

Wage and Hour Compliance – Exempt or Non-Exempt?

By Lori Dwyer & Matt Tarasevich | February 23, 2012

Most public employers know that the Fair Labor Standards Act (FLSA), as well as Maine wage laws, require employees to be paid overtime for any hours worked in excess of 40 hours/week, unless the position falls within one of several statutory “exemptions.” However, many public employers—even the most sophisticated—sometimes misclassify salaried employees as exempt and therefore unknowingly face the potential for costly lawsuits or administrative claims.

The three most relevant exemptions that apply to municipalities are the executive, administrative and professional exemptions. To qualify for such an exemption under the FLSA and Maine law, a given position must (1) pay at least \$455 in gross pay per week (approximately \$11.38/hour in a 40-hour work week); **and** (2) meet the relevant FLSA criteria for a bona fide executive, administrative or professional position. The substantive criteria can be complex, but are generally summarized as:

- **Executive:** The employee’s primary duty is managing the enterprise; he or she supervises at least two employees and has authority to hire and fire.
- **Administrative:** The employee’s primary duty is office work related to business operations; involves the exercise of discretion and independent judgment on matters of significance; does not involve substantial amount of time on tasks usually performed by non-exempt employees.
- **Professional:** The employee’s primary duty requires advanced knowledge in a field of science and learning, typically acquired through a prolonged course of specialized instruction (e.g., teacher, engineer, lawyer); requires the consistent exercise of discretion and judgment.

The FLSA does not provide a list of which jobs are exempt or non-exempt. Instead, it falls to employers to perform an analysis of each position under the relevant tests. The application of these tests to each position can be complicated. A town clerk in one town, for example, may fall within the administrative exemption, while a town clerk in another town does not because of the differences in the actual duties each performs.

Many public employers assume that salaried employees are automatically exempt and therefore inadvertently misclassify those positions. As a result, they fail to record hours worked or accurately pay overtime, or change position classifications to reflect shifts in an employee’s actual job duties.

To minimize exposure to claims for back pay, fines and penalties, public employers should conduct periodic FLSA compliance audits. Prior to conducting such an audit, public employers should consult with experienced employment counsel. If the audit reveals a misclassification of a position, employers need strategic and legal advice on potential repercussions.

For further information or advice on these or other wage and hour issues, contact Matt Tarasevich, mtarasevich@bernsteinshur.com, 207-228-7158 or Lori Dwyer, ldwyer@bernsteinshur.com, 207-228-7145.