

DOL's New White Collar Exemption Thresholds and Independent Contractor Regulations

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AGENDA

- Types of Misclassification
- Exempt v. Non-Exempt
- Independent Contractors
- How to Fix It

What's Changed in the Law

Two changes in 2024
that employers should
be aware of

Most recent:
Changes to the DOL's
salary thresholds for the
most common
exemptions

Earlier in 2024:
Codification of a six-
factor test for
determining independent
contractor status

Misclassification – What's the Big Deal?

- Can be very costly
- Penalties:
 - IRS
 - 1.5% of employee wages
 - 40% of the amount that should have been withheld for FICA (100% if willful)
- Class Action lawsuits – state and federal
- Regulatory Enforcement – DOL audits plus regulatory investigations

Exempt v. Non-Exempt

- Federal / State Laws
 - Follow most restrictive
- Exempt employees are not entitled to minimum wage and overtime protections
- Generally, two tests for exemption:
 - 1) Salary basis test
 - 2) Job duties test



“White Collar” Exemptions

FLSA provides an exemption from both minimum wage and overtime pay for certain kinds of employees.

Most
common
exemptions:

Executive

Administrative

Learned Professional

Computer Occupations

Outside Sales

New Salary Thresholds

Earning Threshold	Former Amount	Minimum Amount Beginning July 1, 2024	Minimum Salary Amount Beginning January 1, 2025
Standard Salary Level	\$684 per week (equivalent to \$35,568 annual salary)	\$844 per week (equivalent to a \$43,888 annual salary)	\$1,128 per week (equivalent to a \$58,656 annual salary)
Highly Compensated Employees	\$107,432 per year	\$132,964 per year	\$151,154 per year

Executive Exemption

All of the following must be true:

- Employee must be paid on a salary basis, no less than \$844/week and \$1,128/week (2025).
- Employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.
- Employee must manage and direct the work of at least two or more full-time employees.
- Employee must have the authority to hire or fire, or the employee's recommendations as to the hiring, firing, or promotions of other employees must be given particular weight.

Administrative Exemption

All of the following must be true:

- Employee must be paid on a salary basis, not less than \$844/week (\$1,128 in 2025).
- 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 (*note the administrative / production dichotomy*).
- Employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

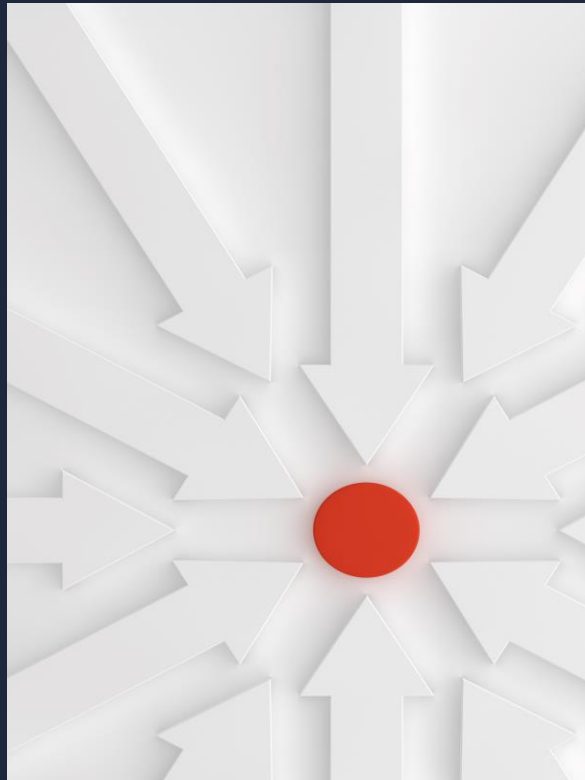
Learned Professional Exemption

All of the following must be true:

- Employee must be paid on a salary basis, not less than \$844/week; \$1,128 in 2025
- Employee's primary duty must be work requiring advanced knowledge (predominantly intellectual in nature);
- Employee must perform work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be acquired by a prolonged course of specialized study.

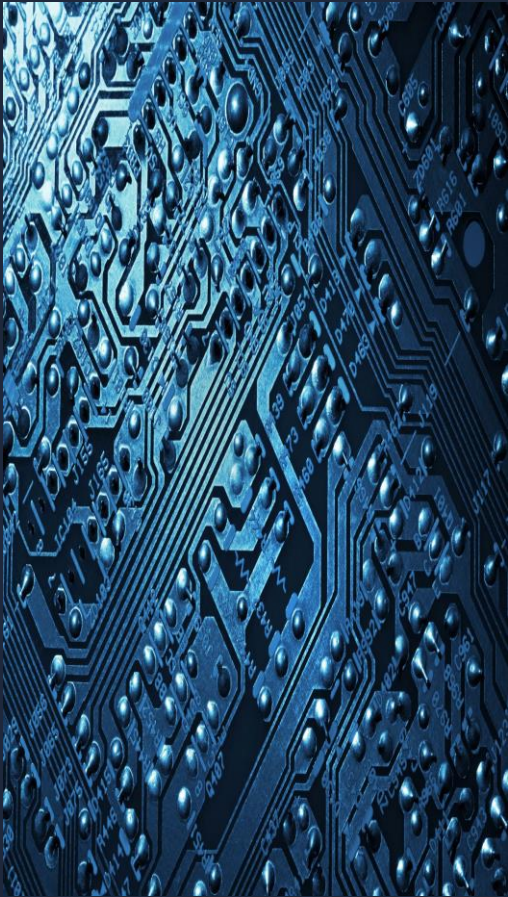
“Discretion and Independent Judgment”

Factors to consider when determining whether an employee exercises discretion / independent judgment can include:



- Whether employee has authority to formulate, affect, interpret, or implement policies or practices.
- Whether employee carries out major assignments in conducting the operations of the business.
- Whether employee 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 employee has authority to deviate from established policies and procedures without prior approval.

Computer Occupations Exemption



All of the following must be true:

1. Must meet salary basis test*
2. Must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled position performing the duties described below:
 - a. The application of systems analysis techniques or procedures
 - b. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs
 - c. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - d. A combination of the above.

Highly Compensated Employee Exemption



Highly compensated employees performing office or non-manual work, and who are paid overall compensation of at least \$132,964 annually (or \$151,164 as of 2025) (which must include at least \$844/week paid on a salary basis or \$1,128/week as of 2025) are exempt from the FLSA if they customarily and regularly perform *at least one* of the duties of an exempt executive, administrative, or professional employee

How to Respond to New FLSA Rules

- If your exempt employees' salaries fall below the new threshold, you will generally either have to:
 - Raise their salaries to the new requirement or
 - Reclassify the employees as non-exempt and pay them overtime whenever they work more than 40 hours in a workweek
- Pay attention to state-notice requirements if you make any pay changes



Challenges to DOL's Salary Basis Test Rulemaking Authority

- In January 2017, a Texas federal judge invalidated a DOL salary basis test change that would have raised the salary basis to about \$47,000 year for the EAP exemptions and \$134,000 for the HCP exemption. The DOL then pulled back its salary basis changes during Trump administration.
- Following the new DOL rule's adoption, there have been several new legal challenges.
- *Mayfield v DOL* (5th circuit)
 - Wendy's franchisee challenged DOL's rule claiming it exceeded its rulemaking authority by imposing salary based requirements for wage and hour exemptions.
 - Lower court had dismissed Mayfield's challenge ruling that the DOL had salary basis rulemaking authority.
 - July 15: parties submitted supplemental briefing on impact of *Loper Bright* on this case.
 - Tests two principles set out in *Loper Bright* regarding the circumstances when agency interpretation still given deference: express delegation and when regulations issued near in time to statute's enactment.
- *Texas v Dept of Labor*: On June 30, 2024, Texas federal court enjoined the DOL from enforcing the salary basis test as to Texas state government employees only. "*Department-invented test, untethered to the text of the FLSA, that systematically deprives employees of the EAP Exemption when they otherwise meet the FLSA's duties test, is necessarily unlawful.*"



California Exemptions

Unlike federal law, exemptions are to be narrowly construed against the employer

No Highly Compensated Employee exemption

Executive, Administrative, and Professional Exemptions: more stringent tests makes it harder to rely upon these exemptions

California: Executive Exemption Test

- 1 Satisfies the salary basis test
- 2 Primarily engaged in managing a department or subdivision of it
- 3 Supervises at least two other individuals
- 4 Has the authority to hire or fire other employees or effectively recommend the same
- 5 Customarily and regularly exercises discretion and independent judgment in the performance of job duties, AND
- 6 Primarily engaged in exempt duties

Executive Exemption: Key Differences

- Higher salary threshold: twice the state minimum wage for full-time employment
 - Currently \$5,546.67 per month (\$66,560/year)
 - Must be a pre-determined amount
 - Higher amount required for fast food workers working in certain limited-service restaurants
- Duties test is more onerous
 - Employee must engage in exempt duties for more than half of each workday
 - This factor will be closely scrutinized
 - Multi-tasking doesn't help. An activity must be categorized as either exempt or nonexempt based on the employee's purpose for engaging in the activity.
 - Must customarily and regularly exercise discretion and independent judgment regarding significant matters
 - If misclassification occurs, it's often because this requirement isn't met

Exempt Duties	Number of Hours / Week	Nonexempt Duties	Number of Hours / Week
Interviewing		Making Sales	
Training		Replenishing Stock	
Setting Pay Rates		Returning Stock to Shelves	
Setting Work Hours		Routing Clerical Work	
Directing Work		Maintenance Work	
Handling Employee Complaints		Performing Same Kind of Work as Subordinates	
Disciplining Employees			
Planning Work			
Distributing Work			
Creating Budgets			
Assuring Employee Safety			
Determining Techniques to Use			

California: Administrative Exemption Test

- 1) Satisfies the salary basis test
- 2) Duties and responsibilities involve either:
 - The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, OR
 - The performance of functions in the administration of a school system, or education establishment or institution, or of one of its departments or subdivisions
- 3) Is one who:
 - Regularly and directly assists a proprietor or an employee employed in a bona fide executive or administrative capacity
 - Performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, OR
 - Executes under only general supervision special assignments and tasks
- 4) Customarily and regularly exercises discretion and independent judgment, AND
- 5) Is primarily engaged in duties that meet the above requirements

Administrative Exemption: Key Differences

- Same higher salary threshold as with California's Executive Exemption
- Duties test is more onerous
 - Employee must engage in exempt duties for more than half of each workday
 - This factor will be closely scrutinized
 - Administrative/production dichotomy is helpful but not dispositive
 - Must customarily and regularly exercise discretion and independent judgment regarding significant matters



California: Professional Exemption Test

- 1) Satisfies the salary basis test
 - Exception for certain physicians
- 2) Must be:
 - In a recognized profession OR
 - Specifically, must be licensed or certified by California and primarily engaged in law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting (and primarily engaged in that type of work)
 - In a learned or artistic profession
 - This means being primarily engaged in an occupation commonly recognized as a learned or artistic profession requiring knowledge or an advanced type customarily acquired by prolonged academic study or primarily engaged in original or creative work dependent primarily on invention, imagination, or artistic talent
 - Must be primarily engaged in work that is predominately intellectual and varied in character
- 3) Customarily and regularly exercises discretion and independent judgment in the performance of the above duties

Professional Exemption: Key Differences

- Key differences

- Same higher salary threshold as with California's Executive Exemption
- Duties test is more onerous
 - Employee must engage in exempt duties for more than half of each workday
 - Must customarily and regularly exercise discretion and independent judgment regarding significant matters
- Pharmacists and RNs, who are exempt professionals under federal law and in many states, generally cannot qualify as exempt professionals in California



Independent Contractors

Although federal/state laws permit use of contractors, legislative/regulatory efforts have highlighted growing intolerance for these relationships, particularly as gig work has become a key feature of the U.S. economy

Class and collective actions are common

Misclassification – What’s the Big Deal?

Labor Right	Employee	Independent Contractor
Right to Organize/Bargain Collectively	Yes	No
Wage-and-Hour Protections	Yes	No
Group Health Benefits	Yes	No
Unemployment Insurance	Yes	No
Workers’ Compensation	Yes	No
Employer Contributions to Social Security, Retirement	Yes	No

Independent Contractors – New Rule



- Codified in 29 C.F.R. Part 795
- Totality of Circumstances – New DOL Guidance Effective March 11, 2024
 - Degree of permanence
 - Degree of skill and initiative
 - Contractor's investment in equipment or materials
 - Contractor's opportunity for profit or loss
 - Degree of control
 - Whether service is integral part of employer's business

Court Predictions + DOL's Final Rule

- The economic realities test is long standing and well established.
- Circuits generally use the same 6-factor test (may differ slightly), but the elements are largely the same.
- This final rule rescinds the 2021 final rule, which focused on the “core” factors. The 2024 rule focuses instead of economic reality and totality of the circumstances.
- Courts are unlikely to modify long standing tests especially since it may be changed again in the future.



Scope Of Final Rule

The Final Rule has no impact on any state wage and hour, unemployment or other laws that do not follow the FLSA for determining whether a worker should be classified as an employee or independent contractor.

Companies should always review whether and how different federal and state laws may apply to their workforce.

Independent Contractors in the DMV

D.C.

- Five-factor analysis based on common law. *Safeway Stores, Inc. v. Kelly*, 448 A.2d 856, 860 (D.C. 1982); D.C. Code § 51-101.
- Economic realities test used for claims brought under D.C.’s Wage Payment and Collection Law. *Steinke v. P5 Sols., Inc.*, 282 A.3d 1076, 1084–85 (D.C. 2022); *Wright v. Off. of Wage Hour*, 301 A.3d 660, 678-84 (D.C. 2023).

Maryland

- “ABC” test.
 - A. The individual is free from direction or control;
 - B. The individual is customarily engaged in an independent business/occupation of the same nature as that involved in the work; and
 - C. The work is (i) outside the usual course of business or (ii) performed outside any place of business of the person for whom it is performed. MD Code Labor and Employment § 8-205.
- An individual is *presumed* to be an employee unless an employer can show otherwise.

Virginia

- Common law.
- IRS 20-Factor Test: The IRS identified 20 factors to help determine an employer-employee relationship. Virginia has adopted this 20-factor test to help determine whether a worker is an employee under the common law. Va. Code §40.1-28.7:7.
- An individual is *presumed* to be an employee unless an employer can show otherwise.

Independent Contractors in California

- ABC Test
 - A. Free from control and direction of hiring entity in connection with the work, both under the contract and in fact
 - B. Worker performs work that is outside the usual course of the hiring entity's business; AND
 - C. Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed
- If ABC Test is not satisfied, see if the worker falls within an exemption. If not, must classify as an employee.
- Don't assume lawfully classified as an IC simply because everyone in the industry does it. Companies get it wrong *all the time*.
- HUGE penalties if you get caught doing it wrong

Remediation of Misclassification Issues

Potential Exposure

Federal: Two-Year Statute of
Limitations

Three years if violation willful

How / When / If To Fix It



**Do Nothing
Approach**



**Audit or Not
to Audit?**



**Fix Going
Forward**



Back Pay



Messaging

Questions?



Speakers



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