

Changing Retail Staffing Models – Unforeseen Risks in a New Economy

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Events related to the COVID-19 pandemic may have caused roles within retail operations to shift, and managers may have been required to do more when employees are unexpectedly sick or when staffing levels fell due to the “great resignation.” Therefore, employers need to be careful to potential loss of managers’ exempt status. This risk to exempt status has consequences not only for potential wage and hour liability for overtime pay, but union organizing efforts as well.

The Executive Exemption in the Retail Sector

Twenty years ago, brick-and-mortar retail locations would typically have a manager, one or more assistant managers, and many part-time employees making sales, re-stocking, and assisting customers. The expanding online business sector, as well as waves of class and collective action lawsuits in the 2000s and 2010s, however, caused a shift in the traditional retail staffing model. Retailers moved away from having “exempt” assistant store managers and focused instead on leaner staffing with part-time, non-exempt employees. Today, in the retail sector, fewer store and warehouse employees are classified as “exempt” from overtime. Those who are exempt are typically store or warehouse managers who fall under the Fair Labor Standards Act (FLSA) and state “executive” exemption(s).

Generally, to be exempt, a manager must earn a minimum salary and:

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent;
- The employee must have the authority to hire or fire other employees, or the employee’s recommendations must be given particular weight; and
- The employee’s primary (principal, most important) duty must be management of a customarily recognized department or subdivision.

(In California, in addition to a minimum salary, an executive employee also must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c). Generally, this means employees must make an annual salary of at least \$62,400. The FLSA exemption only requires employees be paid at least \$684 a week.)

(California, the largest retail market in the country, uses a “quantitative” not “qualitative” measure of exempt employee time to determine primary duty. This is a *key distinction*. In California, an exempt manager must spend *more than* 50 percent of their time on *exempt managerial* tasks. California also requires that the employee “customarily and regularly exercises discretion and independent

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judgment.”)

The first two requirements are straightforward. Most brick-and-mortar and warehouse locations have at least two full-time equivalent employees for managers to direct and have the authority to hire and fire. “Management” activities are defined by the federal regulations, 29 C.F.R. § 541.102, (as adopted by California) to include activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing employees’ work; appraising employees’ productivity and efficiency; handling employee complaints and grievances; disciplining employees; apportioning work among employees; determining the type of materials, supplies, machinery, equipment, or tools used or merchandise bought, stocked, and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

While these exempt management activities must be the employee’s primary duty under the FLSA, exempt employees can perform other duties without risking the exemption. A manager will not lose their exemption, for example, if they cover the register while an employee takes a break or if they help cover the occasional shift. If a manager is not primarily or more than 50 percent of the time (in California) supervising more than two people and performing management tasks, however, exemption issues may arise.

Unintended Consequences of Staffing Shortages

The COVID-19 pandemic changed the retail sector in ways few expected. After weathering shutdowns and furloughs in 2020, brick-and-mortar stores had to adjust to lower foot traffic or local laws limiting the number of customers in a store. At the same time, online and warehouse retailers could barely keep up with demand, experiencing staffing shortages, and shipping delays. All retail sectors experienced heavy turnover. These challenges may have resulted in full-time exempt managers taking on more tasks in addition to their managerial duties, and potentially weakening the exemption.

If it is determined that a manager is not exempt from overtime, that employee could be owed unpaid overtime and liquidated damages. In California, they could be owed meal and rest period premium pay and additional state-specific penalties.

Additional NLRB Concerns

As headlines have shown, union activity is on the rise among retail locations. Managers who do not retain supervisory status might be eligible to join a union, rather than viewed as sitting on the management side. The assistant manager is key for the daily running of the retail location. The assistant manager is there every day and knows the employees best. Keeping the assistant manager as a supervisor under the law facilitates management’s ability to access the employees. These factors make the assistant manager a critical component of the management response in the event of union organizing. During union organizing, the lowest level supervisor (typically the assistant manager in the

retail setting) often is a key organizational communicator of the company message, with frequent direct access to those who will vote on unionization. Without their supervisory status, it would be improper for the organization to ask the assistant managers to communicate on its behalf – that would infringe on their rights as an eligible person to join a union.

Core factors that determine supervisory status by the National Labor Relations Board (NLRB) include a job title's responsibility to interview, hire, discipline, fire, evaluate, and assign work (among many others) or the authority to effectively recommend such actions. With fewer employees working in a retail location, and to supervise, and more time spent performing non-supervisory tasks, the opportunity for an assistant manager to exercise these authorities may drop so low as to be unpersuasive in establishing to the NLRB's satisfaction that the assistant manager continues to retain supervisory authority. As a result, the organization could lose this key communicator with the most day-to-day contact and potential effect on the staff's decision on unionization. When faced with the question of whether an assistant manager is a supervisor under the National Labor Relations Act, an employer must show actual authority of an assistant manager exercising duties such as hiring, disciplining, and effectively recommending terminations.

Employers should work closely with their Jackson Lewis attorneys to determine whether reclassification of certain exempt employees may be appropriate. Auditing and monitoring employee roles as staffing changes occur can be useful to help mitigate risk and your Jackson Lewis team can ensure that all areas of labor and employment are considered.

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