

# Assessing The Risk:



## Wage and Hour Tip Of The Week

### Pay Heed to the Executive Exemption's "Two or More Employees" Requirement

**TIP:** When assessing the FLSA's executive exemption, address all three key points on the "two or more employees" requirement.

Plaintiff's counsel and the U.S. Department of Labor rarely question the exempt status of high-level managers, such as vice presidents and department heads. But the executive exemption becomes more susceptible to challenges as you move farther down the company's organizational chart. The exemption has many requirements, and one of the frequent areas of contention is whether the manager or supervisor regularly directs the work of "two or more other employees." 29 C.F.R. § 541.100(a)(3). To help reduce challenges on this issue, employers should review organizational charts, job descriptions, and job duties to ensure compliance with these three key points:

1. Make sure the subordinates are in fact employees. A supervisor's exempt status may be challenged if the supervisor only directs the work of independent contractors. On a construction site, for example, a project superintendent often supervises the work of several subcontractors and maintains the power to hire and fire them. Even so, the U.S. Department of Labor says this arrangement does not satisfy the executive exemption. The solution? Ensure at least two of the subordinate workers are employees, and/or consider whether the administrative exemption may apply.
2. Follow the 80-hour rule. The exempt executive must supervise at least two full time employees or the equivalent. Full time generally means at least 40 hours a week, so the supervisor should direct the work of two or more employees who are collectively scheduled to work at least 80 hours a week. It could be one employee scheduled for 40 hours and two employees who are each scheduled for 20 hours. Or it could be four employees who are each scheduled for 20 hours. Other combinations will work, so long as the subordinates are collectively scheduled for at least 80 hours.
3. Follow the direct-line rule. If the supervisor does not directly supervise the subordinate, then one may challenge whether the supervisor actually directs the subordinate's work. What if, for example, the supervisor directly supervises only one subordinate, but that subordinate supervises ten others? The answer is that, if the supervisor directs the work of only one employee, even though that subordinate has the authority to supervise many others, then the supervisor's exemption status may be challenged on a technical reading of the executive exemption. So what's the solution? Ensure a direct line of supervision flows from each manager to at least two subordinate employees.

Remember, two employees is the minimum requirement. The executive exemption is less susceptible to challenge if the supervisor directs the work of several employees. Also keep in mind the executive exemption has several other requirements (e.g., among others: the employee must be compensated on a salary basis; the employee's primary duty must be the management of a customarily recognized department or subdivision; and the employee must have authority to hire/fire or the employee's suggestions on tangible employment actions such as hiring/firing, advancement, and/or promotion must be given particular weight). We will offer compliance tips on some of these issues in the future.

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