

Highly-Anticipated Changes in Overtime Pay Exemptions Will Affect The Hotel Industry: Are You Ready?

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The Department of Labor (DOL) has proposed game-changing rules regarding which employees qualify for the executive, administrative, and professional exemptions (i.e., “white collar” exemptions) from the overtime pay requirements of the Fair Labor Standards Act (FLSA). Once finalized, these rule changes will affect most employers in the United States, and the hotel and lodging industry is certainly no exception.

The cost of an exemption is about to go up

The proposed rules call for an increase of the minimum salary to claim an executive, administrative, and professional exemption, from \$455 per week (\$23,660 annually) to \$921 per week (\$47,892 annually). This almost doubles the minimum salary requirement necessary to qualify for these exemptions. This rule change is expected to affect up to 10 million employees who are currently classified as exempt.

Although the proposed rule changes may be modified slightly, significant change is imminent. Hotels and lodging industry businesses should take action now to assess which employees will be affected, evaluate the financial impact these changes will bring, and formulate a plan of action to remain FLSA-compliant. Acting now to develop a new pay plan for employees who are no longer exempt from overtime pay will help eliminate unnecessary costs. Likewise, ensuring compliance will help prevent unwanted, unnecessary, and costly litigation.

You have options: Managing the minimum salary changes

There is no cookie-cutter approach to managing these changes, but there are several options to be considered. One option is to increase salaries to meet the new minimum requirement. For example, if an assistant manager is currently earning \$900 per week (\$45,000 annually), the salary increase required to maintain the exemption is a relatively small one and presents a potentially good solution. If, however, that assistant manager is currently earning \$500 per week (\$26,000 annually), the salary increase of \$21,892 required to maintain the exemption may be more than a hotel can afford.

Another option is to convert employees to an hourly wage and pay them time and one-half for all hours worked in excess of 40 in any work week. To reduce the financial impact this transition may bring, policies may be implemented that require management preapproval before working overtime. Overtime worked in violation of the policy would need to be paid, but the employee could be disciplined for performing unauthorized work. Another option is to hire additional employees and reduce hours for all employees to minimize the impact overtime compensation may bring.

In addition to converting employees to a nonexempt hourly basis, employers should review patterns of hours worked and consider whether the workweek measuring period should be adjusted (e.g. instead of measuring Monday to Sunday, perhaps Wednesday to Tuesday). If hours are captured differently in this way it may minimize the incidence of overtime hours worked. This would be intended as a permanent adjustment rather than a periodically shifting one.

A third option is to implement a fluctuating workweek, in which a non-exempt employee is paid a salary that represents wages for all work performed during a workweek, regardless of the number of hours worked. Using a fluctuating workweek does not make the employee exempt from overtime, but instead changes how overtime rates every week. Overtime is calculated by determining the employee's regular rate, which is the compensation paid per workweek divided by the number of hours worked during that workweek. The employee is then paid one-half of the regular rate for hours worked exceeding 40 in the workweek. The regular rate will vary each workweek, depending on the number of hours worked. Employers should be careful, therefore, to ensure that hours are accurately recorded, and that the proper calculations are made.

A fluctuating workweek may be more palatable to an employee who sees the transition from salary to hourly as a demotion. Nevertheless, a fluctuating workweek should never be implemented without a written acknowledgment and agreement from the employee. Additionally, an analysis of the position and the employee's work scheduled is required to determine whether the fluctuating workweek method of compensation is permissible. I, and it is imperative that an employer seek legal counsel before implementing the method.

It's not all about the base (salary)

A common mistake many employers make is the erroneous assumption that an employee is exempt simply because he or she is salaried. In addition to the salary requirement, there is also a duties requirement that must be met. Job title does not matter. Rather, the DOL will closely scrutinize an employee's actual responsibilities to determine whether the duties test for the claimed exemption is met.

By way of example (and not by limitation), a hotel may claim the administrative exemption for employees such as customer service representatives or human resources personnel. To claim a valid administrative exemption, the affected employee must perform work that: a) primarily involves office/non-manual tasks directly related to management or general business operations of the employer or employer's customers; and b) includes discretion and independent judgment in matters of significance.

A hotel may claim the executive exemption for employees ranging from desk clerks to accounting clerks/bookkeepers to restaurant managers. To claim a valid executive exemption, the employee must perform work that: a) primarily involves management of the organization or of a recognized unit or subdivision; and b) involves the hiring/firing process or other status changes (such as disciplinary authority over others) that carry weight within the organization.

A hotel with specialized staff such as full time entertainment, ice sculptors or photographers may claim a professional exemption in the creative professions. To claim this exemption, the affected employee must perform work that: a) primarily requires invention, imagination, originality or talent; and b) is a recognized artistic or creative field.

Take two deep breaths, and then take action

To manage these changes, hotel and lodging industry businesses and their legal counsel should consider the following steps:

- Identify all positions in which an administrative, executive, or professional exemption is claimed.
- Review the current salary level for each such position.
- In order to assess the economic impact these changes will bring, to ensure continued FLSA compliance and identify what will work best for your business model, consider alternative forms of compensation for employees affected by the rule change. Alternatives include, but are not limited to, an increased salary and continuation of exempt status, transition to hourly non-exempt status, reduction of hours and implementation of policies designed to reduce the incidence of overtime hours worked, and the implementation of a fluctuating workweek.
- Use this opportunity to scrutinize each affected employee's job description and core job duties to ensure that the duties test portion of the exemption is met.

Change, indeed significant change, is on the way. That said, careful planning now can and will help your hotel manage this change, reduce the financial impact this change will bring, and ensure compliance with federal law and in the process reduce the likelihood of wage/hour litigation.

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