

LABOR AND EMPLOYMENT

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COVID-19 and Employee Furloughs: Overall Guidance from U.S. Department of Labor

By Michael J. Wietrzychowski

Many employers face difficult decisions about employee furloughs related to actions needed to mitigate COVID-19. Businesses have questions about the rules governing employee furloughs, reduced hours and reduced pay, on-call telecommuting, and related subjects.

In September 2019, the U.S. Department of Labor issued Fact Sheet #70 governing furloughs. These rules provide a good place to start when deciding furlough process and procedure, of course acknowledging that the COVID-19 situation is subject to rapid change given the current legal environment, and may be subject to additional federal laws, and more stringent state and/or local laws.

This Alert summarizes some of the key provisions of *Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues*. When making furlough plans, especially in the unpredictable environment of COVID-19, consult with counsel and seek additional up-to-date information, including the following resources:

- U.S. DOL Fact Sheet #70 - <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs>
- U.S. DOL Coronavirus Resources - <https://www.dol.gov/coronavirus>
- Various federal, state, and local initiatives being taken almost daily to assist employers and workers with the challenges presented by COVID-19

Key Provisions of Fact Sheet #70

Q. If an employer is having trouble meeting payroll, do they need to pay non-exempt employees on the regular payday?

A. In general, an employer must pay Fair Labor Standards Act (“FLSA”)-covered employees the full minimum wage and any statutory overtime due on the regularly scheduled pay day for the workweek in question. Failure to do so constitutes a violation of the FLSA. When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

Q. Is it legal for an employer to reduce the wages or number of hours of an hourly employee?

A. The FLSA requires that all covered non-exempt employees receive at least the applicable Federal minimum wage for all hours worked. In a week in which employees work overtime, they must receive their regular rate of pay and overtime pay at a rate not less than one and one-half times the regular rate of pay for all overtime hours. The Act does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.

Q. Does an employer need to pay an hourly employee for a full day of work if he or she was

scheduled for a full day but only worked a partial day due to lack of work?

A. The FLSA does not require employers to pay non-exempt employees for hours they did not work.

Q. In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business?

A. Reductions in the predetermined salary of an employee who is exempt will ordinarily cause a loss of the exemption. Such an employee must then be paid at least the federal minimum wage and overtime pay required by the FLSA, as discussed above. In some circumstances, however, a prospective reduction in salary may not cause a loss of the exemption (see below). Although an employer must pay an exempt employee the full predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Furthermore, deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not permissible if the employee works less than a full day. Except for certain limited exceptions, salary deductions result in loss of the employee's exempt status. Physicians, lawyers, outside salespersons, or teachers in bona fide educational institutions are not subject to any salary requirements. Deductions from the salary or pay of such employees will not result in loss of the exemption.

Q. Can an employer make prospective reduction in pay for a salaried exempt employee due to the economic downturn?

A. An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to an exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis

requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least \$684.00 per week (states/local entities may have a higher salary requirement). On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

Q. Can an employer reduce the leave of a salaried exempt employee?

A. An employer can substitute or reduce an exempt employee's accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis payment, provided that the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed even if the employee has no leave remaining. However, as with all FLSA rules, employers should check their state and/or local laws as well.

Q. Can a salaried exempt employee volunteer to take time off of work due to lack of work?

A. If the employer seeks volunteers to take time off due to insufficient work, and the exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee's decision must be completely voluntary.

Q. Can an employee still be on-call or performing work at home during a furlough day?

A. Whether on-call time is hours worked under the FLSA depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait." An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is allowed to leave a message where he/she can be reached is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated. Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties.

The laws and rules governing the workplace are changing by the day in response to COVID-19. We will strive to keep you up-to-date with significant developments.

This Alert was based on information available at the time of publishing. It is subject to change. You should consult government websites and publications for the most up-to-date information. ◆

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For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the firm, please contact:

*Michael J. Wietrzykowski
Co-Chair, Labor and Employment Practices Group
856-482-5723
mwietrzykowski@schnader.com*

*Jo Bennett
Co-Chair, Labor and Employment Practices Group
215-751-2134
jrbennett@schnader.com*

www.schnader.com

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