

## Layoffs May Spring Claims for Overtime

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The current recession has led many employers to reduce their workforces. Employers must be careful, however, that a reduction in force does not inadvertently expose them to liability for overtime under the federal Fair Labor Standards Act (“FLSA”) or New Jersey’s Wage and Hour Law. Such exposure can arise if a reallocation of responsibilities after a layoff effectively changes an employee’s job in such a way that the position no longer qualifies as “exempt” from overtime.

The FLSA and Wage and Hour Law require employers to pay their employees time and a half for all work performed by each employee over forty hours in a given week except for “exempt” executive, administrative, and professional employees and certain outside sales employees. To qualify for one of these exemptions, the employee’s “primary duty” must be executive, administrative, or professional, as those terms are defined in the applicable regulations of the New Jersey Department of Labor. What happens if, due to a layoff, exempt employees are assigned non-exempt duties? For example, if an exempt store or restaurant manager is required to pitch in and regularly perform non-exempt work, does that manager remain exempt or lose the exemption at some point?

The regulations of the New Jersey Department of Labor require that executive and administrative employees devote less than 20% of their time to non-exempt duties (40% in the case of a retail or service establishment) and that professional employees devote less than 20% of their time to non-exempt duties in order to qualify as exempt from the overtime provisions of the New Jersey Wage and Hour Law. (Although the FLSA does not quantify “primary duty” in this way and may not be as stringent, New Jersey employers are governed by the more stringent requirements of New Jersey law and should focus on meeting its standards.) If, as a result of a layoff, previously exempt employees are assigned non-exempt duties that exceed these allowable percentages, those employees’ exempt status could be lost and the employer could face overtime exposure. Job titles do not determine if a position is exempt or not: actual duties and responsibilities are what state and federal investigators and auditors look at.

Recommendation: Litigation under the FLSA and state wage and hour laws is “hot” right now and is on the rise. Employers should consider performing “job” audits to make sure positions are properly classified as exempt or non-exempt. Additionally, when planning a reduction in force, employers should carefully think through the reallocation of duties that are necessarily part of such a reduction. Failure to do so could inadvertently result in increased overtime costs and defeat the very purpose of the force reduction in the first place.

Published Articles (Cont.)

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