



# The Employment Law Newsletter

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## Cases To Watch

- Marsh v. J. Alexander, Inc.
- Oman v. Delta Air Lines, Inc.

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## Busting Myths About Employees who are Exempt from Overtime Laws By Ryan J. Carlson

You are not entitled to earn overtime wages because your hourly rate is at least twice (2x) the minimum wage, right? Wrong! You are paid a salary rather than an hourly rate, so you are therefore exempt from overtime laws, right? Wrong! Your employer does not owe you overtime wages simply because your title includes the word “manager,” or your job requires that you maintain a professional license, right? Wrong again! There are so many myths and misconceptions about overtime wages in California, and it is time to set the record straight.

First of all, what do overtime laws require? In short, they obligate employers to compensate their non-exempt employees with “premium” wages – or wages in excess of their regular hourly rate – when those employees work a certain number of hours per day or days per week. However, those premium rates and when they apply varies depending on certain factors. Allow the following breakdown to explain:

- An employee who works more than 8 hours in a single 24-hour workday is entitled to 1.5x their regular hourly rate for hours worked in excess of 8;
- An employee who works more than 40 hours in a single 7-day workweek is entitled to 1.5x their regular hourly rate for hours worked in excess of 40;
- An employee who works more than 12 hours in a single 24-hour workday is entitled to 2x their regular hourly rate for hours worked in excess of 12; and
- An employee who works 6 consecutive days in the same 7-day workweek is entitled to 1.5x their regular rate for the first 8 hours worked on the seventh consecutive workday, and 2x their regular hourly rate for any time worked in excess of 8 hours that same day.

Employment Law

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Side note: for those earning an annual salary rather than hourly wages, fear not! There is a simple way to calculate your regular hourly rate for purposes of establishing the premium wages you are owed if/when you work overtime. Simply divide your annual salary by 52 to get your weekly rate, then divide your weekly rate by 40 (or the number of hours you typically work per week on average, *not including overtime hours*) to calculate your hourly rate. It is that easy! For those earning commissions, piece rate wages or a combination of different types of wages, the formula is a tad different but generally similar.

So, now that we have discussed when overtime laws kick in and how to calculate one's regular hourly rate, let's discuss when, how and why those laws *do not* kick in even when an employee works more than 8 hours in a workday or 6 days in a workweek, etc.

Both Federal law and California state law create exceptions to overtime requirements that render certain employees exempt from earning overtime. Hence, employees who are entitled to overtime premium wages are often dubbed "non-exempt" employees and, conversely, those not entitled to earn overtime are deemed "exempt."

In general, there are five categories of exempt employees in California. Whether one falls into any one of those categories depends upon a multitude of factors. However, the one element common to four of those five categories is the requirement that the employee earn an amount greater than minimum wage. Exactly how much more depends upon the exemption under which you fall, *but by no means does the analysis stop here*. This is, by far, the most common misconception concerning overtime exemptions in California.

To be perfectly clear: though one part of the exemption analysis *does* involve the amount one earns, most of the analysis requires a very fact-specific look at the nature and primary duties, and not necessarily the title, of the job being performed.

### **The "Executive" Exemption**

The Executive exemption, sometimes referred to as the "Managerial" exemption, is perhaps the most misunderstood and misapplied exemption of those provided under California law. Many ill-informed employers mistakenly believe that they can avoid paying overtime wages by simply slapping the term "manager" or "executive" onto an employee's job title. There is far more to it than that, however. While there is no black letter definition of what exactly a managerial or executive employee is, the law sets forth certain elements that all must be present in order for an employee to fall under this exemption.

For starters, and not surprisingly, the first question is whether the employee's primary duties involve the actual management of the business or a commonly-recognized department or subdivision thereof. The key word here is "primary" and it means 50% or more of the work one performs, as measured by the time spent performing it. An employee who was hired to sell the employer's products, but who also "manages" that company's social media pages and various marketing efforts from time to time, is not likely to be viewed as *primarily* engaging in duties involving the management of the business. On the flip side, someone hired to oversee and/or direct the company's entire marketing department may very well be regarded as being *primarily* engaged in managerial duties.



Next, the employee must, as part of his/her *primary* duties, oversee or direct the work of at least two other employees. This element is, in large part, what prevents an employer from simply giving an employee the title of, for example, “social media manager” so as to consider that employee covered by this exemption. If you think about what an executive or manager typically does on behalf of any business, this makes a lot of sense. Absent an element of oversight or control over other employees’ work, we could all be considered managers of [insert your job duties here]. Authority over others is an essential element to be able to check off this box.

In order to check off the third box, the employee, as part of his/her *primary* duties, must have the authority to hire or fire other employees, or alternatively, must be given significant deference with respect to hiring and firing decisions by those who have the final say. In other words, the employee must not only oversee at least two other employees, s/he must have at least some say in who those employees are (or are not).

Next, the employee must be employed in a position that primarily requires the exercise of his or her own independent judgment. The more the company directs, controls or supervises the employee’s primary duties, the less likely it is that s/he satisfies this element. While almost every position in every company, save maybe President/CEO, is overseen by at least someone higher up the ladder, it must be said that the employee’s duties are ones that can be carried out without substantial supervision or oversight by those above.

And finally, as with most of the exemptions discussed herein, there is a minimum earnings requirement. In addition to satisfying all four criteria above, the employee must earn monthly wages equivalent to no less than two times (2x) the state minimum wage.

If an employee meets all five criteria, it may likely be the case that s/he is exempt from overtime laws. On the other hand, if any one of the five elements are not satisfied, the employer must pay overtime premium wages consistent with the breakdown above.

### **The “Administrative” Exemption**

The next exemption under California law is the “Administrative” exemption, which is somewhat of a misnomer. The analysis for this one is much trickier, more factually-specific, and involves answering a few more questions as compared to the other exemptions. As a result, it is much harder to provide examples of employees who typically fit into this category. It is easier to, instead, provide examples of those to whom this exemption *does not apply*: administrators, secretaries, paper pushers and/or clerical staff. See what we mean by a misnomer?

The first part of the analysis requires us to look at the type of work being performed by the employee in question. It must be non-manual work that is directly related to the overall operation of the business. “Non-manual” does not mean that the work must be performed solely on the computer or over the phone; it just means that it does not involve the type of work we typically regard as “manual” labor, such as assembly-line work, landscaping, or heavy lifting.



*Non-manual* work that is *directly related* to overall operations could involve, among other things: setting employee schedules, establishing and enforcing office/workplace policies, authoring budget proposals, or ensuring the company’s compliance with certain labor and employment laws. The list goes on and depends largely upon how the respective business is run and what the operation of the business entails. Generally speaking though, the work must be performed at the employer’s workplace and not, for example, out in the field or at a remote job site.

Similar to the executive exemption, the administrative exemption also requires that the employee ordinarily exercise his/her own discretion and independent judgment. This means that the employee must not require supervision, or be supervised by the employer, while carrying out his/her primary job duties. See above for more information on this element.

The third element is a little bit dicey and can be satisfied if any one of the following three criteria is met. The employee must either: a) regularly and directly assist an executive employee or another administrative employee – for example, the owner of the business; b) perform without substantial supervision specialized or technical work that requires special training, knowledge or experience; or c) perform under only general supervision special assignments and/or tasks.

This element is, by far, the most fact-intensive part of the analysis and for that reason it is nearly impossible to break it down any further without rambling on for three more pages. It is therefore by no coincidence that this exemptions is one of the most hotly-contested and heavily-litigated among those available in California. If you feel you may fall into any one of those three classifications, it is probably wisest for you to discuss the circumstances of your employment with an experienced labor and employment attorney.

Last but not least and not surprisingly, the employee must also earn wages equivalent to, or greater than, twice (2x) the state minimum wage.

Thus, if you perform non-manual work that directly relates to the operations of the business, exercise independent judgment with respect to that work, directly assist the owner or an executive or administrative employee or otherwise perform technical and/or specialized duties without much supervision, and make at least twice the minimum wage, you may fall within the administrative exemption. If any of these elements are missing, however, you are likely non-exempt and entitled to earn overtime premium wages.

### **The “Professional” Exemption**

The Professional exemption is perhaps the most straightforward of them all. Rather than requiring a factual analysis as to the nature and scope of one’s job duties, the inquiry starts generally by asking if the employee is required to maintain a professional license in order to perform the work that s/he was primarily hired to perform. Such employees include, but are not limited to: doctors, lawyers, dentists, architects, engineers, teachers, and accountants. (For whatever reason, this generally does *not* include pharmacists or registered nurses.)



However, a professional license is not an absolute requirement in order to be an exempt professional. Subject to satisfying the other requirements detailed below, those engaged in “learned or artistic” professions are also covered by the Professional exemption. This requires a tad more factual analysis than that which is required for the occupations listed above.

A “learned or artistic” profession is typically one that requires either: a) an advanced, specialized and prolonged course of study and learning, typically in a scientific or other similar advanced field; or b) substantial creative artistic contribution or effort. In addition, the work the employee performs must generally be original in nature and not capable of being recreated or reproduced by someone lacking the same training, skill, imagination, talent, and/or creative ability. In practice, such professionals might include a biologist who is performing highly specialized research specific to a very rare form of cancer, or perhaps a choreographer who is hired to choreograph each dance to be performed by the actors starring in an upcoming Broadway musical.

Like the previous two exemptions, these employees must also regularly exercise independent judgment and discretion in performing their work. In addition, they must earn wages that exceed twice the state minimum wage. Thus, whereas a doctor, lawyer or accountant who earns \$15/hour would *not* be exempt, a musical composer authoring original scores for a blockbuster movie and earning \$50/hour, likely would be.

### **The Two Sales-Related Exemptions**

The final two categories of exemptions are slightly different than the others and do not necessarily require us to look at the nature of the work performed. That is because they both apply to salespeople whose primary duty it is to sell goods or services on behalf of their employer. For purposes of this discussion, these employees fall into one of two categories: outside salespeople and commission-based salespeople.

Employees considered “outside” salespeople are not only exempt from overtime, they are also exempt from many other labor laws, such as those requiring meal and/or rest breaks. Whether one can properly be deemed an outside sales person depends *not* on the *type* of work performed, but rather the *place* where the work is performed. The analysis is simple: if an employee regularly spends more than half of his/her working time somewhere other than the employee’s place of business, such as out in the field making sales, s/he can properly be considered an outside salesperson. This is so regardless of the wages s/he earns. Thus, as long as the salesperson spends 51% or more of his/her time out of the employer’s offices, s/he is exempt from overtime requirements no matter how much s/he earns.

The same cannot be said for commission-based salespeople. In order to be considered exempt from overtime laws, a commission-based salesperson must earn wages greater than one-and-one-half (1.5x) times the state minimum wage *and* more than half of the salesperson’s wages must be in the form of, you guessed it, commissions. Both conditions must be present and if they are, the employee is exempt from overtime laws.



Accordingly, a salesperson who earns solely commissions in an amount equivalent to what s/he would have earned had s/he been paid just the minimum hourly wage, is a non-exempt employee. Similarly, a commission-based salesperson who earns more than 2x minimum wage would still be considered non-exempt if only 30% of his/her wages are in the form of commissions.

As you can now see, the analysis required to determine one's status as exempt or non-exempt under any of the categories discussed above is very fact-heavy and equally subjective. No one classification of employee can be said to be exempt or non-exempt in every circumstance. Moreover, very specific occupational fields such as, for example, the computer science/information technology field or the nursing field, have specific rules that apply only to their industries that we have not discussed.

The bottom line is this: job titles, by themselves, do not tell us much about one's status as exempt or non-exempt; neither does the simple fact that the employee earns at least 2x minimum wage. We must look way further into the practical aspects of each person's respective employment to properly make that determination and, even after doing so, there are other factors that must be considered with respect to certain occupations.

If you ever have any questions about your status as a non/exempt employee, do not simply take your boss' word for it. Instead, consider discussing the circumstances of your employment with an attorney who has far more experience applying the facts to the law.

