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WAGE AND HOUR LAW

Too many cooks 'managers' in the kitchen: overtime rule's effect on restaurant industry

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As of December 1, 2016, the U.S. Department of Labor's (DOL) new overtime rule requires that exempt employees be paid a weekly minimum salary of \$913 (which works out to \$47,476 per year). To qualify as an exempt executive employee (the classification that covers most restaurant "managers"), an employee must be paid at least the new minimum salary, and his "primary duty" must satisfy a duties test. How will this play out in the restaurant industry?

What is the duties test?

Under the duties test for the executive exemption from overtime, an employee's primary duty must be managing the business or a department of the business, he must regularly direct the work of at least two full-time employees, and he must have the authority to hire or fire employees. Therefore, for an employee to qualify as an exempt manager, his main or most important duty must actually be management.

"Management" is defined under the Fair Labor Standards Act (FLSA) regulations to include activities such as interviewing, selecting, training, and disciplining employees; setting pay rates and hours of work; directing and scheduling employees' workload; handling employee grievances; planning and controlling inventory and budgets; ensuring the safety of employees and property; and monitoring legal compliance matters.

What does the new overtime rule mean for the restaurant industry?

Unfortunately, for many employers in the restaurant industry, the DOL's new overtime rule means drastic

changes in how they run their business and classify exempt employees, especially managers. Come December 1, exempt managers' salaries will likely need to be adjusted upward to meet the new salary threshold, and restaurant owners will have to restructure their business so that managers' "primary duty" actually qualifies as management under the law. Of course, such changes aren't exclusive to the restaurant industry; significant changes will be necessary for all employers with multiple levels of managers.

The big issue for restaurant owners (or, really, any business owner) is that meeting the new salary threshold simply may not be financially feasible under their current management structure. Restaurants usually employ several types of management employees, including general managers, associate managers, assistant managers, assistant managers in training, kitchen managers, and service managers, and classify them as exempt employees even if their primary duty may not actually be what the FLSA regs define as "management."

When businesses have multiple levels of managers, there's an inherent concern that they are devaluing the executive exemption. The question becomes, are all assistant managers really free to make management decisions without supervision? Will the business be able to function if these employees don't perform their management duties? If the answer to those questions is yes, then lower-level managers likely qualify for the executive exemption. However, if the answer is no, a manager's position may not be exempt and it should be reclassified as nonexempt.

What are your options?

Restaurant owners will either have to make cuts to their workforce or reclassify specific manager positions



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as nonexempt. Lower-level managers would have to be paid hourly and would be eligible for overtime, and their work hours would have to be closely tracked. Simply put, restaurant owners should reclassify employees who aren't primarily engaging in management duties. In short, restaurants should be cognizant of not

devaluing the executive exemption by having too many cooks "managers" in the kitchen.

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