

wage & hour laws 101

A more human resource.℠

Table of Contents

Exempt to Non-Exempt or Vice Versa: How to Reclassify Employees.....3

From time to time, you may need to reclassify an employee due to a change in job duties and responsibilities. Whether it's non-exempt to exempt or vice versa, we cover best practices for handling the change.

Overtime, Travel and More: Frequently Asked Questions.....,.....6

For many employers, it can be confusing to know when to pay employees for overtime, training, or travel time. Here we address frequently asked questions on these and other pay-related scenarios.

Independent Contractors: Frequently Asked Questions.....10

While independent contractors generally relieve employers of certain obligations related to taxes and benefits, the consequences of misclassifying an employee as an independent contractor can be costly. Learn how to properly assess independent contractor relationships.

When Weather's Frightful, What Are the Rules for Paying Employees?.....14

Severe weather conditions can create unsafe travel conditions. When this happens, employers may be forced to close and/or employees may not be able to report to work. Learn how to handle pay issues resulting from inclement weather.



Exempt to Non-Exempt or Vice Versa: How to Reclassify Employees

From time to time, you may need to reclassify an employee due to a change in job duties and responsibilities. Whether it's non-exempt to exempt or vice versa, we cover best practices for handling the change.



Exempt to Non-Exempt or Vice Versa: How to Reclassify Employees

The federal Fair Labor Standards Act (FLSA) requires virtually all employers to pay most employees at least the federal minimum wage for each hour worked, as well as overtime pay for all hours worked in excess of 40 in a workweek. The FLSA allows for exemptions from these requirements for certain employees who work in administrative, professional, executive, highly compensated, outside sales, and computer professional jobs. These employees are known as "exempt" employees. To be considered exempt, these employees must meet very specific salary and duties criteria.

Here are guidelines to consider when reclassifying employees:

Non-Exempt to Exempt:

Most employees are classified as non-exempt. Very few meet the required criteria to be considered exempt. When changing an employee's classification from non-exempt to exempt, make sure the employee meets all applicable exemption criteria.

- **Apply federal and state tests.** Ensure the employee qualifies as exempt under federal and applicable state laws. Exempt employees must generally be paid a set salary each week, regardless of the quantity or quality of work, and must meet the minimum salary and duties requirements for the exemption. If there is any doubt as to whether the employee qualifies for exemption, the employee should remain classified as non-exempt.
- **Communicate the change in advance.** Notify affected employees in advance and explain how the change will impact them. For example, explain that as an exempt employee, he or she will receive a set salary for each week worked and will not be entitled to overtime pay. Also, communicate any revised procedures for timekeeping, absences, and pay deductions.
- **Avoid improper deductions.** Employers are limited in the types of deductions they may make from an exempt employee's salary. Generally, employers may deduct from an exempt employee's salary in the first or last week of employment if the employee did not work the full week, or when an exempt employee is absent for one or more full days for personal reasons, other deductions are generally prohibited.

Exempt to Non-Exempt:

The following guidelines assume that the employee was properly classified as exempt initially. For an employee that has been misclassified as exempt, see the ***Correcting Previous Misclassifications*** section.

- **Review classifications regularly.** Review exempt classifications regularly to determine whether the employee still qualifies for the exemption. A change in an employee's job duties should also trigger a review. If an exemption no longer applies, promptly reclassify the employee as non-exempt and pay him or her overtime in accordance with federal and state law.
- **Communicate the change properly.** As with any change in employment status, employers should notify employees in advance and in writing. Explain the impact of the change and potential benefits of being classified as non-exempt (such as receiving overtime pay whenever the employee works more than 40 hours in a workweek).
- **Be ready for questions.** Employees may have questions about timekeeping, benefits, and other issues related to the new classification. Provide the employee with a contact who can answer any questions he or she may have.

Exempt to Non-Exempt or Vice Versa: How to Reclassify Employees

Correcting Previous Misclassifications:

Employers that misclassify employees as exempt may be required to pay back overtime, fines, and damages. To remedy a misclassification, some employers will determine the amount of overtime worked and then pay any back overtime due. If you have an employee that has been misclassified as exempt, consult legal counsel to discuss how best to address the misclassification.

Following the tips provided above can help you through the process of reclassifying employees. When faced with misclassification issues, consider consulting legal counsel for guidance.



Overtime, Travel and More: Frequently Asked Questions

For many employers, it can be confusing to know when to pay employees for overtime, training, or travel time. Here we address frequently asked questions on these and other pay-related scenarios.

Overtime, Travel and More: Frequently Asked Questions

Exempt vs. Non-Exempt Classifications:

Q: What is a non-exempt employee?

A: A non-exempt employee is entitled to at least the minimum wage for each hour worked and overtime pay for all hours worked over 40 in a workweek. Some states require overtime in additional circumstances.

Q: What is an exempt employee?

A: An exempt employee is generally paid on a salary basis and is not entitled to overtime. Job titles do not determine exempt status. To be classified as exempt, the employee must meet certain salaries and duties tests established by federal and applicable state laws. Most employees are classified as non-exempt. Very few will meet the exemption criteria set by federal and/or state law.

Q: If an employee meets the tests to be exempt from overtime, do I have to classify them as exempt?

A: No. You may classify any employee as non-exempt (and pay them overtime when due). By contrast, only employees who meet applicable exemption tests may be classified as exempt.

Q: During inclement weather, can I require exempt employees to use paid time off (PTO) if we remain open but they are unable to come to work?

A: Under federal law, if the company remains open and exempt employees do not report to work, you may generally require them to use accrued PTO (see ***When Weather's Frightful, What are the Rules for Paying Employees?***).

Q: If an exempt employee only worked for two hours of an 8-hour work day and then left due to personal reasons, can I deduct the six hours of missed work from her salary?

A: No. The FLSA generally prohibits deductions from exempt employees' salaries for partial-day absences, except for those occurring in the first or last week of employment or for unpaid leave taken under the Family and Medical Leave Act. Additionally, full-day deductions are restricted to a few limited situations.

Q: Can exempt employees take paid time off in 4-hour increments or only in 8 -hour increments?

A: Under federal law, employers can charge an exempt employee's paid leave bank for partial-day absences, provided the employee suffers no loss in pay. However, some states place restrictions on charging an exempt employee's paid leave bank. Check your state law for more information. Remember, partial-day salary deductions are prohibited except in a few narrow circumstances, covered above.

Overtime:

Q: When do I have to pay "time-and-a-half" (overtime)?

A: Under the FLSA, employers must pay non-exempt employees overtime (1.5 times their regular rate of pay) whenever they work more than 40 hours in a workweek. A few states, including California, also require double time under certain situations or time-and-a-half after a certain number of hours worked in a day (also known as daily overtime). Check your state law to ensure compliance.

Overtime, Travel and More: Frequently Asked Questions

Q: What is considered a workweek? Is it Monday to Sunday? Can it start on another day?

A: A workweek is a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods. The workweek can begin on any day and at any hour.

Q: Is overtime pay required for an employee who is paid biweekly if one week he or she works over 40 hours, but his or her two-week total is less than or equal to 80 hours?

A: Yes, you must pay the employee overtime. The FLSA requires overtime whenever a non-exempt employee works more than 40 hours in a workweek. The FLSA prohibits employers from averaging two or more workweeks to determine whether overtime pay is due.

Q: If non-exempt employees are instructed not to work more than 40 hours a week and they go over, do they have to be paid overtime or can they be paid their regular rate?

A: You must pay the employee the applicable overtime rate for all hours worked in excess of 40 during the workweek. You may, however, subject the employee to disciplinary action for violating company rules, but in no case may you withhold pay or fail to pay overtime.

Travel Time:

Q: What are the pay requirements for travel outside the employee's regular work hours?

A: If the travel is within the same day (the employee returns home at the end of the day), you must pay employees for their travel time even if it occurs outside their normal working hours. However, you may subtract their normal commute from the total. If the travel keeps the employee away from home overnight, the time that cuts across the employee's regular working hours (regardless of the day of the week the travel occurs) must be paid.

Q: For overnight travel, do I have to pay for the time spent at the airport prior to the flight for security clearance?

A: For overnight travel, you must generally pay employees for any portion of the travel that occurs during their regular working hours, regardless of the day of the week it occurs. This includes time spent waiting at the airport and traveling to a final destination, such as to the hotel or worksite.

Q: Does the FLSA allow me to pay employees a lower wage for travel time than for regular working time?

A: The FLSA allows employers to establish a separate wage for travel and other "nonproductive" work hours, provided the following requirements are met (see **29 CFR 778.318(b)**):

- The wage equals or exceeds the applicable minimum wage; and
- The employee has agreed to the separate wage in advance.

Because of the challenges of administering separate wage rates (including calculating overtime), many employers choose to pay employees the same wage for both productive and nonproductive hours. If you wish to establish separate rates, make sure you comply with all applicable laws and obtain advanced written agreement from the employee.

Overtime, Travel and More: Frequently Asked Questions

Training Time:

Q: We have an extensive orientation program that includes some basic skills training. Do we have to pay new hires for this time? What about new hire orientation that occurs by phone?

A: Yes, you must pay employees for the time spent in orientation, regardless of whether they attend in person or via phone. This is considered training time. In order for training time to be unpaid, the training must meet all four of the following criteria:

1. Attendance is outside of the employee's regular working hours;
2. Attendance is voluntary;
3. The course, lecture, or meeting is not directly related to the employee's job; and
4. The employee does not perform any productive work while attending the training.

Keep in mind that the answers above address federal law; your state or local law may differ. Where federal, state, and local law conflict, the law that is most generous to the employee typically applies.

Independent Contractors: Frequently Asked Questions

While independent contractors generally relieve employers of certain obligations related to taxes and benefits, the onsequences of misclassifying an employee as an independent contractor can be costly. Learn how to properly assess independent contractor relationships.



Independent Contractors: Frequently Asked Questions

When a worker qualifies as an independent contractor, the employer is generally relieved of obligations related to taxes and benefits, among other things. However, only a small fraction of workers qualify for independent contractor status. The following are answers to some common questions about independent contractors:

Q: What are independent contractors?

A: In general, independent contractors are self-employed individuals who offer their services to the general public under terms specified in a contract or agreement. Generally, whether a person is classified as an independent contractor or employee depends on the amount of control exercised by the employer. The more control the business has over the individual, the more likely that individual will be perceived as an employee and not an independent contractor.

Q: What are the penalties for misclassifying employees as independent contractors?

A: The consequences for misclassification can be significant. In addition to owing back pay, overtime, and benefits to a misclassified worker, the employer may be ordered to pay back taxes, interest, and fines to the government. In some states, employers that intentionally misclassify a worker may also face criminal charges or stop-work orders.

Q: How do I determine if a worker is an employee or an independent contractor?

A: A worker is presumed to be an employee unless he or she meets specific criteria. There are a variety of tests used to make this determination, including those used by the Internal Revenue Service (IRS), Department of Labor, the Equal Employment Opportunity Commission, and several states. While each test is slightly different, most tests look at:

- The amount of control the business exercises over the worker;
- Whether the worker's services are an integral part of the business;
- The permanency of the relationship; and
- The worker's investment in facilities, equipment, and tools.

Carefully review each test and consider consulting legal counsel before classifying any individual as an independent contractor.

Q: What is the IRS Common Law Test?

A: The IRS Common Law Test is the most commonly used test for determining independent contractor status. This test evaluates whether a worker is an independent contractor or employee for federal tax purposes. It has three parts that examine factors related to behavioral control, financial control, and the type of relationship between the business and the worker (covered below).

Independent Contractors: Frequently Asked Questions

Q: What factors are considered when looking at behavioral control?

A: The first part of the IRS test examines whether there is a right to control where and how the worker does the work by evaluating:

- The degree of instruction (detailed instructions indicate the worker is an employee);
- Evaluation systems (measuring how the work is performed rather than the end result is an indication of an employer/employee relationship); and
- Training (which indicates the employer wants the job done in a particular way and is strong evidence of an employer/employee relationship).

Q: What factors are considered when looking at financial control?

A: The second part of the IRS test looks at whether the company has a right to control the business aspects of the worker's job, such as how the worker is paid, whether expenses are reimbursed and who provides the supplies. When compared with employees, independent contractors are more likely to: have unreimbursed business expenses; make significant investments in supplies and facilities; make their services available to other businesses; realize a profit or loss; and to be paid a flat fee or on a "time and materials" basis.

Q: What factors are considered when looking at the nature of the relationship between the worker and employer?

A: The third part of the IRS test looks at how the worker and business perceive their relationship. Consider the following questions:

- Is there a written contract describing the relationship?
- Is the worker available to perform services for other businesses?
- What is the permanency of the relationship?
- Are the services performed by the worker an integral part of the business?
- Is the worker entitled to employee-type benefits?

Q: Is there a set number of IRS factors that must be met to classify a worker as an independent contractor?

A: No. Under the IRS test, there is no set number of factors that must be met, and no one factor stands alone in making the determination. An employer must weigh all factors and take into account other applicable tests when determining whether an individual is an employee or an independent contractor.

Q: I gave workers a 1099. Does it mean they are automatically independent contractors?

A: No. A common misconception is that a worker's classification is determined by whether a Form 1099 or Form W-2 is provided to them for tax filing purposes. However, the classification must always be made on the basis of whether the worker meets the specific criteria established by applicable federal or state law.

Independent Contractors: Frequently Asked Questions

Q: Can I lay off employees and bring them back as independent contractors?

A: As mentioned above, if the requirements of federal and state tests for independent contractors are not met, the worker is an employee, regardless of how you characterize the relationship. Simply reinstating an employee and calling them an independent contractor is not going to change his or her status as an employee. Unless the nature of the relationship changes so that it satisfies the tests, the worker would still be considered an employee.

Q: Can a worker waive his or her right to be considered an employee and opt to be a contractor?

A: No, a worker cannot waive his or her employee status through a contract or otherwise. Again, specific tests must be met for a worker to be an independent contractor.

Q: How long can an independent contractor work for me?

A: While there is no specific limit, a continuing relationship between the business and worker is considered an indication of an employer/employee relationship. Since the relationship can change over time, if and when contracts are renewed or extended, review whether the worker still qualifies as an independent contractor.

Q: What are my options if I have applied the tests and I am still unsure whether a worker is an employee or independent contractor?

A: When in doubt, classify the worker as an employee and seek legal counsel. You may also request an official determination from the IRS using Form SS-8. Keep in mind, however, that it ordinarily takes at least six months to get an IRS determination.

Q: What are the paperwork requirements for independent contractors?

A: If you've made the determination that the person you're paying is a bona fide independent contractor, the contractor should complete IRS Form W-9. Retain the W-9 for at least four years. Additionally, if you paid a bona fide independent contractor $600 or more for services provided during the year, you need to complete IRS Form 1099. A copy of the Form 1099 must be provided to the independent contractor and the IRS.

Federal and state laws establish the criteria for classifying workers as independent contractors. Carefully review and apply appropriate tests before classifying any individual as an independent contractor. Review independent contractor relationships periodically to determine if reclassification is necessary.



When Weather's Frightful, What Are the Rules for Paying Employees?

Severe weather conditions can create unsafe travel conditions. When this happens, employers may be forced to close and/or employees may not be able to report to work. Learn how to handle pay issues resulting from inclement weather.

When Weather's Frightful, What Are the Rules for Paying Employees?

When bad weather or other emergencies cause the company to close, employers often have questions about how to pay their employees. Here are some best practices for handling common pay-related scenarios due to inclement weather:

#1: Non-exempt employees, full day closure.

Generally, whether or not an employee must be paid for full-day closures depends on his or her status as an exempt or non-exempt employee. If non-exempt employees miss work because of inclement weather (either because the company is closed or because they are unable to make it to the business location), there is no requirement to pay them, regardless of the duration of the absence. However, some employers choose to voluntarily pay non-exempt employees if the business is closed due to inclement weather.

#2: Exempt employees, full day closure.

Exempt employees must receive their full salary in any workweek in which they perform any work regardless of the number of hours worked. If the business location closes for less than a full workweek, the employer must pay an exempt employee his or her full salary, as long as the employee worked any part of the workweek.

#3: Non-exempt employees report to work, then business closes.

Non-exempt employees must be paid for all the time they actually work plus all time they report to work and are required to stay until a decision about closing is made. There is no federal requirement for employers to pay non-exempt employees a minimum number of hours if they report to work when there is no work available due to weather or related circumstances. However, some states do have report-in pay requirements. Employers should check applicable laws to ensure compliance.

#4: Employees who cannot report to work, business is open.

If the company remains open during inclement weather and exempt employees fail to report to work, the FLSA permits employers to make salary deductions for absences of one or more full days, because it is considered an absence for personal reasons other than sickness or disability. However, deductions from an exempt employee's pay for partial-day absences are prohibited. Thus, if an exempt employee performs any work from home (such as checking work email) or reports to work for an hour and then chooses to go home because of the weather, employers are required to pay the employee his or her full salary for that workweek. Again, if non-exempt employees do not report to work because of inclement weather and do not perform any work from home, there is no requirement to pay them, unless the employer's policy or practice promises otherwise.

#5: Requiring the use of paid time off (PTO).

Under federal law, employers may generally require both non-exempt and exempt employees to use accrued vacation or PTO for the time missed due to inclement weather. However, if exempt employees do not have accrued PTO available, they will still be entitled to their full salary for the workweek as long as they have performed work that week. **Note:** Some states do not permit employers to require the substitution of PTO in these cases. Check your state law to ensure compliance.

When Weather's Frightful, What Are the Rules for Paying Employees?

#6: Offering alternative work arrangements.

As an alternative to employees missing work (because they cannot reach the office or because the office must close), employers may consider offering work-from-home arrangements or allowing non-exempt employees to make up missed hours during the same workweek. When non-exempt employees perform work from home, they should be clearly instructed to record all time spent working, including time spent checking and responding to emails and making phone calls.

Prepare for weather-related emergencies by considering the impact on your company's pay practices.



For more information:
http://sbshrs.adpinfo.com/flsa

This content provides practical information concerning the subject matter covered and is provided with the understanding that ADP is not rendering legal advice or other professional services. ADP does not give legal advice as part of its services. While every effort is made to provide current information, the law changes regularly and laws may vary depending on the state or municipality. This material is made available for informational purposes only and is not a substitute for legal advice or your professional judgment. You should review applicable law in your jurisdiction and consult experienced counsel for legal advice.

ADP and the ADP logo are registered trademarks of ADP, LLC. ADP A more human resource. is a service mark of ADP, LLC. Copyright © 2016 ADP, LLC. ALL RIGHTS RESERVED.