# A Matter of Time

## A LOOK AT HOW REMODELERS ARE DEALING WITH THE NEW OVERTIME REGULATIONS


BY CHARLIE WARDELL

On May 18, the U.S. Department of Labor (DOL) redefined the Fair Labor Standards Act's overtime threshold. The months leading up to the formal announcement saw stiff opposition from lobbying groups in different industries, including the construction field. Those efforts failed, and the rule goes into effect on Dec. 1.

What now?

To answer that question, *Professional Remodeler* spoke with attorneys, human resources experts, and remodelers who are grappling with the implications. We found that while the rule's broad outlines are fairly simple, there are minefields to watch out for and some tough decisions to be made.

### The Basics

The new rule raises the salary at which workers are exempt from overtime pay. The current threshold is $23,660 per year; on Dec. 1 it rises to $47,476. Salaried employees who make less than that must be paid time-and-a-half for every hour worked over 40.

"It's the largest wage and hour change I've experienced professionally," says Karen Young, owner of HR Resolutions, a human resources management company in Harrisburg, Pa., and author of *Stop Knocking on My Door—Drama Free HR to Help Grow Your Business*.

As hefty as that is, it may only be the beginning: The DOL also established a mechanism for automatically updating the threshold every three years. The first update is scheduled for Dec. 1, 2020.

With remodelers still scratching their heads over how the rule will affect them, we weren't surprised to hear a

PHOTO MONTAGE: KELSEY CRAIG; CLOCK: 123RF.COM/ BRYLJAEV; MAN: KELSEY CRAIG

The new rules will affect sales and office-based staff the most. Commission-based employees are exempt from over-time as long as more than 50 percent of their hours are spent on outside sales.

THIS PAGE: ERIKA TAYLOR; OPPOSITE: KELSEY CRAIG

variety of reactions. Some expressed real concern. "I'm afraid we'll have to reduce people's hours and stretch out contracts to control labor hours. We'll be making less by not being able to complete as many contracts, or we will have to raise costs to the customer," says Ryan Cook, a builder and remodeler in Raynham, Mass.

Others didn't consider it a big deal. "Most of our people won't be affected because most already earn more than the new threshold," says Bill Simone, a design/build remodeler in Los Angeles. (Though Simone is concerned that the rule could affect some trade partners and local cabinet shops, who would then pass their increased costs on to him.)

The impact on any particular company will depend on its pay structures. Generally, the pain will be felt less in the field, since most lead carpenters and project managers already earn well above the new threshold. But the office is a different story.

### The Duties Test

The three exemptions to the rule that are relevant to remodelers are sales, administrative, and executive. Beware, however, that exemptions are determined not by job titles, but by what the employee actually does. "It's important to understand that job titles aren't exempt, only job functions are," says Doug Delp, president at The Delp Group, a human resources firm in Green Lane, Pa., which works with remodelers.

With salespeople, it's fairly straightforward. Commission-based employees are exempt from overtime as long as more than 50 percent of their hours are spent on outside sales (not including phone calls made from the office).

The administrative exemption is a bit trickier. It applies to employees who perform non-manual work directly related to management or general business operations, and whose duties, according to the DOL website, include "the exercise of discretion and independent judgment with respect to matters of significance."

HR professionals say that a lot of employers get this wrong. "They misclassify administrative help who don't qualify because they don't exercise significant independent judgment," says Michael Abcarian, a labor lawyer and managing partner with Fisher Phillips, in Dallas.

The executive exemption applies only to true managers, not to crew leaders who spend the majority of their time performing nonmanagement tasks. "I call it the Burger King Rule," says Jeffrey Brecker, an attorney with Jackson Lewis, on Long Island, N.Y. The term refers to fast-food managers who work alongside hourly employees. They're not exempt from overtime; neither are salaried lead carpenters who spend time swinging a hammer. (While most lead carpenters are paid hourly, a few are in salaried positions.)

The consequences for improper classification can be expensive. Bryan Clayton is CEO of GreenPal, a referral service for lawn care, but he used to run a large landscaping service. He paid his crew foremen salaries of $45,000 to $60,000 each, under the rationale that they were managing workers. He then got a nasty surprise when the DOL audited the company in 2009. "They decided that my foremen were not exempt," he recalls. "It killed us. We had to pay $400,000 in back wages."

### Rethinking Bonuses

The new rule also limits the amount of bonus money that can contribute to the threshold salary. In the past, an exempt employee could work more than 40 hours without overtime pay as long as the total compensation—including salary and bonuses—exceeded the threshold. No more. Under the new rule, only 10 percent of the employee's earnings can consist of bonuses. In other words, if a manager earns $60,000 per year but only $40,000 of that is salary, that person is not exempt from overtime. Delp knows several remodelers who base a large part of their project managers' compensation on bonuses and who will now have to rethink that approach.

One remodeler who is unhappy about this is Anthony Nardo of Reborn Cabinets, an Anaheim, Calif.-based

**Generally, the new rules won't affect employees working in the field since more lead carpenters and project managers already earn well above the new threshold.**

DAN MORRISON

kitchen remodeling company with 330 employees. He says that the company's reliance on bonuses has been a strong incentive for field managers to bring jobs in on time and on budget with little supervision.

"We're going to have to lower bonuses and increase salaries," he says. "We'll also have to manage more closely and replace underperformers more quickly."

**IT'S CRUCIAL THAT ALL RULES BE CLEARLY COMMUNICATED. THIS COULD INCLUDE A POLICY THAT NO OVERTIME IS ALLOWED WITHOUT PERMISSION, AS WELL AS A PROHIBITION ON USING COMPANY EMAIL OUTSIDE OF WORK HOURS.**

### Evaluating Options

With the new rule in place, the question is how to make sure your company stays out of trouble for the least possible expense. HR professionals are consistent in the approach they recommend.

"Employers face a choice," says Tim Garrett, a labor lawyer with Bass, Berry & Sims, in Nashville, Tenn. "One is to give a raise, effective no later than Dec. 1, to any employee classified as exempt but not yet receiving an annual salary of $47,476. The other is to reclassify the employee as nonexempt and eligible for overtime."

The best way to start is by doing a thorough audit of all positions. This includes reviewing each salaried job description, along with the hours needed to complete that job. It's important to determine that the job description matches what the employee is actually doing, and to also ascertain whether the employee needs more than 40 hours per week to complete these tasks.

If you decide to raise salaries Garrett cautions that, at least in some companies, this can have unintended consequences. "If you raise someone from $43,000 to more than $47,000 this can cause morale issues among employees who were already earning the higher number but have more responsibility," he says.

Another option is to make everyone nonexempt and pay them hourly, an approach that some remodelers prefer because it clarifies job costing. This doesn't necessarily have to add expense. If a company owner knows that an employee's job requires more than 40 hours per week, he or she can calculate the wage so that the combined regular and overtime pay equals a desired amount.

This can also cause morale issues if not properly managed. Nardo, for instance is converting some piecework installers to an hourly rate using the above method and has found it useful to involve them in the discussion. "We need to show them that, in the end, they will be making the same amount of money," he says.

The other tactic is simply to pay overtime to nonexempt employees who earn less than the threshold salary. This is a good approach if you want to guarantee certain employees a minimum income. "I have office staff salaried below the threshold," says Maggio Roofing's Siegal. "If they work more than 40 hours per week, we simply pay them time-and-a-half."

### Tracking Hours

Paying hourly requires that the employer have an accurate system for tracking work hours. Most remodelers would say they already know how to do this, but with small businesses now under increasing scrutiny, it's important to make sure the system will stand up to a DOL audit. For field employees, several apps are available that let them clock in and out with a smartphone.

However, the big challenges are less in technology than in policies, and it's crucial that all rules be clearly communicated to employees. This could include a policy that no overtime is allowed without permission, as well as a prohibition on using company email outside of work hours. It's recommended that this information be spelled out in an employee handbook that is then signed as received and read by everyone on staff. PRO

*Charlie Wardell is a freelance writer and former remodeler in Tisbury, Mass.*