

## DOL Overtime Rule Will Hit Hospitality Employers Hard

Law360, New York (August 12, 2015, 10:57 AM ET) --



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On June 30, the U.S. Department of Labor issued its eagerly anticipated notice of proposed rulemaking, which submitted for public comment various proposed changes to its regulations on the Fair Labor Standards Act's white-collar exemptions.

The most significant proposed change would more than double the required salary amount required for white-collar workers to qualify as exempt from the FLSA's overtime requirements (from \$455 per week to \$970 per week, that is, from \$23,660 per year to \$50,440 per year). By the DOL's own estimate, "Workers will get roughly \$1.2 billion to \$1.3 billion in additional wages [annually] as a result of this rule."<sup>[1]</sup>

The proposed changes, should they or something substantially similar be contained in the DOL's final rule, will have a wide-ranging impact on all workers and businesses, particularly those in the hospitality industry. According to Hcareers, a leading recruitment source for the hospitality industry, the 2014 median salary for a hotel general manager was \$51,782 per year.<sup>[2]</sup>

The reaction from the hospitality industry was swift, with the National Restaurant Association issuing an official statement that "these proposed rules have the potential to radically change industry standards and negatively impact our workforce. As with previous policies put forth by this administration, we are deeply concerned with the outcome this process will have on the employer community and our employees."

Similarly, the American Hotel and Lodging Association noted in its official statement on the DOL's

proposal that “the proposed changes to overtime rules will hurt our employees and severely impact small-business owners, who will be unable to continue the pace of job growth that has been so vital to boosting the economy. The majority of jobs in the hotel industry start above the minimum wage and employers should have the flexibility to set salary parameters that foster a strong team environment and allow for good benefits, higher pay and workable schedules.”

Because issuance of a final rule along the lines set forth in the DOL’s notice of proposed rulemaking is not only possible, but probable, hospitality sector employers should begin preparing immediately. Preparations should include a proactive assessment of current wage-and-hour practices to determine the operational and financial impact of the DOL’s proposed regulations.

### **How We Got Here**

For nearly 75 years, the DOL’s overtime regulations have generally required employees to meet a three-prong test to qualify for one of the FLSA’s white-collar exemptions:

1. the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed;
2. the employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations; and
3. the amount of salary paid must meet a minimum specified amount, which is currently \$455 per week (which equates to \$23,660 per year).

The current minimum weekly salary amount saw a modest increase in 2004 under the Bush administration, the first since 1975. However, the threshold is not inflation-adjusted (absent additional regulation), and therefore has eroded in terms of real dollar value over time.

### **Details**

The DOL's notice of proposed rulemaking is focused on updating the salary thresholds for the white-collar exemptions, based on 2013 data regarding weekly earnings for full-time salaried workers. Specifically, it proposes to:

- Set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers, which in 2013 was \$921 per week (\$47,892 annually), and which is projected in 2016 to be \$970 per week (\$50,440 annually).
- Increase the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers, which in 2013 was \$2,349 per week (\$122,148 annually). This would be an increase from the current threshold of \$100,000.
- Establish a mechanism for automatically updating the salary and compensation levels going forward without the need for additional rulemaking "to ensure that they will continue to provide a useful and effective test for exemption."

In the notice of proposed rulemaking, the DOL took the position that the current salary threshold is

ineffective as a test for overtime exemption because it only screens from exemption approximately 15 percent of overtime-eligible white-collar salaried employees. The DOL concluded that the current salary threshold has not accomplished its intended purpose of simplifying the exemption analysis by reducing the number of employees for whom employers must perform a duties analysis.

### **Is More Coming?**

While specific regulatory changes regarding the duties required to qualify for exemption were not proposed in the notice of proposed rulemaking, the DOL did solicit comments on the current duties test as well as the possibility of including nondiscretionary bonuses (including, for example, production or performance bonuses, or other nondiscretionary incentive bonuses tied to productivity and profitability) to satisfy a portion of the salary threshold requirement.

The DOL also has announced that it will publish a request for information "in the near future" seeking information from stakeholders on the use of electronic devices by overtime-protected (i.e., nonexempt) employees outside of scheduled work hours.

### **What Hospitality Employers Should Do to Prepare**

While the DOL's proposed changes would have a wide-ranging impact on many different business sectors, the hospitality industry (as well as retail) stands to be particularly affected. Hospitality employers have a large and varied group of workers who currently are classified as exempt: managers, assistant managers, accounting employees, sales representatives, kitchen and catering professionals, etc. Given the proposed increase in the salary threshold, many of these workers may need to be reclassified as nonexempt employees, thereby rendering them overtime-eligible.

Prior to the DOL's proposed rule, hospitality employers increasingly found themselves in the wage and hour crosshairs. National Economic Research Associates Inc. noted recently in its Trends in Wage and Hour Settlements: 2015 Update that 17 percent of all settlement dollars paid in wage and hour settlements from January 2014 through March 2015 were in the food and food services industry (19 percent were in retail). Given the potential addition of thousands of nonexempt workers, the uptick in hospitality wage and hour litigation likely will continue apace.

Indeed, the DOL estimates that 4.6 million workers who are exempt under the current regulations, and who earn at least the current weekly salary level of \$455, but less than the proposed salary level of \$970, would, without some intervening action by their employers, become entitled to overtime protections under the FLSA in the first year.

While it is unclear exactly what number the DOL will include in its final rule following evaluation of the comments submitted on the notice of proposed rulemaking, the DOL clearly has focused significant time and resources on substantially increasing the salary basis to qualify for white-collar exemption under the FLSA. Although there is vocal opposition to the proposed salary levels, given the DOL's focus on increasing the salary basis, it seems unlikely that the DOL will let the clock wind down into the 2016 election without issuing a final rule. Any final rule will, in all likelihood, more than double the current salary threshold.

To prepare, hospitality employers should consider some of the following measures:

- proactively assess current wage and hour practices to determine the operational and financial impact of a significant increase in the salary basis along the lines proposed by the DOL;
- consider changes to staffing or salary levels;
- analyze staffing patterns to maximize efficiency and eliminate unnecessary hours;
- prepare financial forecasting/budgeting models to account for increased overtime expenditures;
- revise policies and protocols or more closely monitor and manage hours worked to minimize overtime exposure; and/or
- hire additional workers to minimize overtime expenses incurred by providing additional staff coverage.

Once a final rule is issued, employers will have a limited window to adjust their policies and practices. Preparation will not only limit the legal risk inherent in not complying with the DOL's new overtime regulations, but also the significant financial impact they could have on hospitality employers, absent careful analysis and planning.

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[1] <http://www.politico.com/story/2015/06/tom-perez-obama-overtime-proposal-119588.html>

[2] <http://www.hcareers.com/us/resourcecenter/tabid/306/articleid/1245/default.aspx>

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