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Human Resources

Making mistakes in FLSA exemptions can be costly for employers

Memphis Business Journal by BARBARA RICHMAN

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On May 1, 2012, the Department of Labor issued a press release titled, "US Department of Labor recovers \$4.83 million in back wages, damages for more than 4,500 Wal-Mart workers. Misapplied exemption resulted in pay violations; nearly \$464,000 assessed in penalties." In the settlement, Wal-Mart agreed to pay back wages and damages to vision-center managers and asset protection coordinators nationwide. The DOL noted that the corporation failed to compensate these employees with overtime pay, considering them to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements. Although the violations cited in this investigation involved one of the nation's largest employers, there are lessons to be learned for all organizations.

Secretary of Labor Hilda L. Solis issued a statement about Wal-Mart's agreement that should serve as a warning to each employer covered by the act: "Misclassification of employees as exempt from FLSA coverage is a costly problem with adverse consequences for employees and corporations," said the Secretary. "Let this be a signal to other companies that when violations are found, the Labor Department will take appropriate action to ensure that workers receive the wages they have earned."

Regardless of organizational size, the DOL holds employers accountable for classifying employees in accordance with the FLSA. Compliance requires an understanding of how the law distinguishes between exempt and non-exempt classifications and of requirements for determining exempt status.

In all circumstances, employers bear the burden of proof if the exemption of a particular employee is challenged. If a decision cannot be justified, the organization may be liable for costly penalties, such as back pay, overtime and attorneys' fees.

The following provides an overview of a number of considerations for employers to take into account in assessing whether employees should be classified as exempt.

1. Gain an understanding of each "white collar" exemption. The FLSA provides an exemption from minimum wage and overtime pay requirements for individuals employed in bona fide executive, administrative, professional, outside sales, skilled computer, and highly compensated positions.
2. Exercise caution when classifying employees as exempt, since the criteria or tests for exemptions can be difficult to interpret. It may be advisable to consider classifying an employee as non-exempt if there is uncertainty whether requirements are met.
3. Develop an understanding of terminology used in the regulations to describe requirements for exemptions. For example, an understanding of "salary basis" and "primary duty" is necessary in determining whether tests for exemptions are met. Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. This amount constitutes all or part of the employee's compensation and is not subject to reduction because of variations in the quality or quantity of the work performed. A "primary duty" is the principal, main, major, or most important duty that the employee performs. It must be the performance of exempt work to qualify for an exemption.
4. Be aware that an employee is not qualified for an exemption based on a job title, such as supervisor or manager, or the fact that the employee receives a salary rather than hourly wages. The determination of an employee's exempt or non-exempt status must be based on whether the employee's specific salary and duties meet exemption criteria.
5. To analyze a particular employee's current status, begin by determining whether the employee is paid on a salary basis and at the required level for the exemption under consideration. While the FLSA states that employees generally must be paid at a level of at least \$455 per week, it is necessary to examine the criteria for the specific exemption. For example, to be exempt on the basis of their compensation levels, highly compensated employees' total annual compensation must be at least \$100,000. Certain categories of computer-systems employees, to be exempt as such, may be paid at an hourly rate, but not less than \$27.63 an hour. There is no salary requirement for outside sales employees.
6. If salary requirements for an exemption are met, analyze the employee's primary duty to determine whether both salary and duty criteria are satisfied. For example, one of the tests required for the administrative exemption is that an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. To meet the executive exemption, an employee must customarily and regularly direct the work of two or more full-time employees or their equivalent (e.g. one full-time employee and two half-time employees). For outside sales, the employee must be customarily and regularly engaged away from the employer's place or places of business.
7. Review relevant resources, such as the Wage and Hour Division's website, www.dol.gov/whd. By clicking on the Overtime Pay link under Wages, viewers can access a reference page with links to pertinent information, including General Guidance, Fact Sheets, E-tools, Interpretive Guidance and Applicable Laws and Regulations.

8. Consider seeking the input of legal counsel and human resource professionals in interpreting the FLSA's complex exemptions. This input can assist employers when questions arise or in-depth analyses are required.