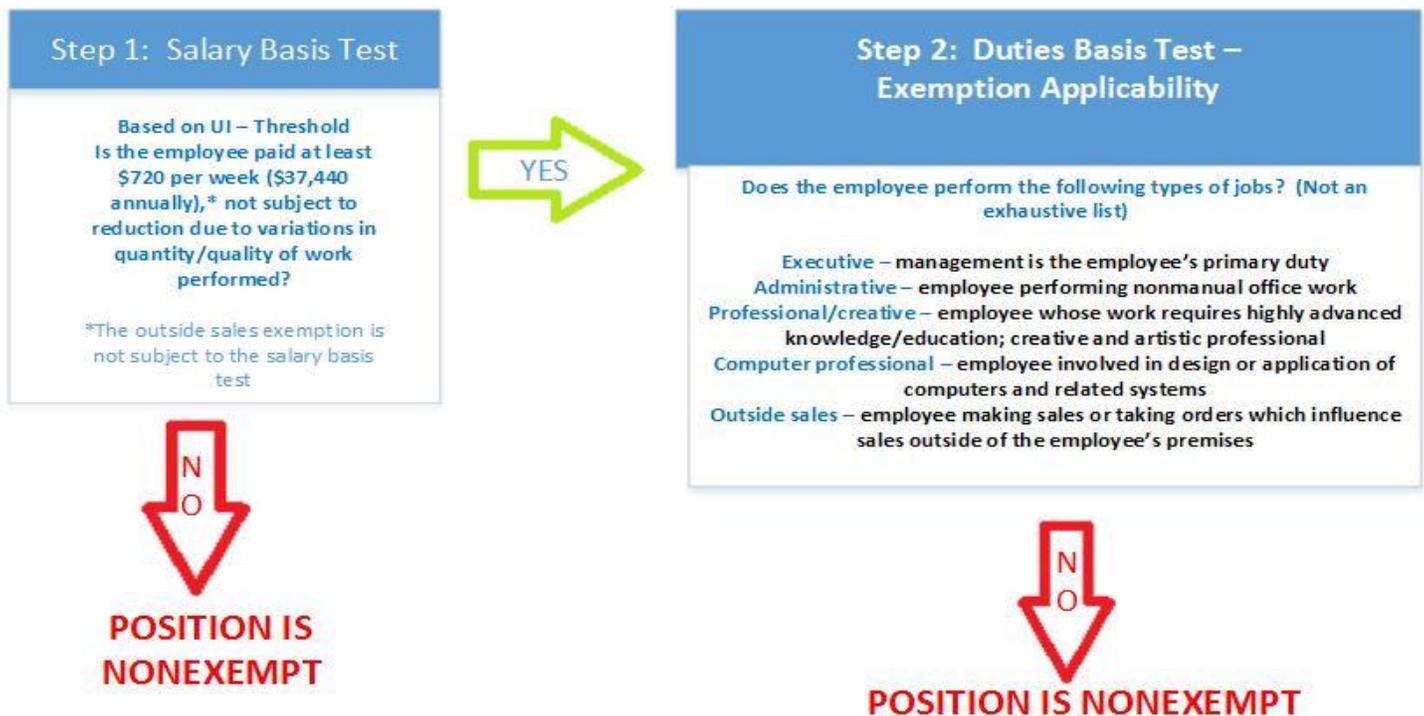


# Fair Labor Standards Act (FLSA) Exemption Determinations

The U.S. Department of Labor (DOL) oversees and enforces the Fair Labor Standards Act. Part of the Act is the determination of which positions are exempt (exempted and ineligible from overtime pay) or non-exempt (eligible for overtime pay). The DOL interprets the law and their regulations with a strong bias toward making positions non-exempt. Due in part to the changing DOL regulations regarding the salary test and the uncertainty of final regulations, the University of Idaho adopted a minimum University salary threshold that will be required as part of the exemption determination as of August 27, 2017.

There are multiple types of applicable exemptions based on the duties section of the DOL exemption determination test. The duties test is utilized once the UI salary basis test has been met:



## Here is a short summary of the test for each exemption:

Step 1: Apply the salary basis test

If the employee is paid at least \$734 per week (\$38,168 per annum) that is not subject to reduction due to variations in quantity/quality of work performed, continue to step 2. (The outside sales exemption is not subject to the salary basis test.) This standard is specific to the University of Idaho and exceeds the federal standard.

Step 2: Determine which exemption applies (Duties are not exhaustive)

**Executive** – Employee whose primary duty is to manage the business or a recognized department/entity and who customarily directs the work of two or more employees. Also includes individuals who hire, fire, or make recommendations that carry particular weight regarding employment status. *Examples:* executive, director, owner, manager, supervisor.

**Administrative** – Employee whose primary activities are performing office work or non-manual work on matters of significance relating to the management or business operations of the firm or its customers and which require the exercise of discretion and independent judgement.

*Examples:* coordinator, administrator, analyst, accountant.

**Professional/creative** – Employee who primarily performs work requiring advanced knowledge/education and which includes consistent exercise of discretion and independent judgement. The advanced knowledge must be in a field of science or learning acquired in a prolonged course of specialized intellectual instruction. Creative professionals perform work requiring invention, imagination, originality and/or talent in a field of artistic endeavor. *Examples:* attorney, physician, statistician, architect, biologist, pharmacist, engineer, teacher, author, editor, composer, musician, artist.

**Computer professional** – Employee who primarily performs work as a computer systems analyst, programmer, software engineer or similarly skilled work in the computer field performing a) application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; or b) design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specification; or c) design, documentation, testing, creation or modification of computer programs based on and related to user or system design specifications; or a combination of the duties described above, the performance of which requires the same level of skills. *Examples:* system analyst, database analyst, network architect, software engineer, programmer.

**Outside sales** – Employee who performs sales work off the company's premises and whose primary duties include making sales or obtaining order or contracts for services or for the use of facilities for which the client or customer pays. This employee is customarily and regularly away from the company's place of business while performing such duties. *Examples:* sales representative, account manager, business development representative.

*Source: SHRM Information Center*

## Why is it important for us to comply?

In addition to the requirement to comply with laws and regulations, failing to comply may result in significant fines, penalties and two or three years of back pay of overtime. In 2016, federal contractors like us will have to report any violations of one of eight major federal labor laws with all grant and contract applications. The government will consider labor law violations in those decisions.

Human Resources conducts most of its reviews based on the administrative exemption.

## Administrative Exemption

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 above that meets the University minimum salary threshold (slightly higher than federal regulations) at a rate not less than \$734 per week;
- The employee's primary duty must be the performance of office or non-transactional work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Administrative exemption components and a brief explanation of how the DOL interprets the exemption are included below.

## Salary Basis

The position must be paid a minimum of \$734 per week, and the amount is likely to increase annually. This amount is not prorated for part-time employees.

## Primary Duty

“Primary duty” means the principal, main, major or most important duty the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

We need to identify the primary duty – that means one duty that is the emphasis on the character of the whole job or the primary reason the job exists. There can be a few subsequently related tasks, but note that management or supervision may not automatically be a primary duty if someone supervises. Supervision may not be an exempt function. It depends on how much transactional (or non-exempt) work that person does compared to actual management.

## Directly Related to Management or General Business Operations

To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

## Employer’s Customers

An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, employees acting as advisors or consultants to their employer’s clients or customers — as tax experts or financial consultants, for example — may be exempt.

## Discretion and Independent Judgment

In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and then acting or making a decision after the various possibilities have been considered. After evaluating all the facts involved in the employee’s particular employment situation, we determine if the employee has authority to make an independent choice, free from immediate direction or supervision. Some factors to consider include:

- whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- whether the employee has authority to deviate from management policies or operating practices without prior approval;
- whether the employee carries out major assignments in conducting the operations of the business;
- whether the 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 the employee has authority to waive or deviate from established policies and procedures without prior approval;
- other factors set forth in the regulation.

The fact that an employee’s decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

## Matters of Significance

The term “matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

The standard for “matters of significance” is high and may be more than just financial. The criteria is measured by evaluating the types of independent decisions the position requires the employee to make and the risk or impact on the University as a whole, a division, or in some rare cases, an individual department.

## The Interpretation

The University of Idaho, as do most employers, interprets the law and guidelines based on:

- The published guidelines outlined above
- DOL Opinion Letters which shape the interpretation and carve out exceptions
- Ongoing legal and regulatory guidance, cautions from the DOL, federal and state legal systems, and case law
- The results of prior audits and lawsuits from other organizations
- DOL Administrative Interpretation letters
- Corresponding State laws (Idaho follows the FLSA and does not have its own law on this)
- Decades of direct advice and counsel from practicing employment attorneys
- Training, workshops and seminars conducted by skilled practitioners including the actual state and federal wage and hour auditors

## Common Misperceptions

1. Our ability or willingness to pay overtime or compensatory time has no bearing on the FLSA determination. We recognize the potential impact on an organization. Work with HR to formulate ideas to meet your budget constraints and manage unusual schedules or travel.
2. Our internal perception of what exempt versus non-exempt (or classified) means has no bearing on the determination. We recognize this perception and the difference in some fringe benefits, but the requirement is to follow the FLSA as interpreted.
3. A job’s title has no bearing on the determination.
4. How other organizations classify the same or similar position has no bearing on how we make determinations.

Based on the fact that this law has evolved over the years (and will continue to evolve), care must be taken to not base assumptions of FLSA status on past decisions. A position may have historically been exempt at UI but may need to be classified as non-exempt under current interpretations, or vice versa.

## Desk Audit Questions

If a job description is not clear and the determination could go either way, HR usually calls and asks questions specific to the guidelines above. The questions typically focus on the primary duty and the most significant decisions made by the incumbent in that position. This process is part of the Desk Audit that is conducted for due diligence in making a FLSA determination.

## Perceptions

Unlike almost every other industry, employees in higher education seem to equate “exempt” with “professional.” This is unfortunate because every position at our institution contributes in meaningful ways. We consider all of our employees professionals and require them to act as such. We acknowledge the difference in retirement plans between the employee groups, however these are tied to the state requirements as outlined in state code. Part of the reason exempt staff have different leave accrual rates is to recognize the inability for these employees to accrue overtime or receive additional compensation when they work beyond a 40 hour week in their exempt position. If available salary dollars are an issue, you can manage employees hours (by adjusting weekly work schedules to remain under 40 hours) to avoid overtime pay even if they have odd schedules, travel, or occasionally have to work in the evenings or weekends.

## Our Current Practice

The President of the University has asked Human Resources to review positions at the point of turnover to ensure that we get the correct Fair Labor Standards Act designation (exempt from overtime pay or non-exempt meaning eligible for overtime pay).

This FLSA designation has no bearing on the pay range, classification, job title, or any of the duties or responsibilities of the position. Non-exempt jobs are considered "classified" at the University of Idaho and there are laws, rules, policies and procedures that apply specifically to classified personnel. The most obvious implication is overtime (or comp-time if selected) eligibility for any hours worked beyond 40 in a week. More information can be found at the Department of Labor website at [www.dol.gov](http://www.dol.gov).

Updated August 6, 2018