

THE LITTLE-KNOWN REASON WHY AN EMPLOYEE'S JOB PERFORMANCE COULD TANK THEIR EXEMPT STATUS – AND WHAT EMPLOYERS CAN DO ABOUT IT

Insights
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Last week's news that the Labor Department is proposing a hefty increase to the weekly salary requirement to qualify employees for the overtime exemption has put the spotlight on how much you pay your employees – but that doesn't mean you can ignore the second part of the equation: the job duties test. And even seasoned HR and Legal professionals may not realize that an employee's job performance could impact the analysis of whether they satisfy this critical standard. What do you need to know about this potential hidden landmine and what can you do to ensure compliance?

Don't Forget About Duties

[The Department of Labor just released a proposed rule that would raise the weekly salary requirement to qualify for overtime exempt status](#) from \$683 to \$1,059 per week (or more), meaning you would need to pay employees at least \$55,068 per year for them to be exempt from OT pay under the Fair Labor Standards Act (FLSA). This is a significant development for employers of all sizes and across the industry spectrum. If this proposal becomes effective, it will be important for you to review your exempt workforce and determine whether any compensation or classification changes are necessary.

But the real risk for employers actually lies in the job duties tests for these white-collar OT exemptions. Whether you are paying the required weekly salary amount can be answered with a simple "yes" or "no." But it is rarely as simple a question when it comes to the job duties tests. Particularly

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for the administrative exemption, these tests are vague, subject to different interpretations, and can be exploited by skillful plaintiff's attorneys.

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As a result, you would be well served by periodically examining whether your exempt workforce is performing the work required by the job duty tests of the applicable white-collar exemption. For example, is management the primary job duty of your supervisor? Does your HR Coordinator exercise discretion or independent judgment about matters of significance? Do your mid-level managers have the authority to waive or deviate from established company policies and procedures without prior approval? These and similar questions will help guide you down this path.

The Hidden Risk, Revealed

But here is where we ask more of employers. While evaluating the *type* of work performed by your exempt employees for compliance with the job duties tests is critical, you should also take immediate steps to address any *unsatisfactory* performance to ensure your exempt managers remain exempt in the eyes of the law. You are already accustomed to doing this to promote productivity, workplace morale, and to support future disciplinary decisions. But why, you may ask, does this matter for exemption classification decisions?

Consider the following scenario: you hire a new employee to manage your hotel coffee shop. As the manager, you will pay her on a salary basis at more than the required dollar threshold. You expect her to supervise two other full-time coffee shop employees and have given her the authority to hire and fire. You know that she will periodically make drinks and serve customers just like her subordinates, but you make clear with her that her most important work will be to manage the coffee shop personnel, operations, inventory, ordering, budgeting, and so on. In light of this anticipated work, you classify her as an "executive" exempt employee for FLSA purposes and feel confident that you are operating within the parameters of the law.

However, it turns out that the employee is inept at managing others and fails to do so. She also neglects her managerial responsibilities and instead spends 90% of her time making drinks and tidying up the shop. She neither counsels nor disciplines employees, and she does no hiring or firing.

You assume she is doing what is expected of her until you start to receive customer complaints about poor service and drink options. Based on these complaints, you terminate her employment. If the employee then files an FLSA lawsuit against you challenging her exempt status, who wins?

Could Be A Closer Call Than You Think

Generally, an employee's actual work determines whether the duties test for a "white collar" exemption have been met. This might suggest that the FLSA executive exemption duties tests were not met as to your Coffee Shop Manager. This is because she mainly performed non-exempt work rather than the work you expected her to do. In other words, she may have unilaterally undermined her exempt status by failing to perform to your expectations.

Not every court has been willing to accept this theory. For example, when presented with similar facts, a district court acknowledged that a plaintiff spent most of his time performing non-exempt work but noted that this was due to his failure to discharge his responsibility to the employees he was meant to supervise. The court held that the plaintiff's not having properly assigned non-exempt work to others was an exercise of managerial discretion and that the employee did not undo his exempt status through poor performance.

What Should You Do?

It seems proper that a challenge to exempt status should not succeed simply because the employee failed to perform, or poorly performed, the duties that management properly concluded supported an exemption and genuinely believed the employee was carrying out consistently with its expectations. But management should not assume that every court will reach this conclusion.

As a result, you should not simply rely on what you expect an employee to do or assume that they are doing what you asked of them at the time of hire. Instead, once you have determined (with the help of legal counsel) that the duties of a job position meet an exemption's requirements, you should ensure your managers monitor the employee's performance to ensure that these duties are actually being carried out – and being carried out satisfactorily. Some action items you can take to maximize your chances of properly overseeing

an exempt employee's performance and defeating any legal challenge brought against that exempt status include:

- It sounds simple but make sure you document the expectations you have of your exempt employees through clear and specific job descriptions, and have your managers acknowledge receipt and regularly confirm in writing that the description is accurate.
- Periodically perform audits of your manager's work and compare it to the job description to ensure you remain on the right track.
- Make sure to incorporate all the critical criteria for satisfying exempt status into annual evaluations so you can regularly review and track performance.

Conclusion

So let the Labor Department's new salary proposal serve as an opportunity to get your entire exemption house in order, from the salary to the job duties performed by each exempt position. We will continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Wage and Hour Practice Group](#).