



Adapting to the New Department of Labor's Final Rule

ARE YOUR EMPLOYEES STILL EXEMPT?

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The Department of Labor (DOL) Final Rule promulgated new regulations that go into effect on December 1, 2016. All employers need to know how these regulations have changed the test for exemption to understand what they need to do in response. This article will review the basics for the most common exemptions from overtime under Federal law and will also provide an executive summary of the key changes made by the Final Rule.

One of the biggest myths in the workplace is that a "manager" who is paid a salary is automatically an exempt employee. Indeed, hospitality employers will cite many reasons as to why paying a salary is preferred. It can be more convenient because it provides more flexibility and control over scheduling. It avoids the hassle of paying overtime and providing meal and rest periods. It also ensures that employees are not offended by having to clock in and out with other "hourly" employees.

However, all hospitality employers need to know that an employee must be paid overtime (and provided meal/rest breaks) unless the employee fits "plainly and unmistakably" within a specified exemption. To be exempt from overtime under the common "white collar" exemptions, employees must satisfy two criteria: (1) the employee must be paid a minimum salary basis not subject to reduction based on quality or quantity of work ("salary basis test"); and (2) the employee's primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees ("duties test"). Paying someone a salary and calling them a manager does not suffice.

Given this backdrop, it is crucial for all employers to understand what the U.S. Department of Labor's (DOL) Final Rule means for their business and how to make sure that they don't run afoul of the new requirements.

The Department of Labor's Final Rule Changes the Test for Exemption

On December 1, 2016, the U.S. Department of Labor's (DOL) Final Rule went into effect. The new rule changes the salary basis test referenced above by increasing the compensation level needed for Executive, Administrative, Professional, and highly compensated workers to be exempt under FLSA's Section 13(a)(1). The DOL did not change the duties test, but the following summary highlights the main changes:

- The minimum salary threshold will increase to \$913 per week, or \$47,476 per year (up from \$455 per week, or \$23,660 per year). The DOL says that this figure is set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).
- Non-discretionary bonuses and incentive payments may be used to satisfy up to 10 percent of the increased salary levels. Employers previously could not use such amounts to satisfy the salary basis test.
- The Federal "highly compensated employee" exemption threshold will increase to \$134,004 per year (up from \$100,000 per year). To be exempt, the employee must also receive \$913 per week and pass a more streamlined duties test.
- The salary threshold will be "automatically updated" every three years to maintain the levels at the above percentiles beginning on January 1, 2020. The DOL will announce these changes 150 days in advance.

What is the Impact on Employers?

In light of these new thresholds, it is even more important that hoteliers re-evaluate their employee classifications to ensure that all salaried employees in "managerial" roles satisfy the salary basis test and the duties test. This can be done through a wage/hour audit of a hotel's positions. Unless an employee is truly exempt under both state and federal law, that employee may be entitled to overtime pay, meal periods, and/or rest periods. Employers therefore must be vigilant and ensure that they comply with the test for exemption and the new changes implemented by Final Rule.

Are My Employee's Exempt? The Basics

The basic requirements for the most common exemptions that an employer will rely on are summarized here. Again, before an employee can be paid properly considered exempt, they must meet both the salary basis test and the duties test.

The Salary Basis Test

Under current Federal law, an employee must be paid at least \$23,660 per year to meet the salary basis test based on the current Federal standards. However, as set forth in the charts below, starting December 1, 2016, the Final Rule will increase the Federal standard to \$47,476 per year. The DOL has not updated this regulation since 2004 so this is a massive increase from prior levels. This will likely be the largest jump that employers will see as the DOL has built into its Final Rule, a requirement to update the salary basis test threshold every three (3) years.

FEDERAL MINIMUM SALARY - Exempt

<u>Date</u>	<u>Federal Minimum Salary</u>
CURRENT	\$455.00 weekly; \$1,971.67 monthly; \$23,660.00 annually
December 1, 2016	\$913.00 weekly; \$3,956.34 monthly; \$47,476.00 annually
January 1, 2020	TO BE UPDATED

The Duties Test

The duties test varies depending on the exemption. Here is a summary of the basic duties test requirements, under Federal law for the three most common exemptions. Of course, the salary basis test must be met before any of these exemptions can be relied upon.

For the Executive Exemption, (1) the employee's primary duty must be to manage the enterprise or customarily recognized department/subdivision; (2) the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (3) the employee must have the authority to hire or fire employees, or the employee's suggestions and recommendations as to hiring, firing, or any other change of status must be given particular weight.

Under the Administrative Exemption, (1) the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers; and (2) the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Finally, for the Professional Exemption, (1) the employee's primary duty must be the performance of work requiring advanced knowledge, predominantly intellectual in character and which requires the consistent exercise of discretion and judgment; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Hoteliers must always evaluate whether their employees satisfy the duties test. Under Federal law, employers must ensure that an employee's primary duty is engaging in exempt duties. This is a "qualitative test." For employers in California, an employee must satisfy a more stringent duties test. California imposes a "quantitative test" that requires the employee to actually spend more than 50% of work time engaged in exempt duties that require the regular and customary exercise of independent judgment and discretion.

In order to ensure that employers can appropriately rely upon an exemption, hoteliers are advised to conduct a wage/hour audit of their positions to ensure compliance. Otherwise, employers may find

themselves in the unenviable position of finding out that they have misclassified an employee for years. Although the new rules did not change the duties test, hoteliers should immediately review the exemptions they are relying on.

The Hotel Industry Positions Most Often Subject to Misclassification Challenges

While all employee classifications should be examined fully for compliance with the law, below are some of the positions that are most commonly subjected to challenges for misclassification in the hotel industry. These include front desk managers, catering/banquet managers, maintenance managers, and sous chefs. Front-desk Managers may qualify as executive exempt if they supervise two or more full-time employees. However, be careful about job descriptions for Front-Desk Managers that characterize their primary duty as checking in guests, addressing guest complaints, and filling out pro forma reports. Their primary duty may not be seen as being engaged in exempt duties.

Catering/banquet managers are generally not executive exempt unless they truly directly supervise and manage 2 or more subordinates. They are also generally not administratively exempt since "selling" is not typically considered being related to general business operations as required. Therefore, any negotiation and representational duties undertaken in the course of ordinary selling may not constitute administrative-type "servicing", and could be viewed as routine sales. Note that some states, like California, do not provide an inside sales exemptions for hoteliers.

Maintenance Managers may qualify as executive exempt if they supervise two or more full-time employees. However, be cautious of Maintenance Managers who generally do repair work since their primary duty may not be engaging in exempt duties. Finally, Sous Chefs may qualify as executive exempt if they supervise two or more full-time employees. However, be careful of Sous Chefs whose primary duty is to merely cook food. Note that in California, a Sous Chef may qualify for the "learned professional" exemption if they have completed a four-year course in Culinary Arts, and doing so is a requirement of the job.

In light of the new regulations, now is the ideal time for hoteliers to evaluate their exempt positions and conduct a wage/hour audit. It is crucial for hospitality employers to ensure that it does not pay a salary and deny meal/rest period to an employee that does meet the test for exemption under the new Final Rule. The Executive, Administrative, and Professional exemptions are fact specific inquiries and the new DOL regulations provide a good reason to re-examine all employee compensation plans. If not classified properly, an employer could be subjecting itself to costly claims before the Labor Board, in a civil lawsuit, or through a class action. Hoteliers should consult their Fisher Phillips attorney to ensure that their exempt positions are in full compliance.

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Wage and Hour