

When Does An Entry-Level Employee Become Exempt?

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With September winding down, many of the recent classes of graduates have already begun their new jobs. Many of these graduates — some with bachelor’s degrees, some with more advanced degrees, and some with only professional certifications — have taken on positions that may qualify them for exemption from the minimum wage and overtime requirements of the Fair Labor Standards Act. But when does a new employee qualify for exemption? Can he or she be exempt on day one? Is there a minimum level of performance necessary to qualify for exemption? This article will examine the first two of those questions. The third question will be addressed in a future article.



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“Trainees”

Some new hires are formally classified as “trainees” for some amount of time before they actually begin to perform their exempt duties. Regarding such employees, the regulations of the [U.S. Department of Labor](#) state:

The executive, administrative, professional, outside sales and computer employee exemptions do *not* apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee.[1]

The DOL views this rule as “relatively straightforward,” explaining that:

The inquiry in all cases simply involves determining whether or not the employee is “actually performing the duties of” an executive, administrative, professional, outside sales or computer employee. The Department recognizes that there may be formalized, bona fide executive or management training programs that involve employees “actually performing” exempt work, but other training programs can involve performance of significant nonexempt work. For example, an employee in a management training program of a restaurant who spends the first month of the program washing dishes and the second month of the program cooking does not have a primary duty of management.[2]

For example, the DOL has opined that registered financial services representatives, which may include stockbrokers, can qualify for the administrative exemption if they perform certain duties.[3] Nevertheless, in a nonadministrator opinion letter dated March 7, 1994, the DOL stated:

With regard to the application of the administrative exemption to stockbrokers who undergo extended on-the-job training after completing class room training, it is our opinion that such employees would not qualify for the exemption since the exemption does not include employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee. Furthermore, it is unlikely that such trainees would be performing work which requires the requisite level of discretion and independent judgment for exemption as a bona fide administrative employee.

This latter opinion letter illustrates the inapplicability of the white collar exemptions to "trainees."

Entry-Level Workers

In contrast, to formal "trainees," some new hires jump right into their new jobs, albeit under close supervision which diminishes over time. It is more difficult to determine whether such an entry-level worker is exempt.

As with trainees, the inquiry should be whether or not the new employee is actually performing the duties of an executive, administrative, professional, outside sales or computer employee. In the case of the administrative exemption, for example, this means that they must be paid on a salary basis and their primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers and must include the exercise of discretion and independent judgment with respect to matters of significance.[4] Thus, in a nonadministrator opinion letter dated Dec. 16, 1999, the DOL found that certain entry-level positions, specifically "Marketing Specialists I and II" were not exercising the required discretion and independent judgment within the meaning of the regulations because their job description stated that they worked under close and moderate supervision with minimal and limited latitude for the use of initiative and independent judgment.

In addition, the DOL questioned whether employees performing entry-level and routine marketing work were performing work of substantial importance to the management or operation of the business. In contrast, the DOL found that the same companies "Marketing Specialists III and IV" could qualify for the administrative exemption because they performed moderately complex and complex marketing work under general and limited supervision with moderate and considerable latitude for the use of initiative and independent judgment.

This doesn't mean that an employee can never satisfy the administrative exemption just because his work is reviewed by others. The DOL's regulations state:

[E]mployees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are

revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.[5]

But, workers will not be exempt if they do not have authority to make independent choices, free from immediate direction or supervision — not even to make recommendations that would be acted upon by others.

In the case of the professional exemption, the operative question is whether the new hire is performing work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. The DOL explains that an employee who performs work requiring advanced knowledge “generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.”[6] This means that employers must determine on a case-by-case basis whether their new hires are performing at the level required to satisfy the exemption.

For example, certified public accountants generally meet the duties requirements for the learned professional exemption, as do many other accountants who are not certified public accountants, but who perform similar job duties may qualify as exempt learned professionals. On the other hand, accounting clerks, bookkeepers and other employees who normally perform primarily routine work generally will not qualify as exempt professionals.[7] The regulations do not address the positions in-between such as entry-level “junior” accountants, so employers have to determine on a case-by-case basis whether the junior accountant’s duties are more similar to those of a CPA or those of an accounting clerk who performs only routine work.

For some jobs — for example, entry-level lawyers and physicians — the DOL’s regulations provide express guidance:

Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.[8]

This regulation does not appear to require that the law intern or medical resident be performing any particular level of work. Thus, it appears to exempt even an entry-level attorney who has not yet taken, or who has taken but not yet passed, the bar exam.

Similarly, the DOL has opined that degreed architects, whether licensed or nonlicensed, are likely to meet the duties requirements for the professional exemption. On the other hand, individuals performing the work of architects but who are nondegreed and nonlicensed do not meet the duties requirements for the professional exemption.[9]

Conclusion

When it comes to classifying employees as exempt or nonexempt, there are rarely one-size-fits-all answers. Instead, employers must carefully consider the duties of the position in question and compare them to one of the exemption tests to determine whether the employee is exempt or not. It is safe to say, however, that entry-level employees with less

significant responsibilities are less likely to be exempt.

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This article is part of a [regular column](#) by Katz discussing regular challenges that employers face under the Fair Labor Standards Act.

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[1] 29 C.F.R. § 541.705 (emphasis added).

[2] 69 Fed. Reg. 22,189 (April 23, 2004).

[3] W.H. Op. Ltr. No. FLSA2006-43, Nov. 27, 2006.

[4] 29 C.F.R. § 541.200.

[5] *Id.* § 541.202(c).

[6] *Id.* § 541.301(b).

[7] *Id.* § 541.301(e)(5).

[8] *Id.* § 541.304(c).

[9] Deputy Asst. Administrator Opinion Letter dated Feb. 27, 1998.