

Publications

Managing Wage-Hour Issues in the Age of the Coronavirus Pandemic

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Employers face myriad issues as COVID-19 continues to spread and impact communities and workplaces, including questions about disability and accommodation, workplace safety and health, and leaves of absence (addressed in our prior alerts [located here](#)). The U.S. Department of Labor (DOL) recently issued guidance on wage-hour concerns under the Fair Labor Standards Act (FLSA) in light of COVID-19. That guidance is available [here](#). Key considerations raised in that guidance are discussed below.

Paying Non-Exempt Employees

Under the FLSA, non-exempt employees must be paid at least the minimum wage for all hours worked and are paid only for the hours they actually do work. Employers can reduce non-exempt employees' schedules and do not have to pay them for hours they would have otherwise worked. Some states however (such as California and New York), have minimum shift requirements, meaning that an employer sending an employee home for lack of work after his or her shift has begun may have to pay a minimum amount for that shift.

Non-exempt employees also must be paid overtime compensation at time-and-a-half for all hours worked over 40 in a workweek. Some states have different daily and/or weekly overtime requirements. And if an employer extends non-exempt employees' shifts to meet increased demands (e.g., they need to fill in for sick co-workers), some states may require additional pay. For example, New York has a "spread of hours" pay requirement, while California, Oregon, and several cities have enacted "predictive scheduling" laws that dictate how and when an employer can change an employee's schedule.

Paying Exempt Employees

Unlike non-exempt employees, exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. An employee will not be considered paid "on a salary basis" if deductions from his or her

predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work. Exempt employees are not required to be paid their salary in weeks in which they perform no work.

Further, the FLSA does not require employer-provided vacation time. So where an employer offers a bona fide benefits plan or vacation time to its employees, an employer may require that such accrued leave or vacation time be taken on a specific day(s). This will not affect the exempt employee's salary basis so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

An employer also may direct exempt employees to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. However, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

Teleworking

The FLSA does not prevent employers from implementing telework or other flexible work arrangements allowing employees to work from home, and an employer may encourage or require employees to telework as an infection-control or prevention strategy. Telework also may be a reasonable accommodation under the Americans with Disabilities Act or comparable state laws. Employers are required to maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements; and to pay no less than the minimum wage for all hours worked and to pay at least one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek to non-exempt employees. Additionally, exempt employees still must perform primarily exempt duties when teleworking. This is especially important in states like California that take a quantitative approach to determining exempt status and require that at least 51% of an employee's time be spent on exempt duties. Employers considering implementing telework should ensure that employees accurately record their actual hours worked (including any breaks required by state law).

Reimbursement of Expenses for Employees Working from Home

The FLSA prohibits employers from requiring employees to incur business expenses on the employer's behalf if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Non-exempt employees must receive the required minimum wage and overtime pay "free and clear." This means that when a covered employee is required to provide the tools and equipment (e.g., computer, internet connection, facsimile machine, etc.) needed for telework, the cost of providing the tools and equipment may not reduce the employee's pay below that required by the FLSA. Additionally, some states (for example, California and Illinois) also require that employee-incurred business expenses be reimbursed. Further, employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.

Volunteers

Under the FLSA, non-exempt employees working for a private, for-profit employer must be paid at least the minimum wage and cannot volunteer their services to the employer. Individuals who volunteer in an emergency relief capacity to public agencies or private not-for-profit organizations for civic, religious or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.

Conclusion

In addition to complying with the FLSA, employers must ensure that their wage-hour decisions comply with state and local law as well. Contact your Vorys lawyer if you have questions about implementing telework policies or otherwise navigating your federal, state, and local wage-hour obligations during the COVID-19 pandemic.

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Vorys COVID-19 Task Force:

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive during this extremely fluid environment. The business and legal challenges our clients are facing are changing each day.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).