

4 Reasons Why Companies Can Ask Exempt Employees to Work for 'Free'

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The leaked Urban Outfitters memo asking salaried employees to volunteer one or more weekend shifts at an Urban Outfitters fulfillment center to pick, pack and ship merchandise is really no story at all, despite Internet shaming and sensational claims that Urban Outfitters is making management employees work for “free.” The request of Urban Outfitters is not unusual; it is just unusual that the request was leaked to the media. Employers regularly require exempt employees to go over and above a 40-hour work week without additional pay, and this approach is appropriate under wage-hour laws.

And, while some media commentators have dubbed this as “working for free,” the reality is that the employees are not working for free. They have agreed to work all required hours in exchange for a certain salary. After all, remember that there are salary requirements for exempt employees, so those who are being asked to “volunteer” are being compensated at a higher pay grade, at or above a salary set by our federal and state governments pursuant to public policy considerations. Therefore, it is in fact “fair” to ask exempt employees for the extra work—it is an implicit (or explicit) requirement incorporated into their typically larger salaries (right now the pay threshold for exempt status is \$455 a week, but if the amendments to the federal Fair Labor Standards Act (FLSA) are implemented as proposed, the minimum will more than double to \$970 a week). The increased responsibility and salary levels of exempt employees also means they likely have more bargaining power in the marketplace and freedom to leave an oppressive employer, so government is less concerned about extra “unpaid” work in their case.

As such, a request for “volunteer” work, like the one made by Urban Outfitters to its exempt staff, is both appropriate and lawful under wage-hour laws.

1. Employees who are exempt can work over 40 hours without additional compensation.

Here’s why: the FLSA and state fair labor standards legislation requires employees who work more than 40 hours in any work week to be paid time-and-a-half for those hours. There is an exemption for certain employees, such as white-collar employees like administrative and executive professionals. Assuming those employees receive at least certain pre-determined salaries and have certain significant and responsible job duties (aka, are classified correctly), the employers can ask (or even require) the employees to work more than 40 hours a week and do not have to pay any sort of extra compensation. Exempt employees take customers to dinner after hours without additional compensation. They answer after-hour calls and emails without additional compensation. This happens all the time. And, it’s legal. Of course, the employer should be sure the employee is actually exempt before requesting additional work so as not to inadvertently violate wage-hour law.

2. Volunteering for additional work does not change the employee’s primary duty.

Exempt employees who “volunteer” for production type duties (e.g. pick, pack, and ship merchandise) do not have their jobs transformed into hourly non-exempt jobs as long as their primary duty remains exempt. *Primary duty* means the employee’s main or most important duty. For the administrative exemption, the primary duty is non-manual work related to management where the employee exercises discretion with respect to matters of significance. For the executive exemption, the primary duty is management, where the employee directs the work of others, has input into subordinates’ employment status, and has

discretionary authority. Yes, the Urban Outfitters exempt employees who volunteer for warehouse duties will not be exercising their exempt responsibilities while working on the production line, but that does not mean their overall jobs become non-exempt. A manager at a fast food restaurant does not become non-exempt simply because he flips burgers during busy periods. His primary duty remains management – that is his most important job.

3. Production work doubles as leadership training for exempt workers.

In addition, non-exempt work, such as warehouse work, gives exempt workers an insight into what hourly employees do on a daily basis. The exempt employees could very well be making decisions about non-exempt jobs. Rolling up their sleeves to help might provide a real eye-opening education for how hard the hourly employees work and how decisions by exempt personnel affect those hourly workers. This could be valuable training for managers, administrators and professionals. Also, isn't rolling up your sleeves to perform "undesirable" tasks one definition of leadership? Leaders should not be above any task, no matter how "menial."

4. 'Volunteer' work can reduce overtime.

Reducing overtime of hourly workers by asking exempt employees to pitch in, as long as the company does it legally, is a perfectly legitimate business decision. While adding white collar employees to production lines or requesting their assistance in warehouses may actually impede the pace of work, as the white collar employees might well require additional instruction and direction, a company could legally choose to ask for "volunteer" time even if the reason is to reduce the overtime costs associated with using hourly workers. The employer would just need to be sure that it did not request so much "volunteer" non-exempt work so as to eviscerate an exemption, by turning production/warehouse work into a primary duty.

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