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## How to work through HR dilemma of exempt vs. nonexempt status

**H**ourly or salary. Exempt or nonexempt. Employers have been hit with class-action suits because of misclassifications.

According to news reports and court records, here are some of the overtime back-pay awards that have resulted from such lawsuits:

■ In 2002, Radio Shack paid \$29.9 million to 1,300 store managers.

■ In 2002, Starbucks paid \$18 million to 1,000 assistant managers and managers.

■ In 2002, UPS paid \$18 million to 6,000 part-time employees.

■ In 2002, Petco paid \$2.5 million to 1,000 store managers and assistant managers.

■ In 2003, Pacific Sunwear paid \$3.9 million to 600 store managers and co-managers.

■ In 2003, the Auto Club

paid \$2.5 million to 200 claims adjusters.

The Fair Labor Standards Act (FLSA) is a federal law that deals with minimum wage, overtime pay, record keeping and child-labor standard requirements for both employers and employees covered by the act.

As a federal law it does not, however, pre-empt state wage and hour requirements, unless it is more beneficial to the employee.

The FLSA determines whether an employee is exempt or nonexempt. *Exempt* means exempt from the overtime provisions of the law. It means the law does not cover you.

If you are nonexempt, then you are entitled to overtime for work performed over eight hours a day.

Every employee is assumed to be nonexempt and must be



Marie Hayashi Reichelt

are paid a salary does not automatically mean you are exempt. Just because you are paid for overtime work unless it can be determined that they are exempt. Just because you are paid a salary does not automatically mean you are exempt.

In January 2000, California returned to a system of daily overtime, where workers must be paid time-and-a-half after working eight hours in a day. Double time must be paid after the 12th hour.

The previous system called for overtime pay when more than 40 hours were worked in a week.

Classifying your employees as either exempt or nonexempt is

termines that exempt employees are individuals who "customarily and regularly exercise independent discretion and independent judgment" and spend more than 50 percent of their time in performing exempt duties.

The FLSA offers two independent tests, the General Test and the Short Test, to determine if a position meets the executive, administrative or professional exemptions standards.

Companies need to look at the duties that are performed and not to give inflated job titles.

There was a company that had a receptionist. The company president took a liking to the receptionist and her job title was changed to communications manager.

Does that truly make her a manager — and the position an exempt one? Definitely not.

not an exact science. The decision cannot be made arbitrarily, nor should it be made based solely on the job title or the way the employee is paid, i.e. hourly or salaried.

Instead, the determination must be made based on job duties associated with the position, assuming the employee is paid on a salaried basis.

An up-to-date job description would be a good starting point.

Generally, nonexempt employees' work is routine with set standards and rules. The position generally does not require independent judgment or supervising anyone.

Typical examples of nonexempt positions include bank teller, bookkeeper, cashier, secretary and production worker.

Recent legislative changes de-

Misclassification of exempt nonexempt status may result in fines and penalties imposed by the Department of Labor for up to two years of back overtime pay (three years in the case of "willful" violation).

Human-resources professionals need to carefully assess exempt status under both federal and state tests and reduce the company's exposure to overtime claims.

It may be wise to hire an expert to review the classification before final decisions are made.

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