

Wage & Hour Insights

Guidance & Solutions for Employers



What Do You Mean the Job May No Longer Be Considered Exempt?

By Staci Ketay Rotman on October 25, 2011



My last blog entry on travel time only touched on one issue that may arise as we see more employees being asked to take on additional responsibilities and assignments in lieu of hiring new personnel. Indeed, consolidation of jobs or responsibilities can lead to a number of other potential wage and hour issues that can have a significant impact on employers. One such issue arises when an exempt employee takes on additional jobs or duties that are non-exempt. How should an employee be treated for overtime purposes if working both exempt and non-exempt positions?

When an employee performs work in more than one capacity for the same employer – e.g. as a clerical worker (non-exempt) and manager (exempt) – employers must consider the character of the employee's job as a whole.

The standard for determining whether the combined job duties are exempt is the primary duty test. In other words, if the exempt managerial duties are the primary duty, the employee will be exempt. If the clerical duties are the primary duty, the employee will be non-exempt, and normal regular rate principles apply in calculating overtime for all hours worked for both jobs in the workweek.

Factors to consider when determining the primary duty of an employee include, but are not limited to:

- the relative importance of the major or most important duty as compared with other types of duties;
- the amount of time spent performing the major or most important duty;
- the employee's relative freedom from direct supervision; and
- the relationship between the employee's salary and the wages paid to other employees for performance of similar work.

http://www.dol.gov/elaws/esa/flsa/overtime/glossary.htm?wd=primary_duty. The amount of time spent performing the specific duty can be a useful guide in determining whether such work is the primary duty of an employee. Under the FLSA, employees who spend more than 50 percent of their time performing a specific duty will generally satisfy the primary duty requirement. However, employers must remember to check to see if their State law is different than the FLSA. For example, in Illinois, if employees spend more than 20 percent of their time on non-exempt work, they will generally be considered non-exempt. However, it is important to note that time alone is not the sole test; employees may nonetheless meet the primary duty requirement if the other factors (listed above) support such a conclusion.

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Misclassification of employees has the potential to cause significant problems for employers. As employers are looking for ways to cut costs, they need to keep these factors in mind to avoid losing the benefits of an employee's exempt status. Because there is no bright line test, if going down this road, check with an experienced employment attorney before making any such decisions on job consolidation.

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