



Webinar

Reopening Workplaces During COVID-19: Wage and Hour Considerations

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Introduction

- States across the country have begun the process of permitting businesses to reopen and allowing employees to return to work.
- As employees transition back from remote work to the office, or from furlough to active work, employers should remain mindful of the wage and hour implications of such transitions and the steps they can take to minimize risk and to manage payroll costs.

Confirming Basis of Pay, Rate of Pay, and Working Hours

- Many employers have implemented changes to their pay and scheduling practices during the last few months.
- As offices and other business facilities reopen, employers should confirm the basis and rate of pay, as well as working hours expectations, for returning staff.
- If an employer is making any changes to the basis or rate of pay, advance written notice will be required under many states' laws (and is otherwise a best practice).
 - *E.g.*, N.Y. Lab. L. § 195, Calif. Labor Code § 2810.5
- Notices should include the effective date of any changes.

Changing Pay

- For cost and other considerations, employers may decide to reduce the pay of certain employees going forward, or otherwise to manage their payroll costs more stringently than in the past.
- There are several ways to accomplish this.
- The strategies are different for exempt and non-exempt (*i.e.*, overtime-eligible) employees.

Changing Pay: Exempt Employees

- Most exempt employees must receive a fixed salary of a minimum amount set by federal or state law, but nothing prohibits an employer from implementing going-forward salary reductions for at-will employees (*i.e.*, those without an individual or collectively-bargained contract guaranteeing a certain pay rate).
- So long as an exempt employee receives the minimum salary required by federal or state law (\$684 per week, and higher in certain states including New York and California), going-forward salary reductions are permissible in the absence of an agreement prohibiting them.
 - Employers who reduced salaries for exempt employees, and wish to increase salaries again should give thought to whether a going-forward increase will be sustainable. Employers should avoid repeat changes in pay that could reflect short-term, rather than long-term, business needs and give rise to claims of impermissible deductions.
- Employers should make clear that an exempt employee's salary is intended to compensate him or her for all hours worked each workweek.

Changing Pay: Non-Exempt Employees

- Non-exempt (e.g., overtime-eligible) employees can be paid on any basis—by the hour, through a salary, by the day, etc.)—so long as they receive the minimum wage for all hours worked and overtime pay in accordance with federal and state law.
 - See 29 C.F.R. § 778.109 (“The [FLSA] does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis[.]”)
- Employers can reduce or more effectively manage their overtime pay costs in a number of ways.

Strategies for Reducing/Managing Overtime Costs

- Prohibiting overtime work
- Requiring management pre-approval for overtime work
- In states that permit the practice, by paying a salary intended to compensate for all hours worked each week, whether few or many (the “fluctuating workweek” method of pay), resulting in a “halftime” instead of a “time and a half” premium for any overtime hours
- In states that permit the practice, by paying a salary intended to compensate for a fixed number of weekly hours over 40, resulting in a “halftime” instead of a “time and a half” premium for overtime hours up to the “cap” the salary is intended to compensate
- Reducing base pay, which results in a corresponding reduction in the overtime rate
- Reducing working hours’ expectations
- Prohibiting or limiting remote and “after-hours” work

Reviewing Classification

- Employers should be mindful that certain changes to a returning employee's duties may require reclassification from exempt to overtime-eligible.
- For example, an employee whose primary duties historically justified exemption as an exempt "executive" employee may not, for some period of time, customarily and regularly direct the work of two or more other full-time employees.
- As another example, an employee who historically satisfied the duties test for an "outside sales" employee may not, for some period of time because of continued social distancing protocols, be customarily and regularly engaged away from the employer's place or places of business.
- Similarly, if sales decrease, a commission-based employee may earn less than 50% of their compensation from commissions during a representative period, which is required to maintain the retail sales or service exemption.

Reviewing Classification

- For any period of time in which an employee's duties will not support exemption, the employer should ensure that it is tracking hours worked, providing overtime pay, and complying with any state requirements regarding notice of changes in classification and pay.
- Even in the absence of a material change in duties, the implementation of pay and schedule changes in connection with the reopening of offices and facilities may provide an opportunity to review potential historical misclassification of employees and to remediate such misclassification on a going-forward basis.
- For example, an employer may decide to reclassify a returning exempt employee to overtime-eligible where that employee's duties have, over time, made an exempt classification less defensible.

Changing Schedules

- Employers can implement changes to employees' working hours, either in connection with a change in classification and/or pay or not.
- Such changes should be confirmed in writing to the employee, and employers should be mindful of any advance notice requirements under state or local “predictive scheduling” laws.

Changing Schedules: Exempt Employees

- Employers should be mindful that a reduction in an exempt employee's schedule (e.g., from full-time to part-time) does not impact the salary basis and salary minimum requirements.
- Under federal law and the law of many states, there is no concept of proration of the minimum salary for exemption—an employee whose hours are reduced must continue to receive the minimum salary for exemption in each week in which he or she performs any work regardless of the number of days or hours worked, failing which the employee will be eligible for overtime pay.

Changing Schedules: Exempt Employees

- If an employee who historically was classified as exempt will not—going forward or for some period of time—work a full schedule, it may make business sense to reclassify the employee to overtime-eligible as a cost-savings measure.
- While the employer would be required to track the employee's working hours (and to pay a premium for any overtime work), the employer can lighten the administrative burden—on both itself and the newly-reclassified employee—by utilizing an exception time reporting system that prepopulates the employee's fixed schedule and only requires reporting of hours in the event of deviations to that schedule, including in the event of overtime work.
 - USDOL WHD Fact Sheet #21

Avoiding Discrimination Claims

- Any changes to pay or schedule should be based on defensible business/operational/financial reasons and, to the extent possible, based on objective criteria (*e.g.*, by department, by role, for documented performance reasons, etc.).
- Employers should memorialize these decisions and reasons in writing, and Human Resources and Legal departments should review them to spot any potential exposure to claims.

Continuing Remote Work

- Employers that will continue to require or permit “work from home” or other remote work should remain mindful of their obligations with respect to overtime-eligible employees, particularly with respect to tracking and paying for all working hours and, in states that require it, reimbursement of home office-related expenses.

Reiterating Pay Policies and Practices

- Employers should consider reminding employees returning from furlough (or otherwise returning to the workplace) of their wage and hour policies, including with respect to overtime work and timekeeping.
- If these policies have not been review or updated recently, this is the ideal time to do so.

Paying for All Hours “Worked”

- With respect to overtime-eligible employees, employers should remain mindful of “non-productive” time that is compensable and therefore must be tracked.
- This may include, depending on the location of the work, time spent:
 - waiting to go through security checks
 - in temperature checks or other health-related testing required for entry into the workplace
 - in mid-day travel to the office after a partial day working from home
 - in training or re-training activities
 - in meetings relating to health and safety protocols
 - in completing administrative paperwork
 - “on call” or otherwise waiting to be engaged or assigned work
- As employers finalize their return-to-work protocols, they should consider the compensability of the time spent in these and other non-productive activities that may be part of the “new normal.”

Properly Calculating the Regular Rate

- Employers that provide overtime-eligible employees with return-to-work pay incentives, shift differentials, hazard pay, or other pay premiums must consider their impact on the regular rate for purposes of calculating overtime pay.
- The same is true for any “make whole” or “true up” payment to overtime-eligible employees. Think carefully about this with respect to employees who may have worked overtime during the period the payment is intended to cover.
- While a limited number of premium payments can be excluded from the regular rate, most will have to be included in the regular rate calculation.
 - See 29 U.S.C. § 207(e) (requiring inclusion in the regular rate of “all remuneration for employment paid to, or on behalf of, the employee,” excluding the eight specific categories of remuneration in §§ 207(e)(1)-(8)).
 - See 29 C.F.R. § 778.207(b) (“The [FLSA] requires the inclusion in the regular rate of such extra premiums as [shift] differentials ... and premiums paid for hazardous, arduous or dirty work.”).

Ensuring Pay Deductions Are Consistent With Law

- Employees' share of premiums for health, welfare, and other plan benefits are ordinarily collected through payroll deductions.
- Some employers that have continued to provide health, welfare, and other plan benefits to furloughed employees have suspended the practice of collecting the employees' share of premiums for those benefits for the duration of the furlough period.
- Many of those employers have entered into agreements with employees to recover those premiums from covered employees once they return to work, through additional/special payroll deductions.
- Employers in states that require payroll deduction authorizations should ensure that these special/additional deductions have been authorized.

Ensuring Pay Deductions Are Consistent With Law

- For the avoidance of doubt, employers should consider having these employees sign a written authorization:
 - permitting the company to make deductions from their pay upon their return from furlough in respect of individual benefit plan contributions that the employees otherwise would have been responsible for during the furlough period;
 - acknowledging and agreeing that those deductions will be in addition to any other deductions the employees have previously authorized, including for plan contributions for periods after the furlough ends;
 - identifying the specific benefit plans for which deductions will be made; and
 - describing the schedule on which the deductions will be made.

Requiring Use of PTO for Employees Who Refuse to Return to the Workplace

- As stay-at-home orders lift and worksites reopen, employers may encounter employees who are either uncomfortable reporting to the office, or refuse to do so.
- This is a multi-faceted challenge that potentially implicates several different legal and practical considerations, and the response will depend on the facts and circumstances of the employee's refusal to return to work.
- As a general matter and assuming it is an option the employer wishes to consider, an employer can require employees to use PTO to remain out of work.
 - Even in jurisdictions where vacation time is treated as non-forfeitable wages, employers can place parameters around how and when employees use that time.

Requiring Use of PTO for Employees Who Refuse to Return to the Workplace

- If an employer is going to require employees to use accrued PTO, the employer should make sure it is not PTO provided to employees to comply with a state or local paid sick leave law.
- Other non wage-and-hour considerations for employees who refuse to return to the office:
 - Is the employee potentially engaging in protected activity under the NLRA or OSHA?
 - Does the employee have an underlying disability that requires the employer to consider a reasonable accommodation?
 - Does the employee qualify for another type of leave, such as under the FFCRA?
 - Are you approaching the issue consistently with all employees?

Managing Wage and Hour Claims

- As employers reopen their workplaces and access to the courts and government agencies becomes less restricted, we are likely to see a spike in wage and hour lawsuits, administrative complaints, and threatened claims by current and former employees.
- Expect claims for:
 - “off the clock” work at home;
 - misclassification (resulting from a change in duties) and overtime pay;
 - regular rate miscalculation;
 - notice and recordkeeping violations; and
 - breach of pay-related provisions in contracts.

Managing Wage and Hour Claims

- While the unprecedented circumstances of the last few months may “excuse” certain violations from a practical or employee relations perspective, they are not likely to provide a legal defense to most wage and hour claims.
- Employees who lose their jobs, who experience a going-forward reduction in pay and/or hours, or who otherwise feel disenchanted by their employment circumstances may well be inclined to seek legal counsel and to leverage an opportunity to monetize their rights.
- Employers should anticipate these claims and be prepared to defend them.



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