

LITTLER MENDELSON  
**XMPT™ SURVEY REPORT**  
OCTOBER 2013

**Littler**  
Employment & Labor Law Solutions Worldwide™

## EXECUTIVE SUMMARY

In recent years, employers have faced an explosion of wage and hour lawsuits, which are often driven by disagreements over how workers are classified. Data collected by Littler Mendelson from LEXIS Courtlink Reports and Courthouse News Service shows that 4,204 wage and hour class actions were filed in 2012 in state and federal courts combined, which is up 11% from the 3,785 filed 2010. Littler's examination of class and collective action filings in federal courts also found that 2,507 Fair Labor Standards Act (wage and hour) collective actions were filed in 2012 and only 139 discrimination class actions were filed the same year. In addition, a study cited in an October 2013 U.S. Chamber Institute for Legal Reform trends report found that civil settlements of wage and hour cases totaled \$467 million in 2012 alone and approximately \$2.7 billion from 2007 to 2012.

Against this backdrop, Littler conducted a survey to determine how employers were responding to the all too common threat of misclassification claims and audits by the U.S. Department of Labor (DOL). This report summarizes and analyzes the insight provided by human resources professionals, C-suite executives and in-house counsel on their experiences with disputes involving the classification of employees as exempt from overtime pay and certain wage and hour laws.

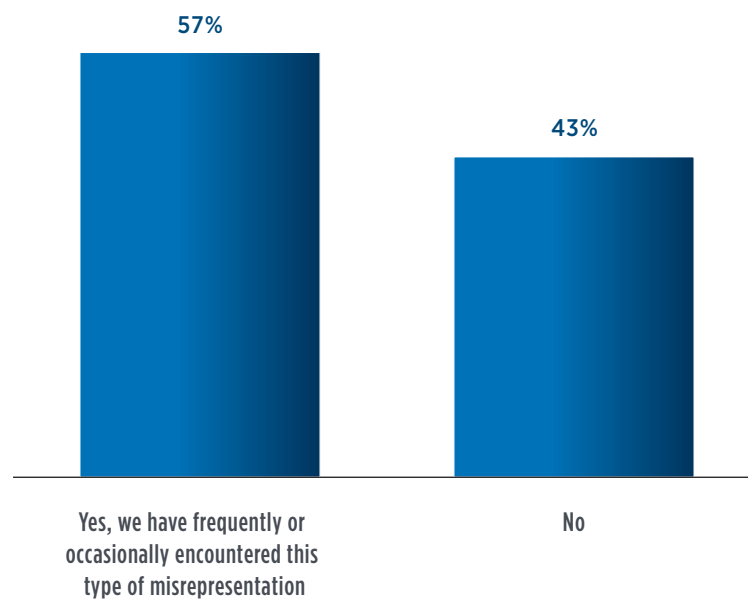
Key findings include:

- Among those who have recently been involved in misclassification litigation or DOL audits, **57%** have encountered employees who misrepresented their job duties. Mid-level management positions were most frequently cited as driving the dispute in **43%** of cases.
- **49%** of respondents are concerned about the possibility of misclassification litigation or a DOL audit in the near future. In response to concerns over the costs and disruption should such an incident arise, organizations have taken action to prepare for an exemption challenge.
  - The majority of respondents are monitoring trends in exempt misclassification litigation in their industries to some degree, which provides an early warning sign of misclassification claims.
  - More than two-thirds of responding organizations have either: (1) conducted exempt audits or evaluated their evidentiary support for claimed exemptions (**54%**); or (2) intend to do so in the next year (**14%**).
- Respondents identified a range of documentation available to defend against exempt misclassification claims. However only **33%** have utilized employee self-assessments as a means of documenting employees' exempt responsibilities, even though a description of job duties that has been affirmed by the employee often provides the strongest evidence in disagreements over the nature of the employee's work.

**QUESTION 1:**

Has your organization, in the course of misclassification litigation or a DOL exemption audit, encountered employees who misrepresented job duties that qualify them as properly exempt from overtime pay and other wage and hour laws?

*Note: This question was only answered by the respondents who have been involved in misclassification litigation or a DOL exemption audit in the past three years*

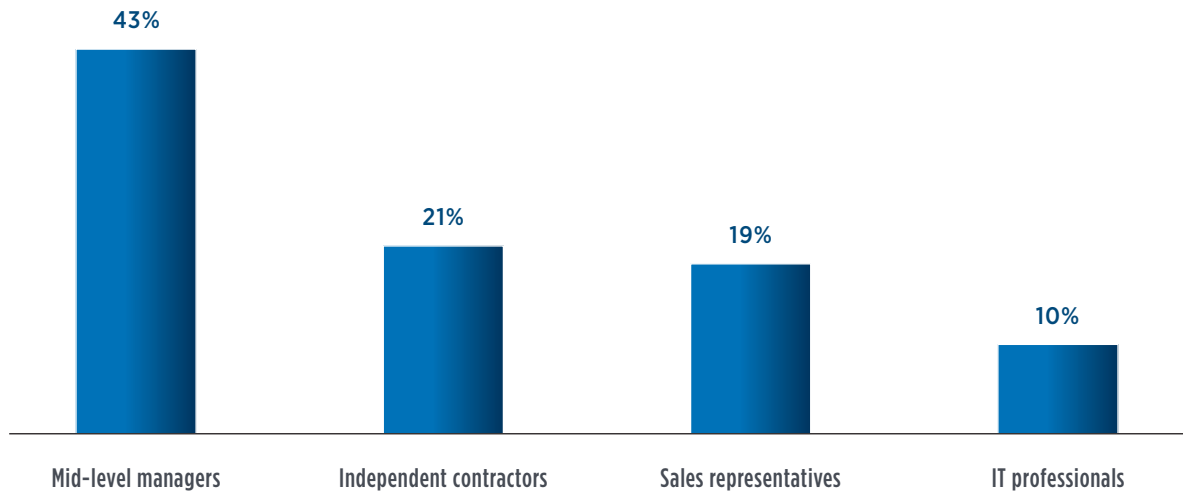


Proving the nature of an employee's position is key to defending against exempt misclassifications. It is significant, therefore, that more than half of respondents (57%) have faced employees that misrepresented their job duties. In these cases, plaintiffs will often disclaim performing any exempt duties and possessing decision-making or supervisory responsibilities that properly qualify them as exempt from overtime pay and other wage and hour laws. This trend illustrates the importance of companies having strong evidentiary records that prove employees are performing exempt duties.

## QUESTION 2:

For which positions has your organization encountered exempt misclassification claims?

*Note: This question was only answered by the respondents who have been involved in misclassification litigation or a DOL exemption audit in the past three years*

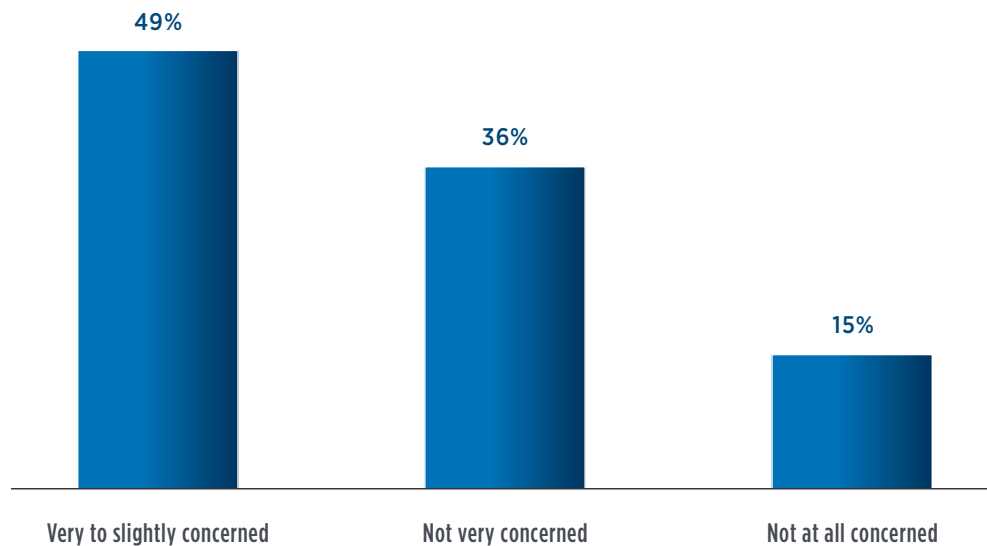


Respondents identified a range of positions for which they have encountered exempt misclassification claims, with mid-level managers being the most prevalent (**43%**).

A noteworthy percentage of respondents have experienced exempt misclassification claims involving independent contractors (**21%**), sales representatives (**19%**) and IT professionals (**10%**).

**QUESTION 3:**

Are you concerned about your company being the subject of misclassification litigation or a DOL exemption audit in the near future?



Given the multitude of labor and employment issues that HR professionals, in-house counsel and executives must navigate on a daily basis, it is significant that roughly half of respondents (49%) are concerned about the threat of misclassification claims or DOL exemption audits.

The most commonly cited concern regarding misclassification claims, either in litigation or DOL investigations, was the financial impact associated with such claims. This finding is indicative of the staggering costs that can be associated with settling or losing these cases. Data examined by Littler on misclassification class action

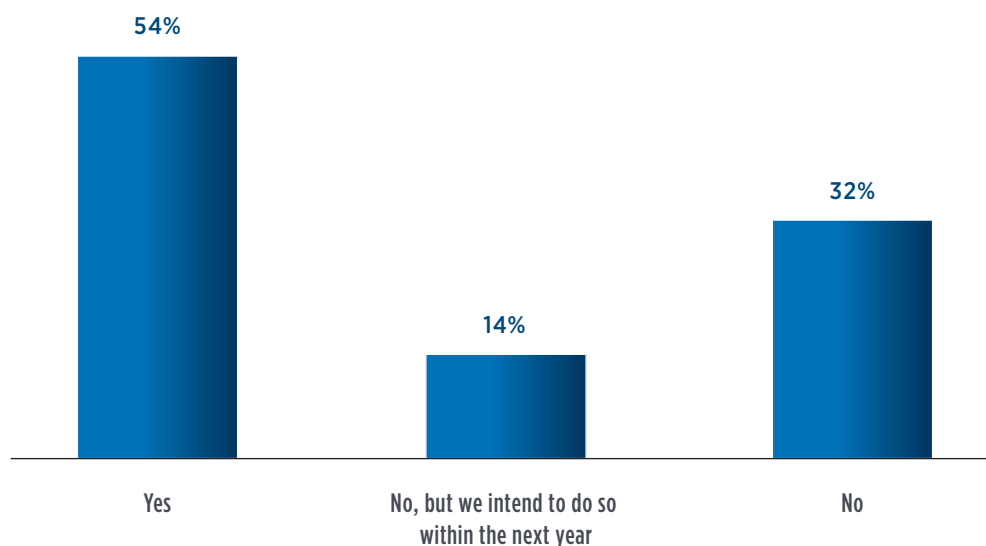
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settlements revealed that between January 1, 2011 and December 1, 2012, the average settlement in complex misclassification cases was \$8.2 million. In addition, the DOL collected \$225 million in back wages from employers in 2011, a jump of 28% from 2010. Additional concerns cited by respondents included:

- The possibility that a single finding could be broadened to cover a wide range of positions.
- Classifying jobs that do not fit well into either the non-exempt or exempt category.
- The flattening of organizational structures requiring supervisors to do non-exempt work, as well as supervise the work.
- Employees doing similar jobs who are classified differently.
- The time, disruption and inconvenience of a DOL audit.
- Classifying work uniformly across different offices.

**QUESTION 4:**

Has your organization conducted audits to determine if employees are properly classified and that proper evidentiary records are available to support classifications?

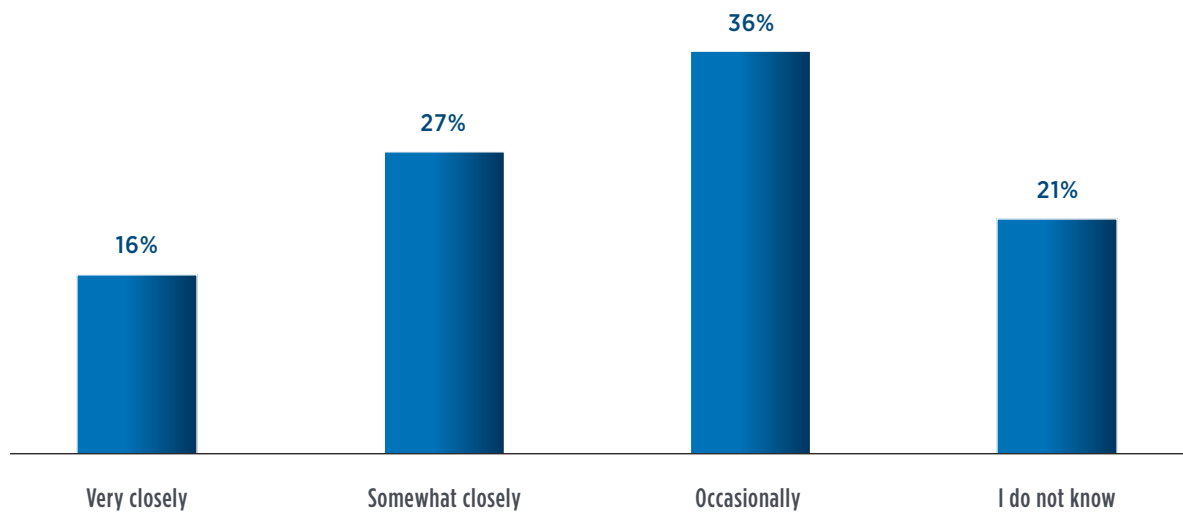


More than two-thirds of responding organizations have either conducted audits to assess exempt classifications and the evidentiary support available (54%) or intend to do so in the next year (14%), providing further indication of the level of concern in this area of employment law. Conducting such audits and determining if additional documentation is necessary to support the classification are critical steps in preparing for potential misclassification claims or DOL audits and defending against claims.

In verbatim feedback, a number of respondents cited concerns about: (1) not having conducted a thorough review of the classification of all positions and/or (2) lacking proper documentation to support their classification determinations. In particular, one respondent's biggest concern in regard to exempt misclassification was whether they "have all the documentation in order and readily available [in the event of] a potential audit."

**QUESTION 5:**

To what extent is your organization monitoring trends in exempt misclassification litigation against your competitors or within your industry?



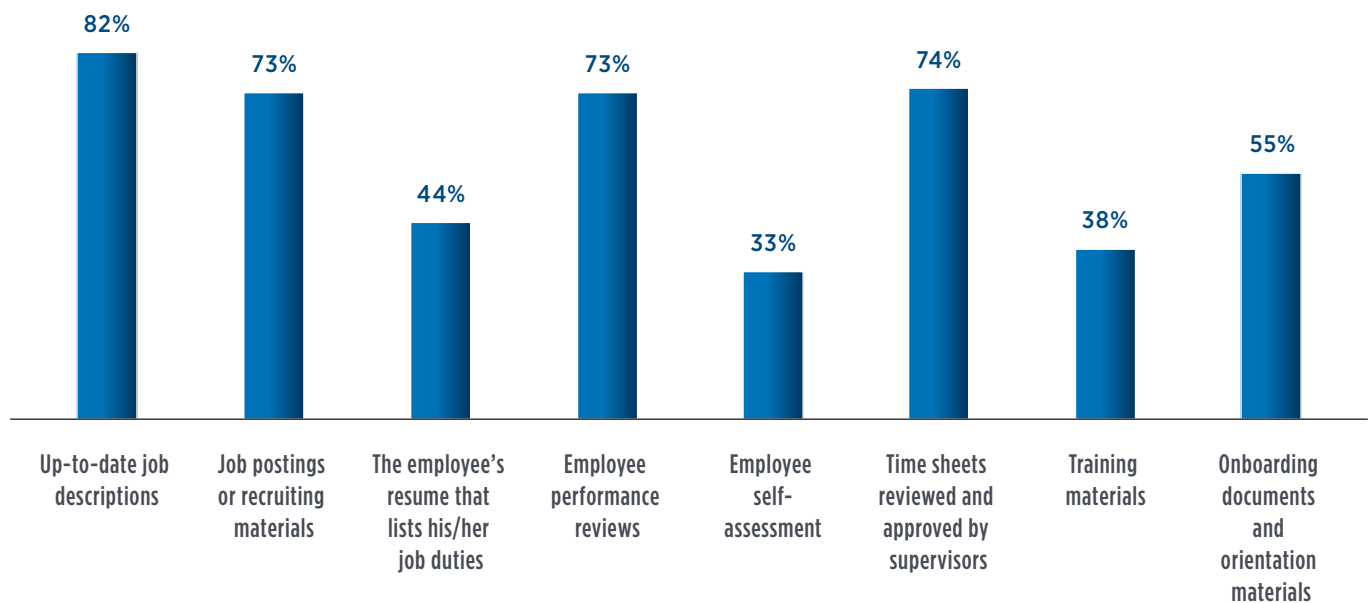
Another indication of concern regarding exempt misclassification litigation is that a majority of respondents monitor trends in their industries to some degree, with **43%** monitoring either very closely or somewhat closely.

Examining lawsuits against competitors or others within an industry can provide valuable insight because plaintiffs' lawyers commonly bring suit against multiple companies across a specific industry. Companies that do not keep abreast of litigation trends within their industries could be ignoring these early warning signs.



## QUESTION 6:

Which of the following documentation does your organization currently have available to demonstrate the exempt nature of positions and defend against future exempt misclassification claims?



Respondents identified a variety of documentation available to defend against future misclassification claims. However, because misclassification claims center on disagreements about the nature of the plaintiff's work, the strongest evidentiary support for an employer can be a description of job duties that has been affirmed by the employee. Notably, only **33%** of respondents indicated having employee self-assessments on record—but, as explained above, a written affirmation of job responsibilities in the employee's own words is powerful evidence that can be used to impeach later contradictory testimony.

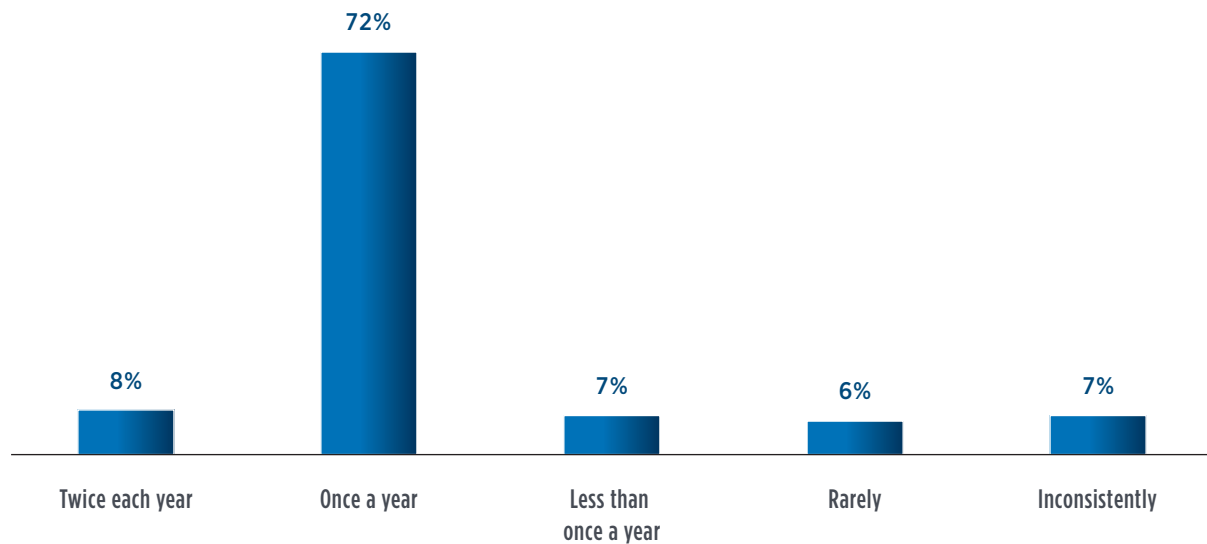
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The majority of respondents specified up-to-date job descriptions (82%) and employee performance reviews (73%) as evidence they would rely upon to defend against misclassification claims. However, these documents fulfill that purpose *only* if (1) they have been reviewed to ensure they are consistent and consistently support the claimed exemption; and (2) they have been affirmed by the employee. Moreover, written job descriptions were often cited as a concern, as well as a means to support exempt classification determinations, as the following examples illustrate:

- Lack of appropriate and current documentation. I believe that we probably have classified most people properly, but that we lack the evidence to prove it.
- My biggest concern is basing an exempt status classification on a job description that has not been updated in years [as] jobs evolve and change.
- Ensuring job descriptions meet the needs to clearly show individuals are classified correctly.

**QUESTION 7:**

How often does your organization conduct detailed performance reviews for its exempt employees?



The majority of respondents indicated conducting performance reviews for exempt employees once a year (72%). Given that such reviews provide a documented overview of an employee's job responsibilities, which can be affirmed in writing by the employee, conducting reviews more frequently than annually provides an opportunity to strengthen evidentiary records in support of the exempt status of employees.

## METHODOLOGY AND DEMOGRAPHICS

In September 2013, Littler distributed the survey via email to HR professionals, C-suite executives and in-house counsel located across the U.S. Respondents were from a wide variety of industries, with the most common being health care and pharmaceutical (21%), manufacturing (11%) and professional services (7%). The results were tabulated, analyzed and released in October 2013.

Respondents included:

- Human resources professionals (49%)
- C-suite executives (21%)
- Attorneys/general counsel (19%)
- Other professionals (12%)

Companies represented were of a variety of sizes:

- LargeCap; Greater than \$4 billion in market capitalization (11%)
- MidCap; \$1b to \$4 billion in market capitalization (20%)
- SmallCap; Less than \$1 billion in market capitalization or Other (68%)