



## **Are You Classifying Your Employees Correctly?**

**Patrick Mouser, General Services**

**pmouser@dmlo.com**

How can you tell if you're correctly classifying employees as exempt or hourly? Exempt employees, unlike their nonexempt hourly counterparts, aren't subject to the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA). However, exempt positions must meet certain requirements set by the Department of Labor (DOL).

This area of regulation gives rise to a number of misperceptions, such as the idea that job titles determine whether jobs are exempt from overtime or minimum wage laws. Breaking through the confusion and getting this responsibility right is critical, because incorrect employee classifications can expose your company to significant fines, legal action and negative publicity.

### **Some background**

The FLSA requires most employees in the United States to be paid at least the federal minimum wage for all hours they work, plus overtime pay for hours worked over 40 in a workweek. The FLSA provides exemptions from these requirements for employees in some executive, administrative, professional, outside sales and computer positions. These often are referred to as "exempt" positions. To be considered exempt, however, the positions must meet a number of criteria.

For instance, an executive exemption requires that an employee's primary duty consist of managing an enterprise or one of its recognized departments or subdivisions. He or she must regularly direct the work of at least two other full-time equivalent employees.

An exempt executive also must have the authority to either hire or fire employees, or have his or her recommendations regarding hiring, firing and promoting other employees be given particular weight. Finally, he or she must make at least \$455 per week on a salary basis. Of special note, paying an exempt executive on an hourly basis instead of a salary basis voids the exemption, creating significant exposure.

Exempt administrative positions also need to meet certain criteria. For example, in addition to being paid at least \$455 per week on a salary *or fee* basis, the DOL states that, to be exempt, administrative employees must be able to "exercise discretion and independent judgment with respect to matters of significance...."

The DOL breaks professional employees into two categories — learned and creative — for the purpose of determining whether they're exempt. Learned professionals' work is predominantly intellectual in character and requires a consistent exercise of discretion and judgment. Creative professional employees' primary work requires "invention, imagination, originality or talent." Like administrative employees, professional employees must be paid at least \$455 per week on a salary or fee basis.

### **Additional requirements**

Several other requirements come into play with exempt employees. Barring a few exceptions, exempt employees must receive their full pay for any weeks in which they've performed work, no matter how many hours or days they work.

If exempt employees are ready, willing and able to work, they can't have their pay cut just because no work is available. Employers who improperly deduct pay from exempt employees' salaries risk losing these employees' exempt status.

### **Positions matter**

Exemptions aren't allowed with a number of positions, including manual laborers and nonmanagement employees in production, maintenance, technical, construction and similar occupations. These workers are covered by the minimum wage and overtime pay provisions of the FLSA, no matter how highly paid they are.

The FLSA also requires employers to maintain certain records for their nonexempt employees. These must include the hours they work daily and within a workweek, as well as the rate or basis of pay and terms of compensation.

### **Do good by your employees**

Determining which jobs are exempt and which aren't can get complicated, as such decisions often turn on specific job duties. Moreover, the burden of proving that a position is exempt rests with employers. So make sure you review the FLSA's requirements and the DOL rules, along with any state or local employment laws and regulations. Also be sure to consult a legal or HR professional when determining employees' classifications.