

Wage and Hour Claims: Limiting Your Risk Through Job Analysis

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Wage and hour laws—the federal and state laws that establish child labor, overtime pay, minimum wage, and meal and rest break standards affecting workers in the public and private sectors—present significant challenges to human resource professionals. The overtime pay provision of wage-hour law is arguably its most confusing aspect—and the one that is most commonly violated.

The guidance regarding who qualifies for overtime involves many gray areas and even conscientious employers can get into trouble. Compounding the issue is the fact that these laws are subject to change. The federal wage-hour statute, the Fair Labor Standards Act (FLSA) was revised in 2004 and will change again in December of this year.

The High Cost of Wage-Hour Claims

Overtime and misclassification claims are the most common type of federal wage-hour claims. In 2015, more than 240,000 employees received a total of approximately \$250 million in minimum wage and overtime back wages. Overtime violations represented 78 percent of all back wages collected under federal wage-hour law.

Legal challenges related to overtime pay have been on the rise for over a decade and it is anticipated that wage and hour litigation will continue at an unprecedented level in the coming years. Since 2000, there has been a 400 percent increase in the number of federal wage-hour lawsuits filed nationally. In 2015, wage-hour actions involving multiple plaintiffs were the leading type of high stakes lawsuits pursued by the plaintiffs' bar, according to the Seyfarth Shaw law firm. Additionally, the law firm found that the value of the ten largest wage-hour class action settlements in 2015 was a whopping \$463 million.

Classifying Employees as Exempt

Both federal and state wage-hour statutes assume all workers are eligible for overtime pay, but allow companies to “exempt” some workers from overtime pay based on their salary level and the specific work done in their jobs. The classification of a worker as exempt versus non-exempt is based on the employee's specific job duties and salary.

Workers who are deemed executive, administrative, professional, computer professional or outside sales employees can be exempted from overtime pay if their salary exceeds \$913 a week and their duties are consistent with legal standards. The standards for classifying workers as exempt from overtime pay regulations are defined by the laws themselves.

The legal criteria for determining a job's exemption status is focused on the specifics of what gets done on the job, how it gets done, when it gets done, what level of responsibility the incumbent has for completing job activities, and who has ultimate authority to make job-related decisions.

The particular requirements for claiming exemption vary depending on the exemption claimed. For example, determining if an employee qualifies for the executive (that is, managerial) exemption requires a detailed consideration of the employee's:

- Performance of management duties
- Supervision of other employees
- Exercise of discretion and independent judgment
- Authority to hire and fire employees

Designating the exemption status of employees requires careful consideration because employers bear the burden of proof when claiming employees are exempt from wage and hour law. Knowing the work that is done on a job is the best way to ensure employees are classified appropriately and, thereby, limit wage-hour risk. Job analysis is the preferred method for documenting the work performed by employees. Job analysis techniques can be used as an aid in determining whether jobs and the incumbents in those jobs meet the specific criteria for establishing exemption.

Key Steps in Conducting Job Analysis for Making Exemption Decisions

Job analysis is the process of identifying the important work behaviors, Knowledge, Skills, Abilities and Other characteristics (KSAOs), and minimum qualifications required to perform jobs successfully. Conducting a thorough job analysis for making exemption decisions requires several key steps.

1. Determine the jobs that need to be analyzed.
2. Conduct background research on the jobs.
3. Collect structured verifiable data on the jobs.
4. Analyze the data collected.
5. Assess the data for exemption implications.
6. Create job descriptions.

Step 1: Determine the Jobs to be Analyzed

The first step in the job analysis process is to determine the jobs that present risk for an organization. Many jobs are clearly exempt or nonexempt and, consequently, an analysis of exemption status is unnecessary. However, jobs that are difficult to classify should be analyzed (for example,

Case Study

A large retailer faced a lawsuit alleging that store managers were incorrectly classified as exempt and should have been paid overtime. APTMetrics was hired by the company to evaluate the accuracy of the store managers' exemption classification.

A job analysis study was conducted to document the work performed by store managers and provide a scientific basis for determining whether the job met the criteria necessary to claim exemption. The study entailed a review of existing documents, job

observations, and a survey administered to the supervisors of store managers.

APTMetrics was able to provide the client with objective data to support their initial decision to classify the store managers as exempt. The study verified that, across store types and locations, store managers have a primary duty of managing, are responsible for regularly directing the work of other employees, and have significant influence on hiring, firing, and compensation decisions.

administrative positions such as insurance adjusters and mortgage loan originators), as should jobs that are subject to frequent wage-hour claims (for example, retail store managers and assistant managers).

It is also important to analyze jobs that have changed significantly or those that have expanded or contracted due to organizational changes. Any circumstances that impact the duties of a job or the time spent on those duties should trigger a review of exemption status. For example, mergers, changes in technology, or any other significant changes in the nature of job duties or the time spent on those duties should prompt a review.

Changes to wage and hour law also necessitate a review of exemption status. Moreover, since state law varies, it is important to review exemption status when companies change locations and jobs are moved to states where they didn't previously exist.

Step 2: Conduct Background Research

The second step in the job analysis process is a review of company documents, such as organizational charts, job descriptions, job postings, and training materials. In addition, any existing information that is the product of previous job analyses is helpful in understanding the job prior to conducting a new job analysis study.

Following the document review, a series of onsite job observations is typically conducted to ensure familiarity with the jobs. During the site observations, experienced job analysts observe and interview employees engaged in their normal work activities. The observations focus on the employees' job responsibilities and activities; interactions with other employees, their management

and customers; supervision received; and procedures and guidelines followed.

Step 3: Collect Structured Verifiable Data

The strength of a job analysis is that it provides a documented, structured approach to collecting data on the target jobs. In Step 3, information gathered from the document review and the job observations is used to facilitate the development of a survey instrument, which includes items that describe work activities and requirements. The survey also includes questions and rating scales designed to determine the extent to which the work activities and requirements meet relevant exemption criteria.

Survey Items. Items describing the core job activities are drafted and, if necessary, the knowledge, skills, abilities, and other characteristics required to perform the target jobs. These items are then reviewed and finalized by job experts. Lastly, when appropriate, the activity statements are classified as representing exempt or nonexempt work activities. Attorneys or other legal experts may be consulted in making the determination as to what is an exempt activity and what is not an exempt activity. Surveys are completed by job experts who provide a number of ratings for each activity and KSAO. Survey respondents typically consist of incumbents employed in the target jobs and/or their supervisors. Employees selected to participate in the job analysis must be representative of employees in the target jobs on key factors which could potentially influence the results of the job analysis and, therefore, the exemption decision. These factors might include variables such as tenure, location, line of business, and functional area.

Rating Scales. The scales used by survey respondents to rate work activities and requirements are developed to determine the extent to which employees' job responsibilities meet the exemption criteria. Since the criteria vary depending on the exemption claimed, the survey questions and rating scales vary on the basis of the particular exemption criteria at issue. To assess activities, rating scales may be used to measure the importance and frequency of job activities, the time spent on activities, and the extent to which those activities require discretion and independent judgment.

Surveys are administered using a web-based survey administration tool or in facilitated group settings.

Step 4: Analyze the Data Collected

The data collected during the job analysis are tallied and analyzed to assess the nature of the work performed by employees relative to the exemption criteria. As a starting point, simple means and standard deviations are computed for each rating scale to quantify survey responses. The standard deviation quantifies the variability of the distribution and indicates the level of agreement among survey respondents.

The survey evidence may be analyzed to examine the extent to which:

- The job is comprised of activities considered exempt versus nonexempt.
- Employees identify exempt and nonexempt activities as important to their job.
- Employees spend time engaged in exempt work.
- Employees exercise discretion and independent judgment.
- The nature of work comprising employees' primary duties is consistent with work specified in the exemption tests.
- The work requires advanced knowledge, skills and/or competence consistent with the exemption tests.

Step 5: Assess the Data for Exemption Implications

The survey results related to each of the above factors are examined to reach an informed, data-driven judgment regarding the exemption status of the job. Survey results are typically reviewed with the company's legal experts to compare the data to the regulations and reach a decision regarding next steps.

In many situations, no action will be required. Employers will simply maintain the job analysis results to document the accuracy of their exemption decisions. In other situations, employers may find that there has been a significant change in the nature of the job duties or the time spent on those duties. For example, managers may have taken on more "non-managerial" work in response to leaner staffing levels and unknowingly affected their exemption status. In those circumstances, employers may decide to redesign jobs to ensure they are appropriately classified by moving some activities to other jobs, or increasing or decreasing the importance of selected activities.

Step 6: Create Updated Job Descriptions

As a final step, it is important to develop updated job descriptions based on the job analysis results and any job redesign that occurs. Job descriptions should include key activities and responsibilities; important and required knowledge, skills and abilities; and minimum and preferred qualifications.

Conclusion

When wage and hour practices are legally challenged, the first line of defense is a robust job analysis with solid data and documentation to support exemption decisions. Job analysis provides a scientifically derived basis upon which to make such high stakes employment decisions. A well-designed and well conducted job analysis supplies all of the information needed to accurately define exemption status. The identification of a job's key functions and critical requirements establishes the foundational criteria for these decisions and offers a forward looking perspective concerning job design.

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Resources

¹\$913 a week is the minimum salary level required to be classified as exempt from overtime under federal wage-hour law effective December 1, 2016. State laws may differ.

