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BOLI Uponds Oregon's Overtime Rules For Manufacturers

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A pending class action against a local bakery coupled with BOLI's (the Oregon Bureau of Labor and Industry) recent and sudden reinterpretation of Oregon's overtime rules has created massive confusion for Oregon manufacturers about when and how to pay overtime.

Which Overtime Rules Are We Talking About?

The current confusion results from two overtime rules that overlap in the manufacturing setting – the “daily overtime rule” and the “weekly overtime rule.” Each rule requires payment of overtime for certain hours worked at a rate of 1.5

times the employee's regular hourly wage, and each rule has defined exemptions that are mutually exclusive – meaning one rule's exemptions do not apply to the other rule.

The Daily Overtime Rule

Oregon Revised Statute (ORS) 652.020 requires that employees working in a mill, factory or “manufacturing establishment” must be paid overtime for any time worked over 10 hours in a 24-hour period. This daily overtime rule applies to many Oregon businesses that one might not normally think of, such as breweries, bakeries and distilleries. That is because the term “manufacturing establishment” is broadly defined as “any place where machinery is used for * * * the process of making goods or any material produced by machinery; anything made from raw materials by machinery; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, by the use of machinery.” Or. Admin. Rule 839-001-100(11)(a).

ORS 652.020 exempts the following categories of employees, and no others, from the daily overtime requirement:

- Watchmen/women,
- Boiler operators,
- Employees who as one of their regular duties are engaged in the transportation of other employees to and from work,
- Employees whose primary duty is that of making necessary repairs. This includes employees conducting maintenance on buildings, equipment or machinery,
- Employees whose primary duty is that of supervising and directing work. This includes supervisors, managers, foremen/women and persons who are temporarily acting in these capacities in the absence of supervisory employees,
- Employees whose primary duty is the loading and removal of finished forest products, and
- Employees engaged in emergency work.

ORS 652.020 was passed in 1913, and for decades was the only law in Oregon requiring payment of overtime.

The Weekly Overtime Rule

50 years later, ORS 653.261 was passed. This law, in pertinent part, gave BOLI the authority to adopt rules regarding the “maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of the employees when computed without benefit of commissions, overrides, spiffs and similar benefits.”

Exercising its authority, BOLI enacted Or. Admin. Rule 839-020-0030, which requires employers to pay overtime to employees for time worked over 40 hours during the 7-day workweek set by the employer. Similarly, through administrative rule, BOLI created several categories of employees who are exempt from this weekly overtime rule. Those exemptions are too numerous to list here, and are not pertinent to this article. What is important is that neither BOLI nor the legislature created an exemption to the weekly overtime rule for those employees who are also covered by the daily overtime rule for manufacturing establishments. Likewise, there is no exemption to the daily overtime rule for those employees who are also covered by the weekly overtime rule. It is thus no clear in the laws whether non-exempt employees of mills, factories and “manufacturing establishments” must be paid both daily and weekly overtime. Therein lies the conflict at the heart of this mess.



Historically, BOLI reconciled the daily and weekly overtime rules by advising employers subject to both rules to pay the higher of either the daily overtime rate or the weekly overtime rate, but not both. In practice, this meant that the employer would compare how much the employee would be paid under just the daily overtime rule (meaning getting overtime only for time worked over 10 hours in a single 24-hour period) with how much the employee would be paid under just the weekly overtime rule (meaning getting overtime only for time worked over 40 hours in a week), and then pay the greater amount.

For years, this was the interpretation that BOLI posted on its website and published in its printed resources for employers. Employers reasonably relied on BOLI's interpretation. However, BOLI never passed an administrative rule codifying its interpretation. Thus, it never had the force of law. It was simply a customary practice that everyone accepted, but that has now changed.

A Class-Action Is Filed and BOLI Suddenly Changes Its Interpretation

In August 2016, a class action was filed against a local bakery alleging that the proper way to apply the daily and weekly overtime rules is to apply the daily overtime rule until the employee reaches 40 hours in a given week, at which point the weekly overtime rule takes over and the employee gets paid overtime for all time worked over 40 hours. After the 40-hour threshold is reached, the daily overtime rule would no longer apply for that workweek. The bakery argues that BOLI's past interpretation is correct. The court has yet to rule on which party's interpretation is correct.

Rather than wait to see how the court decides the issue, BOLI made the situation worse in December of last year by suddenly and without warning changing its long-standing interpretation of the two overtime rules, claiming that its prior interpretation was wrong and a mistake. BOLI's new interpretation goes beyond even what the plaintiffs in the class action argue. Under BOLI's new interpretation, non-exempt employees of mills, factories and manufacturing establishments must be paid overtime when they work more than 10-hours in a 24-hour period, *and* when they work more than 40 hours in a workweek. This means that an employee would get paid overtime twice for time that qualifies under both the daily overtime rule and the weekly overtime rule.

Where That Leaves Us?

Where we're at now is an uncertain situation where nobody knows which interpretation of the law is correct. BOLI's interpretation is just that, an interpretation. It certainly isn't "the law" because it is not an administrative rule or statute. However, it does carry teeth because it is the interpretation that BOLI will be using to determine compliance during an audit of payroll practices or when an

employee files a claim with BOLI for unpaid overtime. Employers wishing to fight that interpretation will face an expensive battle with the agency that would ultimately need to be resolved in court, similar to the pending class action. A decision in the class action will not necessarily resolve the situation because that ruling is binding only on the parties to the lawsuit, and will most certainly be appealed. Clarity can only come from the legislature or a decision from Oregon's appellate courts, and neither looks to be acting on the issue any time soon.

The current situation has created a ticking time bomb for every manufacturer in Oregon, leaving them fearing if and when a current or former employee is going to bring a class action against them for unpaid overtime. Relying on BOLI's past interpretation of the law (if it turns out to have been wrong) is not a defense to a lawsuit, and the risks can be significant. In Oregon, employees can bring a lawsuit for unpaid overtime going back two years from the date the lawsuit was filed. That may not add up to much for a single employee, but it can add up quickly in a class action covering all overtime-eligible employees during that time period. This risk is compounded by the fact that the employer may also have to pay penalties and the other side's attorney fees if it loses.

Because of these significant risks, Oregon manufacturers need to be considering two very important issues. The first is what to do about calculating overtime going forward? Will you continue on as you have or follow BOLI's new interpretation? The second is what to do about past overtime. If you choose to change your overtime pay practices going forward, should you also go back and correct past pay periods?

Unfortunately, there are no easy answers to these questions. The safest course of action would be to change your practices and follow BOLI's current interpretation of the overtime rules to calculate overtime, and also go back two years to correct past pay periods. The riskiest course of action would be to continue on as if nothing has changed until the law is clarified by the legislature or appellate courts, and be prepared to defend against a claim if one is filed in the interim. Both of these approaches has risks and benefits that should be discussed with an attorney specializing in employment law before you make a decision.

Cosgrave Hosts Oregon Entrepreneurs Network Startup Seminar

On March 15th we will host an educational workshop for individuals who are considering launching a business. The workshop will be led by [Nate Funk](#) and [Max Forer](#) of our Business Practice Group and [Shane Swilley](#) from the Employment Law Group. Every startup faces legal questions and it's always best to have the right structure and protections in place from the outset. To learn more go to: [OEN Seminar: Answers to Your Legal Questions](#).

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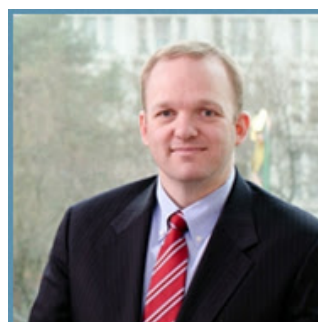
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