

Bits & Pieces – Part 2

Waldthausen & Associates, Inc. is a Retained Executive Search firm with the focus on recruiting managers that influence a company's result and earnings. The firm focuses on recruiting professional managers for US subsidiaries with parent companies located in central Europe.

Inclement Weather – To Pay or Not to Pay

Predictions for this winter's chance of severe weather are much worse than last year. Because of this, employers would be wise to revisit their inclement weather policies. Employers should address two key questions: How will employees be notified whether the business is open or closed? How will employees be paid if the business is closed all day, or closed for only a partial day?

The method of payment for hourly employees when they miss work due to inclement weather is quite simple. If an hourly paid non-exempt employee does not work, the company is under no obligation to pay the employee. This is true regardless of whether the company is open for business or closed due to the weather. The Fair Labor Standards Act (FLSA) says that you must pay non-exempt employees only for time "actually worked." The same holds when an hourly paid non-exempt employee comes in late or leaves early due to the weather – he or she is only paid for actual time worked.

For salaried exempt and non-exempt employees, the method of payment is more complicated. For salaried non-exempt employees, the method of payment depends on what has been communicated. If they are paid a set salary based on a set schedule (i.e. \$400 for a 40 hour workweek), they are essentially being paid by the hour. They can be treated like an hourly employee as outlined above. But, if they are paid a set salary for "all hours worked", then they are treated more like a salaried exempt employee. Salaried exempt employees must be paid if they miss work due to weather, if the company is closed a day or so for business.

The FLSA states "an employee will not be considered to be on a salaried basis if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. " If the business is closed for an entire week, and an employee performs no work, then the employer does not have to pay for that week. In both cases, it would be permissible for a company to require a salaried employee to exhaust days of paid vacation/sick/personal leave; it is not permissible to dock the salaried employee's pay, unless he or she misses the entire week.

If the business is open, and a salaried exempt employee does not report for work and performs no work at home, then the company may require the employee to exhaust a day of paid vacation/sick/personal leave. In this case, if the employee has no available vacation/sick/personal leave, it is permissible to dock their pay for the day, because work was available, and the employee is in essence staying home for personal reasons. If the salaried employee reports for part of the day, they must be paid for the entire day. It is not permissible to dock a salaried exempt employee for a partial day absence.

Interestingly, for salaried non-exempt employees, it depends on what has been communicated. For example, if the employee is being paid half time for overtime premium, their pay cannot be docked. However, if the employee is being paid time and a half premium, and it has been communicated that their pay will be docked, then it is permissible to do so. Companies should balance the legal requirements under the FLSA as compared to the "employee relations" issue of paying/not paying employees for inclement weather days.

Highly Compensated Sales – Exempt or Non-Exempt

The revisions to the Fair Labor Standards Act regarding exempt and non-exempt employee status have taken effect. Although the "tests" for the executive, administrative and professional exemptions were simplified from the existing "long" and "short" tests to one "standard"

duties test, and a "highly compensated" exemption was added to the regulations, not all questions have been specifically addressed.

There is one "job" that still creates a great deal of confusion under the regulations – an "inside salesperson." This is the individual who sits at a desk and uses a telephone, computer, fax, etc., to make sales. Courts have consistently ruled that inside sales employees are non-exempt and subject to overtime pay requirements. A number of rulings have compared inside sales to "production" work that is not directly related to the management or general business operations of the company (a key element of the administrative exemption.) Reading the administrative exemption closely, it might seem that an inside sales person would be exempt from overtime, but that is not the case. Under both the old regulations and the revised regulations, inside sales personnel are non-exempt.

One question not clearly answered is "What about an 'inside sales person' earning more than \$100,000 per year?" From an employer's perspective, an employee generating enough sales to warrant a salary of \$100,000 would likely be considered very important to the overall business. This "war of words" has not been specifically addressed in the revised rules.

Under the revised regulations, an employee is considered exempt under the "highly compensated" exemption if:

- The employee earns a total annual compensation of at least \$100,000 (at least \$455 must be paid per week on a salary basis), AND
- The employee's primary duty must be office or non-manual work, AND
- The employee must "customarily and regularly" perform at least one of the exempt job duties of an exempt administrative, executive or professional employee.

Although the argument can be made that an inside sales person is performing office or non-manual work, the issue of performing at least one of the exempt job duties of an executive, administrative or professional employee is much less clear. If an employee regularly directs the work of two or more other employees (but does not meet any of the other requirements under the executive exemption), s/he could still qualify as an exempt highly compensated executive if s/he earns at least \$100,000 per year. However, if the highly compensated inside sales person does not supervise any other employees, it may be difficult to prove that he performs any of the exempt duties of an administrative employee. The Wage and Hour Division and the courts have not necessarily considered "negotiating" prices or other issues related to the sale of a product or service as the "exercise of discretion and independent judgment with respect to matters of significance." To show that the inside sales person meets this criteria, the employer would likely have to argue that the sales person regularly and customarily acts independently, has the authority to bind the company on significant matters, and that his recommendations to management are given "particular weight."

The bottom line is that highly compensated inside sales staff should not automatically be considered exempt employees. Employers are cautioned to carefully evaluate the specific job duties of each employee. Until the Department of Labor or the courts rule on this question, it is likely to remain a source of confusion for employers. (*The Employers Association*)

Kurt G. Waldthausen
Waldthausen & Associates, Inc.
KWaldthausen@waldthauseninc.com