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DOL updates guidance on COVID-19 and the Fair Labor Standards Act

Updated guidance from the DOL's Wage and Hour Division addresses ongoing wage and hour challenges that employers are facing as they continue or resume operations during the pandemic. Six new Q&As touch on telework, hazard pay, and exempt status issues they may encounter under the FLSA.

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Background

Since March, the DOL's Wage & Hour Division (WHD) has issued ongoing COVID-19 related guidance in the form of questions and answers (Q&As) that address critical questions employers are grappling with under the Families First Coronavirus Response Act (FFCRA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA). On July 20, the WHD updated its prior guidance under each of those statutes, adding new Q&As addressing return-to-work, leave, and pay and hours worked issues. (See, for example, our [July 28, 2020 FYI](#) on FFCRA return-to-work guidance.)

New Q&As

On July 20, the WHD updated its COVID-19 [guidance](#) under the FLSA adding six new Q&As addressing key wage and hour compliance concerns. Two of them focus on telework, one on hazard pay, and three on maintaining exempt status during the pandemic.

Telework

Q&A 14 explores how to properly compensate employees who are allowed to telework during the current health crisis. The WHD reiterates that employees must be compensated for all hours worked in accordance with the FLSA — regardless of whether the work is performed at their primary worksite or at the employee's home. Thus, all hours of telework actually performed, including both unreported and overtime hours (whether or not authorized), are compensable if the employer knew or had reason to believe the work was performed. However, the FLSA does not require an employer to compensate

employees for unreported hours of telework that it neither knew — nor should have known — were performed. Generally, employers may satisfy their pay obligations by providing reasonable time-reporting procedures and compensating teleworkers for all reported hours.

Q&A 15 confirms that all time between the performance of the employee's first and last principal activities in a workday is generally compensable work time under the FLSA's continuous workday rule. Recognizing the need for flexibility during the pandemic, the WHD relaxed this rule when it promulgated regulations pursuant to the FFCRA and carved out an exception for employees to telework with flexible hours during the COVID-19 emergency. Accordingly, an employer that allows a teleworking employee to take time out of their normal workday for personal or family obligations (such as caring for their children whose schools have closed) does not have to compensate them for all of the hours between starting and finishing work — but rather only for the hours actually worked. For example, an employee on a weekday telework schedule of 7-9 a.m., 11:30 a.m.-3 p.m., and 7-9 p.m. to allow time for child care would be compensated 7.5 hours per day — not the 14 hours that elapsed between signing in at 7 a.m. and out at 9 p.m.

Hazard pay

Q&A 17 addresses whether the FLSA requires hazard pay for employees working during the COVID-19 pandemic. It reminds employers that the FLSA's requirements extend only to federal minimum wage and overtime pay for nonexempt employees. While the FLSA does not mandate hazard pay, private agreements or state or local laws may impose a pay obligation.

Exempt status

Q&A 16 considers whether an executive, administrative, or professional employee exempt from the minimum wage and overtime pay requirements under Section 13(a)(1) of the FLSA may perform nonexempt duties during the COVID-19 public health emergency without losing their exemption. FLSA regulations permit an otherwise exempt employee to perform nonexempt duties during emergencies that “threaten the safety of employees, a cessation of operations or serious damage to the employer's property” and which are beyond the employer's control and could not reasonably be anticipated. According to the WHD, the current public health emergency satisfies those criteria. Thus, employees may temporarily be required to perform nonexempt duties due to COVID-19 without jeopardizing their exempt status, as long as they continue to be paid on a salary basis of least \$684 per week.

Buck comment. Employers should be mindful that the FLSA establishes a floor, but the salary basis may be higher under applicable state law.

Q&A 18 discusses whether taking FFCRA paid sick leave or expanded family and medical leave would jeopardize a bona fide executive, administrative, or professional employee's exempt status. The WHD reaffirmed that taking paid sick leave or expanded family and medical leave will not affect that status or eligibility for any exemption from the FLSA's minimum wage and overtime requirements. For example, the WHD will not construe taking paid sick leave or expanded family and medical leave

on an intermittent basis as running afoul of the FLSA's salary basis requirement for those exemptions.

Q&A 19 analyzes whether a salaried exempt executive, administrative, or professional employee would lose exempt status if their salary was reduced during the COVID-19 pandemic or an economic slowdown. The WHD confirms that an employer may prospectively reduce the exempt employee's regular salary amount in these circumstances — provided that the reduction is a predetermined amount rather than an after-the-fact salary deduction based on the employer's day-to-day or week-to-week needs. Further, any such salary change must not be an attempt to evade the salary basis requirements and must be due to COVID-19 or an economic slowdown — not the quantity or quality of work performed. A salary reduction under these conditions will not jeopardize an employee's exempt status, provided they continue to receive a salary of at least \$684 per week.

Additional information on reductions in pay and hours worked issues is available on the WHD's [Fact Sheet #70](#) "Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues."

In closing

This latest guidance from the DOL addresses ongoing wage and hour challenges under the FLSA. Six new Q&As highlight common telework, hazard pay, and exempt status concerns employers may encounter when continuing or resuming operations during the COVID-19 emergency.

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