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New Federal Overtime Rules and the Apartment Industry

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Introduction

Hysteria, misinformation, and hand-wringing – these terms best describe the reaction to the U.S. Department of Labor’s (DOL) new “Overtime Rule.” The title of the new rule is misleading – it makes *no changes to how overtime is calculated, earned or paid*. Nor does it change which types of positions are overtime-eligible. Instead, the change is to the minimum salary level that most employees must earn to satisfy the salary level test for exemption from overtime. That minimum salary has jumped from \$455 per week to \$913 per week, or from \$23,660 per year to \$47,476.¹

The increase does *not* mean you *must* raise salaries to the new higher level. Instead, you may re-classify positions as non-exempt in order to retain lower salaries. This NMHC and NAA Backgrounder provides useful background on the issue, outlines considerations for firms to use when evaluating whether to reclassify an employee, and explores options for an organization’s response to the new DOL rule.

Background

When it comes to overtime, federal law views employees as either “exempt” or “non-exempt.” An exempt employee is exempt from overtime laws; a non-exempt employee is not.² In practice, this means that an exempt employee may work more than 40 hours a week without earning any overtime.³ This also means that an exempt employee does not have to clock in or out, track their time, or take mandated breaks. Non-exempt employees, on the other hand, generally earn overtime for all hours worked over 40 hours in a week.⁴

An employer that fails to pay overtime, or provide breaks when required, violates federal and state wage and hour laws. In order to comply with the law, employers must be vigilant about the timekeeping and work schedules of their non-exempt employees. In addition, an employee’s status as exempt or non-exempt is relevant where free or discounted housing is provided. For example, the value of housing cannot be considered when determining whether an exempt employee has received the required salary level, while the value of housing may be credited towards the employer’s minimum wage obligation for non-exempt employees in certain circumstances.⁵

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As a reminder, all employees are considered non-exempt unless they meet three tests: (1) duties; (2) salary basis; and (3) salary level. The *duties test* looks at what work the employee performs, the *salary basis test* looks at how the employee is paid, and the *salary level test* looks at how much the employee is paid.

Only exempt employees now earning between \$455 to \$912 per week, or \$23,660 to \$47,475 per year, are affected by the new rule. At the property level, you may have exempt Community Managers or Maintenance Managers who fall into this salary range. Keep in mind that the value of housing provided to your exempt employees, whether free or at a discount, cannot be added to their salary to meet the required salary level.

If your exempt managers satisfied the duties and salary basis tests under the old rule, they will satisfy those tests under the new rule because those have not changed. In case you are unsure, let's quickly run through an analysis of these first two tests.

- **DUTIES:** For each exempt employee, look at what duties these employees actually perform. While there are a variety of exemptions, the exemption most likely to be applicable to these positions is the "Managerial Exemption." This exemption requires the employee to direct the management of an organization or a particular department or unit; supervise the equivalent of two, full-time employees; and be able to make, or effectively recommend, personnel changes.

Another potentially applicable exemption is the "Administrative Exemption," which requires an employee's primary duty to be the performance of office or non-manual work related to the management or business operations of the firm or its customers. Remember that an employee's title is irrelevant; calling someone a "manager" does not mean they actually manage anything. A careful analysis of the exempt duties test should include questions like the following: Does the employee hire, train, supervise at least two full-time employees? Can the employee deviate from the property's budget? Can the employee select vendors?⁶

- **SALARY BASIS:** If the employee performs exempt duties, a firm must next confirm that they earn a standard wage, i.e., a salary for every week they work regardless of the quality or quantity of their work that week, and that no unlawful deductions are taken from that salary. If so, then they will likely satisfy the salary basis test.

If your answer is "no" to either of the above two tests, the employee may not have been exempt in the first place and the firm should explore, with the advice of counsel, how to remedy that situation before deciding how to respond to the new Overtime Rule.

- **SALARY LEVEL:** The third test is the salary level test. This is the test affected by the new Overtime Rule. To determine what it will cost a company to comply and retain exempt status, management will need to compare the current salary level of affected employees to the new salary level requirements.

Employee Reclassification Considerations

One option in reaction to the rule is to re-classify affected employees to non-exempt status. In evaluating whether or not to do this, start with the potential overtime a newly non-exempt employee might earn. While the employee probably does not clock in and out, try to estimate the amount of “excess” hours they generally work over 40 hours per week or 8 hours per day (in states that have daily overtime).

Remember to include time spent before or after business hours engaged in activities like answering phones/emails/texts, working on reports, overseeing emergencies, travel time between properties, etc. Be conservative and over-estimate. Roughly calculate potential overtime pay by dividing the employee’s annual salary by 2,080 to get an estimate of their equivalent hourly rate, multiplying this rate by 1.5, then multiplying by the number of “excess” hours.

Next, factor in standard wage and hour cost considerations. While your firm probably currently has non-exempt employees onsite, they will need to instruct and monitor the formerly exempt employee to track their hours, as well as take meal and rest breaks. They may be used to monitoring other employees, so the cost to instruct and monitor may or may not be significant.

Finally, there are some specific considerations. If the employee receives free or discounted housing (whether as a discount offered to all employees or because they are the designated employee living on site), the value of this housing may be required to be included in calculating their regular rate of pay for purposes of calculating and paying overtime.⁷ Similarly, commissions or bonuses for things such as leasing or renewals must be included in the regular rate for purposes of overtime pay calculations. Finally, if the employee spends time traveling, such as to training sessions or between sites, the employee will have to be paid for this time on an hourly basis.

Options

With that background on the potential costs of reclassifying an employee from exempt to non-exempt, here are some options:

- One option is to keep the employee’s exempt status by raising their salary to \$913 per week, or \$47,476 per year, by December 1, 2016. This option is likely most practical when there is little difference between the exempt employee’s current salary and the new minimum or the costs of reclassifying them as non-exempt and paying overtime are too high.

- If the employee is likely to work minimal amounts of overtime, another option is to convert the employee to non-exempt status without changing their pay and paying them whatever overtime is worked. This has the benefit of minimizing disruption to your operations and labor costs.
- If the firm does not want to raise the salary to the new minimum salary level but the employee is likely to work significant amounts of overtime as a non-exempt employee, management should consider whether any of the work now performed in excess of 40 in a week (or 8 in a day) could be performed more efficiently or by others? If so, it might make sense to reallocate work to eliminate as much potential overtime as possible. While this saves costs, it is likely the most disruptive to on-site operations.

About NMHC and NAA

For more than 20 years, the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) have partnered on behalf of America's apartment industry. Drawing on the knowledge and policy expertise of staff in Washington, D.C., as well as the advocacy power of nearly 170 NAA state and local affiliated associations, NAA and NMHC provide a single voice for developers, owners and operators of multifamily rental housing. One-third of all Americans rent their housing, and 38 million of them live in an apartment home.

About the Authors

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The information provided herein is general in nature and is not legal advice. It is designed to assist our members in understanding the issue area, but it is not intended to address specific fact circumstances or business situations. For specific legal advice, consult your attorney.

¹ There are other changes brought on by the new rule like allowing up to 10% of an exempt employee's compensation to be paid as non-discretionary bonuses or commissions and raising the minimum salary for "Highly Compensated Employees from \$100,000 to \$134,004 per year. These, and other changes, are outside the scope of this article.

² Exempt employees are typically also exempt from state laws regulating meal and rest breaks.

³ Some states, like California, also require daily overtime pay for all hours worked over 8 in a day. Exempt employees are also typically exempt from daily overtime pay requirements, where applicable.

⁴ Some states, like California, also require that non-exempt employees must be given meal or rest breaks after set periods of time.

⁵ An analysis of whether the value of the housing may be credited towards minimum wage is complex and beyond the scope of this overview. However, courts will generally look at whether: (1) the housing is regularly provided by the employer or similar employers (this is common in the multi-family industry); (2) the employee voluntarily accepts the housing; (3) the housing is furnished in compliance with applicable federal, state, or local law (for example, it is not substandard housing); (4) the housing is provided primarily for the benefit of the employee rather than the employer; and (5) the employer maintains accurate records of the costs incurred in furnishing the housing. Please also note that the value of the housing may need to be included in the employee's "regular rate of pay" for overtime purposes.

⁶ Some states have different tests. For example, in California, an exempt employee must be "primarily engaged" in exempt work, i.e., they must spend more than 50% of their time supervising, managing, etc. This qualitative test can much harder to meet than the qualitative "primary duty" test under the FLSA.

⁷ The test for whether the value of housing must be included in an employee's regular rate of pay is highly fact-specific and based on a multitude of factors. We recommend you consult with counsel on this issue.