



ABOUT THE AUTHOR

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ABOUT THE FIRM

Epstein Becker & Green P.C., is a national law firm with a primary focus on employment, labor, and workforce management. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in hospitality, financial services, retail, and technology, among other industries. For more information, visit www.ebglaw.com.

Manager Misclassification

A PERVASIVE WAGE AND HOUR LEGAL ISSUE

When thinking about hot button wage and hour legal issues in the hospitality industry, manager misclassification is often at the top of the list. The crux of the issue is whether managers are actually performing work that qualifies them as exempt from overtime pay pursuant to federal and state laws and regulations.

To qualify to be exempt from overtime, an employee with a manager job title must perform managerial duties as his or her primary job. Specifically, federal regulations provide that the “executive” exemption, which is to say, managerial exemption, is available for employees whose primary duty is management of the enterprise, customarily and regularly directs the work of two or more full-time employees or their equivalent, e.g.

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four part-time employees, and who has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given deference. In addition to performing managerial duties as a primary duty, exempt employees must be paid a salary (as opposed to an hourly wage) of at least \$455 per week. Also, be mindful of where your property is located because certain states, such as California and New York, have minimum salary thresholds that are higher than the federal \$455 minimum.

Misclassification can occur where a manager spends most of his or her day engaging in functional operations, or as a project

manager, rather than being primarily responsible for personnel management. Owner/operators often make the mistake of thinking that as long as an employee has a “manager,” “assistant manager,” or “lead” title, and is in charge of certain aspects of the property, then they are exempt.

Misclassification can be a costly mistake because the Fair Labor Standards Act (“FLSA”)—the federal wage and hour law—provides that employees misclassified as exempt are entitled to back overtime wages and an amount equal to the unpaid back wages in “liquidated damages,” which is the interest component for the time the employee’s wages were improperly withheld, for a two or three year period depending on whether the back violation is found to be “willful,” meaning that the employer knew or should have known that its wage and hour practices violated the FLSA. To make matters worse, if there is a judgment for back wages, meaning that a judge or jury found that the owner/operator is responsible for paying back wages to its misclassified managers, the FLSA states that the owner/operator is also responsible for paying the employee’s attorney’s fees, which (when added to an owner/operator’s own legal fees) can be exorbitant.

To avoid misclassification, owner/operators should routinely audit their exempt employee workforce, specifically focusing on the job functions being performed by its managers. If a manager is not regularly supervising at least two full-time employees or their equivalent,

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and does not have the ability to hire, fire, promote, discipline, or appraise performance, that manager is likely misclassified. Manager misclassification can be found, but is by no means limited to the following positions: assistant managers, floor managers, housekeeping leads, bell captains, and sous chefs.

If an owner/operator determines that it has misclassified a manager, it should either enhance the duties being performed by the employee so that it can maintain the exemption for that employee, or reclassify that employee to non-exempt, which means recording all of his or her work time and paying overtime for hours worked in excess of 40 per week (also remember that certain states, such as California and Colorado, have daily overtime requirements). Before making the decision to reclassify, however, owner/operators should carefully consider how to communicate the reclassification to the employee. Employee relations is paramount, and the employee should not feel demoralized perceiving that he or she has been demoted. Misclassification in the hospitality industry is pervasive, and the potential consequences can be significant, so always be vigilant from the moment you onboard each employee. **HT**