

## **FLSA Exemptions Still Trip Up Employers**

By Robert L. Dambrov, Esq.

The Fair Labor Standards Act (“FLSA”) enacted in 1938, is the cornerstone of federal wage policy and epitomizes regulation through the imposition of detailed requirements which must be satisfied by an employer in order to avoid the requirement to pay time and one half for hours worked over 40. Though certain distinctions between exempt and nonexempt workers have blurred over the years, the law’s scheme of exemptions remains both rigid and complex – creating a pitfall that regularly lands hundreds of companies, both large and small, in court.

The FLSA allows exemptions for certain employees as long as they are paid on a salaried basis and meet corresponding occupational tests, such as spending sufficient time performing exempt work, and minimum earnings requirements. These employees include white-collar workers, such as executives, administrators, and professionals.

Many employers are unaware that, by certain “docking” of employees’ pay, the exempt status can be lost. Employees are paid on a salary basis if they receive a specified amount of compensation each pay period that does not change due to variations in the quantity and quality of their work. Moreover, salaried employees generally must receive their full salary for any week in which they perform work, without regard to the number of days or hours worked. However, employers are not required to pay salaried employees for workweeks in which they perform no work. Although deductions from salary are prohibited, a reduction in paid leave time does not affect an employee’s status as a salaried employee.

Employees lose their exempt status if deductions from salary are made for absences of any length caused by the employer or by the operating requirements of the business. Employers also are prohibited from docking an exempt employee’s pay unless the absence is for a full day or more and is due to personal reasons, illness or accident (so long as the employee is covered under a sick-pay policy), or jury duty, attendance as a witness, or temporary military leave, provided the employee’s salary is reduced only to the extent of the jury or witness fees or military pay. The only “disciplinary” reduction in pay that will not defeat the salary requirement is one made for an employee’s infractions of major safety rules – those relating to the prevention of serious danger to the plant or other employees.

An employer generally may take advantage of a “window of correction,” which provides that an employee’s exemption will not be lost if the employer reimburses the employee for an inadvertent deduction or for one made for reasons other than lack of work, where the employer promises to comply in the future.

Furthermore, many employers erroneously believe that all employees are exempt under the FLSA as long as they are paid a salary. The executive and administrative exemptions are used by many employers as catch-all categories, often incorrectly by not following the strict requirements for exemption. The executive exemption requires, among other things, that exempt executive employees regularly direct the work of two or more employees and, if they do not have the primary duty of managing an enterprise, department, or subdivision of the company, engage

in nonexempt work for no more than 20% of the total hours worked (40% for retail and service establishments). Bona fide administrators must exercise discretion and independent judgment to be exempt. Those who merely follow a standard matrix for decisionmaking do not satisfy this requirement.

A lot of employees classified as exempt under the executive or administrative exemption have been found nonexempt because they actually performed “production” type work. When the regulations were written, it was easier to distinguish between production employees – that is, workers on the factory floor – and executives and administrators. In today’s more service-oriented economy, that distinction is not as clear.

Making a mistake by erroneously designating employees as exempt can have a substantial financial cost to an employer. Claims for unpaid overtime for all hours worked over 40 can go back two, and sometimes three, years. In addition, the damages may be doubled and attorneys fees and interest will be awarded. Employers would be well-advised to be proactive by reviewing any questionable job positions with their attorney to avoid making a costly misclassification of FLSA exemption.

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