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▶ Tip Sheet

Professional Development

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Reevaluating Employee Classifications

As PR agencies grow, positions become more specialized and employees begin to fit more neatly into certain, defined roles. As this occurs, it is critical for PR managers to reevaluate their employee classifications to determine which employees should be classified as exempt (not eligible for overtime) and non-exempt (eligible for overtime).

► **Common exemptions in the PR industry**. An agency is not required to pay overtime under federal law only if an employee meets a two-part test. First, the employee must be paid a salary of at least $455 per week, although this salary level does vary from state to state. Second, the employee must perform "exempt" duties. "Exempt" duties are those described under applicable law in the definition of each "exemption."

The two most common exemptions in the PR industry are the administrative exemption and the executive exemption.

The "administrative exemption"—by far the most common in the PR industry—applies to employees whose primary duties: (i) are the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (ii) include the exercise of discretion and independent judgment with respect to matters of significance.

The first requirement generally is met by employees of PR agencies, as they perform public relations services for their clients. However, the second requirement often is the more difficult to meet.

Generally, entry-level employees need to learn on the job. This is not unique to the PR industry, but is true of any business. As a result, especially during their initial period of employment, entry-level employees may not be granted sufficient discretion and independent judgment to meet the administrative exemption.

The "executive exemption" is generally more difficult to satisfy. It can be successfully applied only to managerial employees who: (i) manage either the agency or a department within the agency; (ii) customarily and regularly direct the work of at least two or more other full-time employees; and (iii) have either the authority to hire and fire other employees, or have their suggestions given particular weight.

Agency management and heads of account teams typically will fit within this executive exemption. However, agencies—and smaller agencies, in particular—should be mindful that if the primary duties of their managerial employees is client work, and not to direct, they may have to rely on the administrative exemption instead of the executive exemption.

► **Risks of misclassification**. Under federal law, non-exempt employees must be paid overtime at a rate of 1.5 times their regular rate for all hours worked in excess of 40 each week.

Employees who are misclassified as "exempt" but who should have been eligible for overtime pay can bring lawsuits against their employers for unpaid overtime, liquidated (double) damages and attorneys' fees.

This can result in significant monetary liability, particularly for employers with numerous misclassified employees who choose to bring their claims as class actions.

► **Conducting an exemption audit**. It is critical for PR agencies to evaluate their current employee classifications to ensure that all employees are properly classified as exempt or non-exempt, and that all entitled employees receive appropriate overtime pay.

Conducting an exemption audit involves, at a minimum, the following steps:

- Identify vulnerable jobs (those classified as exempt but whose duties may not meet an exemption test).
- Select an evaluation plan (review job descriptions; interviews with current employees; hire a consultant or some combination of these steps).
- Assess each employee's current exemption status and identify risks.
- Analyze the pros and cons of reclassification to determine the best way to minimize potential exposure.
- Implement any changes.

Taking steps to address these concerns now, before a lawsuit or a governmental audit, places PR agencies in the best position to defend against claims.

As the saying goes, "an ounce of prevention is worth a pound of cure." By taking these steps now, PR managers can avoid millions of dollars in liability, which can have drastic effects on their bottom line profitability. PRN

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