



## Preventing A Messy "Failed Exemption" Lawsuit

Insights

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In recent years employers have become all too familiar with lawsuits alleging violations of the federal Fair Labor Standards Act (FLSA). According to the Administrative Office of the United States Courts, there were more than 7,000 FLSA federal lawsuits filed in 2012, and 2013 was similar. Many of these lawsuits include claims that the employee was "misclassified" as exempt from the FLSA's overtime-pay requirements.

In the face of these statistics, employers should not just blindly hope that they have classified their employees correctly. Instead, you should proactively plan ahead for the possibility of such litigation and begin now to build the evidence you will need to prove an exemption in court.

### Don't Neglect Your Duties

All of the so-called "white-collar" exemptions under the FLSA (executive, administrative, professional, outside sales, and computer professional) contain a "duties test." For example, to qualify for the "administrative" exemption under the FLSA, the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers – and the employee's primary duty must include the exercise of discretion and independent judgment with respect to *matters of significance*. Sound familiar? Probably. But it's not enough for an employer to be vaguely familiar with the duties test.

Regardless of which exemption is being relied upon, you need to analyze whether the employee at issue actually performs the duties that are required to support the exemption. One way of verifying an employee's duties is to work with the individual who supervises or manages the exempt employee. This higher-level supervisor/manager is usually the most reliable source for information about what the employee does on a daily basis.

By engaging with the higher-level supervisor/manager, you or your attorney can evaluate the strengths and weaknesses of the exemption and can make recommendations as necessary. While your HR team may be perfectly capable of such a review, by using an attorney the communication should be covered by the attorney-client privilege. This allows a free exchange of information without fear of having to disclose potentially damaging communications in a subsequent lawsuit. A confidential and privileged Position Analysis Questionnaire is one tool we like to use.

**Mind Your Documents**

## **MIND YOUR DOCUMENTS**

You should also review your human resources documents to determine whether those documents will help or hurt in any lawsuit. While documents alone will not prove the duties test for an exemption, you do not want inaccurate documents that could undermine an exemption. If an offer letter or job description does not accurately reflect the duties to be performed, those documents should be revised. This is particularly true if the employee's actual duties satisfy a test for an exemption but employer-created documents suggest otherwise.

Some commentators have suggested that employers should ask employees to create self-assessments which state, in the employees' own words, what duties they perform. While such a document would undoubtedly be compelling evidence if employees always described duties in a way that satisfied an exemption, be careful. The possibility exists that an employee might describe duties in a way that *undermines* an exemption.

In that scenario, you will have created "bad" evidence, and put yourself in the awkward position of deciding how to explain it. Most troubling, of course, would be a self-assessment that did not support an exemption *and* that did not accurately reflect the employee's duties. For these reasons, we suggest consulting with employment counsel before implementing such a self-assessment program.

And remember, most of the white-collar exemptions also require payment on a "salary basis," which means a weekly guarantee not subject to reductions except in limited circumstances.

## **Clean Up Salary Misunderstandings**

In addition to proactively shoring up the duties test for an exemption defense when possible, take steps to limit damages in any future litigation. Veterans of failed-exemption lawsuits are familiar with the disputed issue of how to calculate overtime damages in such cases. An employee is likely to argue that the salary was intended as compensation for only 40 hours, and that the employer thus owes "one and one-half" the employee's "forty-hour rate" of pay for any hours worked over 40.

To undercut this argument, make clear in offer letters and elsewhere that the exempt employee's salary is being paid to compensate the employee for *all hours worked whether few or many*. When a salary is paid to compensate all hours worked, the salary itself is the "one" of "one and one-half." FLSA overtime premium is therefore figured at one-half of the rate obtained by dividing the weekly salary by all of the hours worked in each particular overtime workweek. Calculating damages using this method, instead of using the employee's method, can result in savings of nearly 80%.

The wise old saying, "an ounce of prevention is worth a pound of cure," is particularly true in the wage-hour arena.

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