# Must Management Justify Treating Exempt Employees As Non-Exempt?

Insights
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For years, The Big Corporation has treated its Department Supervisors as meeting all of the requirements for the executive exemption from the federal Fair Labor Standards Act's minimum-wage and overtime requirements. However, TBC's CEO has now concluded that, for a variety of reasons, it makes more business sense to treat them as non-exempt employees, including paying them by-the-hour.

But when she tells the Human Resources Director she wants to do this, he balks at the idea. He reminds her that each Department Supervisor clearly meets all of the exemption's tests, a conclusion that has been both re-evaluated in detail and re-confirmed more than once. He says that there is no alternative under the FLSA but to consider them to be exempt.

**Can TBC Do What The CEO Has In Mind?**
*Yes*, it can. The Human Resources Director is mistaken, but his misconception crops up from time-to-time with surprising frequency. It is usually based upon the erroneous notion that the FLSA somehow *requires* an employer to justify treating an exempt employee as non-exempt if management chooses not to invoke exempt status.

But this is not so. Nothing in the FLSA compels an employer to treat an employee as being exempt from that law's compensation requirements, despite the fact that there is no question that the employee could satisfy all of an exemption's prerequisites.

As one U.S. Labor Department official said years ago, "Whether [an] exemption is claimed is within the sole discretion of the employer." No FLSA-related impediment prevents TBC from reclassifying its Department Supervisors as non-exempt and paying them in compliance with the FLSA's minimum-wage and overtime requirements.

**The Bottom Line**
Of course, there could be independent considerations affecting the decision of whether to treat a clearly-exempt employee as being non-exempt. For example, perhaps there is an employment agreement under which management is contractually obligated to pay the employee on a salary basis.

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Where the FLSA is concerned, though, the exemption-related proof burden runs the *other* way: If an employer intends to rely upon an exemption, then it must be able to establish that every exemption requirement is met as to each employee being treated as exempt. If the employer elects to consider employees to be *non*-exempt, however, then management is entirely free to do so.

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