

**Dear HR Knowledge, how do I know if my employees are misclassified?**

Defining employment classifications is imperative for any organization as these classifications help ensure wage and hour compliance as well as proper administration of compensation and benefits.

There are two types of classifications to consider: One is a legal requirement under the federal Fair Labor Standards Act (FLSA) and the other is company-defined classification.

To help determine if your employees are misclassified, let's review the distinctions between these two classifications.

**I. FLSA classifications**

These classifications are most commonly known as "exempt and nonexempt." They are governed by the FLSA and set the standard for minimum wage and overtime requirements.

- A. Nonexempt** employees must be paid at least minimum wage for all the hours worked, and although there are some exceptions, generally, overtime must be paid at a rate of 1 ½ times the employee's regular rate of pay for each hour worked in excess of 40 hours in a workweek. Most states follow these federal rules, but some states such as California have special overtime calculations.
  
- B. Exempt** employees are not eligible for overtime pay. Rather they are paid for the job they do, not the hours they keep. To be considered exempt, an employee must meet **all three** of the following exemption "tests":
  - 1. **Salary Basis Test** – The employee must receive a guaranteed minimum salary for any workweek in which any work is performed.
  - 2. **Salary Level Test** – The employee must be paid at least \$455 per week.
  - 3. **Duties Test** – The employee must spend at least 50% of their time performing exempt job duties that fall within one of the exemption categories: Administrative, Executive, Professional, Computer, or Outside Sales.

Classifying employees as either exempt or nonexempt is neither an exact science nor an easy task. To determine if an employee is exempt, all three of the above criteria must be met. Keep in mind that paying a salary is not enough, nor is a particular job title.

To assess whether an employee is exempt, the first step is to review his or her compensation. The employee should be paid a salary of at least \$455 per week or \$23,660 annually. The next step is more involved, which is examining the employee's day-to-day duties and job description to quantify whether at least 50% of the time is spent performing exempt job duties under one of the FLSA's exemption categories. Performing one exempt job duty infrequently is not enough and would not pass muster.

*Compliance Recommendation*



Misclassifying employees as exempt can result in costly fines and damages, so before determining that an employee is exempt, make sure they satisfy all the applicable federal and state tests. In cases where a position falls into a “gray area,” we suggest erring on the side of nonexempt status, keeping in mind that the employer bears the burden of proof that an employee is exempt if ever called into question.

## II. **Company-Driven classifications**

These classifications are employer-defined, so there is no legal requirement on how they are defined. They generally fall into three categories: full-time, part-time, and temporary/seasonal. There is some flexibility when deciding how these are defined and they are often based on the number of hours worked per week. These classifications may or may not drive benefit eligibility, with the caveat that they will not impact those legally mandated benefits that may include Affordable Care Act (ACA) requirements, unemployment, workers’ compensation and sick time in many states.

Here are some general guidelines on how to define these types of classifications:

**Full-Time:** These employees are usually eligible for the company’s full benefit package. Traditionally, full-time employees are those who work 40 hours a week, but depending on your workday schedules and meal breaks, some organizations consider 37.5 or 35 hours per week as full time.

**Part-Time:** These employees typically receive some benefits offered by the company, and may receive a pro rata portion of the paid time off benefits. Part-time employees work less than a regular, full-time work schedule; many organizations define this threshold as working less than 30 hours per week.

**Temporary:** These employees can work a full-time or part-time work schedule, with the difference being that their employment is for a finite period. Temporary employees are usually ineligible for company benefits, other than those required by law. Temporary employees are generally hired to help with a certain project or to cover the workload when a regular employee is absent. These are short-term engagements, so if the assignment is extended, the company should evaluate whether the individual should be reclassified as a regular (i.e., full-time regular or part-time regular) employee. A temporary assignment lasting more than six months is a good benchmark for determining if the employee should be reclassified as a regular employee and offered the same benefits provided to regular employees.

### *Compliance Recommendation*

No matter how you define full-time, part-time, or temporary status, you must apply these guidelines consistently. Whichever standards you set, they should be reflected in company policies or your Employee Handbook, as appropriate. Lastly, you should monitor and evaluate part-time and temporary status on an ongoing basis.

## **About HR Knowledge**



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