Exempt or nonexempt?

How wage and overtime exemption laws affect your business

INTERVIEWED BY ROGER VOZAR

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Federal and state laws generally require that employees are paid minimum wage, as well as overtime compensation when they work more than 40 hours in a week. Many white-collar workers are exempt from these rules, but employers need to be careful about how they classify employees.

"There is no system to ask the federal government if a certain position is exempt. So, employers need to make educated guesses about the duties of a particular job and, based on language in the regulations, decide if that position is exempt," says Stephen P. Bond, a partner at Brouse McDowell.

Smart Business spoke with Bond about how to properly classify employees as exempt or nonexempt, and the risks involved with improper classification.

Does paying a salary mean a position is exempt?

No, although that's a common misconception among employers. The first test is that the salary must be at least $23,660. Then, the employee's job duties — not title —must also fall under one of the exemptions in the regulations. The title doesn't matter because it doesn't necessarily mean the same thing at different companies.

What job duties can be exempted?

There are three main exemptions:

- Executive — Exactly what it sounds like: primarily being the head of a business or a department, and supervising other employees.
- Administrative — White-collar, management-level worker whose job involves discretion or independent judgment. Clerical work wouldn't qualify because it isn't directly related to management of the business operations.
- Professional — This is the most ambiguous area. It requires that the worker have special knowledge or expertise, typically based on a college degree. However, a college degree doesn't necessarily make a person exempt.

There also are exemptions for certain duties in the computer field and outside sales, as well as one that covers any employee making $100,000 who regularly performs at least one of the duties of an executive, administrative or professional employee.

How can an employer lose an exemption?

One way is by not being consistent about paying the employee a salary. If you dock someone for missing part of a day, that demonstrates that he or she was not really a salary employee, and cannot be exempt.

However, there is a separate provision that applies if an exempt employee is off work for Family and Medical Leave Act purposes, and allows for deductions that do not affect exempt status.

What are the penalties for incorrect classification?

If an employee's claim is deemed correct and an exemption did not apply, he or she may be able to claim unpaid overtime for the past two years, as well as collect damages and attorney fees. A disgruntled employee could contact the Department of Labor's (DOL) Wage and Hour Division and trigger an audit that could result in back pay awards for several employees.

Even when employees are correctly classified as nonexempt, companies can run into trouble in terms of hours worked. If employees work at their desks during lunchtime, that counts as paid time. If you give an employee a smartphone and say he or she has to respond to emails even when at home, that also is work time. Those types of claims can cost a lot of money because employees typically have a record of their hours and the employer doesn't have anything to contradict it.

How can companies avoid misclassification?

You need to have a qualified human resources person conduct an analysis. It has to be someone who understands all of the implications, and will take the time to consider the various positions and where they fit.

Also, it's a good idea to re-evaluate exemption status as job duties change, especially if you're going through a reorganization.

A lot of times, management makes decisions based on what makes economic sense at the time. That's fine as long as everyone is getting along. But then an employee is fired or disgruntled for some reason and files a claim with the DOL. ●