

**BLOGS**

Archives; Department of Labor; Wage & Hour

FLSA Fundamentals: The Taxing Taxonomy of Exempt Classifications (Part 2)

In honor of the Fair Labor Standard Acts 78th birthday and in light of the important changes to the DOL overtime regulations going into effect December 1, 2016, the Modern Workplace is running a special multipart series entitled FLSA Fundamentals. The series has covered some basics of this important law and includes a discussion of the DOLs new regulations. This is the fourth post in that series.

As discussed in previous posts, determining the proper FLSA classification of an employee can be taxing. In addition to the white collar exemptions (e.g. **Executive Employees**, **Administrative Employees**, and **Learned Professionals**) discussed in a prior [blog post](#) in our FLSA Fundamentals series, employers often apply (or rather misapply) two other common exemptions to avoid overtime costs: **Computer Employees** and **Outside Sales Employees**.

As with all FLSA exempt classifications, an employees duties and pay, rather than job title, determine whether the employee is, in fact, an exempt **Computer Employee** or **Outside Sales Employee**. To qualify for the FLSAs **Computer Employee** exemption, an employee must meet the following test:

COMPUTER EMPLOYEE EXEMPTION

Pay Guaranteed Weekly Salary of at least \$455/week (as a result of the [DOL Final Rule](#), this weekly salary amount will increase to \$913/week on 12/1/2016); or If compensated on an hourly basis, at a rate of not less than \$27.63/hour

Duties Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field whose **primary duty** (generally >50% of time) **is performing:** Application of systems analysis techniques and procedures (such as consulting with users, determining hardware/software/system specifications); Design, development, documentation, analysis, creation, testing or modification of computer systems or programs (such as prototypes) based on user or system design specifications; Design, documentation, testing, creation or modification of computer programs related to machine operating systems; or Combination of these skills which requires the same level of skills.

In our age of ubiquitous computers and increasingly prevalent technology, most employees have a basic fluency with computer technology and many employees perform a large portion of their job duties on computers. As a result, employers often improperly classify employees under the computer exemption. As noted above, the computer employee exemption requires that the employees primary duty be higher-level computer work, such as systems analysis or designing computer systems and software programs, rather than troubleshooting remote access issues and answering basic call-center questions. As an example, while R2-D2 would technically be a computer employee, it would not qualify for the computer employee exemption because its electronic repair duties do not rise to the requisite level required by the FLSA.



An employee will qualify for the FLSAs **Outside Sales Employee** exemption by meeting the following test:

OUTSIDE SALES EMPLOYEE EXEMPTION

Pay No salary requirement

Duties 1. Primary duty (generally >50% of time) is: Making sales *or* Obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by client/customer 2. Employee must be customarily and regularly engaged away from the employers place(s) of business

A key component of the outside sales exemption is that the employee must actually have a primary duty of sell *outsideof and away from* the employers office; simply making sales by telephone, no matter how long distance, is insufficient. Employees may still qualify for the exemption if they do minor amounts of incidental work in the employers office. However, it is not enough that the employee is physically working outside the employers office. An employee who offices at home but does not regularly travel away from that work site to make sales is not an outside salesperson. An employee must be regularly away from his or her home base office and selling products, such as at customer locations and trade shows. Think Willy Loman, the traveling salesmen from *Death of a Salesman*, not Chris Gardner the cold-calling medical devices salesmen from *Pursuit of Happyness*.

As explained more fully in our previous posts, employers must carefully analyze and revisit positions classified as exempt because the costs of FLSA misclassification can be significant. Employers must be cognizant of employee *drift* an employees primary duties may qualify for an exemption when they first start working, but that employee may no longer qualify for the exemption if their primary duties drift or are reassigned during their employment. Employers should regularly revisit their employee classifications to ensure FLSA compliance.