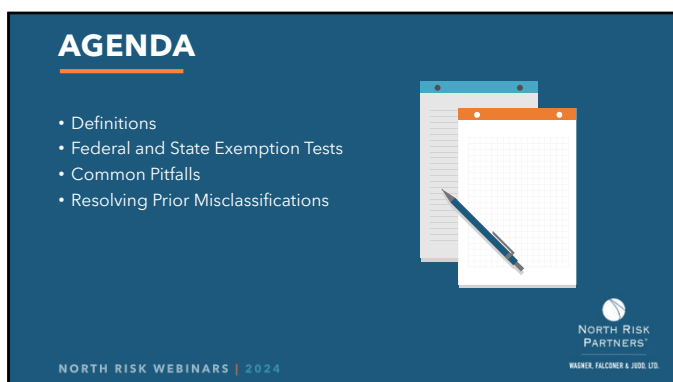


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EXEMPT VS. NON-EXEMPT EMPLOYEES: THAT IS THE QUESTION
APRIL 2024
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AGENDA

- Definitions
- Federal and State Exemption Tests
- Common Pitfalls
- Resolving Prior Misclassifications

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PRESENTER



Janell Stanton
HR Attorney
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DEFINITIONS

- When thinking about exempt v. non-exempt - the question is not whether the employee is salary v. hourly
- A non-exempt employee can be paid on a salary basis. That does not make them exempt

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DEFINITIONS

Non-exempt {

- Must comply with all the minimum wage and overtime requirements.

Exempt {

- Not covered by the minimum wage and overtime requirements.
- Three-part test:
 - Paid on a salary basis
 - At least the salary threshold
 - Meet the duties test

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DEFINITIONS

The #1 Most Important Principle to Remember...


**EMPLOYEES ARE BORN
NON-EXEMPT**

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EXEMPT EMPLOYEE TEST



Salary Level and Basis Test

The employee be paid a predetermined salary of at least \$684 per week.
The salary cannot be reduced because of the quality or quantity of the employee's work.
The employer cannot make any improper deductions from the salary.




Duties Test

Exempt employees are individuals employed as bona fide:

- Administrative, Executive, Professional (learned and creative), Highly Compensated Employees, Computer Professionals, Outside Sales, or Commissioned Retail Sales employees.

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EXEMPT EMPLOYEE TEST

- Salary Level Test:
 - Employee's salary must meet certain \$\$ thresholds
 - \$684 per week OR
 - \$35,568 annually
 - Watch for state law differences

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EXEMPT EMPLOYEE TEST

- Salary Level Test:
 - DOL's WHD announced NPRM on August 30, 2023, proposing various changes including salary threshold increases and automatic updates every three years.
 - NPRM published on September 8, 2023, with a 60-day comment period.
 - Mayfield v. U.S. Department of Labor affirmed agency's authority to impose minimum salary requirements.
 - Public comment period for proposed rule closed on November 7, 2023.
 - Fall 2023 regulatory agenda set April 2024 for final rule publication.
 - DOL's final rule submitted for review to OMB's Office of Information and Regulatory Affairs on March 1, 2024.
 - On February 15, 2024, Rep. Eric Burlison introduced H.R. 7367, the Overtime Pay Flexibility Act, which aims to prevent DOL's 2023 proposed rule enforcement.

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EXEMPT EMPLOYEE TEST

- Salary Level Test:
 - Proposed change would:
 - increase the minimum salary threshold (the "standard salary level") for the executive, administrative, and professional (EAP) exemptions under the FLSA from \$684 to \$1,059 a week;
 - increase the total annual compensation requirement for the highly compensated employee (HCE) exemption under the FLSA from \$107,432 to \$143,988; and
 - automatically update earnings thresholds every three years.

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EXEMPT EMPLOYEE TEST

- Salary Basis Test
 - To satisfy this test, the employer must be able to say yes to all three of the following factors:
 - Employee must receive a predetermined amount of pay each pay period
 - Pay cannot be reduced based on hours worked or production
 - No deductions when an employee is able to work, but no work is available

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EXEMPT EMPLOYEE TEST

- The most overlooked part of the test is the employee's job duties

This is the most important of the three-part test and where most employers go wrong.

An exempt employee's primary duty, when looking at the job as a whole, the principal, main, major or MOST important reason that the job exists, is to perform exempt duties 50% or more of their working time.

Non-exempt work may be performed up to 20% of the time.

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ADMINISTRATIVE EXEMPTION

For an administrative employee to be properly classified as exempt, the administrative employee's position must meet BOTH of these factors:

- Perform office or non-manual work directly related to management or general business operations
- Be able to exercise discretion and independent judgment regarding significant business decisions



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ADMINISTRATIVE EXEMPTION

Bookkeeper

- Handles delinquent accounts according to specific standards established by the company
- Likely non-exempt

Accountant

- Staff accountant with specialized training and who uses personal judgment and discretion
- Likely exempt



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EXECUTIVE EXEMPTION

For an executive employee to be properly classified as exempt, the executive employee's position must meet ALL THREE of these factors:

1. Primary duty is managing the enterprise or a department
2. Customarily and regularly direct the work of at least 2+ full time employees
3. Hire or fire employees, or when the executive gives recommendations about hiring and firing, those recommendations are given particular weight



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EXECUTIVE EXEMPTION

Retail Managers

Technically, they manage a team of individuals

however

In practice, they stock shelves, clean the bathroom, run the register




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PROFESSIONAL EXEMPTION

For a professional employee to be properly classified as exempt, the professional employee's position must meet ALL THREE of these factors:

1. Primary duty is performing work requiring advanced knowledge
2. This advanced knowledge must be in a field of science or learning
3. Typically, this knowledge is acquired by lengthy, specialized intellectual instruction (college)



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PROFESSIONAL EXEMPTION

Certified Engineer

- Exempt learned professional

Design Specialist working in Engineering Firm

- Likely non-exempt if the role does not require an advanced degree, but rather specialized knowledge of a skilled technician



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OTHER EXEMPTIONS



Computer Related



Educational Establishments and Administrative



Outside Sales



Highly Compensated Employees

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BEWARE OF STATE DIFFERENCES

- Remember that if a state/city/county ordinance is more employee friendly than the federal rule (usually meaning the test for exemption is harder to meet), then the state law exemption will trump the federal one.
 - For example, Minnesota does not recognize the computer professional exemption or highly compensated employee
 - Industry-specific exemptions, such as for agricultural employees
 - California's salary level test requires employee earn at least double the state minimum wage: \$1,240/week

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MINNESOTA EXEMPTIONS

- Certain corn detassellers and certain other agricultural workers.
- Seasonal carnival, circus, fair, resident or day camp, or ski facility employees.
- Taxicab drivers.
- Babysitters who work as "solo practitioners."
- Certain elected officials and certain government employees.
- Police and firefighters employed by a political subdivision.
- Seafarers.
- Members of religious orders.
- Motor vehicle salespeople and mechanics.
- Certain on-farm silo constructors or installers.
(Minn. Stat. Ann. §§ 177.23, subd. 7 and 177.25.)

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NORTH DAKOTA EXEMPTIONS

- Agricultural workers.
- Employees spending at least 51% of their work time providing direct care to clients of a shelter, foster care, or other related establishment whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.
- Domestic service workers residing in the household of employment.
- Mechanics paid on a commission basis from a flat rate schedule.
- Retail sales employees whose regular rate of pay is over 1.5 times the minimum hourly rate if more than half of their compensation for not less than one month is from commission on goods or services sold.
- Announcers, news editors, or chief engineers of radio or TV stations.
- Employees exempted by Sections 7 and 13(b)(1)-(3) of the Fair Labor Standards Act (FLSA) as applied to covered employees of motor carriers specified by the federal Motor Carriers Act.
- Teachers, instructors, tutors, and lecturers teaching in a school or educational system.
- Highly compensated employees.
(N.D. Admin. Code § 46-02-07-02(4).)

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MOST COMMON PITFALLS

Always
classifying
salaried
employees as
exempt

Always
classifying
supervisors
as exempt

Classifying
employees
based upon
job
descriptions
or titles only

Making
deductions
from exempt
employee's
paychecks

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RESOLVING MISCLASSIFICATION ISSUES

- Audit your job descriptions and classifications
 - Do they really meet the duties test?
 - Don't just give titles and expect employees to be exempt - duties must match
 - Ensure that job descriptions actually reflect what duties the employee performs - this may require interviewing employees

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RESOLVING MISCLASSIFICATION ISSUES

- Prepare for Possible Backlash
 - Changes can be unpopular
 - They can lead an employee to wonder if they are owed unpaid overtime
- Communicating Changes
 - Ensure managers fully understand the change
 - Communicate clearly, through multiple channels
 - Provide a main point of contact
 - Ensure employees know this is not punishment


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QUESTIONS?



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