OVERTIME EXEMPTIONS: THE IMPACT OF THE DEPARTMENT OF LABOR'S NEW REGULATIONS ON THE QUICKSERVICE RESTAURANT INDUSTRY

William B. Werner

Andrew Hale Feinstein

Christian E. Hardigree

University of Nevada, Las Vegas

On April 20, 2004, the U.S. Department of Labor released its final revised regulations governing the so-called "white collar" exemptions from overtime pay requirements under the Fair Labor Standards Act. The revised regulations, which became effective August 23, 2004, contain several significant changes to the qualifications for executive and managerial exemptions that are likely to be particularly important to the Quickservice Restaurant (QSR) industry. This paper reviews the regulatory changes and assesses the actual and potential impact of the new regulations on the QSR industry, and concludes with recommendations to avoid the increasing legal risk of claims by salaried managers and supervisors for unpaid overtime.

Keywords: overtime exemption, QSR, restaurant, regulations

INTRODUCTION

Nearly all U.S. restaurants with annual gross sales of $500,000 or more are subject to, and certainly at least familiar with, the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) (U.S. Department of Labor, 2006). Among other things, the FLSA guarantees all non-exempt employees the right to be paid overtime at one and one half times his or her hourly rate of pay for hours worked in excess of 40 in any week (29 U.S.C. § 207(a)(1) (2000)). Most quick service restaurants (QSR) are also subject to additional state wage and hour laws, many of which provide greater rights to employees.

Under the FLSA and state overtime laws, however, bona fide professional, administrative, executive and commissioned employees, among others, are exempt from the overtime requirement and are not entitled to overtime pay regardless of the number of hours they work. The Department of Labor (DOL) regulations defining the terms and limits of the overtime exemptions have always required, and continue to require, that exempt employees be paid on a "salary basis" at a prescribed minimum rate (U.S. Department of Labor, 2006). One of the significant changes in 2004 was the increase of this minimum salary from $13,000 or less to $23,660 for all exempt employees. Available employment data indicates that significant numbers of QSR managers and assistant managers were paid lesser salaries immediately before the regulations went into effect (National Restaurant Association, 2006). The only alternative to increasing the salaries of such employees is to convert them to an hourly basis of pay, including overtime pay.

But the determination whether an employee meets the salary basis requirement of the exemption is by no means a simple matter either. Although the minimum salary is definite as stated above, deductions from a salaried employee's pay for such things as absences and cash shortages threaten to invalidate the employee's salary basis and thus the entire overtime exemption (Pollack, 2001; *Belcher v. Shoney's, Inc.*, 1998). If both requirements are not met, the employee is entitled to overtime pay based on his regular hourly rate of pay, even if his regular pay was in the form of a weekly, monthly or annual salary. This could mean as much as three years worth of back pay and overtime for intentional violations, and two years worth of back pay for other violations. In one such case, the general manager and co-manager of a Sbarro outlet were permitted to proceed with their action for back overtime pay even though the company had refunded all the deductions and stopped the practice when the case was filed (*Hoffman v. Sbarro, Inc.*, 1997). An additional amendment to the overtime regulations discussed below provides employers new protection from such lawsuits, but does not completely eliminate the risk.

The salary requirement, however, is only the first of two factors necessary to meet the criteria for an overtime exemption. Paying an employee a salary and conferring the title of *Manager* is not sufficient to qualify the employee for overtime exemption. To escape the overtime requirements, employers must also satisfy strict requirements concerning the employees' actual work duties and authority. These work duty requirements were also significantly altered in the new regulations, and it is likely that some QSR managers who met the work duties guidelines previously no longer qualify under the new regulations. This paper will attempt to identify QSR employees who are likely to be affected by the new regulations and to provide recommendations for QSR to avoid potential liabilities for violating them.

LIMITATIONS

This paper addresses only the executive overtime exemption, and not exemptions covering administrative, professional, commissioned salespersons and other types of employees.

While the executive exemption applies to all sorts of businesses and workers, its implications and impacts will be analyzed here only in the context of QSRs.

This paper is further limited to the federal law and regulations concerning overtime exemptions. States have the authority to provide for greater rights, and many do. Although the DOL's revised regulations apply only to the federal wage and hour law, the overtime exemptions are defined in many state laws almost identically to or with reference to the federal regulations (Gesinsky & Arone, 2004). Any determination whether a particular employee is entitled to overtime pay must also take into account the potential application and variation of state and local laws, most of which will be affected directly or indirectly by the DOL's regulatory changes.

THE STATE OF THE LAW PRIOR TO REVISION

The overtime exemption applicable to mid-level managers and supervisors is the exemption for bona fide executive employees (Defining and delimiting the exemptions, 2004). In order to qualify for the executive exemption under the DOL regulations prior to the 2004 revisions, an employee must have satisfied one of the following tests, depending on his or her rate of pay (Table 1).

Table 1: Tests for Determining Overtime Exemption (Old Regulations)

The Short Test	*The Long Test*
1. The employee is paid on a salary basis no less than $250 per week ($13,000 per year) 2. The employee customarily and regularly supervises at least two employees 3. The employee's primary duty is to manage an enterprise or department or subdivision thereof	1. The employee is paid on a salary basis no less than $155 per week ($8,060 per year) 2. The employee customarily and regularly supervises at least two employees 3. The employee's primary duty is to manage an enterprise or department or subdivision thereof 4. The employee regularly exercises discretionary authority 5. The employee has authority to make or effectively recommend hiring, firing or discipline. 6. The employee does not devote more than 20% of his or her time to non-executive work.

Note: 29 U.S.C. 13(a); 29 C.F.R. 541.1.

Pollack (2001) identified misclassification of employees as exempt from overtime as a growing area for class action litigation. Since then, employers nationwide and particularly in the foodservice industry have faced a sharp increase in such cases. In fact, it was reported just two years later that misclassification had become the most commonly litigated, and most costly violation of the FLSA (Gaswirth, 2003; Simmons, 2003). Hawkins (2003) likewise reported that overtime suits have accounted for much of the recent proliferation of employment litigation. Meanwhile, the U.S. Department of Labor (2003) has identified overtime exemptions to be a typical problem in the QSR industry.

A frequent cause of violations of the overtime exemption rules is simple misunderstanding or misinterpretation of the regulations (Postol, 2004). While the DOL cited frequent misunderstanding of the law as one reason for the revision, it has also announced publicly its intention to focus more investigation and compliance resources to the QSR industry.

Not all overtime cases are independent lawsuits by employees. The DOL has broad authority to investigate wage and hour disputes and to litigate on behalf of individuals and groups of employees. In 2003, the DOL continued its recent focus on overtime regulations, especially in traditionally low wage industries. Of the approximately 13,000 department investigations undertaken in 2003, forty percent involved restaurants. The department's budget proposal for 2004 included an increase in spending on these investigations (Thompson, 2004).

Table 2 is a summary of the results of the recent primary cases (in terms of loss) filed by managers against QSR and fullservice restaurants for recovery of back overtime wages. In each of these cases, the employees were paid on a salary basis and were successful in their claims for overtime pay based on a misclassification. Some losses resulted from individual or collective lawsuits and others represent settlements that followed DOL investigations.

Table 2: Recent Overtime Exemption Misclassification Cases

Foodservice Business	*Employees Misclassified*	*The Problem*	*Amount of Loss (excluding fees and costs)*
Starbucks	Over 1,000 store managers and assistant managers	Primary duty was serving customers and performing other non-exempt work	$18 million
Waffle House	125 unit managers and relief managers averaging 89 hours per week	According to the company's own manual, the manager's primary duty was to operate the grill	$2.9 million
New World Restaurant Group (Einstein Bros. and Noah's New York Bagels)	424 assistant managers averaging 50 hours per week	Primary duty was serving customers, taking orders, etc.	$495,930.
Taco Bell	3,000 store managers and assistant managers	Primary duty was preparing food orders	$9 million
Cinnabon	150 bakery managers	Primary duty was operational, not supervisory	$1.5 million

The ongoing litigation against QSRs is a result not just of difficulty applying the old regulations, but of the conventional use of front-line managers to perform some of the same work as the other hourly employees. The new regulations do not change the element of the exemption that requires management to be a manager's primary duty, and so will provide no relief to the litigation arising out of that issue.

Of course, restaurants have prevailed in some of these cases, although more frequently because of the unique factual situation than of good planning. For instance, employees who manage small operations and perform mostly non-exempt work are typically found to be exempt anyway because they are the sole manager responsible for an independent business unit and thus naturally have broad independent discretion over the business (*Jones v. Virginia Oil Co*., 2003; *Thomas v. Jones Restaurants, Inc.*, 1999; *Murray v. Stuckey's Inc*., 1995). The new regulations, however, remove the automatic exemption for the sole manager, who will have to meet the new requirements to continue to qualify for the overtime exemption.

THE NEW REGULATIONS

In March 2003, the DOL published a proposal to change the 30-year-old overtime exemption regulations (U.S. Department of Labor, 2003). The press release that accompanied the proposal announced that the purpose of the modifications was to simplify the determination whether an employee is truly exempt, thus reducing both administrative difficulties for employers and the need for litigation for employees (U.S. Department of Labor, 2003). The new proposal, however, drew immediate opposition from labor unions, who argued that the result of the changes will be an increase in the number of exempt employees and a net loss of overtime pay for American workers (Thomas, 2004). Although opposition in Congress seemed to be growing in late 2003, final passage was accomplished with few revisions to the original proposal (Thomas, 2004).

The necessary consensus behind the regulations, however, required additional revision of the regulations. In April, 2004 the Associated Press reported that the Administration was retreating under pressure and intended to revise the proposal substantially (Espo & Strope, 2004). Yet, Republicans, Democrats and labor organizations continued to differ by millions in their projections of the number of employees who will gain or lose eligibility for overtime pay under the current proposal.

The DOL released its final regulations with Congressional approval on April 23, 2004. The new rules took effect on August 23, 2004, leaving employers little time to estimate the impact of the changes on their business and to plan strategically how best to protect themselves from, and take advantage of, the changes in the law.

The final regulations have generally been viewed as positive clarifications likely to benefit both employers and employees (Montgomery, McIntyre & Powell, 2005; Rowan, 2004). But it remains widely disputed whether the changes will ultimately result in any significant changes in labor costs. Early estimates were that many salaried managers would be converted to hourly pay because of the changes, but that even more could be moved from hourly pay to the new minimum salary (Eisenbrey & Bernstein, 2003).

Increased Minimum Weekly Salary

The proposed regulations do away with the dual short and long tests and establish the minimum salary for any exempt employee at $455 per week ($23,660 per year). This figure represents a substantial increase from the levels established in 1974 and a slight increase from the DOL's original 2003 proposal of $425 (Espo & Strope, 2004). Thus, no employee who is paid less than $455 per week, even if it is in the form of an annual salary, is exempt from overtime pay under the new regulations.

Duties

The more significant changes contained in the DOL's new regulations are the revisions of the portion of the overtime exemption test that concern the employee's actual daily job duties.

The following chart (Table 3) demonstrates the changes from the prior short test and long test for determining overtime exemptions.

Table 3: Recent Changes to the Overtime Exemption Tests

The Short Test (Old)	*The Long Test (Old)*	*The New Test*
Minimum salary of $250 per week ($13,000 per year) Customarily and regularly supervises at least two employees Primary duty is to manage an enterprise or department or subdivision thereof No other requirements	Minimum salary of $155 per week ($8,060 per year) Customarily and regularly supervises at least two employees Primary duty is to manage an enterprise or department or subdivision thereof The employee customarily and regularly exercises discretionary authority The employee has authority to make or effectively recommend hiring, firing or discipline. The employee does not devote more than 20% of his or her time.	Minimum salary for all exempt employees of $455 per week ($23,660 per year) Customarily and regularly supervises at least two employees Primary duty is to manage an enterprise or department or subdivision thereof Authority to hire or fire employees, or to effectively recommend changes in employment status if the recommendation is given "particular weight"

Table 3 reveals an important change to the executive exemption under the new regulations. Under the old rules, a manager earning more than $13,000 per year could be classified as an exempt "executive employee" so long as his or her primary duty was management (including the regular supervision of at least two employees.) It was not necessary, however, to show that the manager or supervisor actually exercised hiring and firing authority over employees. So long as he or she supervised two or more employees and spent the majority of work time managing the business, the employee was exempt.

The new rule, while eliminating the dual "short test" and "long test" analysis, adds a component to the definition of an exempt executive employee: that he or she have the authority to hire and fire employees, or to effectively recommend such action. Under the new rules, an employee without this authority is no longer exempt, even if all the elements of the prior "short test" were met.

THE POTENTIAL IMPACT

The basis for much of the debate over the proposed revisions has been sharp disagreement over their potential effects. When it proposed the overhaul to the white collar overtime exemptions in 2003, the DOL stated that the intended purpose of the proposal was to improve and clarify job classifications, increase salaries for many workers and reduce litigation (DOL will release …, 2003). The AFL-CIO, which has been among the strongest opponents of the changes, estimated that the proposal would result in a reduction by 8 million in the number of employees eligible for overtime pay (Senate Republicans pull bill …, 2004). By contrast, the DOL estimated that the change would result in a net increase in the number of employees eligible for overtime pay (Espo & Strope, 2004). The purpose of the remainder of this study is to estimate the potential effects of the changes on the QSR industry employees most likely to be impacted by it.

The National Restaurant Association, which actively supported and applauded the revisions, predicted that the changes would "not necessarily" lead to more restaurant employees receiving overtime pay (National Restaurant Association, July 2004, p. 8).

QSRs typically operate with limited management. Further, in many of these operations, management is not a full time job. But while mechanization and standardization of processes may have reduced to some degree the need for full time management, QSRs have long found the practice of assigning some line work to salaried supervisors to be an attractive method of reducing head count and total labor cost, since many salaried working supervisors, particularly in the foodservice industry, work well in excess of forty hours per week (Reice, 2005).

Overtime exemptions are particularly important to the foodservice industry because it employs large numbers of managers and supervisors. According to the U.S. Department of Labor, there were 386,000 foodservice managers in 2002 (Bureau of Labor Statistics, 2004). That number has been predicted to increase by 15% over the next ten years (National Restaurant Association, 2004). Misclassification of even a small percentage of these employees may result in liabilities greater than those that are already plaguing the industry.

Under the new regulations, an employee's concurrent performance of exempt and non-exempt work does not necessarily disqualify him from the executive overtime exemption, potentially even in cases where the manager performs non-exempt work the majority of his working time (Defining and delimiting the exemptions …, 2004). If the manager remains in responsible command of the operation, has the authority to hire and fire and has discretion over when to perform non-exempt work, then the exemption is not defeated.

The DOL's very first example illustrating this regulation is an assistant restaurant manager whose primary duty is management but who also performs non-exempt work along with the hourly employees. Although the percentage of the manager's time spent managing is a factor in the exemption test, it is clearly no longer determinative. Other factors include the degree of supervision over the manager and his pay compared to that of the hourly employees.

In *Marx v. Friendly's Ice Cream Corp.* (2005), the New Jersey Appellate court held that general managers of individual restaurants in a chain of stores can be treated as executive employees and are not entitled to overtime pay even if they spent most of their time cooking, cleaning, dispensing drinks and serving customers. The court's decision relied on the argument that the general managers' day-to-day duties involved supervising and coaching the employees, ensuring compliance with written policies, rules and procedures, and constantly monitoring the facility, even while the managers performed other non-managerial tasks.

<u>Salaries of Supervisors and Managers</u>

It is likely that many, if not most, QSRs and full service restaurants will be affected in some way by the DOL's increase in the minimum salary of an exempt executive employee to $23,660, particularly in the Midwest and South (Berta, 2004). Managers and supervisors paid less than that amount per year will gain eligibility for overtime pay despite having the necessary managerial responsibility and authority, unless of course the employer elects to increase the salary to the new minimum.

Table 4 represents median base salary and median annual bonus for management positions in the foodservice industry. These numbers have increased somewhat since 2001. The median expected salary for a typical restaurant manager in the United States was reported to be $41,596 as of 2004 (Salary.com, 2004). Managers in QSRs, however, earn substantially less than their counterparts in other segments of the industry. The median annual salary for a QSR manager was reported to be $26,000 and for an assistant manager, $24,500 as of 2004 (Payscale, 2004).

Table 4: Median Base Salary and Annual Bonuses for Foodservice Managers.

Position	Median base salary	Median annual bonus
Food and Beverage Director	$44,200	$4,000
Banquet Manager	$32,000	$3,000
Catering Manager	$35,000	$4,000
Unit Manager	$35,132	$4,615
Assistant Unit Manager	$28,000	$2,460
Night Manager	$26,000	$1,500
Manager Trainee	$25,080	$2,000
Dining Room Manager	$30,000	$2,000
Kitchen Manager	$29,000	$2,000

Note: Abstracted from: National Restaurant Association (2001). *Compensation for Salaried Personnel*. Chicago, IL: NRA.

Assuming the median annual salary for all QSR managers is somewhere between $24,000 and $26,000, there certainly are a significant number who currently earn less than the new federal minimum of $23,660. In order to preserve the overtime exemption for any such employee, the employer will have to increase the salary to that amount. This is likely to be a substantial cost for some QSRs, even if portion of the overtime test relating to job duties is adequately addressed. Another alternative to avoid overtime, of course, is to limit those workers to forty hours per week. This is not likely to be an attractive or even feasible alternative in many QSRs, where front line supervisors regularly work well in excess of forty hours per week.

Duties of Supervisors and Managers

QSRs and small dining establishments do not allow for heavy management of employees and in many cases simply do not require more than one or two managers present at any one time. In fact, the managerial responsibilities in such an establishment may not even justify one full time job. This may lead to the assignment of non-managerial duties to managers. In small scale operations like Starbucks, it is difficult to discern who the manager is because nearly all the work of the operation consists of serving customers. Starbucks accounted for the largest loss in Table 4 for this very reason. So little management was required that is was not even the primary duty of the unit manager, much less the assistant manager.

The U.S. Department of Labor describes the duties of a foodservice manager as follows:

> Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment, and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training (Bureau of Labor Statistics, 2004, p. 4).

While this and other similar descriptions of the duties of a restaurant manager may describe many of the typical job functions, those employed in QSRs and full service restaurants will note the conspicuous absence of any mention of non-managerial work. In fact, the problem that has led to most of the lawsuits and settlements summarized above is that the primary duty of the putative manager was to do the same work as the rest of the hourly-paid workers.

It may be assumed for purposes of this article, however, that the primary duty of a hypothetical manager is management, since that requirement has existed in the overtime exemptions for decades. However, the new regulations add an element to the duties portion of the exemption test: the authority to hire and fire employees, or to effectively recommend such action. The DOL’s own job description above is even a little vague on the issue. If a manager has authority to recruit and monitor employees, but not to actually hire and fire them, he will now fall outside the exemption. Similarly, a manager with authority to recommend hiring and firing decisions but whose recommendations are given no special weight by the decision-maker will fall outside the exemptions under the new regulations.

Working assistant managers who also perform line work may still be exempt from overtime if their primary duty is management and they still meet the other requirements of the executive exemption (Postol, 2004). Small scale operations obviously require less supervision and thus involve more manager participation in the line work of the employees. But it is presumed that someone has the authority of manager, even though it might be just one person or might be exercised infrequently.

DEPARTMENT OF LABOR ENFORCEMENT ACTIVITY

In its recent annual report of enforcement activities, the DOL confirmed that overtime cases, though fewer in number than cases alleging violations of minimum wage laws, accounted for nearly 90% of all back wages it collected on behalf of employees in 2005 (Employment Standards Administration, 2005). Cases specifically involving violations of the new overtime exemption regulations accounted for $14.7 million in payments to approximately 11,000 employees in 2005 alone.

Also in 2005, the DOL's Overtime Security Task Force launched an initiative to investigate and ensure employer compliance with the new regulations. The task force reportedly pays particular attention to those industries that have traditionally employed large numbers of salaried workers at less than the new minimal salary of $23,660 for work typically exceeding 40 hours per week. According to the DOL, those industries are restaurants, hotels and motels, groceries and day care facilities.

The task force's 165 directed investigations in 2005, however, resulted in total payments of only $217,000 to 285 employees. While the amounts of these losses may not appear significant, it must be noted that the DOL reports only the payments that it collects on behalf of employees as a result of the directed investigations. The department's enforcement statistics do not include private court actions by employees. Because no employee is required to report an FLSA violation to the DOL before proceeding to court, it is likely that the DOL statistics significantly under-represent the true risk of overtime violations because private litigation, and particularly class actions, pose an increasing risk for overtime violations.

Increased government enforcement of overtime laws has attracted the attention of employment lawyers and has coincided with an increase in the number of private lawsuits for back overtime pay (Franklin, 2006). In fact, collective actions under the FLSA now outnumber federal class actions for all of the anti-discrimination employment laws combined (Franklin, 2006; King & Muraco, 2006). Employment cases now account for 20% of the Federal docket, and some consider private wage and hour cases to be most accountable for the recent proliferation (Hawkins, 2003). Participation rates among potentially eligible managers in the collective actions have been reported to be as high as 30% (Hawkins).

Overall, the task force found in 2005 that 48% of the employers investigated were found to be out of compliance with the new overtime regulations. The most common violation found, generally in the hotel and restaurant industries, was payment of a salary that was less than the new minimum of $23,660. Far fewer discovered violations involved misinterpretation of the duties portion of the new exemption test. The task force also found that many restaurants continue to violate the salary basis portion of the test by making illegal deductions from salaries (Employment Standards Administration, 2005).

The wage and hour division of the DOL devotes about one third of all its enforcement resources to investigations in nine traditionally low-paying industries, which include both restaurants and hotels. Restaurants also continue to lead all industries in child labor law violations. Thus, the DOL should be expected to continue its enforcement activities in the QSR industry in addition to the Task Force investigations.

The DOL's increased attention to the QSR industry has been apparent. Even in its releases supporting the regulatory changes, the agency cited, as an example of the intended beneficiaries of the changes, a restaurant manager working 50 hours per week for an annual salary of $15,600; not a rare instance in fast food (U.S. Department of Labor, 2004).

CONCLUSIONS

The revised overtime exemption regulations provide some new protection against violations, but also provide an excellent opportunity to review an employer's overtime compliance and to correct potential problems before they develop into larger legal risks (Reice, 2005; Postol, 2004).

Many QSRs and casual dining operators will be faced with an interesting decision as the implementation date for the new regulations approaches. In order to preserve the exempt status of any manager who is exempt under the current law, the restaurant will have to: 1) pay the employee a minimum annual salary of $23,660 and 2) give authority to the manager to hire and fire employees, or to effectively recommend such actions. The benefit of protecting the exemption, as QSR managers clearly know, is the ability to require the salaried manager to work unlimited hours, a tradition some will find hard to abandon.

Limiting salaried managers to 40 hours per week will not be an attractive option to some operators either. In the cases referenced above, the number of hours the supervisory employees were actually working was between 50 and 65 per week. In fact, it is the typical long hours that result in especially large back-overtime awards in the industry. Few QSR managers are unfamiliar with the practice of working salaried front line supervisors for very long hours.

Practices vary widely among operators in the industry, but it seems that some will elect to limit their not-truly-exempt "managers" to forty hours of work per week, thus eliminating the possibility of an overtime claim, while remaining free to assign non-supervisory work to the managers. This was the approach adopted by San Diego-based Garden Fresh Restaurant Corp., owner of Souplantation and Sweet Tomatoes buffet restaurants (Berta, 2002). Wendy's, according to the same article, has switched assistant managers to hourly pay to avoid the risk. Likewise, Einstein Bros. reportedly began paying its assistant managers hourly wages after settling claims for overtime (U.S. Department of Labor, 2002).

If these few cases are representative in any way, they may indicate unwillingness on the part of owners to give up the practice of assigning regular work to managers and assistant managers, even at the cost of forfeiting their overtime exemption. Either way, it clearly does not appear that the new regulations will result in savings for the QSR industry.

Recommendations for Consideration and Practice

- Check the annual salary of every employee treated as exempt from overtime to ensure that it meets the new minimum of $455 per week or $23,660 per year. Under the new regulations, no employee who earns less can be exempt as a salaried manager or supervisor, yet DOL investigations have revealed that many QSRs continue to pay less. Of course, there is the option of converting the supervisors to hourly wages rather than increasing their salaries, but then more supervisors might be needed on staff to avoid substantial overtime exposure.

- Review and, if necessary, revise both the written and the actual job duties of all salaried managers to ensure that they meet the revised duties portion of the executive exemption. Lower level managers may have to be given authority they do not presently have in order to preserve their exempt status. In particular, each exempt supervisor must now have the authority to hire and fire employees or to effectively recommend such actions.

- Revise and update all written policy and compensation manuals to ensure that company documents consistently establish each manager's authority and primary duty. Leave no potential for dispute over what the company's policy really is. In cases for back overtime pay by salaried supervisors, conflicts between the company's written policies and actual practices are typically resolved in the employee's favor.

- Take advantage of the new "window of correction" for violations of the salary basis portion of the exemption test. The revised regulation provide new protection against class claims that are based on isolated improper deductions from an exempt employee's salary, but the protection is not automatic. To ensure against such cases, an employer must:

    - Clearly communicate a salary deductions policy that is consistent with the regulations and designed to prevent violations of the overtime exemption rules. The new regulations establishing the safe harbor do not require this notice to be in writing, but without a written document an employer may have difficulty proving that it had such a policy and that it clearly communicated the policy to all the affected employees. The DOL has provided a sample model policy for employers to follow.

    - Maintain a communication mechanism for employee complaints about deductions from salary.
    - Correct all discovered errors by immediately reimbursing the employee for any improper deductions.
    - Make a good faith effort to avoid future similar errors.

- Consider using a fluctuating workweek overtime calculation to reduce overtime obligations to managers paid an hourly rate (Von Bergen & Chong, 2006). This calculation method allows an employer to pay a non-exempt employee a regular weekly salary for variable hours worked, so long as the employee earns at least minimum wage for all hours actually worked in any week. For overtime hours, the employee is due only an additional one half his rate of pay, which is calculated by dividing the number of hours worked in the week, even if more than forty, into the weekly salary.

REFERENCES

Belcher v. Shoney's, Inc., 30 F. Supp. 2d 1010 (M.D. Tenn. 1998).

Berta, D. (2004, May 24). Industry leaders: DOL's final OT rules more complex, costly. *Nation's Restaurant News, 38*(21), 12.

Berta, D. (2002, November 25). Operators in overdrive to avoid overtime suits. *Nation's Restaurant News*, 16-18.

Bureau of Labor Statistics. (2004) *Occupational outlook handbook.* Retrieved May 18, 2004 from http://www.bls.gov/oco/ocos024.htm.

DOL will release proposed revisions for public comment in March. (January 28, 2003). *Federal Human Resources Week, 9*(38), 16.

Defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees, 29 C.F.R Part 541 (2004).

Eisenbrey, R., & Bernstein, J. (2003). *Briefing paper: Eliminating the right to overtime pay*. Washington, DC: Economic Policy Institute.

Employment Standards Administration. (2005). *Fiscal year 2005 statistics fact sheet.* Retrieved July 6, 2006 from http://www.dol.gov/esa/whd/statistics/200531.htm.

Espo, D., & Strope, L. (2004, April 20). Officials expect revisions to Bush overtime plan. *Las Vegas Review Journal*, A1, A3.

Franklin, S. (2006, July 9). More workers suing to get overtime pay. *Chicago Tribune [Chicagoland Final Edition]*, 1.

Gaswirth, R. (2003). FLSA: An old law that can cost companies millions. *Texas Lawyer, 18*(53), 11.

Gesinsky, L., & Arone, D. E. (2004, December 20). Changes in overtime eligibility: FLSA regulations have ripple effects on state laws. *New York Law Journal*, 7.

Hawkins, M. W. (2003). Current trends in class action employment litigation. *The Labor Lawyer, 19*(1), 33-62.

Hoffman v. Sbarro, Inc., 982 F. Supp. 249 (S.D.N.Y. 1997).

Jones v. Virginia Oil Co., 2003 U.S. App. LEXIS 14675 (4th Cir. 2003).

King, A. G., & Muraco, M. S. (2006). Classwide determinations of overtime exemptions: The false dichotomy posed by *Sav-On* and a suggested solution. *The Labor Lawyer 21*(3), 257-275.

Marx v. Friendly Ice Cream Corp., No. A-6105-03TI (N.J. App. Div. 2005).

Montgomery, D. K., McIntyre, M. S., & Powell, B. K. (2005). The FairPay 2004: A survey of recent court decisions with emphasis on the Sixth Circuit. 32 *N. Ky. L. Rev.* 651-709.

Murray v. Stuckey's Inc., 516 U.S. 863 (1995).

National Restaurant Association. (2006). H*ourly wages for foodservice occupations.* Washington, DC: National Restaurant Association.

National Restaurant Association. (2004). *2004 Restaurant industry forecast.* Chicago, IL: National Restaurant Association.

National Restaurant Association. (2004, July). *Federal overtime regulations: A primer for restaurant and foodservice employers.* Washington, DC: National Restaurant Association.

National Restaurant Association (2001). *Compensation for Salaried Personnel*. Chicago, IL: National Restaurant Association.

Payscale (2004). *Real-time salary survey information for restaurant manager (United States).* Retrieved May 18, 2004 from http://www.payscale.com/salary-survey/aid-10893/raname-SALARY/rid-104/fid-6886.

Pollack, J. D. (2001, October). Exemption under the Fair Labor Standards Act: The cost of misclassifying employees. *Cornell Hotel & Restaurant Administration Quarterly, 42*(5), 16-23.

Postol, L. P. (2004). The new FLSA regulations concerning overtime pay. *The Labor Lawyer, 20*(2), 225-241.

Reice, R. M. (2005, August 22). Self-auditing can exempt employers from costly litigation. *Nation's Restaurant News 39*(34), 22-23.

Rowan, R. C. (2004). Solving the bluish collar problem: An analysis of the DOL's modernization of the exemptions to the Fair Labor Standards Act. 7 *U. Pa. J. Lab. & Empl. L.* 119-138.

Salary.com (2004). *Salary wizard*. Retrieved May 18, 2004 from: http://swz.salary.com/salarywizard/layouthtmls/swzl_compresult_national_HS08000018.html#readon.

Senate Republicans pull bill that would have stopped Bush's overtime pay take-away. (2004). Retrieved March 28, 2004 from http://www.afl-cio.org/yourjobeconomy/overtimepay/ns03252004.cfm.

Simmons, T. R. (2003). Wage and hour law: Four common (and costly) mistakes. *Public Employment Law Report*, *7*(22), 4-5.

Thomas v. Jones Restaurants, Inc., 64 F.Supp.2d 1205 (M.D. Tenn. 1999).

Thomas, A. L. (2004). Overtime: The new hot topic in employment law. *Communique*, *25*(1), 16-18.

Thompson, J. (2004). Hospitality in the crosshairs: Are you ready? Retrieved April 6, 2004 from www.laborlawyers.com/CM/Hospitality%20Workforce/eHLLApril2004.pdf.

Von Bergen, C. W., & Chong, J. K. S. (2006). Using the fluxuating *[sic]*workweek compensation method to reduce overtime expenses. *Proceedings of the American Society of Business and Behavioral Sciences, Thirteenth Annual Meeting*, *13*, 2207-2221.

U.S. Department of Labor. (2006). *Model salary basics policy: Overtime security for the 21st century workforce*. Retrieved August 22, 2006 from: http://www.dol.gov/esa/regs/compliance/whd/fairpay/modelPolicy_PF.htm.

U.S. Department of Labor. (2004). Proposal to strengthen overtime protection: Summary of proposed changes. Retrieved February 6, 2004 from: http://www.dol.gov/_sec/media/speeches/541handout.htm.

U.S Department of Labor (2003). Defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees (proposed rule). 68 Fed. Reg. 1559 (March 27, 2003).

U.S. Department of Labor (2002). News release: Colorado-based Einstein Brothers Bagels agrees to pay $495,930 in back overtime wages to employees in 27 states. Retrieved March 16, 2004 from: http://www.dol.gov/opa/media/press/esa/ESA2002555.htm.

Submitted August 31, 2006

First Revision Submitted October 15, 2006

Second Revision Submitted October 30, 2006

Accepted January 2, 2007

Refereed Anonymously

William D. Werner, J.D. (e-mail: william.werner@unlv.edu), is an associate professor, **Andrew Hale Feinstein**, Ph.D. (e-mail: andyf@unlv.nevada.edu) is an Associate Professor/Associate Dean for Strategic Initiatives, and Christian E. Hardigree, J.D. (e-mail: christian.hardigree@unlv.edu) is an associate professor in the William F. Harrah College of Hotel Administration at the University of Nevada, Las Vegas.