

MARCH 13, 2020 | WAGE & HOUR COMPLIANCE

Employers Face a Myriad of Wage & Hour Issues with COVID-19

There are significant developments happening every day (and virtually every hour) relating to the Coronavirus (COVID-19). While we cannot predict all the effects of this virus, we can say that first and foremost, employers across all industries need to focus on the safety of their employees, customers, and guests. Thus, whether your employees are working at your company's office or from home, employers must monitor guidance from federal, state, and local public health experts and implement recommendations or orders designed to maintain a safe work environment. To that end, please see our [blog post](#) from last week providing advice and FAQ's regarding how employers can respond to COVID-19. 

In addition to so many other issues, COVID-19 poses unique wage and hour and human resource challenges. Indeed, Since our last post, we have received dozens of wage and hour related questions from clients resulting from this virus. Although no employer could have full been prepared for the scope of this pandemic, it is important to be aware of both federal and state laws that apply to situations such as this. The best protection is to have a policies and procedures in place in advance (or if that ship has already sailed, to quickly create some policies and procedures) to ensure your employees are paid and well taken care of during this unprecedented time. Our guidance can be used by employers in navigating through the legal and business implications created by this pandemic. In addition, the information may be applicable to other future crises or disasters.

Therefore, please find below answers to the most frequently asked questions we have received:

Frequently Asked Questions

If an employer decides to fully close the work site and stop its employees from working, is that employer required to pay affected employees?

The Fair Labor Standards Act requires employers to pay their **non-exempt** employees only for hours that the employees have actually worked. Therefore, an employer is not required to pay nonexempt employees if it is unable to provide work to those employees due to COVID-19.

An exception to this general rule exists when there are employees who receive fixed salaries for fluctuating workweeks. These are nonexempt employees who have agreed to work a specified number of hours for a specified salary. An employer must pay these employees their full weekly salary for any week in which any work

was performed.

For **exempt** employees, an employer will be required to pay the employee's full salary if the work site is closed or unable to reopen for *less than* a full workweek. However, an employer may require exempt employees to use available leave for this time. An employer does not, however, need to pay an exempt employee for weeks in which no work was performed.

Is it lawful to dock the salaries of exempt employees who do not return to work when needed?

Under this circumstance, an employer may place an exempt employee on leave without pay (or require the employee to use accrued vacation time) for the full day that he or she fails to report to work.

If an employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made from a salary for such absences. However, a deduction from salary for less than a full-day's absence is not permitted.

We recommend caution, however, in docking salaried employees' pay and suggest that you first consult with legal counsel. Moreover, many employers instead require employees to "make up" lost time after they return to work, which is permissible for exempt employees. This practice is not allowed for nonexempt employees, who must be paid overtime for all hours worked over 40 in a workweek.

Is it lawful to require employees to exhaust their vacation leave due to missed time at work?

Federal wage and hour laws do not regulate the use of vacation leave. Thus, employers are free to determine whether and to what extent they can require (or allow) employees to use vacation leave as a result of missed time at work. However, employers may have pre-existing policies on this issue, including in the employee handbook. Thus, employers should make sure to follow their leave policies, as a failure to do so could be found to be a breach of contract. That being said, an employer should have the authority to modify its vacation procedures and usage as long it provides its employees with notice of such modifications. Further, an employer would be well within its rights to deny any vacation or paid time off requests during this unique situation so long as it does not do so in contravention of its own policy.

If an employee is put on quarantine for two weeks or someone puts themselves on self-quarantine, is an employer required to pay them for those two weeks?

If an employee is quarantined and does not work during the time of quarantine, then an employer is not required to pay that employee. If the employee is an exempt employee and works any time during a work week, then the employer must pay the employee his or her full salary for that work week. If the employee is non-exempt, and is put into quarantine because of his or her own medical condition, then that could qualify as protected sick leave under certain state laws (such as DC law) as well as a covered medical condition under the FMLA, and then that person may be able to use their accrued but unused sick leave.

Can an employer reduce employees to a 4-day work week and reduce their salaries accordingly?

Employers only need to pay non-exempt employees for time worked. The analysis for exempt employees is

slightly more complicated when dealing with these reduced hours and/or furlough issues. Exempt employees must be paid a fixed salary each week regardless of the number of days or hours that they work which, under the new overtime law, is at least \$684 per week. An employer cannot simply proportionately lower an exempt employee's salary based on days worked just because they are working 4 days instead of 5 because under the FLSA, as long as the exempt employee works some portion of the week, they must be paid their full fixed salary. However, if an employer does decide to reduce an exempt employee's weekly salary because of business demands, then that employee should be informed in writing (and for some states like DC there also must be a change in the DC New Hire Form to reflect the lower salary.)

What other wage and hour pitfalls should employers be aware of as a result of COVID-19?

On-call time: An employee who is required to remain "on call" at the employer's premises or close by may be working while "on call," and the employer may be required to pay that employee for his "on call" time. For example, maintenance workers who remain on the premises deal with emergency repairs must be compensated — even if they perform no work — if they are not free to leave at any time.

Waiting time: If an employee is required to wait, that time is compensable. For example, if employees are required to be at work to wait for some sort of official announcement or directive, that is considered time worked.

Volunteer time: Employees of private not-for-profit organizations are not volunteers if they perform the same services that they are regularly employed to perform. They must be compensated for those services. Employers should generally be cautious about having employees "volunteer" to assist the employer during an emergency if those duties benefit the company and are regularly performed by employees.

Should we allow, or require, employees to work from home?

It certainly may be a good idea to at least allow, if not require, certain employees to work from home if it is possible for their jobs to be performed remotely. Hopefully, your company already has a telecommuting policy that addresses issues such as security and privacy protocols, dedicated office spaces, instructions regarding work-related equipment, working hours, expenses, workers' compensation, and possibly even child care. If your company does not have such a policy, it would be prudent to draft one quickly prior to simply allowing employees to telecommute with no set rules in place. It is important to remember though, that regardless of where an employee is located, he or she must be paid for all hours worked, even if the work was not authorized.

Can employees affected by COVID-19 seek protected leave under the Family and Medical Leave Act (FMLA)?

Yes, employees affected by COVID-19 certainly are entitled to leave under the FMLA for a serious health condition. Additionally, employees affected by this pandemic who must care for a child, spouse or parent with this serious health condition may also be entitled to leave under the FMLA.

If a work site or business makes the decision that it will not reopen, what notice must be provided to affected employees?

The Worker Adjustment and Retraining Notification (WARN) Act, a federal law, imposes notice requirements on employers with 100 or more employees for certain plant closings and/or mass layoffs. However, an exception exists where the closing or layoff is a direct result of unforeseeable business circumstances, which in all likelihood would be the case here.

Nonetheless, the employer is required to give as much notice as is practicable. If an employer gives less than 60 days' notice, the employer must prove that the conditions for the exception have been met. If such a decision is contemplated, it is advisable to consult with legal counsel about the possible notice requirements to ensure compliance with the WARN Act. Also, note that many states have a "mini-Warn" statutes that provide more stringent requirements than the federal WARN Act.

Our HR department has been disrupted, and it may be weeks before things are back to normal. Will the government extend any of the customary deadlines governing employer payment for benefits, pension contributions and other subjects during this recovery effort?

This is an extremely unique and unprecedented situation. That being said, we can look to other similar types of destructive events for guidance. During natural disasters, such as Hurricane Sandy and Katrina, many governmental agencies and entities extended the deadlines for certain reports and paperwork. Therefore, it is expected that with COVID-19 the government will provide some deadline extensions, but, as with every disaster, the government's response will vary.

Regardless of what extensions may be granted, employers should be fully aware of state laws and implement any policies or plans necessary to minimally interrupt the payment of wages to their employees.

Employees from other states want to donate leave to affected employees. Is this lawful?

Yes. Employers can allow employees to donate leave to a leave bank and then award the donated leave to the affected employees.

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At the end of the day, it is clear that COVID-19 is posing an unprecedented number of HR challenges for employers. While many employers are working around the clock (such as hospitals), other employers find themselves unable to function. Remember to be sensitive to the needs of your employees who have experienced extensive property damage or personal devastation. While the economic effects of this virus will have long-term consequences on businesses, it is important to keep in mind that human life and safety trumps all other business necessities.

We will continue to provide you with updates regarding this unprecedented situation.