

**FAIR LABOR STANDARDS ACT (“FLSA”)**  
**MISCLASSIFICATION &**  
**OUTSIDE SALES EMPLOYEE EXEMPTION**

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The purpose of this brief informational article is to lay out the general overtime and minimum wage rules required under the FLSA, note several exceptions to the rule, and finally to focus on one of the exceptions in particular.

**General Rule:** Subject to exceptions, the FLSA requires that most employees be paid a minimum wage and one and one-half times that minimum wage for any hours worked in excess of 40 per week. This 40-hour limit before overtime is required does not limit the amount of hours an employee may work in a day, again subject to specific industry regulations. The federal minimum wage at the writing of this article is \$7.25/hour. States may offer employees working within their boundaries greater minimum wage and overtime protections than the FLSA; however, employers are prohibited from paying less than the minimum wage amount required under the federal law. Employers are required to comply with both state and federal minimum wage and overtime laws.

**Exemptions Generally:** Section 13(a)(1) of the FLSA provides an exception to the both the minimum wage and overtime requirements noted above if such employee is a *bona fide* executive, administrative, professional or outside sales employee. There is an additional exception for certain computer workers. An employer may not simply classify or re-classify a worker under one of the above categories to absolve itself from the responsibilities of paying minimum wage and overtime. The FLSA has very strict guidelines for categorizing an employee under one of the exemptions, thus the phrase “bona fide” embedded in the actual law. In order for an employer to properly classify a worker as exempt under the law, the individual must be paid a minimum of \$455.00 per week as well as be able to meet certain other minimum requirements set out in the United States Department of Labor (“DOL”) Regulations.

**Outside Sales Employee Exemption:** The exemption may vary from state to state, however, the FLSA outside sales employee exemption will be met if: (a) the employee’s primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; AND (b) the employee must be customarily and regularly engaged away from the employer’s place or places of business. Although the definition may appear to be relatively straight forward, the FLSA and regulations promulgated thereunder offer additional guidance as to how each word and phrase may be interpreted in order to comply with the law. For example, “primary duty” may be interpreted

as the employee's most important function of his/her job, taking all of the employee's responsibilities into account; "sales" may be more broadly defined to mean "any sale".

**Application to Reality:** It seems rather intuitive to assume that because a commissioned salesperson is not paid on an hourly basis, that he/she naturally falls under the FLSA outside sales employee exemption, and therefore the employer is not required to pay minimum wage and overtime under the FLSA as the employee will be compensated purely on a commission basis. However, an employer must be careful to make sure the employee is truly an outside sales employee according to his/her actions and job duties, rather than an in-house employee making numerous sales over the telephone or email, and making outside sales calls occasionally or incidentally to the other "sales" functions. Pre-scripted marketing pitches at the employer's direction may also be enough to knock an employee outside of the exemption and into a marketing employee category, who would be entitled to overtime and minimum wage under the FLSA.

**Conclusion:** The DOL as well as the federal and state courts are becoming ever more interested in what has become a common practice of misclassifying workers in order for employers to avoid minimum wage and overtime requirements. It is insufficient for an employer to rely on a job title to defend itself if the employee's actions are contrary to the legal elements required to meet the exemption. It is important for employers to not only have job descriptions for their employees that strictly define the duties of the position, but that the employees' actions meet such description.

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