



# **Brewers Beware: BOLI's New Interpretation of Overtime Rules**

Publication

2.06.17

Oregon's Bureau of Labor & Industries (BOLI) recently announced a new interpretation of overtime compensation rules that directly impacts Oregon breweries and brewpubs. Under the new guidance issued in December 2016, employees in "manufacturing establishments" must be paid overtime rates for hours worked in excess of 40 hours per week and overtime rates for any hours in excess of 10 hours in any given day. BOLI says that manufacturing establishments cannot continue with the former practice of paying employees the greater of the daily overtime rate or the weekly overtime rate.

## **What changed?**

It's important to note that this new interpretation is not the result of a new law being passed. ORS 652.020 has always stated that employees who work in manufacturing establishments must be paid one and one-half times their regular hourly rate when the employees work more than 10 hours in a work day. Similarly, ORS 653.261 has always stated that employees who work more than 40 hours in a week are entitled to pay one and one-half times their regular hourly rate.

However, as noted above, BOLI previously interpreted these two statutes to allow covered employers to simply pay employees the higher of the weekly and daily overtime amounts. For example, under the prior interpretation, if an employee worked 11 hours on Monday and Tuesday, and 10 hours on Wednesday, Thursday, and Friday – for a total of 52 hours in the week – the employee would only be entitled to 12 hours of overtime pay (because the 12 hours over 40 is greater than the two daily hours of overtime for Monday and Tuesday). Under the new interpretation, however, the same employee is entitled to 14 hours of overtime pay (the two daily overtime hours for Monday and Tuesday, *plus* the 12 hours over 40 in the week) and 38 hours of regular pay.

The timing of BOLI's position change is also interesting. It follows a class action lawsuit that was filed last year against Portland Specialty Baking. The suit argues that the bakery was not paying workers daily and weekly overtime. Brad Avakian, the BOLI Commissioner, submitted a declaration in support of the plaintiff workers. And now we have the new interpretation.

## **Why does this apply to Breweries and Brewpubs?**

Breweries and brewpubs are covered because a "manufacturing establishment" is defined as any place where machinery is used for "manufacturing purposes." This includes any establishment making goods by machinery, any making raw materials by machinery, and any producing articles for

use from raw or prepared materials by giving prepared materials by giving such materials new forms, qualities, properties or combinations, by use of machinery.

Beer, of course, is brewed from raw materials and involves the use of machinery. My conversations with BOLI have similarly confirmed that the agency interprets the statute to cover breweries and brewpubs.

### **Are there any exceptions?**

Yes. The new interpretation does not impact the statutory exceptions, which state that the daily overtime pay requirements do not apply to, among others: supervisors, managers, foremen/women, and those temporarily acting in such capacities in the absence of supervisory employees; those whose primary duty is that of making necessary repairs; and boiler operators.

The daily overtime law also does not apply to employees who are employed to perform duties that do not include work in connection with production machinery, such as administrative staff or bookkeepers, provided they don't work in the brewery or brewpub, or they perform their duties in a location that is physically separated from the actual production process by means of an architectural barrier.

### **What next?**

This "double pay" issue is currently being looked at by the legislature, which will hopefully amend the existing statutes to clarify its intent as to whether employees are or are not entitled to daily and weekly overtime pay when the employee works more than 40 hours in a week.

It is also unclear whether BOLI will take the position that covered employers are expected to retroactively correct payments made to employees over the last two years (the length of the applicable statute of limitations for overtime wage claims). But as the *Portland Specialty Baking* case made clear, some plaintiffs' attorneys are not necessarily going to wait to find out what the courts or legislature decide.

At the very least, breweries and brewpubs should immediately ensure they are not currently running afoul of BOLI's new overtime interpretations. Breweries and brewpubs are also encouraged to seek legal counsel to help evaluate their potential exposure to overtime wage claims, and how to best handle their specific wage payment structure and shift scheduling practices.

## ***Service Focus***

Wage and Hour

## ***Industry Focus***

Hospitality

