3 Critical Wage And Hour Questions For Every Hospitality Employer

Insights
8.31.18

The hospitality industry is an increasingly popular target for enforcement actions by government agencies, not to mention lawsuits by plaintiffs' attorneys. To help avoid three common wage and hour issues that come up too often in hospitality businesses, here are just a few questions you should ask yourself right now. Note: these examples address federal wage and hour laws and regulations; many states have their own laws and regulations that may also come into play. You should check with your Fisher Phillips attorney if you have specific questions about local compliance issues.

Question No 1: Are My Salaried Exempt Employees Properly Classified?
Gretchen is a front desk supervisor. She is paid a salary and is not paid overtime, even when she works way more than 40 hours in a week. Gretchen oversees a team of seven front desk agents. When things get busy, or when an agent calls out sick, Gretchen works the front desk. Her bosses, the assistant manager and the general manager of the front desk, tell her that she is too busy to bother herself with interviewing new hires, issuing discipline, or making decisions as to who to promote and, when it happens, who gets fired. Her bosses are also very hands on when it comes to service recovery and dealing with customer issues—she is under strict orders to pull in either the assistant manager or manager whenever there is an issue. Gretchen feels like she lacks the authority to make any decisions, and her only job is to make sure the operation runs smoothly. This frustrates Gretchen, but she is a team player and doesn't complain. Is it possible she is misclassified as a salaried exempt employee?

A good rule of thumb to keep in mind is that, by default, all employees in the United States are hourly employees entitled to overtime pay—*unless*, of course, you can show that they are subject to one of the exceptions (or exemptions, hence the term "exempt employees") set forth by the U.S. Department of Labor (USDOL). Further, you should keep in mind that an exemption is only as good as the actual duties performed by the employee.

The Executive Exemption
So, for example, it is not enough to simply give an employee the title of "supervisor" and not pay them overtime. Rather, the employee must meet the test for the executive exemption, which means satisfying all four of these tests:

- Directs the work of two or more full-time employees (or their equivalent) on a regular basis;
- Is paid a salary of not less than $455 per week;

- Is paid a salary of not less than $455 per week;
- Manages the enterprise, or a customarily recognized department or subdivision of the enterprise; and
- Has the authority to hire and fire employees, or their recommendations regarding hiring, firing, advancement, promotion, etc. are given "particular weight."

It is the final factor—hiring, firing, or the supervisor's recommendations being given "special weight"—that have long given hospitality employers the most trouble. As in Gretchen's case, it is unfortunately very common for management to permit supervisors to oversee the work of two or more employees on a daily basis but not provide them the authority to hire or fire. Moreover, in these situations, it is also common to learn that management does not necessarily take into account the supervisors' recommendations with regard to hiring, firing, promotions, or demotions. This structure has doomed many an exemption defense.

Another potential area of concern: how frequently does Gretchen (and her fellow supervisors) engage in non-supervisory work such as helping customers check in? Given this possible exposure, you should take a deep dive into what your salaried exempt supervisors and managers actually do on a daily basis, and you should consult with your employment counsel to determine whether they are properly classified.

The Administrative Exemption

The executive exemption is only one basis for exempting employees from payment for overtime work. In addition to the professional exemption (think doctors, lawyers, etc.), the computer exemption (applied to those IT folks who design and test computer systems), and the outside sales exemption (those who spend the bulk of their time outside the office selling the employer's goods and services), the USDOL also recognizes an administrative exemption. To meet this test, employees must satisfy the following three elements:

- Is paid a salary of not less than $455 per week;
- Performs primarily office or non-manual work that is directly related to the management or general business operations of (i) the employer or (ii) the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment "with respect to matters of significance."

This exemption contains some ambiguous terms, but at the end of the day the main question will be whether the employee has the ability to make decisions that are both significant to and are binding to the company. In Gretchen's case, her managers have taken away her authority to make any decisions of consequence to the business, meaning it is very doubtful that she would satisfy this legal test. Once again, you should partner with your employment counsel to determine whether your non-supervisory salaried employees meet the requirements of this exemptions, or one of the others.

Question No. 2: Are My Hourly Employees Performing Off-The-Clock Work?

Gene is a prep cook at a high-end restaurant. He's a real go-getter and thinks nothing of coming in a half an hour before his shift, helping wrap silverware, putting last night's final clean dishes away, and generally getting the place ready to open. A few minutes before the doors open, Gene goes out the back door and has a quick smoke. Then he clocks in and it's go time! Does Gene's pre-shift work create possible exposure?

Like Gene, hospitality industry employees are generally, by nature, positive, upbeat, and service-oriented. Many employees in the industry think nothing of coming in to work early, getting their stations ready to open, finishing up work from the night before, and engaging in a myriad of so-called "pre-shift" activities. If you ask them, most will say they are happy to get this work done before the shift starts, as it makes their job easy once the doors open.

But here's the rule: if an hourly employee engages in *any* activity that even remotely resembles work, you must pay them for it. It doesn't matter if the employee doesn't expect to be compensated, or even "volunteers" to do the work. They *must* be paid. It's enough that an employer knows about the activity to create liability for unpaid, off-the-clock work.

Unfortunately, in situations like this, the pot is just starting to boil once you determine that someone is working off the clock. If the employee is already working a 40-hour a week schedule, this unpaid time might just push them into overtime status, increasing your legal exposure. Employees who prove that they were not paid for work done can get back pay (going back as far as three years), liquidated damages, plus attorneys' fees. Even though Gene's pre-shift activities may have lasted only 15 or 20 minutes each day, the numbers can get surprisingly high once you start adding up all the days from the past several years. Moreover, if there are others who follow his example and jump in early to help out, an enterprising attorney can seek to collect back wages and damages for them as well, over a three-year period. This can add up quickly.

And by the way, it doesn't matter that Gene stops work to go for a smoke break. Most courts will hold that his day began the moment he engaged in work-related activities. Finally, because there are no records as to exactly when Gene started his pre-shift work, the courtroom fight will boil down to whose word the judge or jury believes as to how long and how frequently off-the-clock work happened: Gene's and his co-workers', or management's. You can guess how these questions are usually resolved.

Many very expensive lawsuits are filed each year alleging off-the-clock work. For you to avoid getting caught up in such a claim, it is crucial to make sure that your hourly employees are not doing anything remotely like work either before or after they clock in and out. This includes pre-shift meetings, unless the meeting is completely voluntary and has nothing to do with the job (such as if your employees are planning a charity drive). Also, you should beware of off-the-clock post-shift work, such as putting work-related documents away, cleaning utensils, and preparing for the next day's work. Even five or 10 minutes a day can add up quickly!

Question No 3: Are We In Compliance With Tip-Pool Related Requirements?

Question No 3: Are We In Compliance With Tip-Pool Related Requirements?

Arman is a waiter at a popular, and usually very busy, restaurant. When he started, he was told that he would be paid less than minimum wage but that he would easily make up the difference—and then some—in tips. However, that has turned out to not always be true. Sometimes when the weather is bad and business slows down, he makes less than minimum wage on his weekly pay. Also, the waiters pool their tips, and a percentage goes to bussers, dishwashers, and, rumor has it, even to the cooks and the restaurant's manager. Is the restaurant compliant with the USDOL's rules on tip credit and tip pools?

Let's start with some obvious rules first. In order to pay a tipped employee less than minimum wage, you must monitor the employee's tips in order to make up the difference when there is a shortfall. Because this restaurant fails to make sure that Arman takes home at least the minimum wage, this could come back to bite them.

Also, because this restaurant takes a "tip credit" against minimum wage, the USDOL limits those who may participate in tip pools to "employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders." According to the federal agency, "a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors."

So, to the extent these kinds of employees are sharing in the tip pool, a government investigator may conclude that the restaurant violated the USDOL's tip pooling rules. Further, if it turns out to be true that the restaurant's manager gets a cut of the tips, that is probably the business's biggest sin. In the eyes of the USDOL, a member of management sharing in a tip pool is the equivalent of the company taking money from the tipped employee themselves. In other words, the government considers that to be stealing from employees. (Note: the concept of a tip or gratuity differs from the concept of a "service charge." See your employment lawyer for more information.)

In April 2018, the USDOL issued tip pool guidance for employers who pay tipped employees at least minimum wage and do not take a tip credit against the federal minimum wage (usually because their state's law requires that all employees be paid at least the minimum wage). In such cases, the agency confirmed that you may include "employees who are not customarily and regularly tipped—such as cooks and dishwashers—in tip pools." However, the USDOL also made clear that managers and supervisors still may *not* participate in tip pools, even where the employer does not take a tip credit. This issue is currently in litigation; ask your employment attorney for updates.

And now for the tough topic. Unfortunately, most managers who read this scenario will miss a subtle, but crucial, issue. The USDOL requires employers who pay tipped employees less than minimum wage to provide an oral or written notice to each such employee containing the following pieces of information:

- the amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

- the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 (the difference between the minimum required cash wage of $2.13 and the current federal minimum wage of $7.25);
- that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
- that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

In the scenario above, it appears that Arman was not sufficiently informed of each of these specific items by his employer. The best practice is to create a document containing all of the required notice items, tailor the required figures for each item to each employee for whom the business takes a tip credit, have the employee read and sign the document, and keep the document in the employee's file. And remember, each time the employee's base wage changes, you must issue a new notice.

The consequence of non-compliance is contained within the regulation. Those who do not comply quite simply lose the tip credit, and may be required to make up the difference between the minimum wage and the actual wage paid—and face penalties and attorneys' fees.

Conclusion

Wage and hour compliance can be very technical, but the exposure to back pay, penalties, and attorneys' fees can be expensive enough that compliance is an absolute necessity. Too often, employers are sitting ducks for hungry class action plaintiffs' attorneys. Consult with your Fisher Phillips lawyer to make sure you are in compliance. Remember: because the statute of limitations for federal wage claims is a maximum of three years, every day you are in compliance is one less day of exposure. Do it today.

For more information, contact the author at JWinchester@fisherphillips.com or 206.693.5068.

Service Focus

Counseling and Advice

Wage and Hour

Industry Focus

Hospitality