New OT Pay Rule Adds to Labor Complexity

Clients are now responsible for their on-site contractor's legal compliance

Dining Insights, Summer 2016

The recent regulation increasing the minimum salary to $47,476 for employees exempt from overtime pay has created new responsibilities for organizations that retain on-site contractors. The rule becomes effective December 1.

Last year's National Labor Relations Board ruling that host companies are "joint employers" with their contractors in union relations has been adopted by the U.S. Dept. of Labor and other agencies.

Companies, colleges and others will need to ensure their food service and other on-site vendors comply with the new regulations or be swept into federal or state enforcement actions and/or related civil suits. (*Dining Insights, Winter 2016)*

What's the risk?

"Let the Good Times Roll" was the page one lead-in to an article about the new overtime rule in the *Boston Business Journal.* "Employment lawyers . . .anticipate they'll rack up plenty of billable hours helping clients comply with the . . . new overtime pay rule, which some believe will lead to a wave of suits in Massachusetts courts," the *Journal* reported.

There doesn't seem to be much room to avoid being deemed a joint employer with on-site service contractors.

"Vertical joint employment exists when the employee has an employment relationship with one employer [such as an on-site contractor] and . . . he or she is economically dependent on, and thus employed by, another entity . . . [who] receives the benefit of the employee's labor," according to the DOL Wage and Hour Division.

If your organization "receives the benefit" of your contractor's employee's labor and/or "the employee's performance of the work" is on your premises, you're a joint employer, equally responsible for any of the contractor's labor-related misdeeds.

As noted in the Winter *Dining Insights* (Agencies Applying NLRB "Joint Employer Rule"), the host company, college or institution undeniably receives "the benefit of [its vendors'] employees' labor."

Additionally, "the employee's performance of the work on the premises" of the host organization "indicates" a joint employer relationship exists, DOL says.

Back Pay and Penalties

The cost of being involved in the contractor's labor law violations can be high.

"Each joint employer is individually responsible . . . for the entire amount of wages due," the Wage and Hour Division's "Administrator's Interpretation" says.

"If one employer cannot pay the wages [due an employee(s)], then the other employer must pay the entire amount of wages; the law does not assign a proportional amount to each employer."

The DOL intends to enforce the new rule, and joint-employer responsibility.

"We're increasing the cost of non-compliance by using all the enforcement tools provided by Congress," David Weil, Administrator of the Wage and Hour Division, wrote in a blog on the

DOL website, "including civil money penalties, liquidated damages and debarments."

"We're identifying the contracting stream, or supply chains," he added, "so those at the top of the chain will evaluate the compliance practices of those below."

More Risk than Just OT

The host company's liability extends to all labor-related incidents, including wages, harassment and discrimination disputes.

Some states also are adopting the NLRB joint-employer interpretation.

The New York State Attorney General is suing Domino's, the franchise company, for alleged employee wage thefts by its franchisees, *The New York Times* reports.

Two Sides to OT Regulations

For employees' exclusion from overtime pay eligibility there are two tests:

- Is the employee designated as salaried paid at least $47,476?
- Do the employee's duties meet the test for an executive, administrative or professional position?

If the answer isn't "yes" to both questions, the employee is entitled to overtime pay like all other hourly employees. In on-site dining and hospitality services, there are both clearly non-compliant positions and gray areas, generally centered around the titles assistant manager, office manager, supervisor and in the kitchen, sous chef.

The executive exemption from overtime pay requirements is for someone whose "primary duty [is] managing the enterprise . . . or a customarily recognized department or subdivision . . . regularly directs the work of two or more full-time employees" and has "authority to hire and fire" or at least make recommendations that have "particular weight."

Not many supervisors, assistant managers or sous chefs (the working cooks supervised by an executive chef) fulfill all these requirements, no matter how high their pay.

An office manager who answers the phone, takes catering orders and handles paperwork doesn't meet the test of having as a "primary duty. . . office or non-manual work directly related to the management or general business operations [and exercises] discretion and independent judgement with respect to matter of significance."

Check Contractor's Pay Practices

It will be worthwhile to review your on-site contractor's pay practices before December 1 to ensure compliance. The money saved will be your own.

At one Clarion client where we have access to payroll records, the contractor classifies as salaried two sous chefs, an assistant manager and an office manager. At two others, low-paid sous chefs are classified as salaried. At another, a catering manager who earns $30,000 is salaried.

Their clients are at risk if the federal or state DOL looks into their books.

Adjusting to the new regulation, and in some states higher minimum wages, can be difficult, but not as difficult as being caught in violation by a labor inspector.

Clarion can help you reorganize your services to comply with the new rules as well as create an improved, cost-effective program. For information, contact Tom Mac Dermott, 603/642-8011 or e-mail us at info@clariongp.com.