



# Proposed OT Regulations Will Hit Hospitality Industry Hard

Insights

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At long last, the anxiously awaited proposed changes to the regulations defining federal wage and hour law have been published by the U.S. Department of Labor (USDOL). The changes, if adopted, would impact the determination of which of your employees has to be paid overtime. These regulations will sharply reduce the number of workers across the country who are exempt from OT pay and will work to give many employees a raise in pay.

Hospitality employers and other businesses can now offer comments regarding the suggested changes, which would alter the way the Fair Labor Standards Act (FLSA) is interpreted in a dramatic way.

## Double Your Pleasure, Double Your Pain

In order to qualify as exempt from overtime pay, employees must work in positions that meet specific duties tests, and in most cases, also meet minimum compensation tests. The good news is that the proposed regulations don't address the specific duties tests, so you shouldn't have to review your executive, administrative, professional, and outside-sales positions again to see whether they qualify.

The bad news is that there would be significant changes to the compensation tests if these regulations are adopted. USDOL intends to essentially **double** the minimum salary threshold, raising it from \$455 to \$921 per week. The new figure would annualize to \$47,892.

And even worse, for the first time in the 75-plus-year history of these exemptions, the USDOL is proposing that it would release an "updated salary rate" on an annual basis. The agency's accompanying remarks suggest that this might result in a \$970 threshold (annualizing to \$50,440) as early as 2016.

Therefore, if you are viewing this proposal from the standpoint of longer-range planning and budgeting, you would be wise to project for now that the minimum salary will move up steadily. We predict that it will head toward an annualized level in the mid-\$50,000s in the not-too-distant future.

These proposed regulations would hit your industry hard. We recently conducted an informal survey of about 20 hotel and resort properties, asking them what percentage of their current exempt employees do not meet the proposed minimum salary threshold. The average was only 21%, with

several properties reporting that over 50% of exempt supervisors and managers would not meet the minimum threshold.

## **Escaping The Fray**

If there is a silver lining to this dark cloud, it's that there are certain employees who will not be affected by these proposed changes at all. One such group consists of those non-exempt employees who are paid on a salary-plus-overtime basis. In other words, the potential salary change would not represent some generalized requirement to pay salaried, *non*-exempt employees at the minimum salary rate.

There are others who would escape the brunt of these changes. In the hospitality industry these might include sales managers falling within the "outside salesman" exemption, employees whose work meets the computer-employee exemption requirements and who are paid on an hourly basis at a rate of at least \$27.63, and employees who fall under the overtime exception for retail employees paid under a commission pay plan (such as banquet servers).

## **Comments And Criticisms**

Comments on and criticisms of these proposals must be submitted to USDOL by September 4, 2015, unless that date is extended. Currently, the American Hotel and Lodging Association (AH&LA) is soliciting industry feedback on a number of issues and preparing comments to present to the USDOL.

Issues on which AH&LA will likely comment include the negative impact the salary increase will have on hospitality operations, the adverse influence the changes would have on training and career progression opportunities for employees, and whether any portion of nondiscretionary bonuses and incentives may be used to meet the minimum salary requirements.

## **What Should You Do Now?**

Blaring headlines notwithstanding, *these provisions are not yet in effect, the exemption rules have not yet been changed, and hospitality employers are not yet required to do anything differently – for the moment, at least.*

That being said, we urge hospitality employers to take immediate action. We recommend that you:

- evaluate immediately what these changes would mean for your organization and employees;
- determine whether and how to bolster the FLSA exemption status of those you treat as exempt from overtime;
- decide what *other* FLSA exemptions might apply to one or more of your employees;
- select alternative FLSA-compliant pay plans that would serve your needs if you decide to convert one or more employees to non-exempt status; and

- prepare comments for submission to USDOL and/or participate in AH&LA's efforts to gather information on behalf of the industry.

It's difficult to predict when any final changes will actually be put into effect. Using history as a rough guide, we are inclined to think that these changes will not be put into effect before late this year or early next year. Given that 2016 will be here before you know it, the time to act is now.

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