

“What Do You Mean My Supervisor is Not Exempt?!”

The Costly Employment Mistake Your Company May Be Making

BY JOANNA R. BRODY

Most Oregon employees are entitled to overtime (i.e., time and a half for all hours worked in excess of 40 hours in one workweek). However, Oregon and federal law provide that certain employees who meet very specific requirements are exempt from overtime. These “exemptions” are considered exceptions to the general rule requiring overtime and are narrowly construed. Furthermore, the burden of proving that an exemption applies rests with the employer.

Misclassification of employees as exempt is an ever-present risk for employers. Employee lawsuits alleging misclassification, both on an individual or class-wide basis are on the rise, and defending such claims is difficult and costly. Misclassified employees may be entitled not only to unpaid overtime plus interest and attorneys’ fees, but also to penalties that can be double the amount of unpaid wages. Claims for unpaid overtime may go back two years under state law and up to three years under federal law.

Among the most commonly applied exemption is the “executive” exemption, one of three “white-collar” exemptions (the others are administrative and professional). However, this “executive” exemption is also among the most frequently misapplied. The misclassification of “executive” employees often arises from the misconception that employees with a management or supervisory title who are paid a salary, rather than an hourly rate, automatically qualify for this exemption. This is incorrect. The employee’s actual job duties must also meet both federal and the stricter Oregon requirements. In order for an Oregon employee to be exempt as an “executive,” the following requirements must **all** be satisfied:

- The employee’s **primary duty** (generally more than 50 percent of the em-

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ployee’s time) is to manage a recognized department;

- The employee regularly directs the work of two or more full-time employees, or the equivalent, in the department. This requirement is not met if there is a shared responsibility for the supervision of the same employees in the same department (i.e., if the primary duty of an assistant manager is to assist the manager in the supervision of employees, the assistant manager would generally not be considered exempt);
- The employee has the authority to hire/fire/discipline employees, or the employee’s recommendations are given particular weight, meaning that unless there are good business reasons to the contrary, the employee’s decision to hire/fire/discipline will be followed;
- The employee regularly exercises discretionary authority as to decisions of significance as part of the employee’s daily performance; **and**
- The employee is paid a salary of at least \$455 a week. In most cases, this weekly salary must be a predetermined amount given without regard to the number of hours or days actually worked.

If even one requirement of this test is not “plainly and unmistakably” met, the employee is not exempt.

It is never appropriate to classify “executive” employees based solely on their salary, title or job description. Instead, employers

should conduct a careful review of employees’ actual duties on a case-by-case basis in order to determine exempt status under Oregon and federal law. If a position has been classified incorrectly, consult with legal counsel about the process for changing the classification and reducing the employer’s exposure. Additionally, employers should be aware of potential changes to federal law. President Obama recently directed the U.S. Secretary of Labor to modernize overtime regulations. The proposed changes are expected to raise the minimum salary threshold and make the required duties more difficult to satisfy. If these changes are implemented, many Oregon workers classified as exempt under Oregon law could now be eligible for overtime under federal law. ■

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