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Employment Law, Advice, Litigation and Solutions
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“To Be or Not to Be, The Employer’s Conundrum Over Exempt Employees”

Best Practices To Avoid Employment Law Issues

- ▶ Presented By: Rebecca L. Gombos, Esq.
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Wage and Hour Compliance

- ▶ Goal: 100%/Strict Compliance with Labor Code and regulations
- ▶ Knowledge of applicable Wage Order– Industry/Occupation
- ▶ Avoid Technical Violations– statutory and civil penalties
- ▶ Reliance on payroll vendors for compliance
- ▶ Regular Audits – self audits or professional legal audits

Wage and Hour Compliance

- ▶ Unique Issues In Wage & Hour Claims
- Burden is on employer to establish proper classification (exemptions) and record hours worked for Non-Exempt Employees.
- The purpose of laws is to provide transparency to workers regarding wage calculations and to give employees enough information to verify that they are being properly paid.
- Most laws provide for recovery of attorney fees to employees but not to employers.
- Non-compliance exposes Employers to significant liability – Labor Code, PAGA, Class Action.

Proper Classification

- Non-Exempt is the default classification for employees In California.
- Employees must meet the strict criteria of Exempt classification in order to be Exempt.



Employee misclassification– Exempt v. Non-Exempt

- ▶ Exemptions relieve an employer from having to meet statutory overtime, meal and rest periods, tracking hours.
- ▶ Duties Test: three major exemptions:
 - ▶ *Executive–Administrative–Professional*
 - ▶ Other Exemptions: Outside Sales, Computer Professionals, some Healthcare Professionals.
- ❖ Salary Test: Twice the State Minimum Wage

Employee Misclassification– Exempt v. Non-Exempt

- ▶ Law focuses on employee's actual duties/realistic requirements of the job.
- ▶ The job description may be helpful, but what matters are the actual duties and that the employee is primarily engaged in exempt duties.
- ▶ “Primarily Engaged” means that more than one half of the employee's work time must be spent engaged in exempt work.

Executive Exemption

- ▶ The employee is primarily engaged in managing the business, or managing a recognized department or subdivision of the business; AND
- ▶ Customarily and regularly directs the work of two or more other employees; AND
- ▶ Has the authority to hire or fire, or whose recommendations of hiring/firing/promoting is given particular weight; AND
- ▶ Earns monthly salary: no less than 2x minimum wage

Administrative Exemption

- ▶ The employee is primarily engaged in the performance of office or non-manual work directly related to the management policies or general business operations of the employer or the employer's customers; AND
- ▶ Customarily and regularly exercises and discretion and independent judgment; AND
- ▶ Regularly and directly assists an owner OR performs under general supervision; AND
- ▶ Earns monthly salary: no less than 2x minimum wage

Professional Exemption

- ▶ Licensed or certified by State of CA and primarily engaged in law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; OR
- ▶ Who is primarily engaged in an occupation commonly recognized as a “learned or artistic profession” AND
- ▶ Customarily and regularly exercises discretion and independent judgment; AND
- ▶ Earns monthly salary: no less than 2x minimum wage

Learned or Artistic Professional

- ▶ Primarily engaged in work requiring advanced knowledge in a field of science or learning and acquired through specialized instruction; OR
- ▶ Work is original or creative in a recognized field of artistic endeavor; AND
- ▶ Work is predominantly intellectual and varied (not routine mental/manual/mechanical/physical work)

Outside Salesperson Exemption

- ▶ Employee spends more than half of their work time away from the employer's place of business.
- ▶ Employee earns commissions from sales of products, services or use of facilities.
- ▶ If the employee spends more time delivering rather than selling, the employee cannot be classified as an exempt outside salesperson.

Computer Professional Exemption

- ▶ The employee's compensation must either satisfy the salary basis test or be paid on an hourly basis at a rate that equals or meets the salary test.
- ▶ Must be employed as a computer systems analyst, a programmer, a software engineer, or similarly skilled worker.

Computer Professional Duties

- ▶ The employee's primary duty must consist of:
- ▶ Applying systems analysis procedures, consulting with users on hardware/software.
- ▶ Designing, developing, analyzing, testing and modifying programs related to system design and operating systems.
- ▶ A combination of these duties, the performance of which requires the same level of skill.

Exempt Employee Salary Basis

- ▶ The salary must be guaranteed with a fixed amount each pay period.
- ▶ Must ensure that employee is paid a sufficient salary to maintain exempt status, 2X minimum wage.
- ▶ The workweek is presumed to be 40 hours.
- ▶ Bonuses are not considered part of salary.
- ▶ Commissions are not considered part of salary.

California Minimum Wage

YEAR	FEDERAL	CALIFORNIA (effective January 1)		LOS ANGELES CITY (effective July 1)		LOS ANGELES COUNTY & UNINCORPORATED AREAS OF LOS ANGELES COUNTY (effective July 1)	
		26 or greater	25 or fewer	26 or greater	25 or fewer	26 or greater	25 or fewer
2019	\$7.25	\$12.00	\$11.00	\$14.25	\$13.25	\$14.25	\$13.25
2020		\$13.00	\$12.00	\$15.00	\$14.25	\$15.00	\$14.25
2021		\$14.00	\$13.00		\$15.00		\$15.00
2022		\$15.00	\$14.00				

ANNUAL SALARY REQUIREMENTS FOR EXEMPT CALIFORNIA EMPLOYEES

	2019 (January 1 st)		2020 (January 1 st)		2021 (January 1 st)		2022 (January 1 st)	
Annual Salary	<u>25 or Less</u>	<u>26 or More</u>	<u>25 or Less</u>	<u>26 or More</u>	<u>25 or Less</u>	<u>26 or More</u>	<u>25 or Less</u>	<u>26 or More</u>
	\$45,760	\$49,920	\$49,920	\$54,080	\$54,080	\$58,240	\$58,240	\$62,400
Weekly Salary	\$880	\$960	\$960	\$1,040	\$1,040	\$1,120	\$1,120	\$1,200

*Unless the Dept. of Labor increases the minimum salary to a level higher than the California State minimum.

Deductions–Exempt Employee

- ▶ Exempt employee gets paid the same amount each pay period despite lack of work, poor work, attendance or disciplinary issues.
- ▶ Generally, no deductions from the salary are allowed, unless employee performs no work during the entire week.
- ▶ Salaried workers' pay not subject to deductions for portion of a workweek, with some exceptions.
- ▶ If deductions are made for quantity of work or performance, exemption may be lost.

Employee Misclassification– Consequences

- ▶ Salary compensates employee for 40 hours of work in a week even if employee was expected to work 50 hours per week.
- ▶ Salary is divided by 40 to determine regular rate.
[\$600 divided by 40 = \$15.00 per hour instead of \$12.00 per hour for 50 hours]
- ▶ Employee entitled to recover \$22.50 premium overtime rate for all overtime hours worked (instead of \$18.00).

Wage and Hour– Timekeeping Records

- ▶ Consequences of misclassifications:
 - Unpaid Overtime
 - Missed Meal and Rest Periods
 - Recordkeeping Violations, e.g. 226 – failing to accurately record hours worked, meal periods, and pay stub violations.
 - Penalties for Unpaid Wages including waiting penalties, e.g. Section 203.

Wage and Hour – Timekeeping Records

- ▶ When in doubt – Classify individuals as Non-Exempt Employees (hourly).
- ▶ Non-Exempt employees must record accurate start and end times, as well as start and end of meal periods.
- ▶ Critical to have compliant meal and rest period policy.
- ▶ Rest periods do not need to be recorded, but you may require them to be recorded even if onerous.

Pay Stubs

- Labor Code Section 226 requires 9 items:
 - Gross wages
 - Total hours worked – not applicable to Exempt employees
 - Piece rate and number of units–not applicable to Exempt
 - All deductions
 - Net wages
 - Pay period
 - Legal Name of employee, and last 4 digits of SSN or employee I.D
 - Name/address of employer, no DBA. Must have actual legal name of entity
 - All hourly rates and hours worked for each rate–(not for Exempt).
- Missing any one above can result in penalties [\$50/\$100/\$4000]
- Paid Sick Leave Accruals

Other Issues

- Notice to Employee Form (Labor Code Section 2810.5) – all employees must receive; includes wage information and how employee is being paid
- Travel Time: Non-Exempt
- Rounding of Hours Worked: Don't do it
- Off-the-Clock Work: Non-Exempt

Employee Expenses California

- ▶ Labor Code Section 2802:
 - Provides that all expenses necessarily incurred by the employee in discharge of their duties to the employer must be reimbursed:
 - Auto mileage: Reimburse at IRS rate
 - Cell phone
 - Personal computer or office equipment
 - Uniforms
 - Meals, Lodging and Entertainment
 - Tools

Final Pay Rules

- ▶ Termination – Pay is due immediately at the time of termination.
- ▶ Resignation with 72 hours notice – Pay is due immediately at the time of separation.
- ▶ Resignation without notice – Pay is due within 72 hours.
- ▶ Cannot mail final pay without authorization of employee.
- ▶ Labor Code Section 203 serves as a daily penalty for ANY unpaid wages (including OT, accrued vacation or PTO) up to 30 calendar days after separation.

Wage and Hour

Preventative Solutions:

- Conduct regular audits to determine areas of potential exposure
 - Review Exempt employees' duties for compliance
 - Follow recordkeeping requirements
 - Review payroll practices
 - Follow your progressive discipline protocol and properly record disciplinary issues
- Review and understand applicable wage orders
- Train Supervisors to do regular weekly audits
- Consult with legal counsel

Have you classified your employees correctly?



Exempt/Non-Exempt Test

- ▶ Store manager earns \$60k per year, supervises 10 employees, is able to hire/fire and exercises discretion and independent judgment in performing his job. He works 50 hours per week. 45% of his time is spent supervising and managing and 55% of his time is spent stocking shelves and unloading delivery trucks.

- ▶ Exempt or Non-Exempt?

Exempt/Non-Exempt Test

- ▶ Executive Assistant to the CEO of a large corporation earns \$49,000 annual salary and is directly engaged in work related to the company's operations, and works under general supervision.

- Exempt or Non-Exempt?

Exempt/Non-Exempt Test

- ▶ In-house I.T. person reports directly to the CEO and earns \$115,000 per year.

- Exempt or Non-Exempt?

Exempt–non–exempt test

- ▶ The Office Administrator earns an annual salary of \$95,000. He negotiates with suppliers, makes hiring decisions, and creates and implements the company's personnel policies. He also answers the phone when coverage is needed and orders lunch for the monthly staff meetings.

- ▶ Exempt or Non–Exempt?

Questions & Answers

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