

HOSPITALITY LAW

July 2016

ASSESS PAY PRACTICES NOW TO COMPLY WITH NEW OVERTIME RULE

Final Rule doubling exempt worker minimum salary takes effect Dec. 1

By Gregg Gilman and Sharon Cohen

The U.S. Department of Labor recently released its highly anticipated Final Rule on the Fair Labor Standard Act's overtime exemptions. By more than doubling the annual salary thresholds necessary to qualify for the FLSA's white-collar exemptions, the Final Rule will significantly impact hotel and restaurant employees, whose salaries normally fall well below the new standard of \$47,476. Employers in the hospitality industry will need to assess their pay practices and worker classifications in order to comply with the Final Rule, which goes into effect on Dec. 1, 2016.

Under the FLSA, employees in administrative, executive, or professional positions may be exempt from the statute's overtime requirements as long as they satisfy the following three criteria: they are paid a predetermined and fixed salary that cannot be reduced based on variations in the quantity or quality of work performed; they are paid at a specified minimum salary level; and they perform primarily executive, administrative or professional duties, as defined in the FLSA regulations.

The Final Rule raises the minimum salary level requirement to \$913 per week, or \$47,476 per year — more than double the current threshold of \$455 per week, or \$23,660 per year. Up to 10 percent of the minimum salary level may come from non-discretionary bonuses and incentive payments, including commissions, as long as the payments are made on a quarterly or more frequent basis. Examples of these types of payments are non-discretionary incentive bonuses linked to productivity and profitability.

The Final Rule also increases the requisite minimum salary level for the "highly compensated employee" exemption to \$134,004 per year (currently \$100,000 per year). To qualify for the "highly compensated employee" exemption, an employee must meet the revised salary level of \$134,004 per year, regularly perform at least one of the primary duties of a professional, administrative, or executive employee, as defined in the FLSA regulations, and not perform manual labor.

The Final Rule provides for automatic updates to these minimum salary levels every three years, starting on January 1, 2020, to ensure that the salary requirements continue to be a meaningful test for identifying employees entitled to overtime protection.

To prepare for these changes, employers in the hospitality industry should take the following steps:

- >> Assess the salary levels for all exempt employees paid below the new salary thresholds to determine the necessary salary increase to maintain the employee's exemption designation. Employers should also

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consider whether rolling in one-time bonuses into salary, or paying non-discretionary bonuses on a quarterly (as opposed to annual) basis would be more cost effective than increasing base salaries.

- >> Determine the number of hours exempt employees work on a weekly basis to assess potential overtime premiums if they are reclassified. Overtime hours may vary by location due to customer volume. Therefore, it may be less costly to reclassify a particular position in certain regions, but not in other locations.
- >> Train reclassified employees on company overtime policies, including time-reporting practices and receiving approval to work overtime. Employees, including supervisors, will need to understand the consequences “off the clock” work or performing work outside of regular working hours, especially in the hospitality industry where hotel management employees may live on-site.
- >> Account for potential employee morale issues that may arise. Certain managerial employees may dislike having to report their time if reclassified as non-exempt.
- >> Even if employers decide to increase an employee’s salary to the new minimum threshold to maintain the “exempt” designation, they should still reassess the employee’s job duties to ensure they satisfy the “primary duties.” The release of the Final Rule provides an opportunity for hospitality employers to reassess and ensure their exempt employees satisfy the “duties” test, and that the occasional manual work, such as housekeeping or attending to guests’ needs, does not make up the majority of the managers’ duties.
- >> Conduct an audit. This is an opportune time to evaluate questionable exemption designations. Every day an employer is in compliance is a day off of the statute of limitations.
- >> Develop a communication plan. Communicating any changes is key to addressing employee morale issues and potentially avoiding any legal issues.
- >> Always make sure that you are in compliance with applicable state wage-and-hour laws.

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