



Fox Rothschild LLP
ATTORNEYS AT LAW

Payroll savings in the kitchen: Worth the risk?

8/26/10 - Carolyn Richmond

With businesses facing continued economic uncertainty, the pressure to find cost savings is greater than ever. Undeniably, cutting down on overtime costs is one of the first places employers look. Unfortunately, this is often rife with risk. The easiest way to cut down on overtime costs (and most lawful) is to ensure that non-exempt employees do not work in excess of forty hours in a week (or eight hours in a day in states that require daily overtimes, such as California). Unfortunately, this is not always the path taken. The Department of Labor and plaintiffs attorneys know to look out for "time shaving," "off-the-clock" work, and failure to pay for overtime at the correct rate. This column, however, will address what is often an unintentional error committed by many hospitality employers who simply do not understand the wage and hour laws: failure to understand the difference between paying a "salary" and being "exempt" from overtime.

Many employers often mistakenly believe that by simply paying an employee a "salary" (e.g. \$700 a week, rather than \$17 an hour), overtime pay is not required. As a result, I often see entire kitchens paid on a salary basis with multiple sous chefs and line cooks typically working anywhere from 50-70 hours per week. Paying an employee a "salary" is only one factor in determining whether the employee is "exempt" from overtime.

Federal and state laws provide for very limited exemptions. These exemptions typically cover professional employees (e.g. doctors, lawyers), administrative employees (e.g. human resources administrator), and certain sales employees. The tests for passing the

exemptions in these categories are also fairly onerous — title alone does not guarantee exemption and the specific duties that are actually performed by the employee will be key in ascertaining whether the employee will qualify for an exemption. While most restaurant employees will not meet the aforementioned exemptions, there is one exemption that is most likely to be applicable, the “executive exemption.” This exemption provides an opportunity for restaurant owners to classify certain employees as “management” rendering them exempt from overtime and allowing restaurant owners to pay them a salary without having to make additional overtime payments.

Under the federal Fair Labor Standards Act (“FLSA”) and its implementing regulations to qualify for the executive exemption an employee must receive a salary of at least \$455 per week and:

- (a) Have a *primary* duty of *managing* the enterprise or *managing* a customarily recognized department or subdivision of the enterprise;
- (b) Customarily and regularly *direct* the work of two (2) or more other full-time employees; and,
- (c) Have the *authority* to hire or fire other employees (or be able to make recommendations as to hiring, firing, promotion, or other changes of status of other employees and have these recommendations carry a particular weight with the decision makers).

Examples of exempt “executive” job responsibilities include: interviewing, hiring and training new employees; setting and adjusting pay rates; conducting job evaluations; disciplining and/or terminating employees; conducting employee investigations; monitoring and implementing legal and regulatory compliance programs; controlling costs, revenue and expenses; making purchasing decisions; determining techniques and processes that will be used; handling employee complaints and grievances; planning, directing and distributing work assignments.

While applying these tests to front-of-house managers has its own inherent difficulties, applying it to chefs is even tougher. Restaurants often have a very difficult time establishing that chefs – other than an executive chef – meet these standards. Generally, sous chefs have qualified for the executive exemption under the following circumstances:

(a) The sous chef's primary daily duties include training and supervising kitchen personnel and assigning their work on an ongoing basis;

(b) The sous chef's primary daily duty is managing and overseeing the kitchen or a part of the kitchen (i.e. supervising, scheduling and training employees; determining how much food needs to be prepared and tracking kitchen inventory for supply purposes, etc.); and,

(c) The sous chef is responsible for menu and recipe development in the kitchen.

Conversely, sous chefs have generally not met the executive exemption if:

(a) The sous chef does not regularly supervise or direct any employees;

(b) The sous chef's primary duty is cooking, instead of managing the kitchen;

(c) The sous chef does not have any hiring, firing, disciplinary or scheduling authority for other employees;

(d) The sous chef does not have the authority to modify or alter recipes in the kitchen; or,

(e) The sous chef does not manage a recognized subdivision of kitchen (e.g. the pastry department, sushi line).

It is important to note that certain states have more rigid and quantitative standards than the FLSA and will look at the actual time spent on "exempt" vs. "non-exempt" job duties during a shift to determine exemption status not merely whether the purported exempt duties are the employee's "primary duty". For instance, in California, the employee must be "primarily engaged" in the exempt work and devote more than 50% of their time to that work. Certain states also have salary requirements in excess of those of the FLSA. For example, New York State's salary minimum for the executive exemption is \$543.75.

While wage and hour class action litigation shows no signs of abating, and the Department of Labor is only increasing its enforcement activity, it is incumbent on food service operators to ensure compliance now. Reviewing kitchen payroll practices is a key area to start. Work

with local labor counsel and internal human resources to assess overtime risk today. The perceived payroll savings today is not worth the risk of back wages, liquidated damages (equal to 100% of the back wages under the FLSA), attorneys fees, interest, and additional fines and penalties under state laws.