

Are Your Employees Overtime-Eligible?

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OVERVIEW

On May 23, 2016 the US Department of Labor (DOL) published revisions to the FLSA regulations which define what factors make employees eligible for overtime pay. The most notable revision was a significant increase in the minimum salary an employee must be paid in order to be overtime-exempt—increasing from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). In addition to the salary threshold, an employee's "primary duty" must meet certain requirements (discussed below) to be exempt from overtime requirements. The new FLSA regulations will go into effect on December 1, 2016 and will result in millions of US workers becoming eligible for

overtime pay and other FLSA protections according to DOL estimates. In preparation for this change many organizations are revisiting current employee classifications and evaluating whether their employees qualify for an exemption under the revised regulations.

The goal of this article is to describe several scientifically-based methodologies which can be used to determine whether employees' "primary duties" qualify them to be overtime-exempt. Each of these methodologies are based on job analysis techniques and are designed to collect detailed data on the work employees actually perform, the amount of time they spend performing that work,

and the context in which that work is performed. We have developed and refined these job analysis methodologies over many years to specifically address the key issues relevant to assessing an employee's exempt status and have used them successfully with many clients.

FLSA REVISIONS

The FLSA, enacted in 1938, grants numerous wage and hour protections to all US employees unless they meet the criteria for an exemption and have been classified by their employer as "exempt." The most notable FLSA protection entitles workers to overtime pay at 1.5 times their regular rate for all hours worked in excess of 40 in a week. Em-

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employees who qualify for an exemption may legally be classified as “exempt” and thus are not entitled to any FLSA protections including overtime pay. Exempt employees are paid a fixed salary regardless of the number of hours they work (i.e., “salaried”).

There are several exemptions for which an employee can qualify and these are all described in regulations promulgated by the US. Department of Labor.¹ The three most common are the Executive, Administrative and Professional exemptions, commonly known as the “White Collar” exemptions. Although the specific criteria for each exemption differ, all exemptions are based on two factors: the employee’s salary (“Salary Test”) and the employee’s job duties (“Duties Test”).

In 2014, President Obama issued a directive to the U.S. Secretary of Labor to “modernize and streamline” the regulations that define the white collar exemptions.² The directive was intended to address the concern that current regulations have “failed to keep up with inflation, only being updated twice in the last 40 years and leaving millions of low-paid, salaried workers without these basic [FLSA] protections.”³ In response to the directive, the DOL released

the much-anticipated Notice of Proposed Rulemaking (NPRM) in July 2015, which described the department’s proposed changes to the regulations.⁴ After a period of public comment during which hundreds of thousands of comments were submitted, the DOL finalized and published the revision on May 23, 2016.⁵

The most notable revision to the regulations, which goes into effect December 1, 2016, is a significant increase in the minimum salary an employee must be paid in order to be overtime-exempt—increasing from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). The majority of employers will be impacted to some degree by these changes, with millions of employees expected to lose their exempt status and become overtime-eligible. As a result, many employers will be looking for a way to clarify whether their current employee classifications comply with the regulations.

Salary Test

To satisfy the revised Salary Test, the employee must be paid a minimum of \$913 per week (\$47,476 per year) and must be paid a predetermined and fixed salary. The minimum salary was set at the 40th percentile of earnings of full-time

salaried workers in the lowest-wage Census Region (currently the South). This is a significant increase to the minimum salary which was previously \$455 per week (\$23,660 per year). Therefore, all exempt employees who previously qualified under one of the white collar exemptions and earn less than \$47k per year will no longer meet the Salary Test and will become overtime eligible. This revision will impact millions of employees according to DOL estimates,⁶ likely resulting in most of these employees being reclassified to overtime-eligible employees.

An evaluation of whether employees meet the new Salary Test will involve analyzing payroll data to determine which employees reach the minimum salary threshold. This analysis does not necessarily require expertise in work measurement. In contrast, determining whether different jobs in an organization meet the Duties Test requires detailed measurement of work behaviors. This is where our expertise is most applicable. Below we describe the requirements for the Duties Test and three different methodologies that can be used to conduct an exemption audit.

Duties Test

To satisfy the Duties Test,

the employee's "primary duty" must be exempt work. The term "primary duty" is the phrase in the regulations where disputes commonly arise. An evaluation of "primary duties" requires an understanding of what work employees actually perform, the context in which it's performed, the nature of the work, and the time spent on that work. Different methods, such as job analyses are often required to collect this evidence.⁷

Although the DOL stated that they considered possible revisions to the Duties Test, no specific changes were made. Regardless, the current definition of primary duty remains somewhat unclear to employers. In federal courts, "primary duty" has been interpreted qualitatively, meaning that there is no defined threshold for the percent of time that an employee needs to spend performing exempt duties. Other factors such as importance of the work performed may be considered in addition to percent of time spent when determining an employee's primary duty. As a result, an employee may be considered exempt, even if they spend less than half of their time performing exempt work. In contrast, California's state labor laws (where exemption litigation is disproportionately high) are more restrictive, requiring that

exempt employees spend more than 50% of their time performing exempt work. Employers operating in California must comply with the more restrictive state standard.

Through our extensive client work auditing employees job duties we have developed several methodologies to measure the amount of time employees spend performing exempt work for many organizations and job titles. All of these methodologies can be used to collect precise measurements of work behaviors which is useful for addressing exempt status under both state and federal regulations. The three most commonly-used methodologies are described in the following section.

HOW TO AUDIT EMPLOYEES' JOB DUTIES

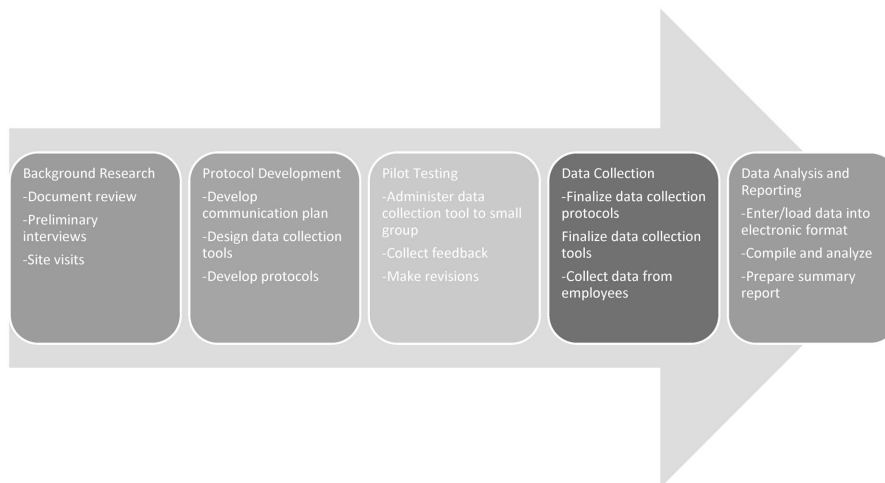
There are multiple exemptions for which an employee can qualify and it is possible that a single employee could meet the criteria for multiple exemptions. The specific method of data collection should be selected and customized based on the specifics of the job and the exemption(s) being evaluated. Having executed more than 100 exemption studies for many different positions across a variety of industries, we offer a general framework for the evaluation

process as well as some examples to highlight some of the issues which may arise for employers.

The common theme across all of the following methods is primary data collection. Reviewing documents which provide high level descriptions of the work that employees in a certain positions are *supposed to do* (e.g., job descriptions) provide some value in the process, but alone are insufficient to evaluate classification. An effective evaluation requires data which reveals what employees *actually do* on the job. The most appropriate methods for collecting valid and reliable data are observing and documenting how employees perform their work, or collecting verbal/written self-reports from employees about the work they perform. Each of these methods are based on scientifically-sound job analysis techniques. The appropriate method for a given organization or job is dependent on several factors, such as: the type of work performed, the language ability of employees, the geographic disparity of employees and even practical considerations such as cost and time. Most importantly, the method selected must be capable of generating valid and reliable data. A general overview of the underlying process for conducting a job audit is provided in

the graphic below.

General Framework for a Job Audit⁸



Time and Motion Observations

Time and motion observation studies result in a robust data set which many readers find particularly compelling. Observations involve a trained job analyst directly observing and documenting a continuous record of all tasks an employee performed throughout the day, along with the duration of each task performed. One advantage of this method is that data is collected from an objective professional who directly observes and documents the tasks performed in a given work environment. This ensures that data are free from any self-report biases or memory decay that may lead to inaccurate self-reports.

Once collected, the individually recorded tasks can be

grouped into exempt and non-exempt categories and analyzed to provide an overall percentage of time spent on different exempt activities. Other factors relevant to a classification evaluation, such as independent judgment and decision-making, and role in hiring and firing may be difficult to observe directly because they are mental processes that are not visible and may occur infrequently. Therefore, observation data can be supplemented with some self-report data from incumbents or managers to address these areas.

Conducting full-shift observations from employees can be time consuming and expensive. Therefore, it is typically necessary to collect data from a sample of employees. The methods used to select

the sample should be carefully considered to avoid any bias.

An important consideration when conducting an observation study is the type of job being evaluated. Some tasks (e.g., mental tasks) do not lend themselves to an observation methodology. Jobs that are comprised primarily of these types of tasks are more challenging to observe whereas job that are comprised primarily of visible tasks are more easily studied using observational techniques. The case study below describes an observation study we conducted of a manager position at a chain restaurant in California.

Case Study Example. We conducted an observation study of a manager position at a popular themed restaurant chain. This client was facing litigation in California in which plaintiffs claimed that

the managers of their restaurants were misclassified as exempt. The organization believed that the managers met the criteria for the executive exemption. To collect relevant data, we designed a study that included conducting 30 full shift manager observations.

We started the study by reviewing documents (e.g., job descriptions, training materials), interviewing different district level managers (i.e., supervisors of the managers), and visiting multiple incumbent managers outside of California to observe them performing their work first hand. Observing managers out of state gave us the opportunity to ask incumbent managers questions without tapping into the same group of managers in California we would ultimately be studying.

Through these visits we learned important details about the work environment. This information was incorporated into a Task List, a list of individual activities which any manager may perform on the job. This list was used to ensure that observers were able to recognize, accurately record, and categorize the tasks they observed. For example, we learned about the different areas and features of restaurants, the names of the different programs and reports managers used to manage restaurant operations, and what terminology (including nicknames and acronyms) employees used to communicate with each other. This list of tasks was grouped by topic into "Task Areas", which were then classified as "exempt" or "non-exempt". This Task Area structure was used to analyze the data collected and determine how time was spent.

To standardize the observation data collection and ensure that observers were pre-

pared to appropriately respond to potential customer interactions, we prepared a detailed observation protocol. The protocol provided guidance to observers on how to track unique tasks and scripted language to use in various scenarios.

We conducted full shifts observations of 30 randomly selected managers at different locations throughout California. Observations were done on different days of the week and covered a variety of shift times. When the data was compiled and analyzed it created a compelling picture of what these managers spent their time doing. It also demonstrated how time spent performing different tasks varied across managers. The client used this data to address the pending litigation.

Job Analysis Questionnaires

A second method for evaluating exemption classifications is a self-report job analysis questionnaire. This method involves collecting self-report responses from employees and/or their managers to a series of questions. Based on current science and best practices in the field, the job analysis questionnaire is a carefully designed instrument specifically designed to accurately measure employee behaviors in the workplace. One of the advantages of a self-report questionnaire is that it can be administered to a large number of employees relatively inexpensively. In addition, data can be collected retrospectively and questions can be

asked about issues that may be difficult to observe such as decision-making authority or the purpose of tasks performed. Self-report data collection can be used independently or in conjunction with other methods.

To address factors relevant to the exemptions, a job analysis questionnaire must be thorough, detailed and comprehensive. For example, our job analysis questionnaires often include five or more subsections, each covering a different element of the job. Given its length, participation can be time consuming for employees, however, this is necessary to collect sufficient data to draw meaningful conclusions.

Topics addressed in a self-report tool can include tasks performed, time spent, decision-making, level of autonomy, task importance, role in different operational areas, and other special duties or responsibilities. Using this approach can also provide insight into the *reasons* behind employees performing various tasks. If, for example, a manager at a retail store is spending the majority of their time ringing up customers on the register, a self-report tool could reveal that the reason for this behavior is to ensure that a recently repaired register is functioning properly. This type

of information can be critical in determining whether non-compliant behavior is an individualized issue or a structural problem throughout the organization.

There are different mediums which can be used to administer a job analysis questionnaire. Two which we use for clients are a hard copy "paper and pencil" questionnaires and an online, web based questionnaire. One consideration when choosing a medium for administration is the fact that the administration of a hard copy questionnaire requires more time and effort to manage, including coordinating and overseeing procured, in-person administration sessions. In contrast, an online questionnaire requires less time to administer, but is only feasible when employees have reliable access to and general familiarity with computers and the internet.

If a hard copy questionnaire is used, the employees' responses must be entered into an electronic form before they can be analyzed. If an online questionnaire is used, no data entry is required and the responses can be easily downloaded and analyzed to determine how employees responded. The case study below describes how we used a paper and pencil question-

naire to conduct a study of a Site Manager position working at different client locations around the country.

Case Study Example. A national staffing company asked us to determine whether the managers at each of the client locations were performing their jobs in a way that met the criteria for the administrative exemption under the FLSA. To accomplish this, we developed and administered a customized job questionnaire.

To develop this questionnaire we conducted a thorough review of the Site Manager position. First, we reviewed existing documents including training and operations materials and job descriptions of various positions that reported to the Site Manager. Next, we visited a variety of sites around the country to interview and observe Site Managers to learn firsthand about facility operations and Site Manager job responsibilities. We also held multiple Subject Matter Expert (SME) group meetings with several District Managers representing different geographies around the country to gather information about the differences between facilities and how that may impact the way a Site Manager spends his/her time.

Based on this background information we developed a comprehensive list of all of the tasks a Site Manager may perform on the job. This task list was then reviewed by multiple groups of SMEs for accuracy and modifications were made based on their input.

The task list was used as the basis of the questionnaire. For each task participants were asked to report the relative time spent on each task. Next, tasks were grouped into

Task Areas (i.e., tasks that serve a common function) and participants reported the percent of time they have spent performing work in each Task Area. Task areas were pre-classified as exempt or non-exempt by an external legal expert allowing calculation of total time spent on exempt work.

Next, we asked Site Managers to indicate the level of importance each task area represented in the successful execution of the job. We then asked Site Managers to report their purpose for performing non-exempt tasks, followed by questions about their role in and frequency of decision making regarding matters of significance. Lastly, we asked Site Managers about their role in different aspects of facility operations. The entire questionnaire was then reviewed by a several groups District Managers for clarity and revisions were incorporated based on their feedback.

The questionnaire was then pilot tested with a random sample of Site Managers to ensure that the instructions were clear and that the content was appropriate and accurately reflected the scope of the Site Manager job. After making minor revisions based on this feedback, we administered the questionnaire to approximately 300 Site Managers nationwide.

The questionnaires were collected, entered into electronic format and then analyzed. We found that many Site Managers spent the majority of their time performing exempt work, reported that exempt areas were important to the successful performance of their jobs, made important decisions regularly, and played an important role in site operations. Our client used these findings to resolve the case.

Structured Interviews

Another self-report tool which can be used for evaluating exemption compliance is the structured interview. The same foundations of job analysis practice are used to form the basis of the structured interview. However, unlike the job analysis questionnaire which typically contains mostly closed ended (i.e., fixed scale) questions, the structured interview contains mostly open-ended questions. Open-ended questions allow employees to elaborate and provide significant detail in their responses. These types of interviews can result in interesting and illustrative examples of different scenarios and circumstances. In addition, follow-up questions can be built into the tool to capture the drivers that lead to different employee behaviors. Some interviews may incorporate both open and closed ended questions which can expedite the interview and provide numeric data to analyze.

The structured interview approach can be useful when studying complex and highly technical jobs which do not lend themselves to a pre-structured questionnaire with defined measurement scales. Given the large number and detailed nature of questions, structured interviews can take a significant amount of time to

execute. Depending on the environment, this time requirement can limit the number of employees who can be interviewed and included in the study.

The employee responses to a structured interview can be lengthy, thus requiring a content analysis approach to summarize. However, responses typically contain much more detail than other self-report instruments. Some find these detailed descriptions more informative and useful than numeric data. The case study below describes how we designed and implemented a structured interview tool to a group of employees involved in various stages of the design and creation of Integrated Circuit chips at a semiconductor company.

Case Study Example. A semiconductor manufacturing company was facing litigation in which plaintiffs alleged that their “engineers” were misclassified as exempt. We were asked to determine how employees in this position were performing their work in relationship to several different exemptions. Through our initial review we determined that the group of employees included in our study actually held many different job titles. These vastly different jobs were all classified as exempt, but under a variety of exemptions, including the professional, administrative, computer professional, and executive exemptions. Because of the diversity and the technical nature of the jobs

included in the study, we determined that a structured interview method would be the best method to gather reliable data that addressed the key issues relevant to each of the various exemptions.

We started the job analysis by collecting background information about the parts of the business where engineers worked. Through this effort we learned that engineers worked in almost every phase of the product development cycle and that we needed to obtain significant background information about the different procedures and technologies involved in this process to adequately understand what employees in this group of jobs were actually doing. To gain this knowledge we relied on both internal and external resources, including interviews with external technology experts and industry readings.

Next, we conducted and recorded interviews with more than 40 subject matter experts (managers of the different engineering positions). We referred back to these recordings frequently to help decipher various aspects of the work and procedures being described.

We used the information gained from the background research and manager interviews to develop a customized structured interview protocol. The protocol asked questions about the nature of their work related to a variety of topics, such as their relationship with customers and other employees, the frequency and nature of supervision by their managers, the degree and nature of problem-solving required in performing tasks, and the technical knowledge and expertise required to perform tasks, among other things.

These two-hour interviews

were conducted in private offices at the client site. The data collected provided detailed information about the work that engineers in each of the different work groups performed. Once the data was compiled from each of the interviews into one master database we went through the process of determining how this reported information fit into different aspects of the various exemptions. This process resulted in a master “map” which demonstrated how each of the positions fit into one or more exemptions.

The final summary report detailed our findings and described the significant range in job duties we found across the different jobs we studied. The client relied on our report to evaluate its position related to both class certification and the different exemptions.

CONCLUSION

Recent revisions to FLSA regulations will have a significant impact on the exempt status of many employees nationwide. These changes will cause many businesses to revisit the classifications of employees. To assist in this process, we have provided several job analysis methods we have developed and ap-

plied over the years to properly evaluate the exempt status of employees. All research methods have strengths and weaknesses so the most appropriate method depends on the specifics of an organization and the position being studied.

Disclaimer: Each of the methods presented above describe data collection options which can be used to inform job classification decisions, however, we recommend seeking legal counsel before making any decisions related to classification.

NOTES:

¹See 29 C.F.R. §§ 541 et seq.

²Executive Office of the President (2014). Updating and Modernizing Overtime Regulations: Memorandum for the Secretary of Labor (79 FR 15209). Retrieved from <https://federalregister.gov/a/2014-06138>.

³Office of the Press Secretary (2014). Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections [Press Release]. Retrieved from <http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr>.

⁴Department of Labor (2015).

Defining and Delimiting the Exemptions for the Executive, Administrative, Professional, Outside Sales and Computer Employees [Notice of Proposed Rulemaking].

⁵Department of Labor (2016). Defining and Delimiting the Exemptions for the Executive, Administrative, Professional, Outside Sales and Computer Employees [Final Rule]. Retrieved from <https://federalregister.gov/a/2016-11754>.

⁶Department of Labor (2016). Defining and Delimiting the Exemptions for the Executive, Administrative, Professional, Outside Sales and Computer Employees [Final Rule]. Retrieved from <https://federalregister.gov/a/2016-11754>.

⁷Banks, C. G., & Aubry, L. W. (2005). How to Conduct a Wage and Hour Audit for Exemptions to Overtime Laws. *Bender's Labor & Employment Bulletin*, 292–302; Banks, C. G., & Cohen, L. (2005). Wage and Hour Litigation: I-O Psychology's New Frontier. In F. J. Landy, *Employment Discrimination Litigation*. Jossey-Bass/Pfeiffer; Hanvey, C.M., & Banks, C.G. (2015). Wage and Hour Litigation. In C.M. Hanvey and K. Sady (Eds.), *Practitioner's Guide to Legal Issues in Organizations*. New York, NY: Springer; Honorée, A. L., Wyld, D. C., & Juban, R. L. (2005). A Step-by-Step Model for Employers to Comply with the Fairpay Overtime Initiative under the Fair Labor Standards Act (FLSA). *Equal Opportunities International*, 24(2), 54–66; Ko, H. Y., & Kleiner, B. H. (2005). Analysing Jobs to Determine Exempt or Non-Exempt Status. *Equal Opportunities International*, 24(5/6), 93–100.

⁸For illustrative purposes only. The specifics for each study will vary.