

EMPLOYMENT QUARTERLY

## Misclassifying workers as hourly, salaried carries increasing risks

Monday, November 24, 2008



BY DAWN ROSS

The calls often start like this: “All of my employees are salaried professionals – that’s how we have always done it, and no one has ever complained before.” The problem is that someone is complaining now.

Often it’s a disgruntled former employee claiming he is entitled to tens of thousands of dollars of unpaid overtime. Sometimes it’s a new employee who knows her legal rights and tells the other employees they should all be getting overtime when they have to work late. Determining who qualifies as a salaried exempt employee is not always easy. Here are a few guidelines to help you figure out if you have fallen into the trap of misclassifying your employees.

Under California law, there are four categories of employees who can be classified as exempt: 1) professional, 2) executive, 3) administrative, 4) outside salespeople. In each case, the employee must earn at least two-times minimum wage (2008 = \$33,280/year).

The first category – professional – is pretty straightforward. Qualified employees include those who need to be licensed or certified by the state and engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting or who are primarily engaged in an occupation commonly recognized as a learned or artistic profession (as opposed to a general academic education); and, secondly, they customarily and regularly exercise discretion and

independent judgment.

The second and third categories are a lot more complicated and gray. Employees who qualify for the executive exemption must spend more than half of their work time as follows: 1) their duties and responsibilities must involve the management of the enterprise in which they are employed or of a customarily recognized department or subdivision thereof; 2) they customarily and regularly exercise discretion and independent judgment; and 3) they customarily and regularly direct the work of two or more employees. This includes hiring and firing, setting and adjusting pay rates and work hours or recommending pay rates and hours, directing work, evaluating the efficiency and productivity of employees and disciplining employees.

The administrative exemption is probably the most often abused, as it contains the most gray area. Employees who qualify for the administrative exemption must spend more than half of their work time as follows: 1) they customarily and regularly exercise discretion and independent judgment in the performance of “intellectual” work, which, in the context of an administrative function, is office or non-manual work directly related to management policies or the general business operations of the employer or its customers; and 2) they regularly and directly assist a proprietor or an exempt administrator; they perform work along specialized or technical lines requiring special training, experience or knowledge under only general supervision; or they execute special assignments and tasks under only general supervision.

To exercise discretion and independent judgment, one must compare and evaluate possible courses of conduct and act or make decisions after considering various possibilities. It implies that the employee has the power to make an independent choice free from immediate supervision. Further, the decisions should pertain to matters of significance, not what type of pens to order.

Outside sales employees who spend more than half their time working/selling outside the office may also qualify for an exemption.

A quick internet search will show you how easy it is for your employees to find an attorney to represent them in a lawsuit for unpaid overtime. It has become big business, with lawyers developing enticing Web sites trying to lure employees into collecting easy money for overtime, penalties and attorneys’ fees.

Recent case law has significantly increased the penalties for misclassifying employees and allows employees to claim as much as four years in unpaid wages.

Often employers misclassify entire groups of employees. For example, class action lawsuits have been filed on behalf of groups of computer programmers, insurance claims technicians and hotel managers. These awards, with attorneys’ fees, can quickly mushroom into the hundreds of thousands or even millions.

Even small awards entitle employees to collect attorneys' fees, which can become cost prohibitive.

Following two basic principles will help employers stay out of trouble:

1. Think of your workplace as a pyramid, generally only those at the top of the pyramid will qualify as salaried/exempt.
2. If you are in doubt as to whether an employee qualifies, always err on the side of making them an hourly employee. As the old saying goes, it's better to be safe than sorry.

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