

# Working overtime

Making sense of employee exemption misclassification claims **Interviewed by Heather Tunstall**

**E**mployers and employees alike commonly assume that if an employee is paid an agreed-upon annual salary rather than an hourly wage, that employee is exempt from the strict wage hour laws here in California. For example, employers believe salaried employees are not entitled to overtime pay and meal and break periods. However, that's not necessarily the case.

"Specific to the white-collar universe, there are exemptions — there's an executive exemption, an administrative exemption, a computer analyst exemption, a professional exemption — and that means if you meet a salary requirement and you meet duties requirements governed by the statute, then you are classified as exempt and therefore are not entitled to overtime," says Elise R. Vasquez, partner at Ropers Majeski Kohn & Bentley PC. "What we've started to see is an up-rise in white-collar exempt misclassification claims."

Under the Obama administration, funds have been funneled to labor board investigators meant to probe wage-hour claims to determine whether or not employers are in violation of the wage hour requirement and employees are misclassified as exempt. In the past, many such claims came primarily from blue-collar jobs, such as the restaurant industry. We are seeing more claims from employees for unpaid overtime that they were entitled to, because they were misclassified as exempt based on the job description and duties performed.

*Smart Business* spoke with Vasquez to find out more about misclassification lawsuits, and what an employer can do in the event a claim is made.

## What establishes an employee as exempt or non-exempt?

The list of qualifiers is comprehensive and very specific for each exemption. Basically, there is a salary requirement and a duties requirement that need to be met for an employee to be exempt. Unfortunately, employers have been relying on the assumption that if they hire a computer analyst, for example, and they pay them the requisite salary, they must be exempt. In reality, that may not be the case. Specific day-to-day duties that they perform may not fall under an exemption. As such, while an employer may meet the salary requirement for a computer analyst, because he or she performs non-exempt duties more than 50 percent of



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the time, the person is entitled to overtime pay and meal and break periods.

## How can employers ensure they are classifying their employees correctly?

The job title and salary requirement are not enough, and each exemption has different requirements. Employers should enlist the counsel of their labor and employment lawyer to perform an audit to make sure each employee falls under the correct exemption.

Their labor and employment lawyer can perform the audit by taking a look at the job description the employer claims is an exempt position, interview the employees in that position, and determine if in fact they perform exempt duties more than 50 percent of the time.

Prior to hiring an employee, employers should be clear about the job duties and what the employee will be doing. When interviewing a candidate, focus specifically on those duties. After hiring, it becomes an upper management issue, where each employee will have a reporting manager who will be responsible for checking with HR and ensuring employees are performing the correct duties for that position more than 50 percent of the time. Educating upper management and HR as to exempt duties will allow for these checks to be in place.

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## What should an employer do in the event that a claim is filed?

If a company does not have a labor and employment lawyer in place, it should look to hire one with a level of expertise in misclassification lawsuits, both with class actions and individual cases. The lawyer will get the job descriptions of all employees and/or former employees involved in the claim, talk to the reporting managers to see whether or not they did the exempt duties more than 50 percent of the time, look at payroll records and do a risk benefit analysis. This analysis will determine the company's potential exposure. If in fact there is potential exposure, the exposure can be calculated with reasonable certainty.

If there is liability, most companies will want to avoid trial and resolve any matter early. Hence the importance of hiring a lawyer who understands each and every one of the exemptions as well as which exemptions the employee(s) fall into.

## What if the employer loses the case?

In addition to the employer owing an employee or a class of employees any unpaid wages, the employer is exposed to penalties. For every employee who is no longer working for the company, there will be penalties for not paying them what they are owed. There are also other penalties under various statutes an employer could be subject to for various payroll violations. In addition, all employees who prevail on wage-hour claims are entitled to attorneys' fees and costs.

Because exposure can usually be calculated with reasonable certainty, a lot of these cases do not go to trial, unless the case for the employer is particularly strong. If the employer is correct and can prove the employee(s) filed a meritless claim, the employer can seek fees from the employee(s). The reality, however, is it is highly unlikely an employee will have the means to pay for the employer's attorneys' fees. <<