

KEEPING EXEMPT JOBS EXEMPT: HOW TO AVOID WAGE AND HOUR LITIGATION

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INTRODUCTION

Employers are stumped. How can they run efficient businesses and generate profits that investors and the street expect and not run afoul of wage and hour litigation? What is *sometimes* good practice in management can lead to claims of misclassification of nonexempt workers as exempt. Plaintiff awards in wage and hour litigation can be as much as ninety million dollars, as it was in *Bell v. Farmer's Insurance Exchange*.¹ The challenge is to understand how well-conceived management practices, when taken to an extreme, may create an environment in which exempt employees turn themselves into non-exempt employees and later, become plaintiffs in wage and hour suits.²

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WAGE AND HOUR REQUIREMENTS

Under the Fair Labor Standards Act (FLSA) passed by Congress in 1938, employees earned minimum wage and maximum hour rights. The law was passed for the protection of "blue collar" workers of the 1930s and 1940s, and most significantly, workers earned the right to overtime (1 1/2 times the hourly rate of pay) when weekly hours exceeded the maximum set under the law. States passed their own laws following the FLSA, with many states mirroring the provisions of the FLSA. Other states such as California passed laws that established a higher standard for exemptions, and this made it easier and/or more desirable to bring suits under state law. Generally, lawsuits arise when plaintiffs charge that they have been misclassified as exempt (from state and federal laws) and are thus due unpaid wages and overtime pay. Wage and hour lawsuits typically cover several years of time, and if filed as a class action, they cover potentially all employees, both current and

former, who worked under the job title. Regardless of whether a case is settled or resolved at trial, it can cost employers millions of dollars—even when the job is properly classified as exempt.

EXEMPTIONS

"Exempt" jobs are ones that are considered to be exempt from the federal and state wage and hour laws. Generally they fall into three categories of exemption: (1) executive; (2) administrative; and (3) professional. Each exemption has its own criteria to meet. The criteria and evidence required to classify a job as "exempt" can vary between the federal and state statutes, and from state to state. The best course of action for an employer is to become thoroughly familiar with the criteria set federally and for all states in which the employer conducts business. For these laws, employers have the burden of proof to show why a job is classified as "exempt" if the classification is ever challenged.

Most "white collar" workers fall within these exemptions be-

cause of the responsibility associated with the job, the discretion and independent judgment involved, and the general nature of the work. For professional employees, the work must require invention, imagination, or talent in a recognized field. For administrative employees, the work must consist of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or its customers. For executive employees, the work must require management of an enterprise or its customary departments or subdivisions, and involve direction of two or more employees. All employees under these exemptions must be salaried and paid more than an established minimum.

The trouble lies less within the professional and administrative exemptions than within the executive exemption. Although lawsuits have been brought under the professional and administrative exemptions, a case can be made that the tasks comprising a job meet the requirements for exemption if practiced² by employees in the manner intended. For the most part, *how* individual employees perform these kinds of jobs makes little difference in determining whether a job is classified as exempt or non-exempt. The work requires employees to perform certain tasks, and the tasks determine whether the job qualifies for the exemption or not. For example, an instructor at the college level may choose to teach a class differently from another instructor, but the tasks involved with teaching, however they are done (e.g., how many office hours are held, whether lecture notes are provided to students), will deter-

mine whether the job meets the exemption requirements.

Such is not the case for executive employees (i.e., managers). For jobs that involve management of an enterprise and the management of people, *how these employees choose to perform the job* can have a significant impact on whether exemption requirements are met or not. The tasks themselves do not tell the story. How an individual manager interacts with staff and handles the work demand can dramatically affect the kinds of tasks he or she engages in and the amount of time spent on these tasks. The exemption is determined, in part, by what tasks are performed (exempt or non-exempt) and the proportion of time spent on exempt versus non-exempt tasks. If a manager engages primarily in non-exempt tasks, he or she runs the risk of turning his exempt job into a non-exempt one. Because employees with the same job title can perform their jobs very differently and thus can potentially affect whether the job is classified as exempt, an employer is wise to evaluate exemption status on a case-by-case basis.

THE TROUBLE WITH MANAGEMENT PRACTICES

Good management practices include a number of behaviors that in most contexts are appropriate for building staff morale, setting examples for work productivity, and running an efficient enterprise. Whenever a person manages an operation and directs and supervises the work of others, the dynamics are such that he or she makes *choices* about how much hands-on work he or she will do and how to best use everyone's time. Many companies within the restaurant, fast food, grocery, retail, and office

supply industries operate on thin margins, and labor costs have a significant impact on the bottom line. Labor budgets are tight, and consequently, managers must make choices regarding how to effectively and efficiently manage the resources they have in order to meet the business demand. The problem is, if managers adopt a "hands-on" management style or one that emphasizes "teamwork," they may find that while they may get high marks as managers from their staff, they may also put their employer at risk for a wage and hour lawsuit. Here's why.

"Hands-on" management usually brings with it, a lot of "rolling-up-sleeves" type work: taking customers' orders, making the product, stocking shelves, unloading the delivery truck, resetting the display cases, wiping the floors and cleaning bathrooms, and counting inventory. Managers who are "hands-on" believe that this style enables them to stay close to the business, keep informed of what is going on, get a feel for what their customers want, and stay on top of inventory and staff resources. When asked why managers adopt this style, they often say it is necessary for building credibility with their staff: "If I am willing to do it, then you should be willing to do it, too." (This phrase often gets invoked in reference to cleaning bathrooms.) Another reason reported is, "to let others know it's not beneath me to get my hands dirty." Credibility, then, is built from one's willingness to come down to the level of the non-exempt employee. However, doing the same work as non-exempt employees is precisely the problem. The greater the amount of time a manager spends doing the same work as non-exempt employees,

the more the manager looks like a non-exempt employee. Although in the abstract there is nothing wrong with “getting one’s hands dirty” and “showing others you can do it just as well or better than the non-exempts,” managers run the risk of turning themselves into an extra pair of hands—non-exempt ones. Moreover, they lose the “big picture” and become less able to strategically manage their human resources.

“Teamwork” is another potential trap for wage and hour litigation. Unless the manager remains the team *leader* and does not slide into the mentality of a team *member*, the manager can again turn himself or herself into an extra pair of hands, this time under the guise of building the team and promoting team morale. Teamwork, unless handled expertly, can turn into an egalitarian division of work. Everyone, including the manager, has his or her set of duties, and no one has a more important job than anyone else. Evidence of this style can be found when a manager says, “We all work as a team, and I work as hard as everyone else” or, “Everyone on the team knows their job, so I don’t need to tell them what to do.” This kind of thinking potentially runs afoul of wage and hour laws when managers turn themselves into team members, and as a result there is little active management of the team. Again, what sounds like a good management practice in the abstract can turn into potential liability for an employer if not supervised carefully.

Other management styles can turn an exempt job into a non-exempt one as well. The following is a checklist of behaviors to watch for that could be problematic from the perspective of wage and hour

laws. Although these behaviors do not automatically turn an exempt job into a non-exempt one, employers should be alert to these behaviors and verify that managers are not spending a substantial amount of time engaged in behaviors like these. As a rule of thumb, managers should not be spending more than half of their time doing non-exempt work.³

DANGER ZONES

■ *Getting Your Hands Dirty.*

Managers engage in hands-on work in order to demonstrate that they are not “above” doing the same work as their staff, or to do work that they find easy—so they can take a break and do something “mindless” for a while. Examples include stocking, counting, cleaning, cashiering, answering the telephone, recovering, assembling, and building displays.

■ *Being A Member of the Team.*

Managers engage in teamwork in order to build team morale and commit staff to working together. By working as a member of the team rather than as the leader, managers believe they can motivate staff to higher levels of performance and commitment to the organization. Peer pressure then becomes the motivating force in place of a manager’s direction.

■ *Getting Things Done Quicker, Better.*

Managers do the work of non-exempts when they believe they can get more things done at a higher level of effectiveness by doing it themselves. This can be the result of having poorly

trained, under-trained, or under-performing staff. It can also be the result of a manager’s reluctance to direct and delegate to staff.

■ *Delivering the Best Customer Service.*

Managers engage in non-exempt customer service tasks such as waiting on customers, cashiering, locating items for customers, filling orders, and answering customers’ questions when they believe such behavior exemplifies excellent customer service. They are likely to help the customer themselves rather than pass customers to non-exempt employees or call non-exempt employees to assist the customer. Customers reinforce this behavior by preferring to be served by the person in charge regardless of need.

■ *Getting a Feel For What People Are Buying.*

Managers sometimes work as a cashier and wait on customers, they say, to get a sense of “how their business is doing.” While this information is available to them in other forms (e.g., sales reports, inventory counts, store walk-arounds), some managers feel it is necessary to talk to customers personally and actually see what they are buying. Some managers prefer to get information through their own observation rather than through printed or electronic reports.

■ *Getting Accurate Inventory Counts.*

Managers count inventory themselves when they don’t trust the numbers they get from others. Some-

times they do so because they believe they have a shrinkage problem or they don't feel comfortable delegating this work to others. By doing counts themselves, they can be assured their counts are accurate and thus, can look for other reasons for discrepancies between records and counts.

■ *Doing What You Like To Do.*

Managers who have been promoted up through the ranks sometimes retreat back to the tasks they liked to do as a non-exempt. The fondness they have for certain tasks may serve to lure them into spending a significant amount of time on these tasks. Managers may have taken a job with the company initially because they would have the opportunity to do these tasks (e.g., getting a look at brand new merchandise before anyone else, interacting with different types of people). Managers may engage in non-exempt tasks like unpacking new boxes of inventory and waiting on customers instead of managerial tasks because of their special interest in those activities — an interest that did not change when they assumed a managerial position. Because managers can exercise discretion in what tasks they personally perform, they can choose to engage in these activities and delegate to others managerial behaviors they like less or simply spend less time on them.

■ *Filling in for Absent or Missing Staff.*

Managers some-

times take the path of least resistance when there is a shortage of staff, either in the short- or long-term. When staff calls in sick or don't show, managers can fill in for the missing employee by performing the job themselves. Using themselves as "free labor" (since their own labor cost usually doesn't show up on expense reports), managers sometimes take up the slack rather than take the trouble to find a replacement

- *Helping Out.* Managers engage in hands-on tasks when they believe it is important to "help out" staff during rush periods or when the work is behind. "Helping out" may be something that a manager believes is a moral imperative when the need arises, or it may simply be a matter of a manager believing it is expedient to help staff "catch up" when the workload becomes too great or work falls behind rather than bringing in extra resources.

In all of the above instances, managers make a choice to engage in non-exempt work expecting that it will motivate staff, build staff morale, and deliver high quality customer service. They may also expect that it will help them to learn how the business is doing, achieve inventory control, and deal with business rushes.

Alternatively, managers faced with the same situations can make other choices and engage in managerial (exempt) behaviors that will result in the same or better outcomes. Not only would engaging in these behaviors lower the risk of wage and hour litigation, managers would focus on the

kinds of things that facilitate a more successful enterprise. What would these behaviors be? In short, there are five different types of managerial behavior that enable more effective enterprise operation and staff management. If managers focus on these behaviors rather than the non-exempt ones, they would be just as effective if not more effective in their jobs, and employers would be able to maintain the exempt status of managerial jobs.

KEEPING EXEMPT JOBS EXEMPT

Managers have a primary responsibility to direct and deploy resources in precise ways in order to meet business demand. As mentioned earlier, they can choose to fulfill this responsibility by performing the work themselves or they can direct others to do the work. To make it more likely that managers will engage in the latter, the employer can focus managers' attention in particular areas that will enable managers to use their human resources more effectively. One key is to focus managers on building the right amount of staff resources and training them properly so that they can be directed and utilized well in the workplace. Another key is to focus managers on understanding how well their enterprise is performing so that they can anticipate work demand/issues and respond accordingly. By focusing on the following activities, managers will be less likely to turn themselves into an extra pair of hands, and employers will help managers run more effective enterprises.

- *Staffing.* Keeping the enterprise fully staffed is critical for smooth operations. When there is sufficient staff to deal

with business demand, managers can spend the time to observe operations and redirect staff where the need is greatest. When staffing levels are too low to handle business demand, managers can spend their time obtaining additional help or manage customer satisfaction issues that arise as a result. As a last resort, managers can jump in and help, but this should be done on an exception basis only. The best defense against a lawsuit is having a full complement of staff at all times and even holding a small reserve that can be called upon in times of high need. When this isn't the case, managers have to spend their time either filling in themselves or recruiting, hiring, and training new staff, or both. Even though recruiting, hiring and training new staff is exempt activity, these and hands-on activities take away from time better spent on overseeing operations and directing work.

■ **Operations.** Focusing directly on what makes the enterprise successful and facilitating that success through staff is also critical. When managers find themselves jumping in to "save the day," they can lose the perspective of the enterprise as a whole. If the need to jump in arises due to a shortage of staff, poor scheduling of staff resources, disorganized work plans, poorly motivated workers, reluctance to delegate tasks, or the like, managers will find it difficult to get out of the patterns of jumping in until they solve the problems

creating this need. Despite the temptation to respond by jumping in because managers are used to doing it in a former life as a staff person, they must resist and maintain their focus on overall operations. If they do, they will have fewer instances in which the need arises.

■ **Scheduling and Deployment.**

Having staff in the right places doing the right things is the fundamental building block of a successful business. Having too many people for too little work wastes labor dollars, and having too few people for the work demand means lower levels of customer service and potentially lost business opportunity. Getting it "just right" is a key challenge for managers. Managers who devote a significant amount of effort figuring out how to get this right have more effective and efficient operations. It takes understanding the business flow and anticipating fluctuations in the flow daily, weekly and seasonally, and then finding the right staffing levels and making the right deployment decisions to match need. To the extent managers develop this skill, the need to become an extra pair of hands diminishes. It is interesting to note that some managers perceive that they are "free labor" (cost nothing) because their pay does not show up on labor budgets. On the contrary, when they turn themselves into an extra pair of hands, they become a *very expensive* pair of hands.

■ **Performance Focus.** Just having the right amount of staff is not sufficient to run an effective and efficient operation. Managers need to acquire qualified workers and develop workers' skills and knowledge to enable them to become high performing members of the enterprise. Many of the problems that trigger a response from managers to turn themselves into non-exempt workers stem from staff performance issues. Poorly trained or underperforming staff turns a fully staffed operation into a partially staffed operation. The lower the performance capabilities, the higher the need to supplement existing staff. When managers feel they are "underwater" operationally because they have staff who exhibit significant performance deficits, they are reluctant to spend even more time away from the daily work to properly motivate and train underperforming staff or to replace this staff with more motivated and skilled individuals. The longer managers delay in taking action to address performance issues, the worse the problem will become. The harder managers work to keep the business afloat by doing the work themselves, the more the ship travels unguided and encounters more problems as a result. Managers who deal with staff performance issues and provide individual coaching, training, and performance feedback create more effective workers and thus, remove

the need to do the work themselves.

■ **Work Environment.** The work environment can have a powerful effect on the motivation of staff if they believe that when they contribute to the success of the enterprise, they will be recognized and appreciated for their efforts.⁴ Managers do not have to resort to creating a motivating and engaging workplace by turning themselves into a non-exempt. Building credibility as the authority and finding ways to motivate staff does not require “getting down on their level.” In fact, if handled poorly, this strategy is a sure-fire way of losing credibility and authority. Many managers are uncomfortable being in an authority position so they will engage in non-exempt behaviors that make them look like “one of the gang” in the hope that they will earn staff’s friendship. From friendship will come influence, they expect. But this is a misconception, so it is a better bet for managers to assume authority and make good decisions about people using their authority. Credibility and influence will come from a well-managed operation.

ORGANIZATIONAL SUPPORT

How can these behaviors become firmly engrained in the minds of managers so that when they have a choice, they will choose managerial behaviors over non-exempt ones? Several organizational programs and systems potentially available within a human resources framework can serve to reinforce

and maintain exempt behavior. What matters most is how exempt behavior is treated within each of these programs and systems. If designed right, exempt behavior should be managers’ behavior of choice because exempt behavior will benefit them the most. Companies should consider enlisting the assistance of experts when designing or revising these systems to ensure they target and reinforce the desired behaviors. Example programs and systems are detailed below.

■ **Selection of Qualified Managers.** It all starts with job candidates who have the talent to assume the responsibilities of a manager. Selection systems should incorporate selection criteria that are critical for effective performance as a manager. Qualities such as leadership skills, delegation skills, time management skills, communication skills, interpersonal skills, detail orientation, problem-solving and decision-making skills, among others, may make the difference between a manager who chooses to maintain his or her oversight and direction of the enterprise rather than do the work himself or herself. A well-designed and executed selection system will yield the right talent for performing the job in an exempt manner.

■ **Training Programs in Effective Management.** In addition to hiring the right talent, it is important to develop and implement management training programs that provide managers with the skills and behaviors necessary for

executing the job in an exempt manner. Managers need to understand how to run an enterprise effectively and efficiently and develop the skills to execute in the desired manner. Absent this, managers are likely to fall back on previously learned skills and behaviors—and typically this leads to non-exempt work.

■ **Performance Management.** Performance measurement must include an emphasis on exempt behavior. “What you measure is what you get, and that’s all you get”—so goes the adage. If so, be careful to design a performance measurement and management system that clearly identifies the desirability of exempt behavior. In addition, ensure that this system does *not* include messages about the desirability of *non-exempt* behavior such as “customer service at all costs” or “making sales anytime, all the time.”

■ **Compensation and Incentive Programs.** There is a similar adage for compensation: “What you reward is what you get, and that’s all you get.” Examine the existing compensation and incentive programs to verify that exempt behavior is what is most desired and rewarded. If, at the same time, non-exempt behavior is also rewarded, employers should rethink which is most important to the enterprise and make adjustments as necessary.

■ **Training Programs for Managers’ Supervisors.** The

managers' manager is often overlooked as a trigger for non-exempt behavior. Often times, the problem starts with a supervisor who communicates in very clear terms what he or she wants from the managers—and it may go against the job description, company policies, and company guidelines by pushing managers to do more “hands-on” work. Supervisors are tempted to do so because they can get immediate results. When supervisors drive managers to get more involved with daily operations, it often translates into managers doing the work themselves. Employers should provide the proper training and devel-

opment experience to supervisors so that they can guide managers' behavior in a way that both facilitates the success of the business and protects the employer from liability.

CONCLUSION

Some management practices can have unintended consequences if they promote non-exempt behavior which puts employers at risk for wage and hour litigation. There are reasons why managers sometimes choose to engage in non-exempt behavior, but it is important for employers to address these reasons. By focusing managers on managerial behaviors that build effective operations and by providing organizational support

to reinforce and maintain the exempt nature of managerial jobs, employers can lower their risk of wage and hour litigation and facilitate more successful enterprises.

NOTES:

1. *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805, 105 Cal. Rptr. 2d 59, 7 Wage & Hour Cas. 2d (BNA) 838 (1st Dist. 2001).
2. For an excellent review of the challenges of wage and hour litigation, see Eric H. Joss and Peter Rukin, “Awakening a Sleeping Giant: The Resurgence of Wage and Hour Litigation.” HR Advisor, July-August (2002).
3. In California, employers must show that managers spend more than 50% of their time performing exempt work.
4. There are numerous motivational techniques for managers to use and are too numerous to mention here. A casual perusal of any organizational behavior or human resource management textbook would provide introductory descriptions of major motivational techniques.