

Compensation: Focus on Duties First

Many employees paid on an hourly basis earn more than salaried individuals, but there is a perception that being paid on a salary basis is a status symbol. However, salaried compensation is not related to job title or perceived status, but rather duties and income levels.

Paying employees on a salary basis is administratively easier than managing hours, wages, minimum wage calculations and overtime. However, significant exposures are related to improperly paying wages on a salary basis.

In 2017, U.S. District Court Judge Amos Mazzant ruled the Department of Labor's proposed Final Regulations for minimum wage and overtime exemptions were made without the requisite authority from Congress. The judge noted that Congress prescribed that those employees performing specified duties could be exempt from minimum wage and overtime requirements and the DOL did not have the authority to eliminate the analysis of duties in favor of a salary level test.

Employers would do well to focus on job duties in making decisions on how to compensate positions. If an employee does not perform the duties required for minimum wage and overtime exemptions, hourly wages should be paid and records properly maintained. Job titles do not offer any defenses to employers.

The exemption for Administrative Employees is premised upon an employee's primary duty being the performance of office or non-manual labor directly related to the management or general business operations of the employer or the employer's customers. This must include the exercise of discretion and independent judgment with respect to matters of significance. The employee must have authority to make independent decisions free from immediate and direct supervision on matters of significance.

In a similar vein, the Executive exemption provides that the employee's primary duty must be managing the enterprise or a recognized department or subdivision of the entity. The Executive must direct the work of at least two full-time employees or their equivalent and must have the authority to hire or fire, or have significant input on hiring or firing decisions. A failure to meet all of these requirements, plus a salary in excess of \$455 per week, means the exemption does not apply and the employee should be paid on an hourly basis with the requisite documentation in place, if an alternative exemption's requirements are not met.

If employees lack the authority to exercise discretion and independent judgment with respect to significant matters within their primary duties, more likely than not they should be paid on an hourly basis and time records should be maintained. Job descriptions for exempt positions should reflect the factors for an exemption. Otherwise, an employer is shooting itself in the proverbial foot. If an employee does not perform the duties within a job description for his or her position, an investigator will look to the actual job duties,

usually described by the employee, in making a determination of whether a violation has taken place.

Documenting hours worked for all employees is the safest means of avoiding exposures for wages, damages, penalties and attorney fees. Barring that, document duties and hours worked to the extent possible. There are exemptions for business owners (at least a 20% stake in equity) and highly compensated employees who regularly perform at least one of the duties of an exempt position. Other exemptions exist, but those too will focus upon duties and not job titles or job descriptions. An employer that does not appreciate the massive exposures associated with being in the "employment" business, may not have realistic financial statements.