

Chapter 3

FLSA Exemptions



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3.1 Introduction

In the past few decades, one of the most common and costly wage and hour legal disputes has been the classification of employees as “exempt” or “non-exempt” from Fair Labor Standards Act (FLSA) coverage. Unless exempt, all US employees are covered by the FLSA and thus entitled to certain protections, such as minimum wage and overtime pay. In many states, non-exempt workers are entitled to additional protections, such as meal and rest breaks. The FLSA permits employers to classify employees as exempt from the FLSA, provided several specific criteria are met. Typically, exempt employees are paid a fixed salary regardless of the number of hours they work and do not receive overtime.

Litigation arises when one or more employees dispute their exempt classification, claiming the exemption criteria are not met. Litigation involving the classification of employees as exempt is typically brought as a class action, in which one or more plaintiffs seek to represent a class of employees who they believe have similar claims. The “class” is frequently defined as all current or former employees with a certain job title or job titles during a specific time period. For example, an exempt store manager at a national retail chain may file litigation against his or her employer on behalf of all store managers in the company. If the lawsuit is to proceed as a class, it must first be “certified” by the court. Certification decisions are often based on the degree of variability between putative class members with respect to the claims in the litigation. The more variability between putative class members (e.g., time spent performing exempt work), the more challenging it will be for the court to

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resolve the claims of all class members and the less likely the litigation will be certified as a class action.¹

Evaluating exemption status requires detailed knowledge about an employee's job duties. FLSA regulations and case law provide clear guidance that exemption status must be determined based on actual job duties, not job title. An evaluation of proper classification includes data that demonstrates work characteristics such as the work employees perform, the context in which work is performed, the nature of the work, and the time spent on that work. Job analysis methods are commonly used to gather these data in a systematic manner.²

A component of the law that has important consequences for measurement of job duties is that classification decisions must be made on an individual basis, as opposed to a group basis, such as job title. This means that exemption status is determined employee by employee based on the work each employee performs on the job. Exemption status is not based on the job description or what employees in the job generally or typically do. This is a critical component of the law and one that those who conduct job analyses should find particularly meaningful. For many applications, a job analysis results in a generalized description of the work employees typically perform. However, a job analysis that is conducted to evaluate exemption status is focused on a single individual and therefore requires an individual-level job analysis.

In this chapter, I'll first clarify terminology used in this context. I'll then provide a discussion of some broad issues applicable to all exemptions before providing more detail about individual exemptions. In addition to the factors discussed in Chap. 2, the design of the data collection method to evaluate exemption status largely depends on which exemption is being challenged, and I'll also provide commonly used practices for evaluating each exemption.

3.2 Terminology

A challenge sometimes encountered when discussing FLSA exemption is the use of overlapping or inconsistent terminology. Exempt employees are often called "salaried" employees within the workplace because they are typically paid on a fixed salary basis. Conversely, non-exempt employees are often called "hourly" employees in the workplace because they are paid based on the number of hours they work. Exempt employees may also be called "overtime ineligible" or "managerial" while non-exempt employees be called "overtime eligible"³ or "non-

¹See Chap. 1 for further discussion about the class certification process.

²Banks and Aubry (2005); Banks and Cohen (2005); Honorée et al. (2005); Ko and Kleiner (2005). Chapter 2 provides an overview of applicable job analysis methods. In later sections, aspects of those methods that are related to FLSA exemption classification are highlighted.

³The Department of Labor suggested the use of "overtime eligible/overtime protected" and "overtime ineligible/not overtime protected" in response to frustration expressed by stakeholders over the nonintuitive nature of "non-exempt" and "exempt" terminology (U.S. Department of Labor, 2015).

Table 3.1 Terminology used for exempt and non-exempt employees

Exempt	Non-exempt
Salaried	Hourly
Overtime ineligible	Overtime eligible
Not overtime protected	Overtime protected
Managerial	Nonmanagerial

managerial.” In most cases, all of these terms (listed in Table 3.1) refer to the same thing: whether the employee is exempt from the FLSA or non-exempt from (i.e., covered by) the FLSA.

Another potential source of confusion stems from the term “misclassification.” Employees who do not meet the criteria for an exemption but are nonetheless considered exempt by their employer are said to be misclassified. However, workers can also be misclassified with respect to other legal classifications. For example, employees may be misclassified as independent contractors, an issue discussed in more detail in Chap. 4. Therefore, it may be necessary to specify the type of misclassification when discussing these issues.

Finally, different terminology is sometimes used to refer to exemptions from the FLSA. Although there are multiple exemptions for which an employee can qualify, the three most common are the executive, administrative, and professional exemptions. These three exemptions are collectively referenced as the “white-collar” exemptions or alternatively the “EAP” exemptions. Some may also use the term “541 exemptions” to refer to all exemptions which are defined in Section 541 of the federal regulations (i.e., 29 C.F.R. §541).

3.3 Duties Test and Salary Test

The criteria for the three white-collar exemptions are summarized in Table 3.2. Although the specific criteria differ by exemption, all exemptions are based on two broad factors: the manner and amount of pay the employee receives (“salary test”)⁴ and the employee’s job duties (“duties test”). An employee must surpass the minimum thresholds for both tests to be exempt from the FLSA. To satisfy the salary test, an employee must be paid a minimum salary of \$455 or more per week (\$23,660 per year). To satisfy the duties test, the employee’s “primary duty” must meet certain characteristics which is where job analysis methods are applicable. The focus of this chapter is to provide methodological approaches to evaluate the duties test. An evaluation of “primary duties” requires an understanding of what work employees perform, the context in which it’s performed, the nature of the work, and the time spent on that work.

⁴The salary test is sometimes further broken up into two components: the “salary basis test” and the “salary level test” (see, e.g., Miller (2016)).

Table 3.2 Summary of exemption criteria for the “white-collar” exemptions^a

Exemption (federal regulation)	Criteria (must meet all)
Executive (29 C.F.R. §541.100)	<ol style="list-style-type: none"> 1. Paid a salary of \$455 or more per week 2. Primary duty is management of the enterprise, department, or subdivision 3. Manages at least two or more full-time employees 4. Has the authority to hire or fire others (or whose recommendations are given particular weight)
Administrative (29 C.F.R. §541.200)	<ol style="list-style-type: none"> 1. Paid a salary of \$455 or more per week 2. Primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers 3. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
Professional (29 C.F.R. §541.300)	<ol style="list-style-type: none"> 1. Paid a salary of \$455 or more per week 2. Primary duty meets one of the following criteria: <ol style="list-style-type: none"> (a) Primary duty is work requiring advanced knowledge (i.e., “learned professional”) (b) Primary duty is work requiring invention, imagination, originality, or talent in an artistic or creative field (i.e., “creative professional”)

^aThis table is a summary of the criteria specified in the federal regulations. Readers should refer to the actual regulations (29 C.F.R. §541 et seq.) for additional explanation and guidance

3.4 Defining “Primary Duty”

A critical term used in all three white-collar exemptions is “primary duty.” In federal courts, primary duty has been interpreted qualitatively. This means that there is no accepted numeric threshold for the percent of time that an employee needs to spend performing exempt duties to qualify as a primary duty. Other factors, such as importance of the work performed, may be considered in addition to the percent of time spent when determining an employee’s primary duty. Because of this qualitative focus, employees may be considered exempt under the FLSA even if they spend less than half of their time performing exempt work.

This is one area where the FLSA can differ from state law in a critical way. In California, for instance, employees must be “primarily engaged” in exempt work to qualify for an exemption, a requirement that goes beyond the FLSA’s “primary duty” requirement. “Primarily engaged” is consistently interpreted quantitatively, meaning that an employee must spend more than 50% of his or her time on exempt tasks each workweek to be considered exempt under California state law. In other words, an employee who spends 40% of his or her time on exempt duties may be considered exempt under the FLSA but not under California law. Therefore, it is more difficult to meet the exemption criteria in California than it is to meet the

FLSA exemption criteria. When state and federal requirements differ, the more restrictive standard applies.⁵ Therefore, employers operating in California must comply with the higher state standard.

3.5 Executive Exemption

To qualify for the executive exemption, an employee must be “employed in a bona fide executive capacity.”⁶ The specific criteria for the executive exemption are summarized in Table 3.2. Of the exemption criteria, job analysis methods are most commonly applied to evaluate whether an employee’s “primary duty” is the “management of the enterprise.” This evaluation requires at least two broad steps. The first is determining which tasks qualify for “management of the enterprise” (i.e., exempt tasks), and the second is determining degree to which these tasks represent the employee’s “primary duty.”

Federal regulations provide guidance on which tasks are exempt by specifying examples of activities and jobs that are generally considered exempt.⁷ These include typical management functions such as hiring, scheduling, planning, or reviewing performance. The list of activities found within the regulations is provided in Table 3.3. Although these examples provide a useful starting point, most jobs involve many activities that are not included in the regulations, which can create uncertainty about whether those additional activities are considered “management.”

If exemption status is litigated, the court has the authority to decide which job duties are exempt. However, as a practical matter, tasks must be classified as part of the job analysis order to calculate the percent of time employees spend performing exempt work or when an evaluation is conducted proactively (i.e., no active litigation). When exemption status is challenged, the classification of tasks is likely to be scrutinized. Due to the nuances involved in classifying tasks as exempt or non-exempt and the importance of the classification, an employer may benefit from an independent review of the classification of tasks early in the evaluation process. Some employers obtain input from a third-party legal expert in wage and hour classification (often an attorney) to assist with the classification of tasks. Once tasks are classified as exempt or non-exempt, job analysis data can be collected to evaluate whether the employee’s “primary duty” is exempt work, a determination usually based on time spent performing exempt work and the importance of that work for successful job performance.

The executive exemption is intended to apply to management employees with substantial management responsibilities. First-line supervisor positions with “management-like” job titles (e.g., assistant manager, department manager, shift supervisor) sometimes cannot meet the executive exemption criteria and have been

⁵ 29 U.S.C. §218(a).

⁶ 29 C.F.R. §541.100.

⁷ See 29 C.F.R. §541.102.

Table 3.3 Examples of job duties and job titles referenced by federal regulations^a

Exemption	Generally exempt job duties	Job titles
Executive	<ul style="list-style-type: none"> • Interviewing, selecting, and training of employees • Setting and adjusting their rates of pay and hours of work • Directing the work of employees • Maintaining production or sales records for use in supervision or control • Appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status • Handling employee complaints and grievances • Disciplining employees • Planning the work • Determining the techniques to be used • Apportioning the work among the employees • Determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked, and sold • Controlling the flow and distribution of materials or merchandise and supplies • Providing for the safety and security of the employees or the property • Planning and controlling the budget • Monitoring or implementing legal compliance measures 	None specified
Administrative	<p>Work in functional areas such as:</p> <ul style="list-style-type: none"> • 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 	<p><i>Examples that generally meet the exemption:</i></p> <ul style="list-style-type: none"> • Insurance claims adjusters • Employees in the financial services industry • Employees who lead a team assigned to complete major projects • Executive assistant to a business owner or senior executive • Human resources managers • Purchasing agents <p><i>Examples that generally do not meet the exemption:</i></p> <ul style="list-style-type: none"> • Ordinary inspection work • Examiners or graders • Comparison shoppers • Public sector inspectors or investigators

(continued)

Table 3.3 (continued)

Exemption	Generally exempt job duties	Job titles
Professional (learned)	<ul style="list-style-type: none"> • None specified 	<p><i>Examples that generally meet the exemption:</i></p> <ul style="list-style-type: none"> • Registered or certified medical technologists • Nurses • Dental hygienists • Physician assistants • Accountants • Executive chefs and sous chefs • Athletic trainers • Funeral directors or embalmers • Teachers • Physicians <p><i>Examples that generally do not meet the exemption:</i></p> <ul style="list-style-type: none"> • Practical nurses and other similar health-care employees • Accounting clerks and bookkeepers • Cooks • Paralegals and legal assistants

^aNote that these are examples from the regulations that *generally* qualify as exempt. There are many circumstances that could impact these general classifications

the frequent subject of misclassification lawsuits under this exemption. Employees in these positions often perform some managerial duties, but they may also perform some of the same nonmanagerial duties as the non-exempt employees they manage.⁸ In later sections, I describe methods that are typically used to evaluate the executive exemption.

3.5.1 *Employer’s Realistic Expectation*

There are times when employees perform their job in a manner that is inconsistent with their employer’s expectations. As an example, an exempt manager may choose not to perform any of their managerial duties and instead focus on non-exempt duties that are typically performed by non-exempt employees. This would probably make that employee a poor performer, but does it also make the company legally

⁸ See Banks (2004).

liable for misclassifying that employee? In evaluating exemption status, courts have considered whether the employee's practice diverges from the employer's realistic expectations⁹ and whether there was any expression of employer displeasure over an employee's performance. In other words, employees should not be able to "underperform" their way out of an exemption.

This issue may arise when allegations of misclassification involve a single plaintiff as opposed to a class action. This typically occurs when the court does not certify a class action but an individual plaintiff chooses to pursue their claims anyway. In this situation, collecting data on the work performed by other employees may not be able to precisely describe how the plaintiff performed his or her job. Instead, data collected from other employees can be useful for assessing whether the company's expectation for employees in the plaintiff's position to perform the job in an exempt manner is realistic. Data showing that the majority of employees in the plaintiff's position spent most of their time performing exempt work provides evidence that the expectation to perform the job in this manner is realistic.

3.5.2 Methods to Evaluate the Executive Exemption

There are a few reasons why an assessment of exemption status is conducted: to determine the appropriate classification for employees, to audit existing classifications, and to provide evidence in litigation. The methods used to gather relevant data are generally the same for all purposes. However, the data collection method is likely to encounter substantial scrutiny when conducted for purposes of litigation. In addition, the outcomes associated with the evaluation in litigation are considerably higher stakes than a similar study conducted in a non-litigation environment.

There are three primary methods to study the executive exemption: observational studies, self-report questionnaires, and structured interviews. The foundations for each of these methods are discussed in Chap. 2. Please refer to that chapter for more detail about these methods. In this section, I will expand on the information presented previously by addressing some considerations specific to evaluating the executive exemption.

Observation Observational studies have become one of the most commonly used approaches in the past few decades to determine whether employees meet the criteria for the executive exemption. An observational approach is typically used to study jobs that consist primarily of tasks that are either physical or otherwise observable. Observations are often used in industries such as retail, food service, and grocery where job analysts can clearly understand and describe the tasks employees perform. Observations are either conducted by a live observer or by analyzing prerecorded video footage. Live observations are typically more effective

⁹See *Ramirez v. Yosemite Water Co.*

than video observations in this context because live job analysts are able to capture subtle aspects of the work environment that impact the classification of tasks as exempt or non-exempt. Details such as the content of conversations or phone calls, printed or electronic information the employee is reviewing, or the reasons the employee is performing a task can provide critical information and can be obtained more easily by a live observer. In addition, live observers can easily move with the employees when they move within the premises and especially when they leave the premises (e.g., attend an off-site meeting).

An observation study usually begins with the creation of a detailed task list that includes all tasks the employee may perform.¹⁰ The task list is compiled based on various sources including existing documents (e.g., job descriptions, operation manuals, performance criteria), preliminary observations or “site visits,” interviews with subject matter experts (SMEs), or external resources such as O*NET.¹¹ A typical task list consists of 200–300 discrete tasks although the number of tasks can vary by job. Each task begins with a verb in the present tense and describes an observable¹² unit of work (e.g., “process customer transaction at register”). Tasks are then grouped into homogenous groups or “task areas” (e.g., serving customers”). Grouping tasks that serve a similar function is a common practice in job analysis, but the groupings serve an additional function in the evaluation of exemption status. Each task area consists of tasks that are also homogeneous with respect to exempt status, so that group-level data can be used to calculate the percent of time spent performing exempt work. That is, each task area is comprised entirely of exempt tasks or entirely of non-exempt tasks. This often requires some functions to be split into two separate task areas, one non-exempt and one exempt. For instance, a restaurant manager’s responsibility for “customer service” usually consists of some exempt and some non-exempt tasks. The non-exempt portion (“serving customers”) includes tasks that servers or hosts typically perform, such as showing customer to their table, taking food and drink orders, and delivering food to the customer. The exempt portion (“overseeing customer service”) consists of managerial duties that servers or hosts do not typically perform, such as approving discounts or special pricing, evaluating customer’s satisfaction with their service (“table touching”), or resolving customer complaints. Table 3.4 contains an example of the task list structure for managerial jobs in the retail and food service industries.

Often, the breadth of a managers’ responsibility within their establishment results in a task list with more exempt task areas than non-exempt task areas. However, the number of exempt task areas does *not* bias the study results to overestimate the amount of non-exempt time. The task list reflects the comprehensive

¹⁰This approach is similar to what has previously been described as a job task analysis (JTA). See Gael (1988) for additional detail on this approach.

¹¹O*NET is publically available at <https://www.onetonline.org/>

¹²Tasks beginning with verbs such as “verify” or “ensure” do not describe observable behavior and can be problematic if used in an observational study.

Table 3.4 Examples of task list structure

Retail store manager	Restaurant manager
Task area (exempt/non-exempt) • <i>Example tasks</i>	Task area (exempt/non-exempt) • <i>Example tasks</i>
Directing customer service (exempt) <ul style="list-style-type: none"> • Assist cashier with questions • Review customer service survey results 	Overseeing and directing guest service (exempt) <ul style="list-style-type: none"> • Direct server to run food to customer • Resolve guest complaints
Serving customers (non-exempt) <ul style="list-style-type: none"> • Greet customers in the store • Process customer transactions at register 	Serving guests (non-exempt) <ul style="list-style-type: none"> • Seat customer at the table • Take customer's food order
Overseeing inventory (exempt) <ul style="list-style-type: none"> • Direct associates to restock merchandise on sales floor • Review displays in the store compared to plan 	Monitoring food preparation (exempt) <ul style="list-style-type: none"> • Evaluate appearance of food • Check temperature of food
Stocking products (non-exempt) <ul style="list-style-type: none"> • "Front and face" products on shelves • Restock merchandise on sales floor 	Preparing food (non-exempt) <ul style="list-style-type: none"> • Add garnish to plated food • Pull product from freezer to thaw
Supervising merchandise delivery process (exempt) <ul style="list-style-type: none"> • Review and sign delivery invoice • Inspect quality of delivered merchandise 	Training and developing staff (exempt) <ul style="list-style-type: none"> • Provide training to new employees • Conduct coaching session with employees
Receiving and processing deliveries (non-exempt) <ul style="list-style-type: none"> • Unload merchandise from delivery truck • Scan delivered merchandise using handheld 	Managing HR and personnel (exempt) <ul style="list-style-type: none"> • Update employee personnel file • Advertise open positions
Training and coaching staff (exempt) <ul style="list-style-type: none"> • Review employee completion of online training modules • Provide performance feedback to employees 	Controlling inventory (exempt) <ul style="list-style-type: none"> • Place food and supply order • Verify and sign for accuracy of deliveries
Managing hiring (exempt) <ul style="list-style-type: none"> • Review job applications • Conduct job interviews 	Analyzing labor hours (exempt) <ul style="list-style-type: none"> • Prepare labor hours forecast • Evaluate labor hour usage report
Analyzing store performance (exempt) <ul style="list-style-type: none"> • Review store performance metrics • Analyze sales trends 	Analyzing store sales (exempt) <ul style="list-style-type: none"> • Analyze store sales reports • Complete profit and loss (P&L) report
Scheduling and planning work (exempt) <ul style="list-style-type: none"> • Prepare employee's work schedules • Assign daily tasks to employees 	Overseeing handling cash (exempt) <ul style="list-style-type: none"> • Count and reconcile cash in safe • Pull change from safe for servers or bartenders
Overseeing cash handling and loss prevention (exempt) <ul style="list-style-type: none"> • Take cash deposit to the bank • Investigate cash discrepancies 	Monitoring customer and employee's safety (exempt) <ul style="list-style-type: none"> • Conduct safety inspection • Prepare accident report

(continued)

Table 3.4 (continued)

Retail store manager	Restaurant manager
Task area (exempt/non-exempt)	Task area (exempt/non-exempt)
<ul style="list-style-type: none"> • <i>Example tasks</i> 	<ul style="list-style-type: none"> • <i>Example tasks</i>
Handling cash (non-exempt) <ul style="list-style-type: none"> • Verify cash in register at start of shift • Request change for register 	Overseeing facility maintenance and repair (exempt) <ul style="list-style-type: none"> • Inspect cleanliness of kitchen equipment • Contact IT department to report issues with POS system
Monitoring safety (exempt) <ul style="list-style-type: none"> • Conduct safety meetings • Perform store safety inspection 	Cleaning and sanitizing facility (non-exempt) <ul style="list-style-type: none"> • Wipe down tables • Clean exterior windows
Overseeing store cleaning and maintenance (exempt) <ul style="list-style-type: none"> • Call vendor to request repairs to equipment • Direct employee to sweep the floor 	
Cleaning and maintaining store (non-exempt) <ul style="list-style-type: none"> • Sweep the floor • Take garbage to dumpster 	

range of tasks employees *could* perform. The study results reflect the tasks employees *actually* perform and how much time they spend on those tasks. If an employee spends the majority of his or her time performing non-exempt tasks, the study results will reflect that, regardless of how many exempt tasks and non-exempt tasks are on the task list.

After the task list is created, the observation sample is selected and notified about the study, and observations are conducted as described in Chap. 2. Once the data are collected, each task is coded into one of the task areas. Based on the duration of each observed task, the amount of time spent performing work in each task area can be calculated. Because each task area is either entirely exempt or entirely non-exempt, the exempt task areas are summed to determine the total percent of time spent performing exempt work.

Questionnaire Job analysis questionnaires can be designed to measure many of the critical components of the executive exemption, including the percent of time an employee spends performing exempt tasks and the importance of that work. Although the percent of time spent on exempt work is a critical component of the exemption, estimating this value may be a difficult task for some employees as it requires them to recall all the work they perform, categorize that work as either exempt or non-exempt, and estimate the percent of time they spend performing the tasks within each group. To minimize the cognitive demand and maximize the accuracy of self-reports, the questionnaire can separate this process into a few distinct steps.

The first step asks employees to estimate time spent on individual tasks (task ratings). A key component of the questionnaire is a task list, which closely resembles what was described for an observational study in the previous section. The individual

Table 3.5 Example rating scale for task ratings

Use the scale below to indicate *how much time* you have spent in an *average week* performing each task *compared to all other tasks*. When selecting your rating, consider all the tasks you have performed in your job—Not just the ones in the task area.

1. Have not performed this task
 2. Very small amount of time
 3. Small amount of time
 4. About the same amount of time as other tasks
 5. Large amount of time
 6. Very large amount of time
-

tasks, grouped by task area, are included in the questionnaire, and employees are asked to report the relative amount of time they personally spend performing each task compared to all other tasks.¹³ A useful rating scale for this purpose is provided in Table 3.5.

The primary purpose for collecting task ratings is to remind the employee of all the tasks they may perform in their job and thus reduce the cognitive burden associated with unaided recall of all tasks performed. Like an observation study, task areas consist entirely of tasks that are exempt or entirely of tasks that are non-exempt which also removes the cognitive burden associated with properly distinguishing between exempt and non-exempt tasks. As discussed in an earlier section, the classification of tasks as exempt or non-exempt can be nuanced and sometimes requires a legal expert. Allowing the typical employees to make their own classifications may result in unreliable data. Pre-classifying task as exempt or non-exempt greatly enhances the reliability of the data.

After providing task ratings, the next step is for employees to report the percent of time they personally spend performing different aspects of their job. Because it's not feasible for employees to report the percent of time spent on each individual task, employees can report the percent of time they spend performing tasks in each task area. When there are many task areas, this can be done in two steps. First, employees report the amount of time they spend performing work in larger groups or work categories that include several related task areas. See Table 3.6 for an example of the work category and task area structure for a retail store manager. Once the employees have allocated their time among the larger work categories, they can then allocate their time among the smaller task areas within that work category. The groupings of tasks in the previous step (task ratings) help define the work that is included in each task area for the employee. When possible, employees should be able to see all the tasks within each task area to refresh their memory if needed. See Table 3.7 for an example.

To calculate the percent of total work time spent on each task area, the percent of time spent on the work category is combined with the percent of time spent on each

¹³Harvey (1991) questions the usefulness of this type of scale because it doesn't allow for comparisons across jobs. However, cross-job comparisons are rarely of interest in this context.

Table 3.6 Example of work category and task area structure

Work category	Task area
Customer service	Directing customer service (exempt)
	Serving customers (non-exempt)
Inventory	Overseeing inventory (exempt)
	Stocking products (non-exempt)
	Supervising merchandise delivery process (exempt)
	Receiving and processing deliveries (non-exempt)
Human resources	Managing hiring (exempt)
	Analyzing store performance (exempt)
	Scheduling and planning work (exempt)
Cash management	Overseeing cash handing and loss prevention (exempt)
	Handling cash (non-exempt)
Facility and equipment	Monitoring safety (exempt)
	Overseeing store cleaning and maintenance (exempt)
	Cleaning and maintaining store (non-exempt)

Table 3.7 Example of question to report percent of time spent in task areas

Work category	Task area	Percent of time working in task area
Inventory	Overseeing inventory (pp. 7–9)	%
	Stocking products (pp. 10–12)	%
	Supervising merchandise delivery process (pp. 13–14)	%
	Receiving and processing deliveries (pp. 15–17)	%
	Total of inventory =	100%

Instructions: Estimate the percent of time *from 0 to 100%* that you have spent in each *task area within each work category* over the last 12 months as an account manager

The percentages for task areas within each work category *must total 100%*. If you need to refresh your memory, review the tasks included in each task area (page numbers are included for your reference)

task area within that work category. For example, if an employee reports spending 50% of his or her time on the “inventory” work category and 20% of that time on the “overseeing inventory” task area, the total percent of time spent on the “overseeing inventory” task area is 10% ($0.50 \times 0.20 = 0.10$ or 10%). An advantage to this approach is that participants do not need to be aware of the classification of task areas as exempt or non-exempt. Participants’ lack of awareness of this distinction is not only acceptable but often desirable, as it prevents employees from purposely distorting results.¹⁴ Total time spent on exempt and non-exempt tasks is then calculated by summing the percent of time spent on task areas that were predetermined to be comprised entirely of exempt tasks.

¹⁴ See Chap. 2 for additional discussion on purposeful distortion.

Structured Interviews Structured interviews to evaluate the executive exemption usually follow the same structure as the questionnaire. The primary difference is that structured interviews are administered verbally. A structured interview typically includes open-ended questions, and interviewers have an opportunity to ask probing questions to clarify responses or extract more detail. For some jobs that are highly complex or specialized, it is not feasible to generate a comprehensive task list that can be loaded into a survey or questionnaire. The structured interview allows the employees to provide customized descriptions of their job.

The structured interview follows the same logic as the questionnaire. Rather than providing a task rating section with pre-generated tasks, employees can describe the work they perform within each category in their own words. Example tasks and task area definitions are helpful for ensuring that employees are grouping the work they perform appropriately. Employees may also add additional components of work (e.g., new task areas) that were not previously included.

Employees can also provide numeric estimates for the percent of time they spend performing work in each of the task areas. The interviews are administered according to the procedures described in Chap. 2. Once data are collected, numeric data are analyzed in the same manner as questionnaire data to determine the percent of time spent on each task area and the total percent of time spent on exempt work. Non-numeric data is reviewed and in some cases analyzed using a content analysis strategy to summarize the information, identify response trends, or identify illustrative examples.

3.6 Administrative Exemption

To qualify for the administrative exemption, an employee must be “employed in a bona fide administrative capacity.”¹⁵ The specific criteria to qualify for the administration exemption are summarized in Table 3.2. Of the exemption criteria, two are commonly evaluated using job analysis methods: (1) the employee’s primary duty is “the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers,” and (2) the employee’s primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance.” These factors require detailed information about how the employee’s work supports management or contributes to the company’s general business operations and the frequency and level of authority exercised by the employee. Job analysis methods are applicable for evaluating both of these factors.

According to federal regulations, administratively exempt work is defined as “assisting with the running or servicing of the business,”¹⁶ which means the

¹⁵29 C.F.R. §541.200.

¹⁶See 29 C.F.R. §541.201 (a).

employee's function is to support the fundamentals of the business such as finance, human resources (HR), and administration. Administratively exempt work is distinguished from production work (e.g., manufacturing, production line work) or sales work (e.g., retail or customer service work). Federal regulations also provide several examples of job duties that are generally considered administratively exempt including work in functional areas such as accounting, marketing, and human resources.¹⁷ The full list is provided in Table 3.3.

One of the challenges associated with evaluating jobs under the administrative exemption is the importance placed on the nature of the work. Not only is the actual work that employees perform important, but the purpose of that work may impact whether the job is administratively exempt. What an employee does physically may not project the precise meaning of that work without an in-depth understanding of the context of the work. For instance, it may not be obvious that an employee who designs a new computer chip is doing something more than programming. Instead, the employee may be creating something new that enables the company to be more competitive in the marketplace by introducing a new feature. In essence, the employee is enabling the company in a material way to advance its business operations—an aspect of administratively exempt work.

To facilitate understanding of this exemption, the regulations offer examples of jobs that generally meet and do not meet the duties requirements for the administrative exemption, which are also listed in Table 3.3. Examples include employees in the financial services industry, executive assistants, and purchasing agents. However, recall that job duties, not job title, determine whether an employee is exempt. There have been multiple, high-profile lawsuits challenging the exemption status of insurance claims adjusters, a job title listed in the regulation as one that generally meets the requirements for the administrative exemption.¹⁸ The outcomes of these cases have been inconsistent, with some courts finding these employees to be exempt¹⁹ and others finding them to be non-exempt.²⁰ These outcomes illustrate the need to fully understand what work employees actually perform and the nature of that work.

3.6.1 Administrative/Production Dichotomy

Similar to other exemptions, California's version of the administrative exemption is more restrictive, requiring, among other things, that employees are "primarily engaged" in duties which meet the definition of administratively exempt. In the past, the administrative exemption was evaluated in California courts by assessing the

¹⁷ See 29 C.F.R. §541.201 (b).

¹⁸ 29 C.F.R. §541.203 (a).

¹⁹ See, e.g., *Hodge v. Aon Ins. Services*; *Harris v. Superior Court*.

²⁰ *Bell v. Farmers Insurance Exchange*.

percent of time that employee spent time performing either “administrative” work or “production” work, an analysis called the “administrative/production dichotomy.”²¹ More recently, California courts have not used a strict application of this analysis, a trend that was highlighted by a 2011 California Supreme Court decision in *Harris v. Superior Court*, which rejected the appellate court’s use of the administrative/production dichotomy. In doing so, the Supreme Court stressed the importance of other factors, such as the amount of discretion and independent judgment exercised by employees. However, a more recent decision by the ninth Circuit departed from the California Supreme Court and applied a form of the administrative/production dichotomy in evaluating whether mortgage underwriters met the administrative exemption under the FLSA.²² This decision creates a potential conflict in the appropriate analysis for employers within California which may ultimately be resolved by the US Supreme Court.²³

3.6.2 *Methods to Evaluate the Administrative Exemption*

Multiple methods may be appropriate for evaluating the administrative exemption. In some circumstances, observations provide the most useful data. The focus of observation for the administrative exemption is typically to determine the time employees spend performing work that either supports the general business operations or involves discretion and independent judgment. For instance, job analysts may ask employees during observations to describe their decision-making process (e.g., alternatives considered, reason for decisions), which may provide insight into the employee’s authority to make decisions.

Though observation may be applicable in some situations, self-report approaches are more frequently used to evaluate the administrative exemption. One reason is that an employee’s level of authority to make decisions and the potential consequences of those decisions are difficult to observe directly, as decisions may occur infrequently and are primarily mental tasks (i.e., not observable). Self-report approaches, on the other hand, can be designed to characterize these aspects of an employee’s work. In particular, structured interviews are well suited to address the administrative exemption because the open-ended nature enables employees to provide highly detailed information about the work they perform, how that contributes to business operations, and their role in decision-making. Because the work that may be considered administratively exempt is likely to differ by industry, company, or job, the general approach described here can be customized to capture all relevant aspects of an employee’s work.

²¹ *Bell v. Farmers Insurance Exchange*.

²² *McKeen-Chaplin v. Provident Savings Bank, FSB*.

²³ Petersen, Giovannone, and Finkel (2017).

Structured Interview Consistent with other job analysis methods, a useful starting point is background research about the position and organization, which usually includes activities such as site visits, SME focus groups, and a review of internal documents. The nature of the work performed and the business' operations and structure are especially important when studying the administrative exemption. Understanding how an employee's work contributes to the organization's operations, for example, is a key area of interest at this phase and differs across organizations. Effort invested in the early stages of the project to understand the organization broadly will be beneficial for developing of interview questions that properly tap into administratively exempt aspects of a job.

Interview questions can also be developed to measure the degree to which the employee performs work that involves discretion and independent judgment. Discretion and independent judgment are typically operationalized as the type of decisions in which the employee is involved, his or her role in decision-making (e.g., final decisions or giving recommendations), the importance of the decisions, and the frequency of the decisions. All employees make numerous decisions throughout the day ranging in importance from what to have for lunch to whether to acquire another company. The application of the administrative exemption is based on an employee's decision-making authority related to "matters of significance." Whether an employee plays a significant role in trivial decisions is unlikely to be relevant to exemption status.

It is important to recognize that employees' role in decision-making can be more nuanced than a dichotomous classification of whether or not they make final decisions. This is illustrated by examining typical employee responses to questions about whether they have the authority to terminate an employee (a factor cited in the regulations). Nearly all managers in companies with a sophisticated HR department report that they do not have final authority to terminate employees. A closer examination shows that most managers are required to contact the human resources department, which reviews the termination and ensures proper procedures are followed to protect the company legally (e.g., proper documentation, justified rationale). In most cases, the termination will be approved as long as the proper procedures were followed. Regulations consider an employee to have exercised discretion and independent judgment, even if their decisions or recommendations are reviewed at a higher level.²⁴ It is therefore necessary to capture this level of detail to accurately evaluate the exemption. An example of a response scale to accomplish this goal is provided in Table 3.8.

²⁴29 C.F.R. §541.202 (c).

Table 3.8 Scale to assess role in decision-making

Please use the following scale to indicate your <i>role</i> in making each decision:
1. I have made final decisions
2. I have made recommendations that were regularly followed
3. I have made recommendations that were occasionally followed
4. I have no involvement in this decision

3.7 Professional Exemption

There are two versions of the professional exemption for which an employee can qualify: “learned professional” and “creative professional.”²⁵ The criteria to meet each are summarized in Table 3.2 and described below. Evaluating the learned professional exemption is where job analysis methods most useful and therefore the focus of this section. To qualify for the learned professional exemption, an employee’s primary duty must be work “requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.”²⁶ This factor includes three components, all of which must be present.²⁷ First, the employee’s primary duty requires advanced knowledge. This means that work is primarily intellectual in nature and involves consistent exercise of discretion and judgment. Second, the advanced knowledge must be in a “field of science or learning.” These include law, medicine, accounting, and engineering,²⁸ because they have a recognized professional status as opposed to mechanical arts or skilled trades. Third, the advanced knowledge must be “customarily acquired by a prolonged course of specialized intellectual instruction.” In other words, the knowledge must be academic in nature, as opposed to knowledge acquired through experience (e.g., on the job training). Jobs such as nurses, teachers, and physicians are listed in federal regulations as examples of job titles that are generally considered exempt under the professional exemption.²⁹ The full list of job titles cited in the regulations is provided in Table 3.3.

A potential dispute is whether an advanced degree is *required* to perform a job or simply *preferred*. Even when all current employees in the job have an advanced degree, questions may still remain as to whether the degree is required or whether someone without the degree would be capable of performing the job effectively. Several companies in the high-tech industry have faced litigation related to classification of employees under the professional exemption. The details of the work performed by technical employees are not widely understood, creating a lack of clarity as to whether these employees meet the professional exemption criteria.

²⁵ 29 C.F.R. §541.300.

²⁶ 29 C.F.R. §541.301.

²⁷ See 29 C.F.R. §541.301.

²⁸ See 29 C.F.R. §541.301(c).

²⁹ 29 C.F.R. §541.301 (e).

Employees in this field may have bachelor's or master's degrees in fields such as electrical engineering or computer science, but it sometimes isn't obvious whether these degrees are necessary to perform the work. In such cases, it is crucial to understand the technical details of the work being performed, how the work is performed, why it is performed, and how the work is connected to in the business before one can determine what knowledge is required to perform that work and where that knowledge is customarily acquired. Even after that determination, it is not clear what level of education meets the exemption criterion. Therefore, it is up to the court to determine what "advanced knowledge" means in each case, based on a detailed description of the work and the knowledge required to perform that work. Job analysis data can contribute significantly to the court's ability to make an accurate determination.

3.7.1 Methods to Evaluate the Learned Professional Exemption

Evaluation of the learned professional exemption involves an understanding of the knowledge, skills, abilities, and other characteristics (KSAOs) required to perform the job successfully and how those KSAOs are typically acquired (e.g., prolonged study of an advanced nature or on the job training). Personnel selection professionals regularly address these same issues when designing systems to hire new employees. Selection systems often include the identification of "minimum qualifications" for job applicants to be considered for a position. The use of minimum qualifications, such as educational degree, as an initial screening tool is a common practice in both public and private sectors.³⁰ In the context of personnel selection, job analysis data is typically used as evidence to support job-relatedness and validity of the minimum qualifications and enhance the legal defensibility of the selection system. Similar to an evaluation of the learned professional exemption, the goal is to determine whether a specific educational degree is required to perform the work and, if it is, provide reliable data to support that conclusion.

Several authors have proposed customized job analysis methods specifically for the purpose of demonstrating the validity of using minimum qualifications as a screening tool when selecting new employees.³¹ These methods have proven useful for determining whether an educational degree, or other experience requirements, is related to the content of a job and have withstood legal scrutiny in multiple instances. Although these approaches have previously been applied for purposes of selection, they provide a useful framework for evaluating the applicability of the professional exemption. The following approach is based on recommendations provided by Buster et al. (2005) but adapted to address issues specific to the professional exemption.

³⁰ Buster, Roth, and Bobko (2005).

³¹ See, e.g., Wooten and Prien (2007); Buster et al. (2005); Prien and Hughes (2004); Levine, Maye, Ulm, and Gordon (1997).

An evaluation starts with a job analysis that identifies the tasks and KSAOs that are critical to the job, focusing on those that are required immediately upon entry into the job, as opposed to those that can be learned on the job. Based on these tasks and KSAOs, an initial list of potential educational requirements is developed with input from SMEs. The SMEs independently rate the degree to which specific educational requirements are required to perform the job while considering alternatives such as varying levels of education, professional certifications, or job experience. The educational requirements are then linked to individual tasks and KSAOs identified in the job analysis to document the relationship between the educational degree and the job requirements and to evaluate the proportion of the content domain that is related to the educational degree.

Despite the clear applicability of this approach to address legal questions related to the learned professional exemption, it is yet to be tested in this context. For any method used in litigation, reliance on well-established job analysis techniques and prior acceptance in the court system strengthens the ability to withstand legal scrutiny.

3.8 Other Exemptions

In addition to the “white-collar” exemptions, the federal regulations identify a group of occupations that are also considered exempt. These occupations include teachers, outside salespersons, computer professionals (e.g., programmers, software engineers), public safety employees (police officers), and fire protection employees.³² Although these jobs are specifically designated as exempt in the federal regulations, the exemption status of employees who hold these job titles has been disputed based on questions regarding employees’ actual job duties. As an example, an employee could hold the title of “outside sales” but not actually perform the duties of outside salespersons where the work meets the exemption criteria.³³

There have been a few notable cases challenging the outside salesperson exemption for pharmaceutical sales representatives, individuals who visit physicians’ offices, educate them on the drugs they represent, provide drug samples to the physicians to use with their patients, and encourage physicians to prescribe these drugs for their patients. A key issue in such cases is whether the act of meeting with physicians and gaining nonbinding commitments to use the representatives’ drugs constitutes “sales.” A representative’s performance is judged by how many prescriptions of the representative’s drugs the physician writes and how many prescriptions are filled by a local pharmacy. No sales are directly made by the representative, but rather the actual sale occurs sometime later, following the representative’s visit to the physician. Legally, are these activities sales activities? The US Supreme Court ruled in 2012 that this activity did constitute sales and

³² 29 C.F.R. §541.3.

³³ See 29 C.F.R. §541.500.

therefore pharmaceutical sales employees are properly classified as exempt.³⁴ These exemptions again highlight the need for in-depth and thorough understanding of the work performed by employees.

3.9 The Future of FLSA Exemptions

Starting in March 2014, the US Department of Labor (DOL) engaged in an effort, at the direction of President Obama, to “modernize and streamline” the regulations that define the white-collar exemptions.³⁵ After a lengthy rulemaking process, the Department of Labor released a final rule in May 2016 which was scheduled to take effect on December 1, 2016.³⁶ The primary change in the final rule was a substantial increase in the minimum salary for exempt employees: from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). The new minimum was set at the Fortieth percentile of earnings of full-time salaried workers in the lowest-wage census region. Therefore, all exempt employees who previously qualified under one of the white-collar exemptions and earned less than \$47k per year would no longer meet the salary test and will become non-exempt. Notably, no changes to the duties test were included in the final rule, despite being discussed by the DOL as a possibility and receiving considerable attention.

However, a group of 21 states filed litigation over the legality of the final rule, and days before the new rule was to take effect, a federal judge placed a temporary injunction on the final rule, preventing it from taking effect.³⁷ Eventually, in August 2017, the judge permanently blocked the rule, in part because the new salary was so high that it essentially rendered the duties test irrelevant (nearly all employees who meet the new salary would also meet the duties test) which is inconsistent with the intent of the FLSA.³⁸ The ruling emphasized the importance of evaluating employee job duties in determining which employees are exempt.

Although the proposed rule change did not take effect, indications at the time of this writing are that the DOL intends to pursue alternative revisions. The DOL issued a Request for Information (RFI) in July 2017 to assist the department in preparing a new proposal to revise FLSA regulations. The labor secretary has stated that he believes the previous salary was too high,³⁹ but the department has appealed one part of the ruling that blocked the previous final rule to confirm the agency’s authority to set a salary threshold, something that was called into question by the ruling.⁴⁰ Therefore, it is expected that the DOL will propose an increase in the salary level but

³⁴ *Christopher v. SmithKline Beecham Corp.*

³⁵ Executive Office of the President (2014).

³⁶ US Department of Labor (2016).

³⁷ *State of Nevada et al. v. U.S. Department of Labor et al.* (2016).

³⁸ *State of Nevada et al. v. U.S. Department of Labor et al.* (2017).

³⁹ Campbell (2017a).

⁴⁰ Campbell (2017b).

at a level lower than what was previously proposed. It is unknown whether changes to the duties test will also be proposed. Based on the DOL's announcement of its fall regulatory agenda, there may be a new overtime rule proposed in October 2018.

3.10 Conclusion

This chapter was intended to provide readers an overview of exemptions from FLSA coverage for which employees can qualify along with the specific criteria associated with each exemption. The three most common exemptions (executive, administrative, and professional) were discussed in detail, and I discussed methodological options to evaluate each exemption. Evaluation of exempt status requires detailed job analysis data that addresses the key legal issues involved, and this chapter can serve as a useful reference for those conducting such an evaluation.

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