

Exempt vs. Non-Exempt Employees – The Implications

As your company begins to grow from an idea, to a legal entity, to a successful, functioning business, you likely will want to bring on employees to share the workload and help the company expand. In order to do so, you must comply with both federal and state employment laws.

One of the key questions to answer for each employee¹ is whether the employee is “exempt” or “non-exempt.” To comply with both the federal Fair Labor Standards Act (“FLSA”) and the Massachusetts Minimum Wage Law (“MMW”), employers must categorize their employees as either “exempt” or “non-exempt.” Each employee’s designation will determine whether the employee is entitled to minimum wage and overtime pay. Employees who fall into the “exempt” category are not entitled to overtime or minimum wage (although they are subject to the FLSA’s minimum weekly salary requirement). MMW exemptions closely mirror the FLSA, although they are not identical.

Exempt Employees

With few exceptions, **to be exempt** under both the FLSA and MMW an employee must **(i) be paid at least \$35,568 per year (\$684 per week), (ii) be paid on a salary basis, and (iii) perform exempt job duties**. Massachusetts has adopted the FLSA salary, salary basis, and all three job duties tests to determine exempt status. The lone difference between the FLSA and MMW is the salary dollar threshold. The federal threshold is higher than MMW, and thus controls.

(i) Salary Threshold

Employees earning a salary of at least \$35,568 (\$684 per week) are eligible to be considered exempt employees under the FLSA. Outside sales employees, teachers, lawyers, and doctors are automatically exempt from the salary prong regardless of their dollar salary amount.

(ii) Salary Basis

To be considered paid on a “salary basis” employees must receive a frequent, predetermined amount of compensation on a regular interval for performing “any” work. The predetermined amount must be paid if the employee is available to work, and may not be reduced if the employer does not have projects/work for the employee to complete. This predetermined amount can only be reduced if the employee takes unpaid time off. As a rule of thumb, if a worker’s compensation is calculated by taking an annual number and dividing by the number pay days, the employee is likely salaried. If a worker’s compensation is reduced because of a reduced number of hours other than personal leave, unpaid sick time, or disciplinary suspension, the employee is likely non-exempt.

(iii) Job Duties

¹ The Startup Law Clinic can help you determine if individuals working for your venture are employees or some other category of worker (e.g., independent contractor or intern).

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The FLSA requires employees to perform relatively high-level duties in order to qualify for exempt status. The test is for the actual job duties; and job titles are often irrelevant (the café cashier is still the cashier even if her title is president). Job duties must fall under one of three categories for an employee to be considered exempt: (i) executive, (ii) professional, and (iii) administrative.

Executive Job Duties Test

For a job to be executive, the employee must:

1. Regularly supervise two or more other employees;
2. Have management as the primary duty of the position; and
3. Have some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

To satisfy the first prong, the employee must supervise other employees, not independent contractors or other non-employees. To meet the two-employee threshold, the employee may supervise two fulltime employees or the equivalent number of part time employees.

Determining if an employee has management as a primary job duty is a case-by-case factual analysis. If an employee is “in charge” of a department, subdivision, or shift, they likely have management as a primary job duty. This is true even if the employee assists with lower level job duties during his or her shift. For example, the night shift manager at a restaurant is still the person “in charge” and therefore likely passes the second prong even if he assists in cleaning the kitchen or preparing food.

Finally, an employee must have some regular input that bears weight on personnel decisions in order to satisfy prong three. but The employee, however, need not be the ultimate decision maker.

MMW’s executive test does not differ substantively from the FLSA.

Professional Job Duties Test

Professional jobs are predominantly intellectual and require specialized education beyond high school, and often beyond undergraduate school, to perform (a retired lawyer who possesses a law degree working on an hourly basis washing golf carts at the local golf course would not pass the professional job duties test). This education must be in fields that are distinguished from the mechanical arts or skilled trades. Under both the FLSA and MMW professional job duties test, a number of “learned professions” are exempt. These traditionally include lawyers, doctors, dentists, teachers, members of the clergy, architects, registered nurses, engineers (who possess an engineering degree or an equivalent professional license), actuaries, scientists, pharmacists and other employees who perform work requiring advanced knowledge. In addition, employees who are considered “creative professionals” such as actors, musicians, composers, writers, cartoonists, and some journalists are also exempt.

Administrative Job Duties Test

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The administrative exemption is designed for employees who are relatively high-level and who may be said to “keep the business running.” The administrative test is the most fluid and difficult to apply. These employees are not operational or production employees who make or sell the company’s product, but rather they support these employees. The FLSA defines administrative job duties as:

- (i) office or non-manual work,
- (ii) directly related to management or general business operations of the employer or the employer’s customers, and
- (iii) a primary component of which involves the exercise of independent judgement and discretion about matters of significance.

Examples of administrative job duties include labor relations and human resource employees, payroll and finance, records maintenance, accounting and tax, marketing and advertising, quality control, public relations, legal and regulatory compliance, and some information technology positions. Secretarial positions, while administrative, are generally not exempt as their work generally does not involve the use of independent judgement and discretion about matters of significance.

Non-Exempt Employees

Overtime

Non-exempt employees are those employees who do not meet all three of the prongs explained above to qualify as exempt employees. Under the FLSA and MMW, non-exempt employees are entitled to overtime pay at a rate of 1.5 times their regular rate for time actually worked over 40 hours in a workweek.

Some quick tips to keep in mind for non-exempt workers:

- In calculating overtime eligibility, each workweek stands alone. Thus, at the end of the employee’s workweek (usually Saturday), their time “vests.”
- If an employee’s pay period is bi-weekly, each week must be looked at independently for overtime calculations. For example, if an employee works 50 hours in week one, followed by 35 hours in week two of a two week pay period, they will collect 10 hours of overtime earned during week one. It does not matter that they only worked 5 total hours more than regular hours over a two-week period.
- To earn overtime, the employee must actually work over 40 hours in the week. If an employee works 40 hours from Monday to Friday, and collects 8 hours of holiday pay for a Saturday holiday, they will not be entitled to time and a half for the unworked, paid holiday.
- Non-exempt employees are not guaranteed overtime under the FLSA or MMW. If an employee hits her 40 hours in a given week, the employer has the right to send the employee home to avoid paying her overtime.

- Under the FLSA, non-exempt employees do not need to be paid hourly and thus can be paid a salary (subject to overtime payments). In this case, to calculate overtime you must calculate the employee’s hourly rate by dividing his regular weekly salary by his normally scheduled number of hours per week.
- Under MMW, if a worker works more than one job type with different pay rates in a given week, to calculate overtime the employer must take the weighted average of the hours worked to arrive at a “blended” rate to be paid for all hours above 40 on the week.

Minimum Wage and Mandatory Sunday Premium Pay

Under MMW, non-exempt employees are entitled to minimum wage. For most workers, minimum wage is \$12.75 per hour. For tipped workers (workers who make over \$20 per month in tips), the minimum wage is \$4.95 per hour. The minimum wage for non-tipped workers will rise according to the following table until January 2023 when it reaches \$15 per hour.

Effective Date	Standard Minimum Wage	Tipped Minimum Wage
January 1, 2020	\$12.75	\$4.95
January 1, 2021	\$13.50	\$5.55
January 1, 2022	\$14.25	\$6.15
January 1, 2023	\$15.00	\$6.75

Under MMW, until 2023 retailers are required to pay “premium pay” to non-exempt employees working on any Sunday and certain holidays (New Year’s Day, Memorial Day, Independence Day, Labor Day, Columbus Day, and Veterans Day). The premium pay rate formerly was 1.5 times the employee’s base rate. However, as part of the bill that is slowly raising the minimum wage, premium pay is slowly being phased out according to the following table.

Effective Date	Premium Pay Rate
January 1, 2020	1.3x
January 1, 2021	1.2x
January 1, 2022	1.1x
January 1, 2023	No premium pay

Repercussions for Failing to Adhere to the FLSA and MMW Overtime and Minimum Wage Requirements

FLSA Penalties

Under the FLSA, penalties for failure to pay the required minimum wage or failing to pay required overtime include both civil and criminal liability. **Willful** violations may be prosecuted

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criminally and the violator fined up to \$10,000. A second conviction may result in imprisonment. Employers who **willfully or repeatedly** violate the minimum wage or overtime pay requirements are also subject to a civil penalty of up to \$1,000 for *each violation*. Employees are also entitled to payment of back wages. If a suit is filed by the Secretary of Labor or privately by the employee, the employee is entitled to the amount of back wages plus an equal amount as liquidated damages, as well as court and attorney's fees.

MMW Penalties

The Attorney General's Office may take action against a business as well as individual owners, operators, or agents of the business. Under MMW, "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation"² may be individually liable for any time and labor violations. **In contrast to federal law, there is no "willful" requirement**, as liability may be levied even if the employer did not know the law.

Maximum civil penalties under the MMW range from \$7,500 to \$25,000 *per violation* depending upon whether the offense is intentional, and whether the employer has been cited previously. Once a citation has been issued, the offender has 21 days to pay the penalties required by the citation, and to stop violating the minimum wage law. Employers who are charged by the Attorney General in criminal court face a fine of up to \$50,000 and two years of imprisonment *per violation*.

Employees also have the ability to file a private suit for back wages against an employer. If the plaintiff employee is successful in his suit against the employer, the employee is entitled to treble damages (the wages the employee is owed multiplied by three) plus court and attorney's fees.

² M.G.L. ch. 149, § 148.