entitled to Overtime Pay

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Employers facing a New Jersey Department of Labor misclassification audit could encounter complications with the misclassification of not only independent contractors but also exempt status employees.[\[i\]](#)

If an employer has determined that an employee is exempt from overtime, it is likely that they are not requiring the employee to “clock in and out” or keep any record of the time worked. If the employee is “misclassified” and is not exempt from overtime, because they do not meet the duties test, when calculating overtime that may be owed to the employee, the court will rely on the employee’s testimony regarding the hours worked. See [The Importance of Keeping Accurate Employee Time Records](#).

New Jersey follows the [Fair Labor Standards Act](#) (FLSA) standards regarding overtime exemptions. This blog will review the standards set by the FLSA based on each employee classification and clarify which salaried employees are to be exempt from overtime pay.

The FLSA has long-utilized a three-part test to determine if an employee is exempt from receiving overtime, and can be paid a salary. Below is the test criteria:

1. The employee must be paid a salary that does not vary;
2. The salary has to equal or exceed a set minimum amount; and
3. The employee’s duties must consist of executive, administrative or professional duties, or the employee must work in a specialized area, such as computer professionals or commissioned sales employees.

In order to be exempt from overtime, under the current salary test, an employee must earn at least \$684 per week or \$35,568 per year. Additionally, highly compensated employees, who do not meet all of the elements of the third prong of the overtime exemption test, may still be exempt from overtime if they earn at least \$107,432 per year. The FLSA regulations note that because a high level of pay is a “strong indicator” of exempt status, it eliminates the need for a “detailed analysis” of job duties. Thus, the regulations state, an employee earning a salary of \$107,432 or more a year will qualify for exemption if the worker’s primary duty is performing office/non-manual labor and the worker “customarily and regularly performs any one or more of the exempt duties” of an executive, administrative, professional employee or outside salesperson. The specifics, of each duties test, are outlined below.

The duties of an employee, under the executive exemption, are as follows:

1. The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
2. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
3. 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.

“*Primary duty*” is defined as the principal, main, major, or most important duty that the employee performs. The determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

Generally, “management” includes, but is not limited to activities such as:

Interviewing, selecting, and training employees	Determining the techniques to be used
Setting and adjusting rates of pay and hours of work	Apportioning the work among the employees
Appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status	Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked, and sold
Maintaining production or sales records for use in supervision or control	Controlling the flow and distribution of materials or merchandise and supplies
Monitoring or implementing legal compliance measures	Providing for the safety and security of the employees or the property
Handling employee complaints and grievances	Planning and controlling the budget
Disciplining employees	Directing and planning the work of employees

The phrase “*a customarily recognized department or subdivision*” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

The phrase “*customarily and regularly*” means greater than occasional but less than constant; it includes work normally done every workweek but does not include isolated or one-time tasks.

The phrase “*two or more other employees*” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Factors to be considered in determining an employee’s recommendations regarding hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested and relied upon. Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee’s recommendations may still be deemed to have “particular weight” even if a higher-level manager’s recommendation has more importance and even if the employee does not have the authority to make the ultimate decision as to the employee’s change in status.

The duties of an employee, under the administrative exemption, are as follows:

1. 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
2. The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

“Primary duty” is the principal, main, major, or most important duty that the employee performs. The determination of an employee’s primary duty must be 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 meet the “directly related to management or general business operations” requirement, an 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.

Work “directly related to management or general business operations” includes, but is not limited to work in functional areas such as:

Tax	Procurement	Labor relations
Finance	Advertising	Public relations
Accounting	Marketing	Government relations
Budgeting	Research	Computer network
Auditing	Safety and health	Internet and database administration
Insurance	Personnel management	Legal
Quality control	Human resources	Regulatory compliance and similar activities
Purchasing	Employee benefits	

An employee may qualify for the administrative exemption if the employee’s primary duty is to perform work directly related to the management or general business operations of the employer’s customers. Thus, employees acting as advisors or consultants to their employer’s clients or customers — tax experts or financial consultants, for example — may be exempt.

In general, the exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee’s particular employment situation and implies that the employee has authority to make an independent choice, free from immediate direction or supervision.

Factors to consider include, but are not limited to:

1. The employee’s authority to formulate, affect, interpret, or implement management policies or operating practices;
2. Does the employee carries out major assignments in conducting the operations of the business;
3. Whether the employee performs work that affects business operations to a substantial degree;
4. Does the employee have authority to commit the employer in matters that have a significant financial impact;
5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation.

Despite an employee’s decisions being revised or reversed after review, it does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

The term “*matters of significance*” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates costly equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause severe financial loss to the employer.

The duties of an employee, under the professional exemption, are as follows:

1. 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;
2. The advanced knowledge must be in a field of science or learning; and
3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

“*Primary duty*” means the principal, main, major, or most important duty that the employee performs. The determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

“*Work requiring advanced knowledge*” means work that is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical, or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, pharmacy, and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type but is not in a field of science or learning.

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skills by experience rather than by advanced specialized intellectual instruction.

The duties for the outside sales employee exemption are as follows:

1. The employee’s primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2. The employee must be customarily and regularly engaged away from the employer’s place or places of business.

The salary requirements of the regulation do not apply to the outside sales exemption.

For this category, “*primary duty*” means the principal, main, major, or most important duty that the employee performs. The determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

“Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidence of intangible property.

Obtaining orders for “*the use of facilities*” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word “*services*” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order. The phrase “*customarily and regularly*” means greater than occasional but less than constant; it includes work normally done every workweek but does not include isolated or one-time tasks.

An outside sales employee makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home. Outside sales do not include sales made by mail, telephone, or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Promotional work may or may not be exempt from outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. However, promotional work that is incidental to sales made, or is made, by someone else is not exempt outside sales work.

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver’s duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor’s license when required by law, the description of the employee’s occupation in collective bargaining agreements, and other factors set forth in the regulation.

TAKEAWAY: If an employer improperly classifies an employee as exempt and, therefore, does not keep track of their time, the court will rely on the veracity of the employee’s testimony in determining if overtime is owed. As a result, it is imperative that employers ensure employees are correctly classified and if you are unsure, contact [Tracy Armstrong](#) or another member of the [Wilentz Employment Law Team](#).

[\[i\]](#) A previous blog, reminded NJ employers of their obligation to display the [NJ Department of Labor Misclassification](#) poster. In NJ, if an individual performs a service and is paid, the individual is presumed to be an employee, unless the employer can prove all three of the following: (A) You have been and will continue to be free from control or direction over the performance of the service, both under a contract of service and in fact; and (B) The service is either outside the usual course of the business for which such service is performed, or the service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) You are customarily engaged in an independently established trade, occupation, profession or business.

Attorney

- Tracy Armstrong

Practice

- Employment Law