The Best "Get Out of Jail Free" Tool to Defend Against New Overtime Regs

How to prepare your club for the inevitable effect on operations and finances

2016 will see tremendous marketing interest in overtime lawsuits, and here is some guidance to avoid being hit by one.

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CertiPay HR Services

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Introduction

Prepare now for inevitable salary changes to occur in 2016

Department of Labor's proposed changes to the regulations governing the white collar exemptions of the Fair Labor Standards Act, is anticipated to be issued July, 2016. Currently, a salary basis test requires executive, administrative, and professional employees be paid at least $455 per week, or $23,660 annually as the first test of being an exempt employee. The proposed changes would increase the salary test to $970 per week, or $50,440 annually. The proposed salary level increase is substantial and clubs need to prepare for the effect this may have on their bottom line.

According to NPRM substantial impact will be on professional and business services, leisure and hospitality industries, with the largest impact being on educational and health services. Estimates of 10 - 15 million or more workers will no longer qualify as exempt based on the new salary level. This means a current employee exempt from being paid overtime under the classification of executive, administrative, or professional who is earning less than $50,440 annually will be stripped of their exempt status and will be eligible for overtime pay when the final rule goes into effect.

Lawsuits around overtime are predicted to increase nearly 10% over the all-time high of 8,160 action lawsuits brought against employers in 2015. During our recent webinar discussion with Alfred Roush, Esq. SPHR, SHRM-SCP, it became apparent when the revised overtime regulations proposed by FLSA go into effect the potential compliance issues in how employers determine which employees are exempt, and those entitled to overtime is complicated, and if not done correctly, may result in significant liability for an employer.

We asked our VP of HR Services at CertiPay, and licensed Florida Labor and Employment attorney Alfred Roush, to share how to assess proper classification for overtime exempt status and what you can do now to prepare for when the final rule is implemented in 2016. Mr. Roush is a certified Senior HR Professional dedicated to all areas of Labor and Employment Law relations. His experience includes representing clients through federal and state court litigation, as well as managing our CertiPay HR team in best practice development for employer compliance. With Alfred's vast experience within the club industry, consulting on HR issues and development of policies, he is able to bring a practical approach to help clubs maintain compliance.

What I need to know about FLSA and Wage/Hour to be in business

- Currently $455/ Week for Overtime Exemption
    - $23,660/Yr
- Change to $913/week for
    - $47,476 Annual salary
- PROPOSED CHANGES ARE COMING…WHEN? December 1st 2016

Are you prepared?

1. Do you have a recently updated Handbook with overtime policy? (reviewed in last 6 months)
2. Updated and displayed Posters for 2015 state and federal law changes?
3. Do you have Independent Contractors that perform similar or same job as employees?
4. Do you have a policy for calculating overtime if you pay employees by the job instead of hourly?
5. Do you have updated job descriptions for every employee?
6. Does it include blended job descriptions for certain employees doing more than one job?
7. Do you have policy for clocking in/out for all hourly employees and contractors?
8. Do you have an automated way to calculate, edit, submit, and communicate employee time from the field?

What I need to know about FLSA and Wage/Hour to be in business

- FLSA (Fair Labor Standards Act) vs. State Laws
  - OVERTIME
    - Exemptions
      - **Who or what is an Exemption?**
      - Executive
      - Administrative
      - Professional
      - Outside Sales
      - Computer Professional
      - Highly Compensated Employee

- **Executive Exemptions**

1. Primary duty is management of enterprise department or subdivision

2. Customarily and regularly directs the work of two or more employees

3. Must have power to hire and fire, or recommendations must be given "particular weight"

* The employee must also be paid on a salary basis of at least $455 per week. »

* To determine primary duty, look at amount of time spent, job description, hiring criteria, how paid

- **Administrative**

1. Primary duty is performance of office or non-manual work directly related to management or general business operations of employer

2. Must exercise discretion and independent judgment with respect to matters of significance

  - paid on a salary or fee basis of at least $455 per week
  - Specific exempt job titles:
    - team project leader (lead major projects);
    - administrative assistant (if delegated authority re: matters of significance)
    - ; human resource managers (must make or interpret employment policies)
    - ; purchasing agents (w/ authority to bind company on significant purchases)

- **Professional Exemptions**

Examples: doctors, lawyers, nurses, engineers, scientists»

College or advanced degrees are standard, but a combination of work experience and training will suffice in some cases»

Accountants usually meet this exemption, but accounting clerks and bookkeepers do not »

Graphic artists may qualify, but must exercise a high level of invention, imagination, originality and talent

- **Outside Sales Exemptions**

1. Primary duty is making sales (formerly 80%)

2. Must customarily and regularly be engaged away from the employer's place of business

    - Inside duties such as writing sales reports, updating catalogues, planning itineraries and attending sales conferences are considered part of making sales

    - Inside salespeople not eligible: no telephone, mail or internet sales

- **Highly Compensated Employee Exemptions**

1. An employee with a total annual compensation of at least $100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee

2. Total annual compensation'' must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period

3. If the employee's total annual compensation does not meet the required amount, the employer may, during the last pay period or a one month period after the end of the year, make a payment sufficient to achieve the required level

- **Non-Exempt Employees**

1. Non-exempt employees must be paid at least the federal minimum wage for all hours worked

2. The federal minimum wage for covered nonexempt employees is $7.25 per hour effective July 24, 2009.
The federal minimum wage provisions are contained in the Fair Labor Standards Act (FLSA). Many states also have minimum wage laws.

- **Overtime vs. Piece-rate**

1. Overtime must be paid 1½ times an employee's regular rate of pay for all hours worked in excess of 40 hours in a work week

2. Regular rate of pay must be determined for nonexempt employees paid on a piece-rate, salary, or commission basis by dividing their earnings by the number of hours actually worked.

Non-discretionary bonuses (i.e., performance incentives) are to be included in an employee's regular rate of pay to determine overtime payment obligations.

- **Bonuses**

1. Bonuses are considered to be discretionary if:

    2. The fact that the payment is to be made and the amount are determined at the sole discretion of the employer; and

    3. bonuses are not paid under a prior contract, agreement, announcement, or promise that would cause the payments to be considered "regular"

Permissible Deductions from Exempt employee salary

- Permissible deductions from an exempt employee's salary, which will not violate the "salary basis" requirement:
- Absent from work for one or more full days for personal reasons, other than sickness or disability
- (Short Term Disability Plans in place) Absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance
- Unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules, or for infractions of safety rules of major significance
- FMLA

NOT Permissible Deductions from Exempt employee salary,

- An employer cannot make deductions from pay for jury duty, attendance as a witness or temporary military leave,
- Can offset any amounts received by an employee for jury fees, witness fees, or military pay for a particular week against the salary due for that particular week

Is this Overtime? Exempt?

"Yeah, I'm gonna need you to come in on Saturday and finish those TPS reports…"

How to prepare your club for the inevitable effect on operations and finances

First, this is a good time to review whether the employees you have classified as exempt are truly exempt. Most often, employers mistakenly classify employees as overtime exempt solely on the basis of being paid salary. Qualifications for being considered an exempt employee, other than salary are meeting the duties tests where the employee has to be performing certain duties as defined by their category of exemption. Category classifications include executive exemption, which applies to managers and supervisors; administrative exemption, or professional exemption. Proper classification is based on the job description and actual duties performed. Having up to date job descriptions will help in this process.

Where do you stand?

1. Do you have updated job descriptions for every employee?
2. Does it include blended job descriptions for certain employees doing more than one job?
3. Do you have policy for clocking in/out for all hourly employees and contractors?
4. Do you have an automated way to calculate, edit, submit, and communicate employee time from the field?

What should I do now?

- Get an assessment and find out if you comply with the federal, state & industry regulations.
- Defend against potential claims- limit exposure proactively.
- Draft better HR related documents- Handbooks, Policies, Performance Reviews, Non-Compete Agreements, and Confidentiality Agreements.
- Investigate claims Sexual Harassment, OSHA, DOL, and IRS that could lead to FLSA violation.
- Consult with management on "Best Practices" for hiring the right employees

Due to the stronger stand on enforcement of Federal and State employment regulations being imposed, and potential employee lawsuits on the rise within the hospitality industry; tracking of employees' time, and having up-to-date job duty descriptions for overtime exempt classification will be an important tool to defend against any disputes that might arise.

It is best to work with wage and hour counsel to complete a preliminary assessment of all positions currently considered as exempt. Then determine proper classification based on the nature of duties required for exemption and if they will be affected by the proposed salary changes. Be prepared to budget for salary increases and/or increased overtime costs for at least part of 2016.

To aid in preparing your club for possible salary increases and/or increased overtime costs when the new rule goes into effect; here is an excellent tool developed in Excel to help you calculate potential cost changes for complying with the proposed guide lines. **Download Overtime Rule Calculator Excel Document Here:** **http://cdn2.hubspot.net/hubfs/50988/Overtime_Rule_Calculator.xlsx?t=1457553823618**

We look forward to continuing to serve you, and welcome your specific questions. Email: info@clubpayroll.com

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Alfred Roush is an attorney at Roush Law Group and is the VP of HR services at CertiPay. Mr. Roush is dedicated to all areas of Labor and Employment Law relations. Experience includes representing clients through federal and state court litigation, as well as managing HR professionals in Best Practice development for employer compliance. Mr. Roush is certified Senior HR Professional, and earned his J.D. degree from South Texas College of Law, also holds a Business Administration degree from Loyola University New Orleans.

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