CONSIDERATIONS FOR HOSPITALITY INDUSTRY EMPLOYERS AS THEY CONTINUE TO PREPARE FOR NEW SALARY THRESHOLDS UNDER WHITE-COLLAR OVERTIME EXEMPTIONS

Date: 16 September 2016

Labor, Employment and Workplace Safety Alert

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Employers in the hospitality industry should act now to address recent changes to the overtime exemptions for "white collar" employees. Last month, the U.S. Department of Labor (DOL) published its highly anticipated final rule, which doubles the salary threshold required for certain executive, administrative, and professional employees to qualify for an exemption from overtime pay under the Fair Labor Standards Act (FLSA). The new rule will take effect in the payroll period that includes December 1, 2016. This gives employers in the hospitality industry a relatively short time frame to review their current practices, determine which positions should be reclassified and how they should be classified and paid, consider related policies that should be revised, and plan how to communicate changes to employees.

The final rule is likely to have a disproportionate impact on the hospitality industry, where profit margins are slim and entry-level salaries for front-line managers and supervisors are often well below the new salary threshold requirement.

In the past, DOL enforcement efforts directed at the hospitality industry have revealed misclassification of salaried positions as a common violation, so employers in this industry should pay particular attention to the new rule and the related opportunity to correct any positions that are currently misclassified as exempt from overtime.

WHAT DOES THE NEW RULE CHANGE?

The minimum salary for white-collar exemptions subject to the salary basis test will increase from $455 per week (or $23,660 annually) to $913/week (or $47,476 annually). DOL set this number based on the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently, the South). The final rule also permits employers to include nondiscretionary bonuses, incentives, and commissions to account for up to 10 percent of the required salary for these exemptions, as long as those amounts are paid on at least a quarterly basis. Catch-up payments are permitted at the end of the quarter.

The minimum salary for workers treated as exempt under the highly compensated employee exemption (which relaxes the duties test required for the exemption) will be raised from $100,000 to $134,004 annually, which is the 90th percentile of full-time salaried workers nationally.

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Beginning on January 1, 2020, both salary thresholds will be automatically adjusted and published every three years to keep pace with the 40th percentile and 90th percentile, respectively.

WHAT STAYS THE SAME?

DOL's notice of proposed rulemaking sought input as to whether there should be changes to the duties tests, which employees must also satisfy to qualify for the exemption. However, the final rule makes no changes to the current duties tests. Also, it is worth noting that, as under the existing rule, the required salary cannot be pro rated for a part-time employee. Part-time employees who satisfy the applicable duties test, but who do not receive at least the minimum salary, must be classified as nonexempt, which means that their hours must be recorded and, if at some point they do work more than 40 hours in a given week, they are entitled to overtime pay.

WHAT CAN EMPLOYERS DO TO PREPARE?

Employers should proactively audit exempt positions to review, reclassify, and correct any existing misclassifications. For employees who fall below the salary necessary to meet an exemption, employers should consider whether to classify those employees as nonexempt — and record hours and pay overtime — or increase their salaries to meet the new levels. It may be necessary to implement new timekeeping procedures, practices, or policies to record newly nonexempt employees' total hours worked each day and workweek and to train supervisors on them.

Employers also should look at hours worked by currently exempt employees who might be reclassified as nonexempt to determine an appropriate new rate. If any functions or tasks are redistributed among employees, job descriptions also should be updated.

For employees who fall below the salary necessary to meet an exemption, employers should consider whether to classify those employees as nonexempt — and record hours and pay overtime — or increase their salaries to meet the new levels. For instance, many hotel and restaurant managers and assistant managers will likely fall into this group.

Additionally, hospitality companies commonly rely on the executive exemption for front-line supervisors. The DOL projects that there is only a 0 to 10 percent likelihood that front-line supervisors pass the standard duties test, which has not changed. Key issues include whether supervisors are engaged in hiring, firing, promoting, and demoting. Employers who choose to invest money in higher salaries should be certain that they will not ultimately have to pay overtime to the employee at a much higher rate because of misclassification.

As part of any internal audit or review process to address exempt/nonexempt classifications, hospitality employers may also want to take the opportunity to review their current contractor arrangements to make sure those individuals are properly classified as contractors and should not be considered employees.[2] DOL issued guidance in July 2015 that made clear that misclassification of employees as independent contractors is a focus of DOL's enforcement efforts.[2]

WHAT OTHER ISSUES SHOULD EMPLOYERS CONSIDER?

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Employers must record and pay for any work suffered or permitted by nonexempt employees. As a result, new issues may arise when previously exempt positions are classified as nonexempt, and employers are required to determine what constitutes hours worked and how they will track and pay for time spent in certain activities, like “on-call” duties, meal periods, attendance at meetings or training sessions, traveling, responding to email outside of the normal workday, and performing unauthorized work beyond a scheduled shift.

Waiting/On-Call Time

Employers are required to pay for time that a nonexempt employee spends on-call if the employee is unable to use the time effectively for his or her own purposes. The key question is whether the employee is “waiting to be engaged” (likely not compensable) or “engaged to wait” (compensable). If the employee is required to remain on the employer's premises, the employer is most likely required to pay the employee for that time. Other factors to consider include the frequency of calls, whether the employee can conduct personal activities during the on-call period, and the frequency of interruption from work calls.

Meal Periods

Actual meal periods of typically 30 minutes or more where an employee is completely relieved from duty do not count as hours worked, and an employer does not have to pay for them. However, to the extent an employee performs work during a meal break, such that the meal period is predominately for the benefit of the employer, the employee should be paid for the entire 30-minute break. When choosing to automatically deduct 30-minutes per shift, employers must ensure that the employees are receiving the full meal break.

Meeting/Training Time

The time that nonexempt employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless all four of the following criteria are met:

- Attendance is outside regular working hours.
- Attendance is voluntary.
- The course, lecture, or meeting is not job-related.
- The employee does not perform any productive work during attendance.

Travel Time

Employers will likely need to review policies and practices regarding compensation of travel time to ensure proper payments are made to any employees who are converted to nonexempt status.

Employers typically do not have to pay employees for time spent in ordinary travel between home and work. Similarly, if an employee's worksite changes daily and the travel is a normal occurrence for the position, time spent commuting between home and the first worksite of the day (and returning home from the last worksite of the day) may not need to be compensated.

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However, if a nonexempt employee is traveling out of town for a job that keeps him or her away from home overnight, the general rule under the FLSA is that the employer must compensate the employee for any travel that takes place during what would otherwise be his or her normal work hours, including those corresponding hours on regularly scheduled days off (e.g.,Saturday and Sunday). If the employee is traveling outside of his or her normal work hours, travel time spent driving must be paid, but time spent as a passenger in a plane, train, bus, boat, or car generally need not be paid.

If an employee has gone home after the regular workday has ended, and he or she is called to travel a substantial distance to handle a client or patient emergency, the time spent traveling should also be compensated.

"Off-the-Clock" Hours

Even if the employer does not specifically authorize the work, employees must be paid for any work "suffered or permitted" by the employer. When the employer knows or has reason to believe that the employee is continuing to work, regardless of if it is in violation of a company policy prohibiting working "off-the-clock," the time is considered hours worked. Employers should be cognizant of and monitor any work employees are engaged in before or after their scheduled shifts and include any such hours in the calculation of overtime.

ADDITIONAL RESOURCES

For a more in-depth discussion of how employers can use the new rule as an opportunity to evaluate and make changes in their practices, *see* K&L Gates Webinars, "Leveraging the USDOL's Proposed White Collar Exemption Changes: What Employers Should Be Doing Now" (April 2016) and "Implementing USDOL's New Minimum Salary Requirements for White-Collar Exemptions" (June 2016).

Notes:

[1] In any compliance review, it might be worthwhile to watch for other wage and hour issues, as there are a variety of practices in the industry (such as bonus payments and rounding hours worked) that frequently result in unintentional violations of wage and hour laws. *See* K&L Gates Webinar, "Common Wage & Hour Issues in the Hospitality Industry" (June 2016), http://www.klgateshub.com/details/?media=82ad9a9a-d406-4a04-a5db-2d8c888206f6.

[2] *See* K&L Gates Legal Insight, "DOL Issues New Guidance on Independent Contractors," (July 23, 2015); *see also* K&L Gates Webinar, "Assessing Independent Contractor Relationships: Can They Survive the USDOL's Interpretation?" (September 2015).

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