

NEW OT RULE

AFFECTS DAILY OPERATIONS AND BOTTOM LINE

BY PAUL R. BERGERON III

Human resource (HR) professionals are working round-the-clock to prepare for the upcoming new federal overtime compensation rule that will require employers to pay overtime to non-exempt employees making less than \$47,476 annually—or \$915 per week—starting Dec. 1.

While the rule might directly affect the salaries of only a small percentage of an apartment owner or management company's staff, it could dramatically shift a community's overall workload, job responsibilities, company culture and bottom line.

The rule was announced May 18 by the U.S. Department of Labor. The minimum compensation required to qualify as an "exempt" (not eligible for overtime) employee was more than doubled from \$23,660 per year.

Speaking with apartment owners and managers of various sizes and locations, many told *units* Magazine that they have been working much of this year to analyze the rule. HR teams are weighing options as they craft policy to address their specific situations, based on additional guidance that Department of Labor provided in July.

Some have already adjusted some employees' salaries to meet the requirement—sometimes to the dismay of their employees. Others have adjusted office hours or job descriptions, while still others continue to re-evaluate the completion time frames that they recommend for certain onsite staff responsibilities and duties, such as month-end reporting, walking move-outs, punching make-readies and posting completed work orders to the management software. Companies are looking at largely administrative tasks that can be done by others or delegating tasks to others so that the manager does not work the overtime.

Based on anecdotal responses, most say that only property managers and a small percentage of their corporate management staff members will be affected—if any at all. Per the handful of companies who spoke about the rule, less than 10 percent of their workforce will see adjustments to their pay or employment status.

Perhaps the greatest effect the rule will have is what it will do to day-to-day operations for all onsite staff—not just those whose salaries are directly affected by the rule.

"There are so many factors companies will need to consider behind this overtime rule that change," Susan Weston, CAM, CAPS, NAA Education Institute Senior Faculty member and industry human relations consultant, says.

"You have to look at how you are handling housing allowance, commissions, performance bonuses; company culture as it applies to

Job descriptions, work habits, company culture, time on the clock, compensation and status for many apartment industry employees will be affected.

allowing or expecting employees to take work home, taking or making work-related calls after-hours, answering emails from home; and management policies such as preauthorizing overtime work and what amount or rate will be paid," she says.

Weston adds, "It's going to be a huge mind-shift for regional managers if their staff members' job status shifts to exempt or hourly, and vice versa. The bigger challenge is for leadership to understand that things such as replying to after-hours emails and responding to supervisors' requests are going to have to wait, and be okay with that."

Additionally, employees will have to think about—or even be forced to break—some of their workplace habits, Weston says. Activities such as choosing to work through lunch, staying late to catch up or get ahead of their workload or choosing to work over the weekend will need to be rethought in light of the new rule.

"On the other hand, the rule mandates that they now have even more control over managing their own work-life balance," she says. "And that's important to a lot of employees today."

Do Employees Even Care?

As of early September, responding HR executives said they have received few or even zero questions from employees about potential changes created by the rule, despite its ability to conceivably increase their employees' salaries, decrease their hours or a combination of both.

The No. 1 question HR staff is receiving from employees is: "Why is this happening?" Several express that employees whose status could change from exempt to hourly (and thus qualify them to earn overtime pay) are "disappointed" in the potential move.

"They tell us that they like to be salaried employees," Michelle Dean, PHR, SHRM-CP, Human Resources Manager, Mills Properties, says. "They consider exempt status to be prestigious; something they worked toward and that they are proud of."

Owners and management companies offer varied explanations for the lack of attention their staff has paid to this issue. "I am not surprised," says one. "The rule is complicated and difficult, and they trust us to be fair in complying with it. We have been very transparent in how we are wrestling with these kinds of issues of regulation and profitability."

The rule applies to every U.S. business of any size or location. Out-



side the apartment industry, the rule has received both spirited applause and argument from management, trade associations and advocacy groups.

Some suggest that the overtime rule could be reversed or greatly modified based on the outcome of the November elections. And while the process for overturning or amending the rule is underway in Congress, experts agree that nothing will prevent the rule from going into effect under the current Administration.

Results of the November election could play a significant role, however. The election will determine the next U.S. President, who will appoint committee chairs and cabinet seats. It also could affect the balance of power in the House and Senate. Should the Republicans win the White House, a change, if any, would not likely occur before Q2 2017.

Please see the "Protecting Workplace Advancement and Opportunity Act" (S 2707 and HR 4773), which was created to push "pause" on the rule; and the "Overtime Reform and Enhancement Act" (HR 5813), which was created to phase-in the rule over a longer period of time. See "What You Can Do Now" on pg. 32.

Mills Properties, based in St. Louis, has a portfolio of 40 communities, ranging from new development to C properties. Its communities have as few as 80 to 90 apartment homes and as many as 800. Since February, its supervisors, executive staff and HR department have been collecting payroll data to determine how many hours their employees are working during a given day, week or paycheck period. According to the rule, work is defined as any task that takes at least 15 minutes to complete.

"We revised our time-keeping program and started having all employees track their time by the hour for everything they did, including answering emails while at home, staying late in the office or working on weekends," Mills says. "Everything."

This step is the cornerstone for most companies completing due diligence, according to those who spoke to *units* for this article. They say it helps them forecast what potential overtime pay would be required as a result of complying with the rule, among other things.

Says Dean, "The big question is, 'Do we bump them up, or do we make them hourly?' We are working with our Controller, CFO and Owner to make those decisions and expect to do so by the fall. [Leading up to it], there is a sense of the unknown. Mostly we are asking, 'What's it going to cost?'"

“It’s going to be a huge mind-shift for regional managers.”

What You Can Do Now

Please take a moment to send a quick message to your lawmakers today!

www.naahq.org/advocacy-365-action-center

There’s bipartisan concern in Congress about the negative effects that the pending overtime rule changes will have on businesses, non-profits and universities. Sen. Tim Scott (R-SC) and Rep. Tim Walberg (R-MI-7) introduced the “Protecting Workplace Advancement and Opportunity Act” (S. 2707 and H.R. 4773) to push “pause” on the rule, and Rep. Kurt Schrader (D-OR-5) introduced the “Overtime Reform and Enhancement Act” (H.R. 5813) to phase-in the rule over a longer period of time.

Clearly, members on both sides of the aisle are concerned with the new overtime rules changes. Although the current bills are gaining support, a request from you to your lawmaker to will urge Congress to take action on this important issue.

— NAA

Reaching Congress: We Did It!

- 719** Total messages sent
- 209** Members of Congress (MoC) reached
- 34** States whose MoCs were contacted
- 241** NAA members who reached out
- 209** First-time NAA member advocates
- 71** Messages sent thru Advocacy365

Congressional Bills Update: As of Sept. 28

- HR 4773** 200 co-sponsors
- S 2707** 45 co-sponsors
- HR 5813** 14 co-sponsors

—PopVox

Calculating Costs

LumaCorp. operates 25 communities (6,200 apartment homes) in Texas. Its President, Ian Mattingly, says after having examined the final rule and its associated guidance and then crunching the numbers, there is a revenue-neutral way to implement it.

“It’s a bit convoluted and takes a bit of algebra, but the bottom line is that with a clear understanding with their staff, a company can simply guarantee all of their managers say 50 hours per week of pay at the same rate as they currently make,” Mattingly says.

“They would still be required to track their hours and pay them overtime if they work more than 50 hours, but I don’t think that happens much. If they work less than 50 hours, as they would most weeks, they still get paid their regular weekly salary.”

An example:

June Doe currently makes \$720 per week managing 150 units and three full-time employees, less than the \$913 per week required to be exempt. Instead of trying to limit her to 40 hours per week, her hourly rate would become \$13.09, but she would be guaranteed 4.5 hours of pay for every half-day worked. A typical workweek is five days, so her weekly pay would be \$13.09 for 40 hours, plus \$19.64 (time-and-a-half) for 10 hours or: $(\$13.09 \times 40) + (\$13.09 \times 1.5 \times 10) = \719.95 . Essentially the same as she did as an exempt employee.

“This is an approach that can minimize the change required and still provide certainty to owners,” Mattingly says.

Jeanne Lynch, Vice President of Human Resources at Greenwood Village, Colo.-based Griffis Residential, says her company acted ahead of the Dec. 1 deadline to gain compliance for the 186 employees who are eligible for overtime.

“Griffis Residential has taken a conservative approach to Fair Labor Standards Act (FLSA) regulations even before the new regulations,” Lynch says. “The only property staff who are exempt are our community managers, and they are all paid over the new minimum exempt threshold. In corporate, we expect to continue with just six non-exempt support staff.

“We’ve audited all of our jobs to ensure that they meet the standards for exempt or non-exempt level from a duties and minimum pay

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perspective. Fortunately, we don't expect any monetary change because of the new regulation.”

Lynch and others say that the increase in minimum wage for exempt status was unfair.

“We realize that the FLSA regulations have not been changed in several years, but the change could have been phased in more gradually and will present a hardship for many businesses.”

The U.S. Department of Labor published a notice of proposed rulemaking on July 6, 2015, and received more than 270,000 comments.

Nonetheless, the initial increases to the standard salary level (from \$455 to \$913 per week) and HCE (highly compensated employee) total annual compensation requirement (from \$100,000 to \$134,004 per year) are based on the 40th percentile of earnings of full-time, salaried workers in the lowest-wage Census Region (currently the South), which is \$913 per week or \$47,476 annually for a full-year worker. Future automatic updates to those thresholds will occur every three years, beginning on Jan. 1, 2020. That year, it is estimated to be raised to more than \$50,000.

“Naively, the assumption was that salaried employees under the threshold would get a significant salary bump or earn significant overtime,” says Susan Passmore CAM, CAPS, Executive Vice President, Blue Ridge Companies. “In reality, while some folks may gain a couple of thousand dollars a year in overtime, those exempt employees will now have restrictions to hours worked and will lose all the benefits of being exempt.”

Terry Brewer is Vice President of Human Resources, ROSS Management Services, which operates 44 communities in the Mid-Atlantic region and North Carolina. She said in September that ROSS Management Services had 226 employees who are eligible for overtime.

“At this time, we expect two more to become eligible for overtime as a result of the new regulations, for a total of 228 eligible employees,” Brewer says. “We addressed most of the salary issues during our annual performance and salary review process in July. At that time, there were six managerial employees who did not meet the new salary threshold of \$47,476 to be considered exempt from overtime pay.”

ROSS reviewed its job responsibilities to confirm the employees perform the duties of exempt employees, and the salaries of four of the six were increased at that time to the required salary threshold, Brewer says.

“These four individuals work in the South region of our portfolio, where the market-rate salaries generally are lower than in other regions,” Brewer says. “However, these individuals' salaries were less than \$5,000 from the pay threshold for exempt status. We strive to ensure all employ-

ees at ROSS Management Services feel valued and appreciated. When we communicated the increase to these employees, they were informed they were receiving an increase over and above the standard raise because of their exceptional performance, not the regulation.”

At Blue Ridge Companies, Passmore says 217 out of 289 of its employees are eligible for overtime, including 24 property managers (8.3 percent of total workforce), whose base salaries do not meet the new requirement of \$47,476.

“We have been researching solutions and consulting with our attorneys but we have not put any actions into place yet,” Passmore says. “It has been a good exercise for us as it's created some great discussion on salary ranges and how skill, experience and level of responsibility factor into those. We've also been educating ourselves on the number of hours worked by position and type [exempt/non-exempt]. For some time, we have required exempt employees to log hours worked per day for attendance reasons [not clock in and out]. This data has been very helpful for this analysis.”

Accounting for non-discretionary bonuses is part of the equation that Blue Ridge Companies is figuring that will help it meet the new rule's requirements. The rule will undoubtedly have some effect on its bottom line, Passmore says.

“It is our understanding that 10 percent of the standard salary level can count for non-discretionary bonuses if they are paid out at least quarterly,” she says. “So, making a general assumption that exempt/salaried employees are earning at least \$4,747.60 in annual bonuses, paid quarterly, effectively lowers the base salary requirement to \$42,728.40, which lowers our impact from 8.3 percent of the workforce to 5.9 percent.”

“If we pay overtime for all employees who are currently under the threshold, assuming five hours of overtime per week, which seems to be our average for these employees who currently are salaried, that equates to a \$62,000 increase per year in payroll,” she says.

Revising Job Descriptions

Apartment management is an industry driven by strong customer service. Apartment owners and managers find that the new rule could affect how well their staff can deliver (or continue delivering) the level of customer service their residents expect.

Balancing hours and payroll costs while maintaining compliance—especially for property managers—might require out-of-the-box thinking.

“When the rule does go into effect, it doesn’t automatically mean that staff will start earning overtime pay.”

Some companies who were interviewed say that they have determined that some staff were working as many as 80 hours a week. On average, the companies responding said an employee works an average of 4 to 6 hours in overtime per week. In reaction, they are re-evaluating the time frames that they have set for reasonably completing tasks or duties such as [what and what] is reasonable.

“We don’t think that we’ll change our job descriptions at Mills Properties in response to the new rule,” Dean says. “We have to remember and make sure that our staff and supervisors realize that when the rule does go into effect, it doesn’t automatically mean that staff will start earning overtime pay. Just because you are eligible to earn overtime pay, it doesn’t mean you will be working more to earn it.”

Blue Ridge Companies, which has a total workforce of 289 employees, says it likely will create levels within some job titles based on job descriptions (for example, Community Manager Level 1, Level 2) to help it manage the new rule.

“It also is our understanding that, as long as we are compliant with the primary duties tests, we can have ‘levels’ of job descriptions that allow for both exempt/salary and non-exempt/hourly status for employees who carry conceptually very similar job titles. Having the varying levels probably is what we will do.”

Mary Gwyn, Chief Innovator, Apartment Dynamics, which manages properties in North Carolina, says she is considering staggering office hours.

“This can help us comply with the rule and create a more favorable work environment for some of our employees—such as property managers—who are near that salary threshold,” Gwyn says. “We have great managers who will email us at 8 p.m.—which really means that they are working more than 40 hours per week. They both want and need ‘quiet time’ to do certain non-work-related things that they cannot get done during the day.

“We could have managers come in early and leasing people come in a little later, for example. That way, if the manager leaves for the day at 3 p.m., or they don’t come in until 10 a.m. and work until 7 p.m., we can still have the office covered, and give them that time they need to do their work during the more ‘intense’ hours.

“This way, we keep our costs from escalating into a lot of overtime, preserve our greatest assets—the staff—and keep the properties running efficiently. We wouldn’t have to cut staff due to higher overall salary costs, so we can maintain our high level of customer service, which is so important in order to stay competitive.” ■

Lawsuit Filed by 21 States Challenges OT Rule

Officials from 21 states and a coalition of business groups led by the U.S. Chamber of Commerce filed a pair of lawsuits on Sept. 20 challenging the Obama Administration’s final overtime rule. The dual lawsuits contend that the U.S. Labor Department exceeded its authority by finalizing such a large increase, as well as by including a provision that would automatically increase the threshold every three years to the 40th percentile of income in the nation’s lowest-earning region.

The final rule would harm the ability of apartment housing employers to implement, and their impacted employees, including property man-

agers at traditional apartment housing and student housing developments, to take advantage of flexible scheduling options. Additionally, the rule would limit career advancement opportunities for employees. The rule also goes far beyond the multifamily housing industry and has the potential to affect employees at colleges and universities who serve student housing residents.

NAA/NMHC strongly oppose the overtime rule and are supporting all avenues that would either repeal or limit the rule. It is possible that the House may take up legislation introduced by Representatives Tim Walberg (R-MI-7) and John Kline (R-MN-2) to delay the rule until June

2017. Republicans may also look to deny funding to implement the rule in appropriations legislation to be considered in a lame-duck session after the election. Both efforts are likely to face White House opposition.

Please join us on Oct. 25 when NMHC/NAA will host a webinar regarding guidance on implementing the overtime rule. Prepared by Jennifer Redmond and Brian Fong of Sheppard Mullin, the guidance describes the rule in detail and provides issues for owners, operators and developers of multifamily housing to consider as they seek to comply with the new rule.

Provided by NMHC as part of the NAA/NMHC Joint Legislative Program.

For details about the webinar (requires login), visit:

www.naahq.org/learn/government-affairs/federal-state-local-issues/labor-and-employment/guidance-industry-overtime-rule