

2016 HOSPITALITY LAW CONFERENCE

FEBRUARY 22-24, 2016,

DOL SETS ITS SIGHTS ON HOSPITALITY INDUSTRY – OT EXEMPTIONS AND INDEPENDENT CONTRACTORS

Presented by:
Andria L. Ryan



PRESENTER

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Ms. Ryan represents hospitality employers throughout the U.S. in various phases of labor and employment law. She spends much of her time counseling employers in day-to-day employment and labor decisions and educating employers about prevention and practical solutions to workplace problems. Ms. Ryan is a guest lecturer at the Georgia State University Hospitality School and Johnson and Wales University on employment law topics. Ms. Ryan serves as an active member on the AH&LA's Human Resources Committee, the Resort Employee Relations Group and the Advisory Board of Hospitality Law.



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OVERTIME REGULATIONS



A BRIEF HISTORY

The FLSA was enacted in 1938


- The law specifically delegates the authority to define the “white collar” exemptions to the United States Department of Labor
- The DOL revised definitions of the “white collar” exemptions in 1940, 1949, 1958, 1963, 1970, 1975, and 2004
- In March 2014, the President directed DOL to again “modernize and streamline” its regulations governing “white collar” exemptions

WHY NOW?


“To ensure that the FLSA’s intended overtime protections are fully implemented”

- Encourage employers to hire more employees rather than pay overtime premiums
- Provide more income to middle class employees, resulting in economic growth
- Increase payroll tax contributions to Social Security and Medicare
- **“To simplify the identification of nonexempt employees . . . making [it] easier for employers and workers to understand.”**


THE BASICS – EXECUTIVE EXEMPTION

1. "Primary Duty": Management of the organization or of a recognized unit or subdivision.
 2. Supervises at least two other FT employees or the equivalent.
 3. Hires/fires, or makes suggestions about that or about other status changes that carry particular weight.
 4. Paid on a "salary basis" at rate of least \$_____ per week.
- 

THE BASICS - ADMINISTRATIVE EXEMPTION


1. "Primary duty": office/non-manual work directly related to management or general business operations of the employer or the employer's customers.
 2. Work includes discretion and independent judgment in "matters of significance".
 3. Paid on a "salary basis" or a "fee basis" at rate of least \$_____ per week.
- 

THE BASICS - PROFESSIONAL EXEMPTION

1. "Learned": primary duty is work requiring advanced knowledge in a field of science or learning, usually gained through prolonged instruction and study.
 2. Work is mainly intellectual, includes consistent judgment and discretion.
 3. "Creative": primary duty is work requiring invention, imagination, originality, or talent.
 4. Paid on a "salary basis" or a "fee basis" at rate of least \$_____ per week.
- 

THE BASICS

An increase in the salary basis of \$455 per week (or \$23,660 annually) for “white collar” exempt employees

- Proposed salary level would be 40% of earnings for full-time salaried workers
 - This is projected to be \$970 per week (\$50,440 annually) in 2016
 - Annual (and automatic) updates in salary level to maintain 40% threshold
- 

THERE COULD BE MORE?

The DOL is considering whether nondiscretionary bonuses may satisfy a portion of the salary level threshold

- proposed regulations would limit to 10%
- paid at least monthly


- **The DOL is considering revisions to the “duties” tests**

- A 50% requirement for performing exempt work
- Additional examples illustrating how the exemptions apply to particular occupations

- **“There’s no mischief here.”**

WHAT HASN'T CHANGED?

The status of any employee who is exempt pursuant to a non “white collar” exemption (e.g., outside sales, 7(i))

- The status of certain employees exempt pursuant to a “white collar” exemption (e.g., computer professionals, doctors, lawyers, teachers)
 - The requirement to pay a minimum salary (for now)
 - The requirement to perform certain exempt duties (for now)
- 

WHAT'S NEXT?

The proposed regulations are NOT final

- DOL received over 250,000 comments from the public –in the hopes of influencing DOL's final regulations
- DOL will issue final regulations with a prospective effective date
 - Speculation that the final regulations may be announced ranges from April to late summer 2016
 - With implementation 60 – 120 days after announcement

COMMENTS TO DOL

Large number of comments from hospitality industry – including from AH&LA

Comments addressed:

- Phase in over time
- Adjustments to salary level for different regions of country
- Negative effect on management training and development
- Increase in bonus/commission amount towards salary

HOW DOES YOUR BUSINESS RESPOND?


Review all exempt employees with a salary of less than \$50,440

Create 3 lists:

1. Employees who you will raise salary level to \$50,440 or more
 - But beware of need for future increases and verify that employees still satisfy duties requirements
2. Employees you will not raise to new salary level
3. The *other* group – this one needs some evaluation and attention

HOW DOES YOUR BUSINESS RESPOND?

For your “*other*” group, evaluate whether other non-“white collar” exemptions are available

- 7(i) – for “commission paid employees (retail, in-room dining, spa)
 - Outside sales
- 

HOW DOES YOUR BUSINESS RESPOND?

Prepare to modify the pay of those employees who will no longer be exempt


- Hourly plus overtime (weekly salary divided by 40/50/55 hours?)
- Fluctuating Workweek Pay Plan

- What about new hires from now until new regulations in effect?

- Develop a communication plan



YOUR ACTION PLAN

- Remember, there is still time to prepare
 - Review all exempt employees with a salary of less than \$50,440
 - Evaluate whether other non-“white collar” exemptions are available
 - Prepare to modify the pay of those employees who will no longer be exempt
- 

INDEPENDENT CONTRACTORS




FACTS

- The U.S. Bureau of Labor Statistics estimates that more than 10.3 million workers in the US (7.3 percent of the workforce) are classified as independent contractors.
- A US Department of Labor study found that as many as 30% of businesses have individuals misclassified as independent contractors.
- It is estimated that 3.4 million workers are misclassified

WHY IS IC STATUS ATTRACTIVE?


To Employers:

Significant labor cost savings

- No unemployment insurance costs
 - No workers' compensation premiums
 - No state/federal income tax withholdings
 - No health and welfare benefits
- 


WHY IS IC STATUS ATTRACTIVE?

To Employers (cont.):

- No wage-hour requirements
 - Anti-discrimination laws not applicable
 - OSHA requirements not applicable
 - No unions
 - Avoid tort liability
 - Immigration (no I-9s)
- 

WHY IS IC STATUS ATTRACTIVE?

To Workers:

- Free to play the field
 - Independence – “be your own boss”
 - Higher pay/more \$\$ in their pocket
 - 20% to 40% more per hour than employees performing same work
 - Work-related tax deductions
- 


WHAT'S THE DOWNSIDE?

To Employers:


- Loss of control
- ICs may not be as reliable
- Perception that business is smaller/unstable (i.e., sometimes bigger is perceived as better)
- Work product may be something IC can re-use (i.e., ownership of work product may be debatable in absence of written contract)

WHAT'S THE DOWNSIDE?


To Workers:

- Less job security
 - Pay self-employment taxes
 - No employer-provided benefits
 - No unemployment insurance benefits
 - No employer-provided workers' comp
 - No labor law protections
 - Personal liability
- 

WHO CARES?


- IRS, DOL, various federal and state agencies
 - Federal and state legislatures
 - Courts
 - Class action lawyers
 - Unions
- 

INDEPENDENT CONTRACTORS


- Misclassification of workers as “independent contractors” costs the government billions
 - Efforts are under way by state and federal legislators to enact new laws to crack down on employers who misclassify workers as contractors
 - DOL issued “new” guidance on July 15, 2015
 - IRS promised 6,000 random audits over a 3 year period
- 

THE DOL CARES


“The Department will redouble its efforts to **combat worker misclassification** by investing \$46 million for a multi-agency initiative of OFFCP, the Wage and Hour Division, OSHA, the Office of the Solicitor, and the Employment and Training Administration, which will fund state grants that address worker misclassification within the context of the unemployment insurance program.”



STATES CARE

- Legislation passed in twenty-one states tightening restrictions on use of IC's and/or increasing penalties for misclassification.
 - Prompted by sentiment of “cheating” and “stealing”
 - Ohio claims it loses at least \$160 million a year in taxes because of worker misclassification
 - NY study of construction industry estimates \$1 billion plus lost in tax revenue every year due to misclassification
 - “Task Forces” in many states
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HOW MANY TESTS ARE THERE?

- Unemployment benefits
 - Workers' compensation insurance
 - IRS & State Departments of Revenue
 - Department of Labor
 - NLRB
 - Courts: different tests for different types of cases
- 

The Supreme Court has said that there is no definition that solves all problems relating to the employer-employee relationship under the Fair Labor Standards Act (FLSA).

Source: www.dol.gov/elaws/esa/flsa/docs/contractors.asp




THE IRS TESTS

- While different tests apply, most flow from principles established by the IRS
- Most tests hinge on “degree of control”

IN THE END ...

An IC classification is more likely for a worker who:

- Can earn a profit or suffer a loss from work
 - Furnishes needed tools/equipment
 - Is paid by the job
 - Works for more than one organization
- 


IN THE END ...

An IC classification is more likely for a worker who (cont.):

- Invests in equipment/facilities
- Pays his/her own business and travel expenses
- Hires and pays assistants
- Sets his/her own working hours


ON THE OTHER HAND ...

An IC classification is unlikely for a worker who:

- Can be fired at any time
 - Is paid by the hour
 - Receives instructions from the organization
 - Receives training from the organization
- 


ON THE OTHER HAND ...

An IC classification is unlikely for a worker who (cont.):

- Works full time for the hiring organization
 - Receives employee benefits
 - Has the right to quit without incurring liability
 - Provides services that are integral to the organization's purpose
- 


WHAT IF YOU THINK AN IC IS MISCLASSIFIED?

3 Options:

- Do nothing
 - Reclassify the worker to employee status
 - Retain as IC but restructure the working relationship
- 

WHAT ARE THE CONSEQUENCES?

Misclassifying an employee as an IC may require you to pay:

- The employer's and employee's share of Medicare and Social Security
 - Federal and state income taxes that should have been withheld
 - Federal and state unemployment taxes
 - Fines and penalties
 - Overtime
 - Benefits
- 

PRACTICAL TIPS

Treat workers as “employees”

If worker is treated as IC:

- Written contract
- Be careful with business cards and other material
- Pay by the job, not based on time
- Be careful about **degree of control**

Thank You!

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