

The
HOSPITALITY LAW
CONFERENCE

Down the Rabbit Hole of Wage
and Hour Compliance in the
Hospitality Industry

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Wage and Hour Litigation: Why is it so popular?

- Plaintiffs' attorneys love it.
- Costly judgments and settlements against major employers for overtime and technical violations.
- Statute of limitations and potential back pay: 3-4 years.
- Can cover all employees who worked during that period of time.
- Potential Liquidated Damages: **DOUBLE** back pay
- Automatic attorney's fees.

Wage and Hour Basics

- Minimum Wage: Employers must pay the minimum wage. The Fair Labor Standards Act (FLSA) requires a minimum wage of \$7.25 an hour, and many states and localities impose higher minimum wages.
 - Hospitality employers must consider state laws that require supplemental wages for split shifts, federal and state limitations on deductions for uniforms, cash shortages and lodging, among others.
- Overtime: Employers must pay non-exempt employees overtime after 40 hours in a workweek (or pursuant to state law).
 - Hospitality employers often have unique pay and scheduling issues affecting the payment of overtime: on-call pay, shift differentials, piece rate pay, and employees working jobs at different hourly rates, to name a few.
- Child Labor: FLSA regulates the employment of individuals under 18 years of age. There is an age-18 limit for numerous jobs falling within seventeen hazardous occupations. Fourteen- and 15-year-olds may work in limited occupations including retail and food service. Even then, they may work only within strict hours and times-of-day limitations.
 - Leisure and hospitality is the number one employer of youth labor.
 - Hospitality employers must ensure compliance with maximum hour, time of day restrictions and break requirements.

Exemptions

- Improperly classifying employees as exempt and therefore not eligible for overtime and not required to keep proper time records, is a common FLSA violation.
- Employers bear the ultimate burden of showing the employee meets one of the exemptions under the FLSA.
- Hospitality employers must carefully consider the status of certain unique positions in the industry, such as sales managers and sous chefs.

New DOL Rule

- FLSA requires employees to be paid overtime beyond 40 hours/week, UNLESS they fall under an exemption
 - The new rule changes the salary threshold for several exempt groups, including executive, administrative, and professional exemptions (“white-collar” exemptions)
- Effective as of July 1, 2024, minimum salary threshold for an exemption is **\$844 per week** (paid on a "salary basis"); January 1, 2025 = **\$1,128/ week**
- May use bonuses/commissions for up to 10% of the minimum salary
- Thresholds will be "updated" every three years with 150-day notice

Specific Exemptions

Administrative Exemption	Professional Exemption	Highly Compensated Exemption	Executive Exemption
Primary duty is office or non-manual work directly related to management or general business operations of employer	Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion	Customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.	primary duty must be to manage the enterprise or customarily recognized department and must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent
Work includes exercise of discretion and independent judgment as to matters of significance	The advanced knowledge must be in a field of science or learning AND must be customarily acquired by a prolonged course of specialized intellectual instruction	Highly compensated employees performing office or non-manual work	must have the authority to hire or fire employees, or the employee's suggestions and recommendations as to hiring or firing must be given weight
Paid on a "salary basis" at a rate of at least \$844 a week (for now)	Paid on a "salary basis" at a rate of at least \$844 a week (for now)		Paid on a "salary basis" at a rate of at least \$844 a week (for now)

Legal Challenges

- Multiple challenges filed with respect to expansion of the overtime rule
 - *State of Texas v. U.S. Department of Labor*, Civil Action No. 24-499-SDJ (E.D. Tex. June 28, 2024).
 - **Stay of application of new rule for public employees in Texas**
 - *Mayfield et al. v. U.S. Department of Labor et al.*, 5th Circuit Court of Appeals, Case number 23-50724, Challenging 2019 Rule and DOL authority to set salary threshold – **Issues still pending**

Tip Credits

- Hospitality employers are plagued with legal claims challenging the use of the tip credit.
- Under the FLSA, employers are permitted to pay certain employees a direct cash wage below the federal minimum wage (\$2.13/hr.) with a “tip credit” of up to \$5.12/hr. to make up the difference to the minimum wage.
- The direct wage plus tips must equal \$7.25/hr. or the employer must pay the difference.
- Some states have different tip credit requirements and some prohibit using the tip credit altogether.
- Employers must provide advance notice of the tip credit to employees and if no notice is provided, the full minimum wage is due.

DOL's 80/20/30 Rule

- December 2021: DOL's Wage and Hour Division reinstated the infamous 80/20 Rule.
- Under the 80/20/30 rule, employers lose the tip credit for the time spent performing “directly supporting work” — side work that exceeds 20% of their total hours worked at the tipped rate.
- DOL added a provision that an employer loses the tip credit for the time a tipped employee performs directly supporting work for a continuous period that exceeds 30 minutes.
 - even if the continuous time spent on this work amounts to less than 20% of the employee's total work for the week

5th Circuit to the Rescue

- Restaurant Law Center and the Texas Restaurant Association sought to halt the rule on the grounds that it is “arbitrary, capricious, contrary to the FLSA, promulgated in violation of the Administrative Procedures Act, and a violation of separation of powers.”
- A lower federal court ultimately sided with the DOL and denied the industry groups’ request. Notably, that court decision relied on the *Chevron* doctrine, which required courts to defer to a federal agency’s position on the law when a statute is open to interpretation.
- The restaurant groups appealed and the 5th Circuit reviewed the DOL’s 80/20/30 rule in light of the recent SCOTUS ruling striking down *Chevron* and under the Administrative Procedures Act’s “arbitrary and capricious” standard.
- The 5th Circuit vacated the rule on August 23, finding no basis for the rule in the FLSA’s text and arbitrary and capricious.

Tip Pooling

- Hospitality employers often use tip pools, where they collect all or part of the tips received by employees into a pool and then redistribute the tips among tipped employees.
- Improper tip pooling arrangements can lead to significant liability.
- If the employer takes the tip credit, only “front of house” employees may participate in a tip pool.
- If the employer does not take the tip credit, the pool can be mixed.
- Supervisors and managers can never receive tips from a tip pool.
- The potential landmines are significant.

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WE APPRECIATE YOUR
TIME AND ATTENTION!

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Thank you!