

DOL answers wage and hour questions related to economic downturn

WHD website, Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues, July 2009

The Department of Labor's (DOL) Wage and Hour Division (WHD) has published a list of frequently-asked questions (FAQs) by employers who are currently experiencing difficult times due to the economic downturn. There are 11 Q&As in total. Here are some of the highlights:

Question 1: If an employer is having trouble meeting payroll, does it need to pay non-exempt (hourly) employees on its regular payday?

WHD answer: In general, an employer must pay covered non-exempt 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 Fair Labor Standards Act (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.

Question 2: Is it legal for an employer to reduce the wages or number of hours of an hourly employee?

WHD answer: The FLSA 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.

Question 3: 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?

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

Question 5: Can an employer reduce the leave of a salaried exempt employee?

WHD answer: 29 CFR 541.600 requires payment of at least \$455 per week on a "salary" basis for those employed as exempt executive, administrative, or professional employees (see Payroll Guide ¶ 18,098). 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.

Question 6: Can a salaried exempt employee volunteer to take time off of work due to lack of work?

WHD answer: 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.

Question 7: Can an employer make prospective reductions in pay for a salaried exempt employee due to the economic downturn?

WHD answer: 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 from minimum wage and overtime

pay, as long as the employee still receives on a salary basis at least \$455 per week. 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.

Question 8: Can an employee still be on-call or perform work at home during a furlough day?

WHD answer: 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.

Other questions. There are two Q&As that specifically address issues faced by government employers.

Penalties. The DOL may bring suit against employers who fail to pay wages on time. Employers will be liable for the back wages plus liquidated damages and/or interest. The DOL may file an injunction against an employer for failure to pay the wages when due. Civil money penalties may be assessed against employers for repeat and/or willful violations of the FLSA's minimum wage or overtime requirements. Employers willfully violating the law may also face criminal penalties, including fines and imprisonment. An employee may file suit to recover back wages, an equal amount in liquidated damages, and attorney's fees and court costs.