

RETAILERS PREPARE TO MEET NEW SALARY AND OVERTIME REQUIREMENTS

Nov 17, 2016

By now, most retailers and other employers have evaluated the impact, if any, that the new Department of Labor (DOL) regulations will have on their workforce beginning on **December 1, 2016**, when the minimum salary requirement for exempt status will increase to \$913 per week (\$47,476, annually). For many retailers, a portion of their workforce will now be classified as non-exempt workers and eligible for daily and/or weekly overtime compensation. Implementation of the new rules, however, also requires careful consideration of the retailer's payroll and timekeeping practices to ensure compliance with other state and federal laws that affect non-exempt employees.

Be mindful of "off the clock" work:

Reclassification of employees to hourly, non-exempt positions not only changes the way employees are paid, but also requires employees to think differently about how their work activities *affect* their pay. Employees, who previously were paid a salary regardless of the number of hours worked each pay period, must now track their actual working hours. Compensable work time may include a variety of work-related activities that occur before/after an employee's regularly-scheduled shift. To avoid potential claims for unpaid "off the clock" work, retailers must be mindful that the following work activities may be considered compensable work time under federal and state law:

- Checking and responding to emails and phone calls before/after work hours
- Computer boot-up time
- Pre-shift work (e.g., setting up retail store before a shift, loading or warming up trucks, transferring equipment or preparing a worksite)
- Post-shift work (e.g., cleaning up a workstation or returning to another site to drop off equipment)
- Administrative work that should be performed on the clock (e.g., completing paperwork, meeting with management, or reviewing sales data)
- New hire training and onboarding

- Time spent waiting for work when none is immediately available
- “Controlled” stand-by time
- Reporting-time pay

Proper calculation of the “regular rate of pay” for overtime purposes:

Overtime pay is calculated based on an employee’s “regular rate of pay,” which federal and most state laws define as “all forms of remuneration” for employment. The most common forms of remuneration that must be included in the regular rate of pay for overtime purposes are:

- Non-discretionary bonuses and incentive payments
- Shift differential premium rates
- Commissions
- Retroactive pay increases

However, depending on the circumstances, a variety of other forms of compensation/employee benefits must also be included in the regular rate of pay for purposes of calculating overtime, including:

- Meals, lodging and per diem
- Discounted or free meals at restaurant establishments
- Certain tuition reimbursement programs
- Signing bonuses that are tied to hours of employment or service

Notice requirements for employee reclassification and changes in pay:

Retailers choosing to reclassify employees from exempt status to hourly, non-exempt status in lieu of increasing such employees’ pay to \$913 per week will, of course, have to set a regular hourly rate for their reclassified employees. Perhaps the simplest way to determine a full-time employee’s hourly rate is to divide the employee’s current salary by 2,080 hours. However, retailers who want to limit the impact that reclassification will have on their payroll budgets may decide to set a lower hourly rate of pay for reclassified employees to account for the overtime compensation that such employees will likely earn upon becoming non-exempt. Before implementing an hourly wage rate that may be characterized as a reduction in pay, retailers opting for this approach should consider whether applicable state law requires any advance notice of a wage reduction. A number of states require such notice with varying levels of specificity. For example, while Missouri law mandates 30

days' notice of a wage reduction, California law merely requires "reasonable" advance notice of a wage reduction.

Complications for salaried, non-exempt employees:

Although paying non-exempt employees an hourly wage is the most common compensation arrangement used with non-exempt employees, it is not the only option available to employers. Federal law permits employers to pay non-exempt employees on a salaried basis under certain circumstances, but such employees are still eligible to earn overtime wages despite their salaried status. These salaried, non-exempt arrangements—while available under federal law—should be selected with caution. Such arrangements can require complicated calculations and can often give rise to errors in determining the non-exempt employee's regular and overtime rates of pay.

Furthermore, in some states, salaried, non-exempt arrangements that are permissible under federal law (e.g., a fluctuating workweek arrangement) would be impermissible under applicable state law.

The DOL's new overtime regulations implicate far more than potential reclassification of employees from exempt to non-exempt. The attorneys at Bryan Cave are happy to discuss what additional policies and practices must be revised in light of the reclassification of a portion of your workforce from exempt to non-exempt.

MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

[+1 415 675 3435](tel:+14156753435)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.