



How Did They Manage? Part Two

Insights

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In the last issue of *Retail Industry Update* (March, 2009) we looked at the facts of *Morgan v. Family Dollar Stores*, an overtime lawsuit, which resulted in a jury verdict of over \$35 million. The case was affirmed on appeal, and turned principally on the issue of how much actual control store managers had over the day-to-day operations in their outlets.

In this follow-up article we'll deal with some changes in operations you might want to consider in order to avoid a similar problem.

Lessons To Learn And Action To Take – Now!

So what can we learn from all of this? For one thing, no company wants a jury to decide whether its managers "manage" and are exempt executives. These are the things you should do now to lessen the chance that this can happen to your organization:

1. Review the exempt status of managers and supervisors – especially assistants. Duties change. Store volume fluctuates. Scheduled staffing and hours change. As they do, they may change the factors that can determine whether the executive test is met for managers at a store.
2. Train senior management to understand how the FLSA executive test applies, and why it is so important to be right before asserting it. Otherwise, faced with increasingly tight budgets in a tough economy, senior managers may make decisions or implement changes that cause lower-level managers to lose exempt status.

Make everyone aware of who in the organization actually makes decisions about whether lower levels of management are classified as exempt executives. Guard against managers who want to apply the FLSA "plain meaning" without understanding the complexity of the analysis and application of the exempt tests. To the extent possible, conduct exemption-related communications in a way that increases the chances of asserting the attorney-client privilege.

3. Do not assume that all stores may be treated the same way. You cannot take a "one size fits all" approach.

4. Weigh the need for centralized control against the need to delegate in order to allow the managerial latitude necessary to be an exempt executive. If you want to micromanage from the top, then maybe all of your store managers should be classified as nonexempt.

5. Review job descriptions for managers. Make sure the duties are accurately described and that they represent actual exempt duties performed, so as to convey that the manager's primary duty is really management. While job descriptions alone can't ensure that the executive test is met, too much wording about nonexempt work required to be performed by the manager can be used to make it appear that the test is not met.

6. Review operating and training manuals. Too much detail and instruction shows that managers have little or no discretion or ability to manage. Read them as if you were a skeptical juror deciding whether the individual's primary duty is management.

7. Audit email and other electronic or internal communications. Detailed instructions about what a first-line manager can or cannot do can be used against you to show that the individual was not "managing."

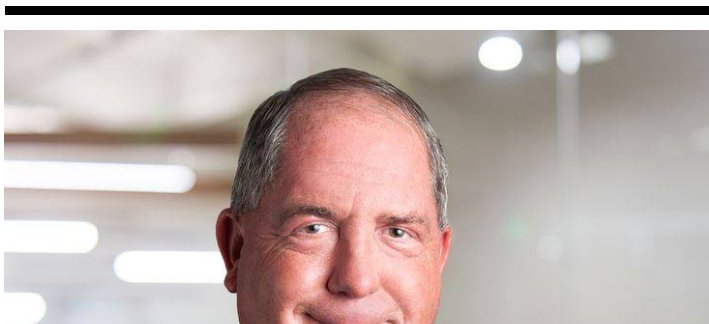
8. Instruct first-line managers to make assignments and communicate their own management decisions to subordinate employees in writing. Have first line managers document employee counseling, interviews, recommendations and other management tasks.

Require that they make written recommendations to their superiors about procedures, policies, hiring, firing, changes in employee status and other management tasks and make sure those recommendations are seriously reviewed, considered and the process is documented. Have district managers document instructions to first line managers in ways that show they are supervising the first line managers instead of actually running things themselves.

Check And Double Check

Finally, remember that state law may be more restrictive than federal law. It is important to not forget about the possible impact of the wage-hour laws of other jurisdictions in which you employ people. For example, a state might not recognize the FLSA's executive exemption or might define it in a different or more-limited way that makes the state's version harder to meet.

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