

White Collar (EAP) Exemption Guide and Worksheet

Introduction

The federal Fair Labor Standards Act (FLSA) requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay for all hours worked over 40 in a workweek.

However, the FLSA provides some exemptions from both minimum wage and overtime pay for employees who qualify as bona fide executive, administrative, professional, computer, highly compensated, or outside sales employees. These are often called the “white collar” exemptions, or “executive, administrative, professional (EAP)” exemptions to distinguish them from other exemptions listed in the law, such as those for farmworkers, seamen, and casual babysitters.

To qualify for one of these exemptions, an employee must pass certain tests regarding their job duties and, in most cases, be paid a minimum amount on a salary basis. Employers may use nondiscretionary bonuses and incentive payments (including commissions), if paid on an annual or more frequent basis, to satisfy up to 10 percent of the required minimum salary.

Job titles do not determine exempt status, nor does method of payment. Just because an employee has the title of manager and is paid by salary, for instance, does not mean they automatically qualify to be an exempt employee. For an exemption to apply, an employee’s specific day-to-day job duties, and in most cases salary, must meet all the requirements of the applicable test.

See the worksheet later in this guide to help determine if a specific employee matches any of the white collar exemption tests. The glossary provides an explanation of the terms used in the tests.

Glossary

Away from the employer’s place of business

An outside sales employee must be customarily and regularly engaged in sales activities “away from the employer’s place(s) of business.” 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 does 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 phone 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.

White Collar (EAP) Exemption Guide and Worksheet

Customarily and regularly

This means with a frequency that must be greater than occasional, but which may be less than constant. It includes work normally done every workweek but does not include isolated or one-time tasks.

Directly related to management or general business operations

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.

This work often includes, but is not limited to, work in functional areas such as: tax, finance, accounting, budgeting, auditing, quality control, purchasing, advertising, marketing, safety and health, personnel management, human resources, government relations, and legal compliance. This list provides examples of functional areas or departments typically considered administrative in nature, although each case must be examined individually.

Discretion and independent judgment

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The exercise of discretion and independent judgment implies that one has authority to make an independent choice, free from immediate direction or supervision. 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 must be applied in the light of all the facts involved in the employee’s particular employment situation. Factors to consider include, but are not limited to, the following:

- 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 or performs work that affects business operations to a substantial degree
- 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 provides consultation or expert advice to management and 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 or represents the employer in handling complaints, arbitrating disputes, or resolving grievances

White Collar (EAP) Exemption Guide and Worksheet

The fact that an employee's decisions are subject to revision or reversal after review does not mean that the employee is not exercising discretion and independent judgment.

Fee basis

A fee basis is an agreed amount for a single job regardless of the time required to complete the job. Payments on a fee basis resemble piece work payments with the important distinction that a fee is generally paid for the kind of job that is unique rather than for a series of jobs repeated indefinitely and for which payment on an identical basis is made over and over. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

To test whether a fee payment meets the minimum required amount for exemption under current FLSA regulations, consider the time worked to complete the job and determine if the payment is at a rate that would yield at least \$684 per week if the employee worked 40 hours.

Field of science or learning

This includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, the hard sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades which are not a field of science or learning. When an advanced specialized degree has become a standard requirement for entrance into a particular occupation, that occupation may have acquired the characteristics of a learned profession.

Invention, imagination, originality, or talent

The requirement that an employee's primary duty must be the performance of work requiring "invention, imagination, originality, or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, and certain painters, writers, cartoonists, essayists, novelists (if they have significant creative license).

Making sales

Making sales includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be 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.

White Collar (EAP) Exemption Guide and Worksheet

Managing

Managing generally includes, but is not limited to, activities such as the following:

- Interviewing, selecting, and training of employees
- Setting and adjusting employee's rates of pay and hours of work
- Directing and apportioning the work of employees
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status
- Handling employee complaints and grievances and disciplining employees
- Planning the work and determining the techniques to be used
- Planning and controlling the budget

Matters of significance

The term "matters of significance" refers to the level of importance or consequence of the work performed to the management or general business operations of the employer or of the employer's customers.

Obtaining orders or contracts for services or for the use of facilities

This includes the selling of time on radio or television, the solicitation of advertising for newspapers, other periodicals, and the internet, 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. The actual performance of the services for the customer may be by someone other than the person taking the order.

Particular weight

Factors to be considered 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 the executive customarily and regularly directs. 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 authority to make the ultimate decision as to the employee's change in status.

Primary duty

Primary duty means the principal, main, major, or most important duty that the employee performs. 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.

The amount of time spent performing the specific duty can be a useful guide in determining whether that work is the primary duty of an employee. Thus, employees who spend more

White Collar (EAP) Exemption Guide and Worksheet

than 50 percent of their time performing a specific duty will generally satisfy the primary duty requirement.

Time alone, however, is not the sole test, and nothing requires that exempt employees spend more than 50 percent of their time performing a specific duty. Employees who do not spend more than 50 percent of their time performing their major or most important duty may nonetheless meet the primary duty requirement based on other factors, such as:

- The relative importance of the major or most important duty as compared with other types of duties.
- The amount of time spent performing the major or most important duty.
- The employee's relative freedom from direct supervision.
- The relationship between the employee's salary and the wages paid to other employees for performance of similar work.

For example, managers in retail establishments who perform exempt executive duties such as supervising and directing the work of other employees, ordering merchandise, managing the budget, and authorizing payment of bills may have management as their primary duty even if they spend more than 50 percent of the time performing nonexempt work such as running the cash register.

However, if a particular manager is closely supervised and earns little more than the nonexempt employees, such a manager generally would not satisfy the primary duty requirement.

Professional employee exceptions to salary rule

Teachers and those practicing law or medicine are not required to be paid on a salary basis, nor are they required to be paid the minimum of \$684 per week. As with as other aspects of these exemptions, however, actual job duties are key.

Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if they are engaged in an internship or resident program for the profession.

White Collar (EAP) Exemption Guide and Worksheet

Prolonged course of intellectual instruction

The learned professional exemption is not available for occupations that require only a four-year degree in any field or a two-year degree as a prerequisite for entrance into the field. The learned professional exemption also does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Salary basis

A salary is a predetermined amount of pay that constitutes all or part of the employee's compensation for the pay period. Being paid on a salary basis means the employee will receive the fixed, predetermined amount each pay period and it will not be reduced based on the quality or quantity of the work performed. A salary is generally expressed as an amount paid per week, per month, or per year.

Total compensation of \$107,432

To claim the highly compensated employee (HCE) exemption, employers must pay workers at least the standard weekly salary level of \$684 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation. Because employers may fulfill a majority of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation, the DOL has determined that it would not be appropriate to permit employers to also use nondiscretionary bonuses and incentive payments to satisfy the weekly standard salary amount.

Work requiring advanced knowledge

This means work which is predominantly intellectual in character and requires the consistent exercise of discretion and judgment. Professional work is distinguishable 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.

White Collar (EAP) Exemption Guide and Worksheet

White Collar Exemption Worksheet

Use this worksheet to help determine if a particular worker can be classified as exempt under one of the FLSA's white collar exemptions.

Employee's name and title:

Employee's primary duties:

Employee's manner and rate of pay:

Instructions

There are eight categories under the white collar umbrella, and each has its own unique test. If you are unfamiliar with this classification system, start by reading through all of the tests to see where an employee is most likely to fit.

You must be able to check "yes" for every element of the applicable test for an employee to qualify for that exemption. If one exemption doesn't apply, another might. Some employees may also fall under more than one category.

When using these tests, it's important to base your answers on the employee's actual day-to-day duties, not what their job description states, what their title implies, or what you'd like them to be doing.

Executive Employee

Yes No

The employee is compensated on a salary basis at a rate not less than \$684 per week, exclusive of board, lodging, or other facilities.

The employee's primary duty is managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.

The employee customarily and regularly directs the work of at least two or more other full-time employees or the equivalent (e.g., four half-time employees).

The employee has 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 are given particular weight.

White Collar (EAP) Exemption Guide and Worksheet

Business Owner Executive

Yes No

The employee owns a bona fide 20 percent (or more) equity interest in the business in which they are employed.

The employee is actively engaged in managing the enterprise in which they are employed.

Administrative Employee

Yes No

The employee is compensated on a salary basis or fee basis at a rate not less than \$684 per week, exclusive of board, lodging, or other facilities.

The employee's primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.

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

Learned Professional Employee

Yes No

The employee is compensated on a salary or fee basis at a rate not less than \$684 per week, exclusive of board, lodging, or other facilities. **See glossary for exceptions.**

The employee's primary duty is the performance of work requiring advanced knowledge.

The advanced knowledge is in a field of science or learning.

The advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

White Collar (EAP) Exemption Guide and Worksheet

Creative Professional Employee

Yes No

The employee is compensated on a salary or fee basis at a rate not less than \$684 per week, exclusive of board, lodging, or other facilities.

The employee's primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (such as writing, music, or acting).

Computer Employee

Yes No

The employee is compensated on a salary or fee basis at a rate of not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour.

The employee is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

The employee's primary duty consists of one or more of the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on, and related to user or system design specifications.
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- A combination of the above duties, the performance of which requires the same level of skill.

White Collar (EAP) Exemption Guide and Worksheet

Highly Compensated Employee

Yes No

The employee is paid total annual compensation of \$107,432 or more which includes at least \$684 per week.

The employee performs office or nonmanual work.

The employee customarily and regularly performs at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard conditions for exemption.

Outside Sales Employee

Yes No

The employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities.

The employee customarily and regularly is engaged away from the employer's place or places of business.

Based on the answers provided above, this employee qualifies for the selected exemption(s):

Exempt executive employee

Exempt business owner executive

Exempt administrative employee

Exempt learned professional employee

Exempt creative professional employee

Exempt computer employee

Exempt highly compensated employee

Exempt outside sales employee

None of the above—this employee should be classified as nonexempt unless a different exemption under the Fair Labor Standards Act applies.