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Federal computer employee exemption: Are you in compliance?

By SAMANTHA D. HARDY

Sheppard Mullin Richter & Hampton LLP

The overtime exemption for computer employees is one of the most often misunderstood and misapplied exemptions from federal overtime requirements. It is also increasingly on the radar screens of plaintiffs' attorneys, who have turned their attention toward filing individual and class-action lawsuits against both technology-based companies and other employers with technology-based employees. Now is the ideal time for employers to confirm they are not misapplying the exemption, before they become the target of such a suit.

Most employers are familiar with the general rule regarding overtime: All employees must receive overtime unless they qualify for an exemption from both the federal overtime requirements and any applicable state overtime requirements. Under federal law, overtime must be paid for any hours worked over 40 in one week. The most frequently used federal exemptions are the computer employee, professional, administrative, executive, inside sales and outside sales exemptions. Employees who are currently misclassified as qualifying for the computer employee exemption may qualify for a different exemption; however, many times such employees do not qualify for any exemption and are entitled to overtime compensation.

In order to qualify for the fed-



Samantha Hardy

eral computer employee exemption, an employee must be a computer systems analyst, computer programmer, software engineer or other similarly skilled worker, whose primary duty is one of the following:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on or related to user or system design specifications;

3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4. A combination of the aforementioned duties, the performance of which requires the

same level of skills.

While the "primary duty" standard does not require the employee spend over 50 percent of his or her time engaged in exempt duties, the breakdown of the employee's duties is an important factor.

The regulations also contain a list of employees who do not fall within the exemption, including employees engaged in the manufacture or repair of computer hardware and related equipment, and employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs.

In addition, the Federal Department of Labor, Wage and Hour Division, has opined multiple times that IT and help desk employees are not exempt computer employees. The division rejected the applicability of the exemption for employees with duties including: identifying computer solutions to fit the needs of customers; changing software settings and specifications to fit those needs; loading and implementing programs to customers' computer networks; training customers with regard to specialized computer software; testing, debugging and troubleshooting; having responsibility for network activities; and having supervisory responsibility for other IT personnel.

In addition to the duties requirements, the exemption has a compensation require-

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ment. Exempt computer employees must be paid on a salary or fee basis of at least \$455 per week or on an hourly basis at a rate of at least \$27.63 per hour. There are complicated rules for paying an employee on a "salary basis," as defined in the regulations. Generally, an employee paid on a salary basis must be paid his or her entire salary for any week in which he or she performs any work with some limited exceptions. Improper deductions from an otherwise properly classified employee's salary can result in a loss of the exemption and can be very expensive. Employers are advised to consult their attorneys before classifying employees as exempt pursuant to any exemption requiring employees to be paid on a salary basis.

Why is this important to employers? Because both the number of suits and settlement values for cases alleging misclassification of computer employees under federal law and similar state laws are on the rise. **Computer Sciences** (NYSE: CSC), a technology company, reportedly agreed to pay \$24 million to settle over-

time claims brought by technical support workers. **Electronic Arts** (Nasdaq: ERTS), a video game company, reportedly agreed to pay nearly \$15.63 million to settle overtime claims brought by image production employees. **Vivendi Universal Games**, **Sony Computer Entertainment America** and **IBM** (NYSE: IBM) have all reportedly been sued for unpaid overtime.

Misuse of the computer employee exemption is on the minds of the Department of Labor as well. Tammy McCutchen, the former head of the Federal Wage and Hour Division, reportedly has said, "Please, please please look at your computer help desk employees! Pay them overtime!"

What can employers do to ensure they are correctly applying the computer employee exemption? First, employers should evaluate whether the employees they have classified as exempt computer employees have as a primary duty the tasks listed in the exemption. Neither job descriptions nor titles are determinative; employers must speak to the employees' immediate supervisors and observe employees while they work. An employ-

ee's duties must qualify for the exemption every week, or the employee is entitled to overtime in the weeks during which his or her duties do not qualify.

Employers who have employees they determine are properly classified as exempt computer employees should ensure all documentation reflects this. Employers who determine some of their employees are misclassified and should be reclassified as nonexempt overtime eligible employees should ensure they comply with all federal and state wage and hour laws applicable to nonexempt employees.

National employers should be particularly wary of states with requirements that are stricter than federal law. For example, California's computer employee exemption is stricter than the federal exemption.

The old saying "an ounce of prevention is worth a pound of cure" is good advice in the wage and hour context. Employers should audit their practices before they become the targets of lawsuits.

Hardy is a senior associate in the labor and employment department of Sheppard Mullin Richter & Hampton LLP's San Diego office.

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