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## **The Fairytale of the Overtime Pay Requirements**

By Frank V. Petrosino, Esq.

Once upon a time, there was a Vermont restaurant that was so popular the patrons had to make reservations at least 5 months in advance in order to get a table. One day, proprietors of the restaurant found themselves in need of yet another cook. So, the proprietors went to the local culinary school and found themselves a recent graduate with a lot of promise. The proprietors told the recent graduate that she could come cook at the restaurant only if she worked many hours; however, the recent graduate would only be paid \$10 per hour and would get no overtime pay.

Now, the recent graduate slaves away in the sweltering kitchen of the restaurant for 13 hours a day at least 6 days a week and is constantly told that this is what it takes to earn any status in the culinary world. Must the recent graduate slave away with no hope of overtime pay?!?

### *Overtime Pay Requirements in Vermont*

Every time a Vermont employer permits an employee to work more than 40 hours per work week, the employer must immediately ask, "Is this employee entitled to overtime pay?" Assuming the employer does not have a contract with the employee to pay overtime, the employer will want to look to the Federal Fair Labor Standards Act ("FLSA") and Vermont's overtime laws (covered in Sections 381 through 396 of Title 21 of the Vermont Statutes Annotated).

Under the FLSA, employees paid on an hourly basis are generally entitled to an overtime pay rate of 1.5 times their regular pay rate for hours worked over 40 in a seven-day workweek. Employers are free to set the day and hour when a seven-day workweek starts and ends; however, it must be at a fixed time and cannot be changed unless the change is intended to be permanent. Vermont overtime laws mirror the FLSA in terms of the amount of overtime pay for hourly employees and the calculation of the workweek.

Of course, where there is a rule there are usually exceptions. Both Vermont restaurant and the recent graduate are going to want to know if (a) the restaurant is covered by either the FLSA or the Vermont overtime laws (or both) and (b) if either or both apply, whether there are any applicable exceptions to the overtime pay requirements.

### *Employers Covered Under the FLSA and Vermont Overtime Laws*

Under Vermont overtime laws, employers with two or more employees are covered.

The FLSA generally applies to those employers who are engaged in interstate commerce and have annual gross sales or business volume of \$500,000 or greater. Even if the \$500,000 threshold is not met, however, an individual employee may be covered in any workweek that such employee engaged in interstate commerce during the scope of her employment (e.g., the employee processed a credit card payment for a customer). Interstate commerce is an incredibly broad concept that usually includes any activity that even remotely affects commerce that crosses State borders. If our Vermont restaurant, for instance, is located on a public highway, sends mail out-of-state, receives deliveries from out-of-state, serves out-of-state patrons, or takes credit cards, it is likely engaged in interstate commerce.

### *Exceptions that May Be Relevant to the Recent Graduate*

There are myriad exceptions to overtime requirements under both the FLSA and Vermont overtime laws. The FLSA has white collar exceptions for salaried employees that many employers are familiar with. Since the recent graduate is being paid hourly, the white collar exceptions will not apply. (It is possible, however, for chefs who are paid salary and meet certain other criteria under the white collar exemptions to be exempt from the FLSA's overtime requirements.)

One interesting Vermont exemption is specifically available for retail and service establishments. Under this exemption, a restaurant is generally considered a service establishment as long as at least 75% of its goods and services are sold directly to consumers; any employee (including a chef, a cook, and a server) of a restaurant qualifying as a service establishment is exempt from Vermont's overtime laws. In practice, this Vermont exemption has very limited application because of the broad scope of the FLSA (which does not contain a similar exception). For the restaurant to have any chance of keeping the FLSA from applying to the recent graduate and having this Vermont exception apply, the restaurant would have to fall below the \$500,000 threshold, and the recent graduate could not during the scope of employment, take any deliveries, make any phone calls, drive, or process credit card payments. Since the concept of interstate commerce is so broad, this might not even be enough.

### *Enforcement and Penalties*

The recent graduate's employment arrangement with the Vermont restaurant creates a potentially significant liability for the restaurant. The recent graduate can easily file a complaint with either the Federal Department of Labor or the Vermont Department of Labor. Such a complaint would trigger an investigation that would be less than pleasant. Investigators must be allowed to enter a place of business in order to inspect all relevant records and question employees (expect all required postings to be checked at this time as well).

Penalties for overtime pay violations can include the payment of double the wages owed but not paid, payment of all expenses of enforcement, civil fines in the thousands of dollars, and even criminal fines and jail time.

*Prevention is the Best Medicine*

Though the Vermont restaurant cannot change the past, it can implement procedures in order to avoid overtime issues in the future. The first step is to learn about the FLSA and Vermont overtime laws ([www.dol.gov](http://www.dol.gov) (FLSA) and [www.labor.vermont.gov](http://www.labor.vermont.gov) (Vermont) are good places to start). Second, all employment positions at the restaurant should have written, detailed job descriptions that accurately set forth job requirements and functions. Assuming they are accurate, job descriptions will help the restaurant figure out at the start of an employment relationship whether an exemption to overtime laws applies.

Assuming no exception applies to the recent graduate, the restaurant should immediately pay the recent graduate for any past wage deficiencies and commence paying the required wages (including overtime) going forward. Doing this will hopefully give the recent graduate a happy ending, and the Vermont restaurant a less unhappy ending.

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