

# Can Exempt Workers Perform More Nonexempt Duties During the Pandemic?

Labor Department answers more COVID-19-related questions

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**W**orkers may find themselves taking on different tasks during the coronavirus pandemic as business operations slow down or shift. So what does that mean for exempt employees who perform more nonexempt duties to meet changing business needs?

The U.S. Department of Labor (DOL) recently addressed this question in updated guidance ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Labor-Department-Issues-More-Coronavirus-Related-Workplace-Guidance.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Labor-Department-Issues-More-Coronavirus-Related-Workplace-Guidance.aspx)). During the COVID-19 public health emergency—as declared by a federal, state or local authority—employees who are exempt from the Fair Labor Standards Act's (FLSA's) overtime requirements under the executive, administrative and professional exemptions may temporarily perform nonexempt duties that are required by the emergency without losing their exempt status, the department said.

Exempt employees, however, still need to earn the minimum weekly salary to qualify for the so-called white-collar exemptions. The FLSA's salary cutoff was raised ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-issues-final-federal-overtime-rule.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-issues-final-federal-overtime-rule.aspx)) to \$684 a week (\$35,568 annualized) on Jan. 1, 2020.

The DOL Wage and Hour Division's regulations allow for flexibility during certain emergencies. "COVID-19 is a rare event affecting the public welfare of the entire nation that an employer could not reasonably anticipate and is consistent with the FLSA's regulatory criteria for emergencies," the department said.

*[SHRM members-only resource: COVID-19 Checklist for Updating Handbook Policies and Plan Documents*

*([www.shrm.org/ResourcesAndTools/tools-and-samples/hr-forms/Pages/COVID-19-Checklist-Updating-Handbook-Policies-and-Plan-Documents-.aspx](http://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-forms/Pages/COVID-19-Checklist-Updating-Handbook-Policies-and-Plan-Documents-.aspx))*

The DOL has recognized that COVID-19 is a covered emergency because it is, at a minimum, a threat to employee safety and health and an employer's ability to continue to operate its business, explained Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C.

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### Exempt-Duties Tests

A common mistake employers make is thinking they can assign any duties to exempt employees, so long as the workers are paid the appropriate salary, observed Matt Simpson, an attorney with Fisher Phillips in Atlanta.

Ordinarily, however, to be exempt from overtime under the FLSA, employees must be paid a salary of at least the threshold amount and meet certain duties tests. If they are paid less or do not meet the tests, they must be paid 1 1/2 times their regular hourly rate for hours worked in excess of 40 in a workweek.

Each of the three white-collar exemptions has slightly different criteria:

- **Executive exemption.** The employee's primary duty must be managing the enterprise or a department or subdivision of the enterprise ([https://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](https://www.dol.gov/whd/overtime/fs17b_executive.pdf)). The employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire workers (or the employee's suggestions and recommendations as to hiring, firing or changing the status of other employees must be given particular weight).
- **Administrative exemption.** The employee's primary duty must be performing office or nonmanual work that is directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty also must include the exercise of discretion and independent judgment ([https://www.dol.gov/whd/overtime/fs17c\\_administrative.pdf](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf)) with respect to matters of significance.
- **Professional exemption.** The employee's primary duty must be to perform work requiring advanced ([https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf)) knowledge in a field of science or learning that is customarily acquired by prolonged, specialized intellectual instruction and study.

"Exempt employees can always perform some nonexempt duties; they just primarily have to perform exempt duties," Simpson explained.

The Wage and Hour Division's regulations allow employees who otherwise qualify for a white-collar exemption to perform more nonexempt duties during emergency situations that "threaten the safety of employees, a cessation of operations or serious damage to the employer's property" and are beyond the employer's control and couldn't reasonably be anticipated.

### Proceed with Caution

Much of the DOL's recent guidance is meant to clarify existing law, as certain wage and hour issues may be more common during the COVID-19 crisis. "During this time, people are improvising as to what tasks they are doing, but employers always need to think about going back to FLSA principles," Simpson said. Employers still need to make sure exempt employees are paid a salary and earning at least the minimum salary, he added.

*[How have you adapted to the pandemic? Share your story with SHRM's Government Affairs team*

*(<https://shrm.formstack.com/forms/resiliency>) as they educate decision-makers on crafting policies on work, workers and the workplace.]*

Employers should note that the Wage and Hour Division's applicable emergency regulation, 29 CFR Section 541.706 ([https://www.ecfr.gov/cgi-bin/text-idx?SID=7b7b31516b156ff41abe038d4befe992&mc=true&node=se29.3.541\\_1706&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=7b7b31516b156ff41abe038d4befe992&mc=true&node=se29.3.541_1706&rgn=div8)), doesn't address the duration for which an exempt employee may perform more nonexempt work during a valid emergency. "Emergencies are rare ... and potentially do not continue for long durations of time," Robinson said. "However, it is not clear what the outer limits may be for the duration of an emergency that can be claimed under Section 541.706."

But employers shouldn't rely on the emergency exception indefinitely. "As the COVID-19 pandemic continues to cause ongoing disruptions to business operations and societal norms," Robinson said, "at some point, employers may be expected to adapt to situations in which they are able to adequately protect employee safety and health and it is no longer necessary for exempt employees to perform nonexempt work."

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