Classifying Employees as Exempt or Non-Exempt in an Agile Business

by CHRIS MORGAN, Partner & JOSHUA WAUGH, Law Clerk — Barran Liebman LLP

Chris Morgan

Joshua Waugh

If you have had employees retire or change jobs at a quicker pace than normal over the past couple of years, you are not alone. All employers in Oregon and throughout the nation face heightened rates of turnover in the current labor market and are exposed to the risks that come along with shifting leadership, workloads and duties among employees. Exempt employee classification is probably the last thing that comes to mind for any business owner or manager when a critical employee leaves and their duties need to be reshuffled, but a failure to revisit employee classification compliance during a personnel transition could entail serious legal risk.

The Fair Labor Standards Act (FLSA) as well as Oregon law require employers to pay most employees at least the applicable minimum wage for all hours worked, and at least time and a half for hours worked in excess of 40 in a given week. These are the standards of compensation which generally apply to employees classified as "non-exempt." Non-exempt employees are also entitled to rest and meal breaks, the amount of which is dependent upon the number of hours worked.

However, employers often choose to classify employees as "exempt," as opposed to non-exempt, the most common reason being that exempt employees are not subject to an entitlement to overtime pay. With that said, properly classifying employees as exempt is not an easy task, and employers subject themselves to significant legal risk in the event that they misclassify a non-exempt employee as exempt. A misclassification for just a few months could lead to a large number of unintended consequences — including unpaid overtime wages, state penalties and federal penalties.

There are very specific circumstances under which an employee may properly be classified as exempt. In Oregon, that includes meeting the applicable salary threshold of $684 per week, as well as at least one of the applicable white-collar "duties" tests (administrative, executive or professional). Oregon Administrative Rule 839-020-0125 also sets out a number of circumstances under which an employee may be exempt from overtime by nature of the substance of their work (for example, fishermen or workers who process fish).

Although employers make the initial classification determination upon hire, they often fail to reconsider that determination on any sort of consistent basis. But the reality is that changes in duties or pay often have a significant impact on a worker's exempt status.

Consider this example: an employee who is classified as exempt under Oregon's "executive duties test" is required, at a minimum, to supervise two or more full-time employees (or the equivalent of two or more). If a Company has a manager who has supervised two employees for the last several years, but those two employees suddenly leave for another company, the manager may very well have just lost their exempt status.

Often times, the Company may understandably be too consumed with the business impact of the departing personnel to consider the internal classification issue that has presented itself as a result. Any time things change, HR should take the time to consider *all* potential personnel impacts which result.

Furthermore, even if there are no dramatic personnel changes which necessitate an immediate review, ensuring that job descriptions are up to date and consistent with the specific exemption under which an employee is qualified is a best practice for a Company to undertake on at least an annual basis. Each of the "white collar" exemptions under Oregon law require employees to meet *all* of the outlined requisites, not just one or two. Going down the list to ensure that an employee's job description and actual substantive duties align with each of the requisites is key to ensuring ongoing qualification and mitigating risk.

Chris Morgan is a partner at Barran Liebman LLP. For questions on classification status, contact him at 503-276-2144 or cmorgan@barran.com.

Joshua Waugh is a law clerk at Barran Liebman LLP. He can be contacted at 503-276-2138 or jwaugh@barran.com.

barran.com