



Assessing The Risk:

Wage and Hour Tip Of The Week

Concentrate on Your Concentration of Exempt Employees

TIP: Pay careful attention to your proportion of exempt to nonexempt employees. Being heavily weighted toward the former is a potential red flag.

Last week, we reminded readers to ensure that their exempt executive employees have at least two direct reports. This week, we recommend considering the proportion of employees you treat as overtime-exempt compared to those who you do not. If the answer is “they’re all exempt”—even that most are—then you should take time to consider whether some may be misclassified.

If they show up at your door, among the first things a wage and hour investigator will do is assess your ratio of exempt-to-nonexempt employees. Her premise is that the typical FLSA-compliant employer is heavily weighted towards nonexempt. Of course, some workforces may justifiably include greater numbers of exempt employees—primarily professional organizations, like engineering firms or law firms. But the norm is that exempt executives (e.g., front-line supervisors) or administrators (e.g., H.R. managers) will not outnumber those they supervise or administer. Also a red flag for the scrupulous investigator will be high populations in oft-misclassified titles, such as “analysts,” “specialists,” or “technicians.”

What causes exempt-to-nonexempt proportions to become overblown? The answer varies by employer, but one of the most common culprits is an overgeneralized application of the FLSA’s exemptions. Not all who perform complex work on a computer satisfy the computer employee exemption; not all medical staff satisfy the professional exemption; not all titles that bear the word “analyst” or “specialist” satisfy the administrative exemption. And the list goes on. The critical point is that it’s not enough for a position to sound or feel exempt—unless it satisfies all of the requirements of at least one exemption, it must be paid overtime.

So how to respond? Preferably with the advice of counsel experienced in wage-hour law, you’ll want to survey your universe of exempt positions and identify those most likely to present issues. There’s no hard-and-fast rule, but here are just a few questions to consider:

- Are others in your industry classifying the same positions as nonexempt?
- Are any of your positions at the bottom of a reporting hierarchy comprised mostly or entirely of exempt employees?
- Are any of the exempt position titles shared by everyone in a department or across operations, despite their doing materially different work?
- Are any of the exempt positions new to the organization because of an acquisition and do they share duties with employees who you classify as nonexempt?

- Are any of the exempt positions in departments that have been overhauled or restructured?
- Are any of the exempt positions' actual duties unknown or not accurately reflected in the job description?
- Are any of the exempt positions common targets of DOL investigations or private lawsuits (e.g., low-level financial positions, assistant store managers, tech support, etc.)?

Once you and your counsel identify positions that most warrant attention, you'll need to analyze their actual duties to determine whether exempt status remains appropriate and decide how to act on your findings. There is no one-size-fits-all approach, but the goal is the same: plan and execute the most effective and efficient approach to proactively ensure FLSA compliance.

Of course, the sheer number of exempt employees across a workforce will not be determinative. It is simply one of the red flags that investigators look for. And by putting ourselves in the investigators' shoes, we can ensure that the flag does not become an actual liability.

By: *Brett C. Bartlett* and *Kevin M. Young*

Brett C. Bartlett is a partner and *Kevin M. Young* is an associate in Seyfarth Shaw's Atlanta office. If you would like further information please contact your Seyfarth attorney, Brett Bartlett at bbartlett@seyfarth.com, or Kevin Young at kyoung@seyfarth.com.



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