

# Salaried Workers: Exempt Versus Non-Exempt

## *A guideline to overtime requirements*

The word “salary” is oftentimes assumed to mean “no overtime.” This is an incorrect assumption: ***a non-exempt employee can be paid on a salary basis and still be entitled to overtime compensation.*** The employee’s duties determine whether the employee is exempt or non-exempt, not whether they are paid by salary. If the duties do not qualify for an exemption, such workers must receive overtime compensation. All non-exempt employees must receive time-and-one-half their regular rate of pay after 40 hours in the workweek.

## Clearing up the Confusion

The confusion around the word “salary” stems from the requirement to pay an employee on a guaranteed salary of no less than **\$700.97** per week in 2021 if the employer claims an exemption from overtime for that employee. However, this salary requirement only applies to those employees who fall under a recognized overtime exemption. Under both federal and state law, employees in a bona fide exempt position are exempt from the overtime requirements if he or she meets certain criteria for that specific exemption. Employers must check the criteria against the job description of the position and the position’s actual duties.

### ***What does it mean to pay a “guaranteed salary?”***

The salary requirements do not apply to outside- (typically paid on commission) sales employees, some computer-related occupations and employees practicing law or medicine. When paying on a “salary basis,” the employee receives a predetermined amount of compensation that cannot be reduced because of variations in the quality or quantity of the employee’s work. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes illegal deductions<sup>1</sup> from an employee’s predetermined salary, the employer can no longer claim the exemption.

### ***How does an employer know whether an employee qualifies for an exemption?***

While there are several types of exemptions under both federal and state law, the most common exemptions are the Executive, Administrative and Professional exemptions. All of the specific exemption’s requirements must be met in order for an employer to claim an exemption on an employee.

#### **EXECUTIVE EXEMPTION**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than **\$700.97** per week in 2021.

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<sup>1</sup> Some deductions are allowed for absences for personal reasons and limited deductions for absences occasioned by sickness or disability. For more information, contact your local, state or federal Wage and Hour Divisions.

- The employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent (this does not include students, volunteers or independent contractors).
- 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.

#### **ADMINISTRATIVE EXEMPTIONS**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$700.97** per week in 2021.
- 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.
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

#### **PROFESSIONAL EXEMPTION**

To qualify for the **learned** professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$700.97** per week in 2021.
- 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.
- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative** professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than **\$700.97** per week in 2021.
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

***After determining an employee's classification as a non-exempt employee, and the employer chooses to pay the non-exempt employee on a salary basis, how does the employer compute the employee's overtime compensation?***

When a non-exempt employee is paid on a salary basis, the overtime pay must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment in any workweek by the total number of hours actually worked.

## **FIXED SALARY FOR WORKWEEK EXCEEDING 40 HOURS**

If a non-exempt employee is paid a guaranteed weekly salary for a regular workweek longer than 40 hours, the employer must compensate the employee for his or her overtime hours.

- **Example One:** An employee may be hired to work a 45-hour workweek for a weekly salary of \$546.75. In this instance the regular rate is obtained by dividing the \$546.75 straight-time salary by 45 hours, resulting in a regular rate of \$12.15/hour. The employee is then due additional overtime computed by multiplying the 5 overtime hours by on-half the regular rate of pay ( $\$6.08 \times 5 = \$30.40$ ). The Employee would be due \$577.15 for the week (\$546.75 guaranteed salary + \$30.40 half-time rate for overtime).
- **Example Two:** An employee may be hired to work a 50-hour workweek for a weekly salary of \$607.50. In this instance, the regular rate is obtained by dividing the \$607.50 straight-time salary by 50 hours, resulting in a regular rate of \$12.15/hour. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ( $\$6.08 \times 10 = \$60.80$ ). Employee would be due \$668.30 for the week (\$607.50 guaranteed salary + \$60.80 one-half rate for overtime). However, should the employee work 55 hours in the workweek, the employer must pay time-and-one-half for the additional 5 overtime hours because the salary was only intended to cover 50 hours in the workweek.

***How does an employer compute overtime for an employee who works two different jobs? Is there a difference if the employee performs both jobs, one that would qualify for an exemption of overtime and the other position not qualifying for an exemption?***

As stated previously, each of the exemption requirements must be met in order for an employer to claim an exemption on an employee. The employee's primary duties will assist employers in determining whether the employee is exempt or non-exempt from the overtime requirements.

## **EMPLOYEE PERFORMING EXEMPT AND NON-EXEMPT DUTIES**

- **Example One:** An employee is hired to work a 40-hour workweek performing non-exempt duties as a customer service operator and an additional five hours a week performing duties as the employer's custodian (not an independent contractor<sup>2</sup>). The duties performed by both positions do not qualify the employee for an overtime exemption; therefore, the employee must be paid time-and-one-half the employee's regular rate of pay. To compute the regular rate of pay with multiple pay rates, divide the total compensation by the total hours worked.
- **Example Two:** An employee is hired to work a 30-hour workweek performing non-exempt duties as an inside sales recruiter and an additional 20 hours a week performing duties in a different department as a manager (executive exemption). The duties performed by the employee would not qualify for an overtime exemption as the employee's primary duties are that of an inside sales recruiter (non-exempt work). The employee must be paid time-and-one-half the employee's regular rate of pay. To compute the regular rate of pay with multiple pay rates, divide the total compensation by the total hours worked.
- **Example Three:** An employee is hired to work a 40-hour workweek performing exempt duties as a teacher (professional exemption) and an additional 10 hours a week as a bus driver. The employee's primary duties are

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<sup>2</sup> For more information on independent contractors, please visit:

[http://www.maine.gov/labor/misclass/how\\_to\\_determine\\_independent\\_contractor\\_status.shtml](http://www.maine.gov/labor/misclass/how_to_determine_independent_contractor_status.shtml)

that of the teacher and an exemption (professional) would apply. The duties as a bus driver are secondary and would not cause the employer to lose the exemption.

## ***FAQs and Common Problems***

### **MISCLASSIFICATION – INCORRECTLY CLASSIFYING EMPLOYEE AS EXEMPT**

- In order for the employer to claim an overtime exemption, the employee must qualify for a bona fide exemption and be primarily engaged in that position. Failure to classify an employee correctly could result in overtime violations.

### **RECORDKEEPING REQUIREMENTS – THE ABSENCE OF RECORDS FOR NON-EXEMPT EMPLOYEES**

- The responsibility lies with the employer to maintain true and accurate records for all non-exempt employees. In the absence of records, the hours must be reconstructed, potentially resulting in higher back-wage liabilities.

### **UNFAIR AGREEMENTS – ILLEGAL DEDUCTIONS FOR BOTH EXEMPT AND NON-EXEMPT EMPLOYEES**

- Employers cannot deduct for logoe uniforms or other tools of the trade that are considered to be primarily for the benefit or convenience of the employer. Nor can employers deduct for cash or inventory shortages or damages to the employer's property. Deductions from an exempt employee's guaranteed salary could result in loss of the overtime exemption and overtime violations for non-exempt employees.
- Employers must provide non-exempt employees a 30-minute uninterrupted break (paid or unpaid) when the employee is scheduled to work a six-hour shift (some exceptions apply to small businesses). "Short rest breaks" lasting 10–15 minutes must be considered as "hours worked" requiring payment. Deductions for short rest breaks for non-exempt employees could result in overtime violations if the deductions would place the non-exempt employee into overtime.

### **OVERTIME – CALCULATING OVERTIME FOR NON-EXEMPT EMPLOYEES**

- Under no condition can employers average out a bi-weekly pay period for non-exempt employees. Each work week stands alone. A non-exempt employee who works 35 hours in week one and 45 hours in week two of the pay period, although totaling 80 hours, is not the equivalent of two 40-hour work weeks in which there is no overtime. In the case of the 35/45 pay period, the non-exempt employee would be due five hours of overtime in the second week.
- Employers must include all types of wages earned when calculating overtime for non-exempt employees. This includes commission, shift differential, piece rates, and non-discretionary bonuses. The non-exempt employee must be paid time-and-one-half the employee's regular rate of pay. To compute the regular rate of pay with multiple pay rates, divide the total compensation by the total hours work.

For more information visit [www.maine.gov/labor/bls](http://www.maine.gov/labor/bls) or call (207) 623-7900.

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**FACT: An employer who violates employment laws may be assessed penalties under state or federal law. Additionally, employees have their private rights to seek legal counsel which could result in legal fees to include court costs, attorney fees and equal amounts of liquidated damages.**