

5 Pro Tips for Analyzing Overtime

Littler[®]



Lori Brown

CEO, ComplianceHR

Littler Shareholder

labrown@littler.com

 @labrown1419

- Former General Counsel / HR Chief of Global Security Organization
- Career Compliance Geek
- Need more information?
<https://compliancehr.com/resources/>

Follow Us on LinkedIn: ComplianceHR

Answering Your Questions

1. Q & A Box on your screen
(questions are confidential – visible to presenters only)
2. Or, Ask at Session's End





PolicySmart™

- Comprehensive library of customizable federal and state specific model policies
- Innovative compliance timeline of important legal changes soon to take effect
- Access to jurisdiction-specific checklists
- Monthly automated emails with a summary and analysis of relevant legal documents

Effective Date Timeline

Jurisdiction	Effective Date
California	09/01/2020
Colorado	09/01/2020
	01/01/2021
	01/01/2021

Filter Timeline

Effective Within

- One Month: 2
- Six Months: 4
- One Year: 4

Filter News

Select Jurisdiction: - Select All -

Requires Policy Update: - Select All -

PolicySmart

This application provides you with the tools of documents:

- A National Template
- State Supplements
- Policy Checklists
- State Guides

The National Template includes a number of traditional policies (e.g., EEO, Harassment, FMLA, Meal Breaks, Standards of Conduct), along with optional sample policies you can customize and provide to employees if they are relevant for your workforce and operations (e.g., Workplace Bullying, Holidays, Personal Appearance and Grooming).

There is a State Supplement to that National Template for every state and the District of Columbia. In the State Supplements you will find policies that carefully track state and locality-specific distinctions from those general, national policies. In the state materials, you will find addenda that identify the protected categories under state EEO laws, state-specific meal break, predictive scheduling, lactation accommodation and leaves of absence policies. We also provide policies tracking sick leave, lactation accommodation and predictive scheduling requirements for major municipalities, which are localities with 100,000 or more residents.

The State Supplement policies are drafted to comprehensively track statutory requirements, while also identifying places for customization. Throughout the templates, you will see comments intended for the policy drafter. These comments may explain why specific language appears, signal updates made within the last year or provide context or background information to help you customize the policy.



Policy Revisions by State

Minnesota

- Wage Disclosure Protection
- St. Paul Sick and Safe Time
- Minneapolis Paid Sick Time

Colorado

Comp of COMPS Org

Michigan

- Social Security Number Privacy

Penn

- Philadelphia Wage Theft Ordinance Notice

Illinois

- Equal Employment Opp
- Sexual Harassment
- Sexual Harassment Protection for "Hotel Workers in Chicago"
- Religious Accommodation
- Pregnancy Accommodation

California

- California Family Rights Act
- New Parent Leave Act
- Pregnancy Disability Leave
- San Francisco Lactation Accommodation
- San Francisco Supplemental Compensation for New Child Bonding

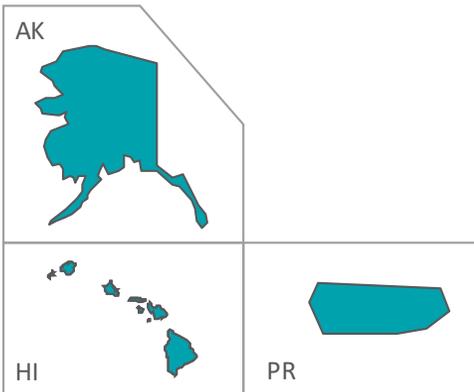
Paid Sick Leave

New York

- Paid Family Leave
- Reproductive Health Decision-Making

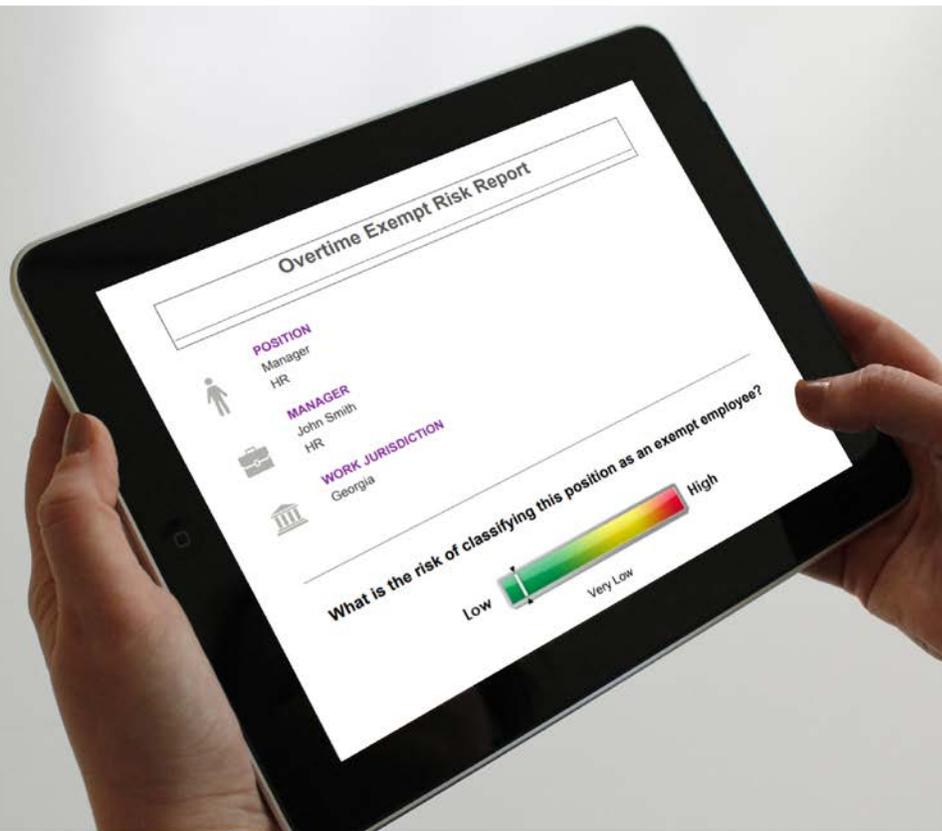
Columbia

DC Family and Medical Leave





Navigator OT



- Determines employee as exempt or non exempt
- Applies all applicable federal and state tests
- Draws from a proprietary engine of **2,400+** reported court decisions and DOL opinion letters
- Delivers reasoned suggestions on how to lower the risk of misclassification
- Provides the risk result, a summary of relevant federal and state exemption standards, and a transcript of answers

Try the Navigator Suite Free for 14 Days

The screenshot displays the Compliance HR Navigator Suite interface. At the top left, the logo "Compliance HR" is visible. Below it, there are two profile cards for Lori Brown (CEO - ComplianceHR, Shareholder - Littler) and Tammy McCutchen (Strategic Adviser - ComplianceHR). The main content area features a "Slides" window showing a presentation slide titled "5 Pro Tips for Analyzing Overtime" with the Littler logo and Compliance HR branding. To the left of the slides is an "Q&A (Content & Technical)" section with a text input field and a "Submit" button, highlighted by a red arrow. To the right is a "Resources" section listing "Feedback Form", "State-By-State CLE Guide", and "Presentation Materials". At the bottom, a navigation bar contains icons for CLE, Q&A, a question mark, a book, a speaker, a calendar, and a person icon. The text "POWERED BY ON24" is located in the bottom right corner of the interface.



What You'll Receive

- Full slide presentation (pdf format)
- Link to recorded audio presentation
- Free 14-day trial
- freetrial@compliancehr.com





Agenda

- Interview Skills for Determining Exempt v. Non-Exempt
- Tackling the "Duties Test"
- Understanding the Primary Duties: "The Grid"
- Role Play Clinic



Tammy McCutchen

Strategic Advisor, ComplianceHR

tammy@compliancehr.com

 [@tdmccutchen](https://twitter.com/tdmccutchen)

- Former Administrator, US-DOL Wage & Hour Division and author of 2004 revisions to the overtime regulations
- Leading authority on federal and state wage and hour laws

Interviewing and Fact-Finding for Exempt/Non-Exempt



Preparing for the Interview



- Review the job description
- Plan your questions
- Chose the exempt manager with the most knowledge of the job duties

Tackling the Job Description: *Fact or Fiction?*



- Is the job description accurate?
- Is job description most recent?
- Are there any significant job duties not included in the job description?
- How many employees in this position?
- Are you the person most knowledgeable about what this position does? If not, has your client interviewed the manager most familiar?

Pro Tip #1: It's All About the Verbs!!

Reviews	Prepares
Creates	Maintains
Calculates	Manages
Handling	Directing
Oversees	Supports
Leads	Conducts
Determines	Performs
Plans	Coordinates

- Seek more information on verbs (*what's the context?*)
- What do employees do, step-by-step, when “handling” a complaint.
- Be forensic. (*Great: what does that mean?*)

Pro Tip #2: Watch For Non-Exempt Verbs!



- Administers
- Schedules
- Coordinates
- Follows
- Handling
- Processing
- Checking
- Entering
- Maintaining
- Inputs
- Supports



Compared to:

- Determining
- Supervising
- Analyzing
- Negotiating
- Directing
- Manages
- Develops
- Creating
- Researching
- Ensuring
- Inspecting

Pro Tip #3: Don't Stop Digging!

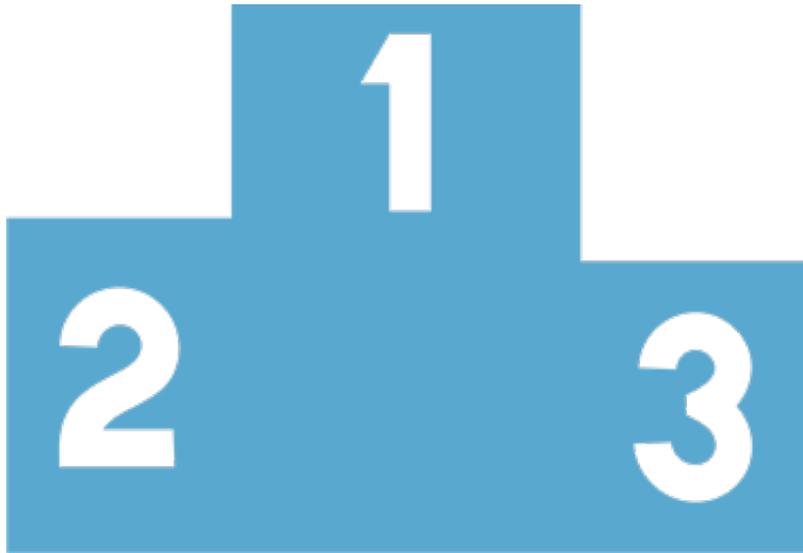
- Manages a budget
- Coordinates office activities
- Oversees vendor contracts
- Leads project teams
- Plan annual marketing calendar
- Maintains inventory

Breaking down the verb.

When you say “manages”, walk me through, step by step, each task that entails. What is the process for “managing a budget”? Do they oversee a team? Do they create the budget? Do they approve?

If that's difficult,
“take me through a typical day.”

Pro Tip #4: Rank the Job Duties



- Which of these job duties are most important?
- How would you allocate the percentage of time spent on each?
- How important is each task to the job and to what degree are their recommendations followed?

Pro Tip #5: Last Question

Is there anything else
about this job that I
need to know?



Understanding the “Duties Test”



Knowing the law....

Did you know.....?



- 2500+ Federal and state statutes, regulations and cases on exempt/non-exempt
- Attorneys must read every case to identify the job duties performed by the employees discussed in the case, and whether the court found the employee exempt or non-exempt

Breaking Down the Duties By Category

Business
Operations

Management of
Employees

Sales and
Customer
Relations

Representing the
Company

Computer Systems
and Other
Equipment

Other Job Duties

Identifying the Duties: The Navigator OT Examples



Customer Relationships

Identified Duty

- Managing client or customer relationships with authority on significant matters

Select this duty for employees who manage client or customer relationships with authority on significant matters. Use this duty for employees with authority to (or who make recommendations on) resolving major issues for significant clients that do not have standards solutions. Do not select this duty for employees who handle routine customer service complaints resolved through established solutions (if the customer complains about X, resolve by offering Y).

Examples:

- **Making recommendations consistent with the customer's objectives**
- **Resolving billing disputes with customers**
- **Negotiating services with customers**
- **Making decisions on approving or challenging invoices**
- **Staying in touch with the customers to make sure that they are satisfied, uncover any customer satisfaction issues and resolve those issues**

Customer Relationships

Identified Duty

- Handling routine customer service complaints without authority to resolve significant matters

Select this duty for employees who handle routine customer service without authority to resolve significant matters. Select this duty when the complaints reoccur on a regular basis and are resolved through established solutions (if the customer complains about X, resolve by offering Y). Do not select this duty for employees who resolve major issues for significant clients that do not have standard solutions.

Examples:

- **Fielding customer complaints**
- **Assisting counter people or customers directly with issues**
- **Answering questions and resolving complaints through a call center using established responses**

Training

Identified Duty

- Developing or managing training programs with authority to depart from any standardized training materials

Select this duty for employees who determine training needs, prepare training materials, or create tests of training comprehension. Also select this duty for employees who conduct training on complicated or technical topics that requires them to interpret the training materials or if they have authority to depart from the training materials. Do not select this duty for employees who merely coordinate training by scheduling rooms, sending invitations or tracking attendance, or employees who use existing training materials with no authority to depart from those materials in any significant way.

Examples:

- **Determining the type of training needed**
- **Deciding the methods for training employees, length of training, or the frequency of training**
- **Developing the training materials**
- **Developing tests of comprehension of the training, including certifications**
- **Conducting training if the trainer is a subject-matter expert who routinely departs from the training materials and answers questions on topics not covered by the training materials**

Training

Identified Duty

- Coordinating or conducting existing or standardized training programs (with no authority to depart from those materials)

Select this duty for employees who coordinate training by scheduling rooms, sending invitations, tracking attendance and other administrative duties. Also select this duty for employees who conduct training using existing training materials with no authority to depart from those materials in any significant way. Do not select this duty for employees who determine training needs, prepare training materials, or have authority to depart from the training materials.

Examples:

- **Administering training where time, topic, and procedure are dictated by others**
- **Scheduling training rooms**
- **Testing the trainees after their training is complete**
- **Tracking completion of training**

Tips for selecting the job duties

Choose the job duties as if you were drafting a job description

The top three to five most important job duties

Job duties that the employees spends most of their time performing

Not every job duty

Not job duties that the employee spends less than 5% or 10% of their time performing

Not job duties performed only occasionally

Diving Deeper: Understanding the 3-Prongs of the Primary Duties Test



Determining Primary Duties



- Estimate the percentage of time employees spend performing the job duty each week
- Assess the level of importance of the job duty to the position
- Identify the level of authority the employees have in making decisions or recommendations

Navigator OT: The Grid

Selected Job Duties

Below is a list of all the duties you selected. If this list is complete, please answer the following questions about each duty. If you need to remove a job duty, you can select "None" from first drop down.

The total time spent should not exceed 100%, even if multiple duties are handled [concurrently](#). The total time spent can be less than 100%.

You are currently allocating: 90%

Selected Job Duty	Approx Time Spent	Importance	Authority
Managing or directing the safety or security of employees or property	40% ▼	Very Important ▼	Almost Always Followed ▼
Following established manuals, guidelines, policies or procedures	40% ▼	Critical ▼	Never Followed ▼
Solve unique or complex issues that do not have a standard resolution	10% ▼	Very Important ▼	Sometimes Followed ▼

Percentage of Time

Now, that you've determined what the position does, how much time does the worker/position spend on each task?

- *Approximate* the percentage of time spent performing the job duty each week
- Choosing “None” or “Less than 5%”
 - ✓ Minimum to no impact on the analysis
 - ✓ Probably choosing too many job duties
- The app provides you with a running total, and warns if you go over 100%
 - ✓ You may have less than 100%
 - ✓ If you do not get over 50% in certain states, the job will come back as non-exempt

Concurrent Duties

Challenge:

- Employees may perform more than one job duty at the same time

Solution:

- Divide total time spent among the duties performed concurrently

Example

If roughly half of the job is spent handling two duties at the same time, rather than entering 50% for each of those duties, consider entering 25% for each

Importance

Assess the level of importance of the job duty to the position

1. Marginally Important
2. Somewhat Important
3. Important
4. Very Important
5. Critical

Not everything that is time consuming is important to the position.

- What about the store manager who sweeps the floors and runs the register?
- What about the trucking recruiter who hands out flyers for several hours a week at the unemployment office?

Authority



How often are the employee's recommendations followed (in regards to the selected job duty)?

1. Always Followed
2. Almost Always Followed
3. Sometimes Followed
4. Rarely Followed
5. Never Followed

Qualifier Questions

- Additional questions are necessary to determine whether other exemption requirements are met, and are populated based on answers to initial questions
 - ✓ Exemptions that may apply – executive, professional, sales, computer
 - ✓ Different state law requirements

Navigator OT

Exemption Analysis

Select the choice that best describes the functional area in which Jane Doe works:

Select all of the following statements that apply to the work that Jane Doe performs:
Check all that apply

Work that regularly and directly assists a business owner or executive

Work that is important to the decision-making process of a business owner or executive

The work is performed under only general supervision, along specialized or technical lines requiring special training, experience or knowledge

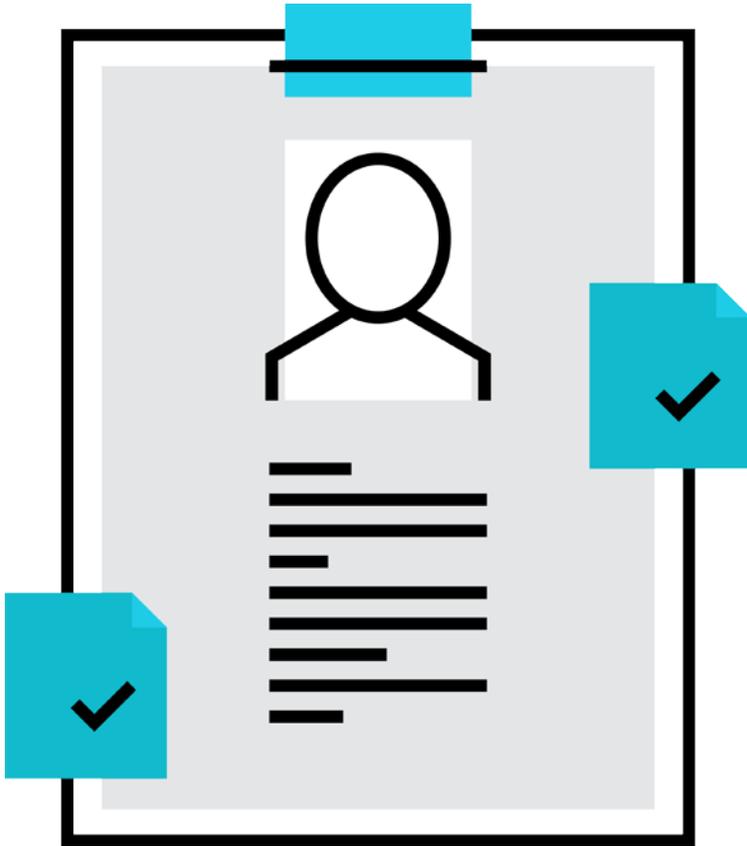
The work involves special assignments and tasks under only general supervision

None of the Above

Role Play

Littler[®]

Job Description



- **Console Supervisor**

- Supervising safe, reliable and environmental sound operations of several refinery processing units
- Performing appropriate critical instrument checks and troubleshooting operating problems

The Interview

Supervision:

- How many employees do you supervise?
- What does supervising of operations involve?

Troubleshooting:

- What types of problems do you troubleshoot?
- Do you resolve the problems yourself?





Translating to Navigator OT

Selected Job Duties

Below is a list of all the duties you selected. If this list is complete, please answer the following questions about each duty. If you need to remove a job duty, you can select "None" from first drop down.

The total time spent should not exceed 100%, even if multiple duties are handled **concurrently**. The total time spent **can** be less than 100%.

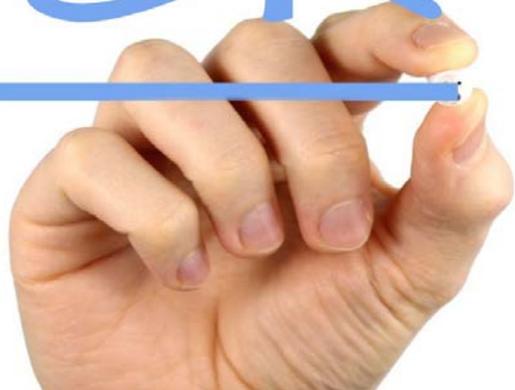
You are currently allocating: 90%

Selected Job Duty	Approx Time Spent [®]	Importance [®]	Authority [®]
Managing or directing the safety or security of employees or property	40% ▼	Very Important ▼	Almost Always Followed ▼
Following established manuals, guidelines, policies or procedures	40% ▼	Critical ▼	Never Followed ▼
Solve unique or complex issues that do not have a standard resolution	10% ▼	Very Important ▼	Sometimes Followed ▼



Navigator OT Result

RISK



Overtime Exempt Risk Report

POSITION
Console Supervisor
Operations

WORK JURISDICTION
Texas

REGULATIONS
2020

What is the risk of classifying this position as an exempt employee?

Low  High

Moderately High

Employees in this position are unlikely to meet the requirements for the following exemption: Administrative.

Employees in this position are extremely unlikely to meet the requirements for the following exemption: Learned Professional.

Employees in this position do not qualify for the following exemptions: Computer, Creative Professional, Executive and Outside Sales.

[View All Individual Exemption Risks](#)



Agenda = Done

- ✓ Interview Skills for Determining Exempt v. Non-Exempt
- ✓ Tackling the "Duties Test"
- ✓ Understanding the Primary Duties: "The Grid"
- ✓ Role Play Clinic

Try the Navigator Suite Free for 14 Days

The screenshot displays the Compliance HR Navigator Suite interface. At the top, the logo "Compliance HR" is visible. On the left, there are two profile cards: one for Lori Brown, CEO - ComplianceHR, and another for Tammy McCutchen, Strategic Adviser - ComplianceHR. Below these is a Q&A section titled "Q&A (Content & Technical)" with a text input field and a "Submit" button. A large orange arrow points to the "Submit" button. The main content area shows a presentation slide titled "5 Pro Tips for Analyzing Overtime" with the Littler logo and Compliance HR branding. On the right, a "Resources" panel lists "Feedback Form", "State-By-State CLE Guide", and "Presentation Materials". At the bottom, a navigation bar contains icons for CLE, Q&A, a question mark, a book, a speaker, a calendar, and a video call. The text "POWERED BY ON24" is in the bottom right corner.



Thank you!



Littler[®]