

HOW TO KEEP EXEMPT EMPLOYEES EXEMPT

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As counter-intuitive as it may sound, an executive or managerial employee who is hired to perform in an exempt capacity, may nonetheless be entitled to pay for overtime and for missed rest and meal breaks depending on how they actually spend their time at work. Simply because the job title sounds “executive” in nature, or because the job description declares the position to be “exempt” is not dispositive. It likewise does not matter if the employee acknowledges that he or she was hired for an exempt position. Instead, the true inquiry is: how much time is this employee devoting to certain job duties? An otherwise exempt employee who devotes more than 50% of his or her time to non-exempt type duties is no longer considered exempt, and must be paid accordingly.

We recently had a case where a food services director, who had been terminated after only 6 weeks, sued his RCFE-employer, claiming that he was owed compensation for overtime wages and for missed rest and meal breaks. He acknowledged that he was an exempt employee, hired to perform exempt-type functions. What he claimed, however, was that the reality of the job was such that he was required to do much more than executive duties. He claimed that because the kitchen was so understaffed, he was forced to pitch-in by washing dishes, unloading supplies, breaking down boxes, cooking food, and plating lunch and dinner orders. And he said he spent more than 50% of his time performing these non-exempt activities. However, the other employees in the kitchen did not support the plaintiff-Food Services Director’s allegations, and instead told a much different story. The dishwashers, prep cooks, and executive chef all agreed that they rarely saw the former Food Services Director in the kitchen, that he spent the majority of the day in his office, that he never helped them with their non-exempt work, and regardless, he never worked more than 8 hours per day.

This case was brought before a Labor Commissioner, who sided with the RCFE and determined that there was no evidence that the plaintiff-Food Services Director spent more than 50% of his time performing non-exempt duties. The plaintiff-Food Services Director appealed this decision to the Superior Court, where a one-day trial was held. At trial, the plaintiff-Food Services Director presented evidence in the form of an email between himself and the Administrator, in which he wrote that he was understaffed in the kitchen and that he spent much of that day cooking and cleaning. In defense, we presented evidence by way of four witnesses who worked in the kitchen and said that the plaintiff-Food Services Director rarely helped them cook, never broke down boxes, and never washed dishes. The Administrator also testified that she did “walk throughs” of the kitchen both

before and after work, and that she rarely saw him there either in the early-morning hours, or late in the evening. In essence, we presented evidence that his claims literally did not add up.

The judge ruled in favor of the RCFE, although his reasoning was somewhat surprising. Rather than relying principally on the testimony of the plaintiff-Food Services Director’s former coworkers, the judge gave greater weight to the absence of certain evidence. The judge believed that given how vocal (via email) the plaintiff had been on the one documented occasion where he worked a long day performing nonexempt tasks, there would have been more of the same kind of emails from the plaintiff to the Administrator if it truly had been a chronic problem.

There are several steps that you can take to avoid these sorts of problems. First, there should be regular communication between Administrators and departmental managers. It is essential that departmental managers know to inform the Administrator immediately if they are short-staffed. And keep good records of any such communications.

Second, if a departmental manager does complain that their department is regularly short-staffed and they are working non-exempt tasks to pick up the slack, it is important for the Administrator to immediately begin a search to solicit potential employees to fill the void.

Third, be clear that departmental managers are not to be regularly performing non-exempt tasks. If you are aware that they are regularly spending more than 50% of their time performing non-exempt tasks, and you know it is not because they are short-staffed but instead, because they choose to perform such tasks, you must have documented communication with them to inform them that they are not meeting job expectations. Be clear what their job duties are. And if the problem continues, and you know that an exempt employee is spending too much of his or her time performing non-exempt functions, you may need to look for a replacement manager. You can take some comfort in knowing that you will not likely be required to pay exempt employees overtime wages if their overtime is attributable to the fact that they are simply incompetent at their job or because they chose to devote less time to those exempt duties than was realistically expected by the RCFE employer.

What this boils down to is: be clear with your expectations, be open and regular with communications, and act early to identify what the problem is if a manager is performing too much non-exempt work.