

Exempt vs. Non-Exempt



Presented by Heffernan Consulting



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Disclaimer

The information presented is general in nature and is intended to present an overview of employment practices.

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- Founder / HR Consultant of HR Jungle, a human resources consulting firm in 2006
- National Certification through the HR Certification Institute (HRCI) as a Senior Professional in Human Resources (SPHR) since 2002
- 25+ years in HR management
- Former President of National Human Resources Association (NHRA) – San Diego Chapter



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Today's Objectives

- Definitions
- Penalties
- Exemptions



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The News

- **Deja Vu Consulting Inc.** – 28,000 current and former exotic dancers from 64 different nightclubs managed by them were awarded \$6.5 million in compensation for minimum wage violations, shorted wages, and being misclassified as independent contractors rather than employees.
- **Zenefits** – \$3.4 million in unpaid overtime to 743 account executives and sales representatives.
- **T-Mobile** – \$19 Million for off-the-clock work, unpaid overtime, missed meal and rest breaks.



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Exemptions Covered

- Executive
- Administrative
- Professional
- Outside Sales
- Commissioned Inside Sales
- Computer Professional



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Starting Point

- Job title does NOT make them exempt
- ALL employees are non-exempt ... unless you can prove otherwise
 - Meets an exemption salary and duties tests
- Consider putting your audit under the privilege protection of your attorney



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Definition of Non-Exempt

- Everyone ... unless they meet exemption tests
 - Paid for overtime hours (varies by state)
 - Must meet minimum wage rules
 - Company controls hours and work



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Definition of Exempt

- Exempt from overtime pay and meal/rest breaks
- Hours not counted or “comped”
- Must meet salary minimum, per exemption
- Must meet duties test of the exemption



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Discretion and Judgment

- “Customarily and regularly exercises discretion and independent judgment.”
 - Compares and evaluates options when making a decision
 - Has authority or power to make an independent choice that is
 - Free from immediate direction or supervision
 - A matter of significance
- May vary slightly with each exemption



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Executive Exemption

- Key personnel running the company or a department
- Usually directly manages at least 2 FTE
- Power to hire, fire, or change the status of employees
- More than 50% of time spent on exempt and related duties
 - Hire / train / evaluate / fire employees
 - Controlling flow / distribution of products
 - Planning / directing work
 - Setting pay rates and hours

Chief
Executive



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Administrative Exemption



- Most common
- Office work directly related to management policies or general business operations or those of your customers
- Discretion and independent judgment
- Staff employees who are functional rather than department heads, using specialized training, experience, or knowledge



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Administrative Duties

- Examples of exempt duties:
 - Advising management
 - Planning / strategy
 - Negotiating deals
 - Representing the company
 - Signing authority when purchasing materials and supplies
 - Promoting sales
 - Researching business opportunities
 - Analyzing business data
 - Determining company and/or personnel policies



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Examples of Exempt Positions

- Exempt
 - Financial consultant working for a firm
 - Accounting manager
 - HR Manager
- Not typically exempt
 - Supervisor
 - Office Manager
 - Executive or Administrative Assistant



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Working Managers

- Usually non-exempt
 - Manages only a few employees
 - Spends over 50% of time doing same work as employees
 - Shared responsibility rather than directing employees



- Consider
 - Relative important of managerial duties
 - Frequency of discretion and independent judgment
 - Relative freedom from supervision
 - Comparative compensation (wage, benefits, perks, etc.)



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Professional Exemption



- Three categories
 - Learned
 - Licensed
 - Artistic
- Salary test
 - Federal = \$684/week (\$35,568/year)
 - State minimums



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Learned Professionals

- Advanced knowledge (degree) in a field of science or learning
 - Law, medicine, theology, accounting, engineering, sciences, etc.
- Prolonged course of specialized intellectual instruction



- Work is predominantly intellectual in character
- Generally analyzes, interprets, deduces
- Meets minimum salary test



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Licensed Professionals

- Holds a valid (required) license or certificate
- Meets minimum salary test
- Only certain fields
 - Law (no minimum salary)
 - Teachers (no minimum salary)
 - Dentistry
 - Optometry
 - Architecture
 - Engineering
 - Accounting
 - Medicine (no minimum salary)
 - Includes degreed medical interns/residents



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Professional Exceptions

- Not automatically considered exempt
 - Pharmacists
 - Nurses
 - Physicians paid hourly



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Artistic Professionals

- Work in recognized field of artistic or creative endeavor
 - Requires invention, imagination, originality, or talent
 - Fields such as music, writing, acting, and graphic arts
- Examples
 - Actors, musicians, cartoonists, novelists, etc.
- Meets minimum salary test



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Outside Sales Exemption

- Must be at least 18 years old
- Must spend 51%+ of time at customer / prospect locations selling for company
 - Not time spent selling virtually or working from home
 - Time spent on setup, delivery varies between feds and state
- No minimum salary



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Commissioned Inside Sales

- No exemption from anything other than overtime
- Minimum pay of 1.5 x minimum wage
- Commissions must be more than half of pay
 - Commission must be paid every pay period
 - Commission must be for selling
- Limited industries
 - Federal: limited to retail establishments
 - CA: limited to IWC Wage Orders 4 & 7



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Computer-Related Exemption

- Meets minimum salary test
- Degree not required
- Work is intellectual or creative
 - Applying systems analysis techniques and procedures
 - Designing, developing, testing systems or programs
 - Documenting, testing, creating related to design of software or hardware for operating systems
 - NOT repair or manufacturing of hardware, trainees, or those using a final product software
- Positions include
 - Computer systems analysts, programmers, software engineers



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Differences in Computer-Related

- Federal law
 - Minimum salary
- California law
 - Minimum salary of approximately \$100,000/year)
 - Changes every year
 - Could still receive overtime



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When You Misclassify as Exempt



- Company totally held responsible for the misclassification
 - Penalties and fines
- Employee gets to decide what wasn't paid



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Costs and Penalties

- Company pays ... a lot
 - All unpaid overtime worked
 - All missed paid rest breaks
 - Any penalty pay for missed meal and/or rest breaks
 - Federal / state fines, penalties, and interest
 - Attorney fees



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When you Misclassify as Non-Exempt

- Zip, nada, nothing

No Worries



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Recommendations

- Be conservative
- Train managers
- Educate senior management on risks
- Have an attorney approve your choices



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Additional Questions?



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