Paying Salaries to Non-exempt Employees

Mark Broth, Esquire

First, the basics: the federal Fair Labor Standards Act generally requires covered employers to pay overtime rates to non-exempt employees who work more than 40 hours in a seven (7) day pay period. Employees who are exempt from this requirement are those that are paid on a salaried basis (with a minimum salary of $455 per week) and employed as an executive, administrative, professional, or outside sales employees. Certain computer specialists may also be classified as exempt, even if they are paid on a per diem or hourly basis.

While exempt status generally requires that an employee be paid on a salaried basis, the FLSA does not prevent an employer from paying salaries to non-exempt employees. However, the fact that non-exempt employees are paid on a salaried basis does not eliminate their entitlement to overtime pay. Thus, it is permissible to pay a salary to a non-exempt employee as long as the employee receives extra compensation for overtime hours. This can be accomplished in several ways: salary plus time and one half for hours worked over 40, or the so-called "fluctuating workweek" method where the employee receives a fixed salary plus additional half-time pay for the hours worked over 40. Details regarding the fluctuating workweek method can be found in the federal wage and hour regulations at: http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_778/29CFR778.114.htm.

To use the fluctuating workweek method, an employer must establish a mutual understanding with the employee (preferably in writing) that the salary is intended to cover all hours worked during the pay week. In addition to the salary, the employee must also receive additional half pay for hours over 40 using this formula: salary divided by total hours x one half x hours worked over 40. Simple enough? The salary must be sufficient to assure that the employee receives at least minimum wage for all hours worked. This compensation method is most appropriate for employees who do not work regular schedules.

So, if you have properly placed an employee in the fluctuating workweek method, may you then treat him/her like any other salaried

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Correction: We extend our apologies to Association Partner Jewett Construction for inaccuracies that appeared in the Summer issue of Dateline: NH. Below is a corrected version.

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employee? Of course, the answer is yes – and no. Under New Hampshire state law, all salaried employees are treated the same, regardless of whether they are exempt or non-exempt. This means that all salaried employees are entitled to the protections of RSA 275:43-b, which limits the deductions that may be made from salaried compensation and generally requires an employer to pay the full salary to an employee who works any portion of the pay period. However, in an Opinion Letter issued on May 25, 2006, the federal Department of Labor reaffirmed that non-exempts paid on the fluctuating workweek basis may not have their salaries reduced in circumstances where those deductions are permissible for exempt employees.

Given these complexities (and I assure you that this is a simplified explanation of the applicable federal and state law), does it make sense to pay a salary to a non-exempt employee? The answer is simply: rarely. In those instances where an employee works a wildly fluctuating schedule, with 40 or fewer hours in most weeks and occasional weeks of high overtime, a fluctuating workweek method salary may produce sufficient overtime cost savings to justify the complicated payroll processing and the additional cost of paying the full salary in weeks where the employee works fewer than 40 hours. In most other instances, paying a non-exempt employee on a salaried basis simply raises payroll costs (employer pays full salary even in low-hour workweeks), without an offsetting overtime savings.

Employers should exercise care in determining whether employees are properly classified as exempt or non-exempt. If classified as non-exempt, the decision to pay on a salaried basis, rather than the standard hourly basis, should be carefully evaluated to determine whether the overtime savings outweigh the cost of salaried employment and payroll administration.

(Mark Broth is with the law firm of Devine Millimet, a Silver Association Partner. You may call 695-8582 to access Devine Millimet's free Employment Law Hotline.)

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