



Brewpub Wage and Hour Issues

BY
THE BREW PUBS COMMITTEE

The U.S. Department of Labor (DOL) estimates that only 30 percent of employers are in compliance with the Fair Labor Standards Act (FLSA).

It should be no surprise then that thousands of wage and hour lawsuits are filed each year. Around the country, the DOL continues to emphasize enforcement in the food and beverage, restaurant, and hospitality industries.

What can and should brewpubs do to ensure they are in compliance? First, review your pay practices for potential problems, then decide if changes need to be made and how best to make those changes. Being proactive could substantially reduce potential liability later in the event that the DOL or—even worse—a plaintiff's lawyer comes calling.

MINIMUM WAGE AND OVERTIME

The DOL continues to investigate compliance with the FLSA's minimum wage, overtime, recordkeeping, and child labor requirements. Employers should pay careful attention to the following areas:

- Record and pay for all hours worked. "Work" can include, for example, pre-shift or post-shift activities, cleaning, and training. Under-the-table pay is absolutely forbidden.
- Ensure that all overtime hours are recognized and properly paid. This includes work performed at different locations or in different jobs.
- Calculate each employee's regular rate correctly. With a few exceptions, all payments to a nonexempt employee must be included in the regular rate calculation.

- Ensure that employees classified as exempt from minimum wage or overtime meet all of the FLSA's requirements. In the brewing industry, employers often misclassify managers or supervisors as exempt. There also has been confusion surrounding whether head brewers or brewmasters are exempt under the executive, administrative, or learned professional exemptions according to FLSA and state law. Additionally, on or before December 1, 2016, brewpubs will need to comply with the DOL's new regulations on white-collar exemptions. See the "Changes Ahead" section of this article.

Make sure your brewpub also complies with state or local wage and hour laws, including any wage orders or regulations. Some states' laws carry a higher minimum wage/tipped employee minimum wage, as well as daily overtime regulations, or requirements that employers pay premium rates for hours worked on consecutive or certain days of the week.

TIPPED EMPLOYEES

Brewpubs that take a tip credit or use tip pools face additional risks of litigation. Tip-credit employers must pay the higher of the state or federal tipped employee minimum wage. Employers must provide advance written notice of the amount of tip credit claimed; ensure that tipped employees (those who customarily receive at least \$30/month in tips under federal law, for example) receive at least regular minimum wage when tips are factored in; treat tips as the sole property of employees; and ensure that tipped employees work no more than 20 percent in prep work or cleaning/maintenance activities.

We'll Handle It.



With tip pools or tip sharing arrangements, again brewpubs must provide advance written notice of the pool and be vigilant about limiting participation only to employees who customarily and regularly receive tips, such as servers, counter personnel, bussers, and service bartenders. It is illegal to share tips with owners, managers, supervisors, janitors, dishwashers, chefs or cooks, or food preparers. It is not as clear-cut as to whether hosts, bar backs, expeditors, and employees who have supervisory duties can share in a tip pool.

Failure to properly notify employees of the tip credit, or unlawful tip pools, can cost an employer back wages, liquidated damages, and attorney fees.

CHANGES AHEAD

The DOL has new regulations slated to take effect on December 1, 2016 that impact white-collar exemptions—certain executive, administrative, professional, computer, and outside sales employees. Brewpubs must ensure that employees classified as exempt satisfy both the Duties Test and Salary Basis Test. For now, changes will not impact the Duties Test (where employees must perform certain job duties to qualify for one of the above exemptions). Instead, the DOL has upped the ante with the Salary Basis Test, requiring employers to bump the salary from \$455/week to a minimum of \$913/week (doubling the current annual salary threshold from just over \$23,600 to \$47,476). This new threshold will be updated every three years starting January 1, 2020, based on the Consumer Price Index and data from the Bureau of Labor Statistics. The good news is that the DOL will graciously allow employers to satisfy up to 10 percent of the salary threshold from “nondiscretionary bonuses and incentive payments,” including commissions, paid on a quarterly or more-frequent basis. The DOL apparently aims to reduce the number of exempt employees as much as possible and/or pay exempt employees more.

These are just a few of the danger zones under federal and state wage and hour law. Visit the Fisher Phillips Wage & Hour Blog (fisherphillips.com/Wage-and-Hour-Laws) for additional details and suggestions on these and other related issues. The time is now to get your wage and hour practices in line.

—Todd Fredrickson, Fisher & Phillips LLP, tfredrickson@fisherphillips.com.

NB



Efficient. Sustainable. Turn-key. Featuring limitless custom or off-the-shelf handle options, in-line applicator solutions and superior service, PakTech is the smart choice. We have your packaging needs handled.

Put PakTech quality to work for you at paktech-opi.com or call (541) 461-5000.