

ECONOMIC DOWNTURN POLICIES AND FLSA-EXEMPT STATUS

Earlier this year, the U.S. Department of Labor (DOL) released three Wage and Hour Opinion Letters that address the risk employers face when there is insufficient work or a reduction in hours for “exempt” employees under the Fair Labor Standards Act (FLSA). Employers do not have to pay overtime to employees who are “exempt” from the overtime requirements of the FLSA; however, if employers violate certain provisions of the Act, they run the risk of losing an employee’s exempt status – thereby triggering overtime obligations.

What is the effect of a Wage and Hour Opinion Letter?

Wage and Hour Opinion Letters constitute the DOL’s Wage and Hour Division (WHD) interpretation of the statutes and regulations enforced by the division. They address specific factual situations, triggered by inquiries from employers and, often, their counsel. An Opinion Letter signed by the WHD administrator is an official ruling or interpretation of the division; reliance upon these letters provides a potential good faith reliance defense to alleged FLSA violations. Opinion Letters can be accessed at <http://www.dol.gov/esa/whd/opinion/opinion.htm>

Deductions from leave banks are acceptable when accompanied by guaranteed salary payment

In Opinion Letter [FLSA 2009-2](#), the DOL confirmed that an employer may take deductions from accrued leave accounts without affecting an employee’s exempt status. Specifically, the DOL said that a company policy requiring exempt employees to use accrued vacation time during a plant shutdown of less than one workweek would not jeopardize an employee’s exempt status under FLSA.

The FLSA does not require or mandate any vacation time for employees. Thus, employers may require exempt employees to use accrued vacation time for any absence – including one resulting from a plant shutdown – without affecting their exempt status; however, the employees must receive a payment in an amount equal to their guaranteed salary each week. Importantly, the DOL stressed that an exempt employee who has no accrued vacation, or who has a negative balance, must still receive the employee’s guaranteed salary for any absence occasioned by the employer or the “operating requirements of the business.”

Salary reductions for short-term business needs are unacceptable

In [FLSA 2009-14](#), the DOL confirmed that if short-term business needs require a reduction in hours worked – and, as a result, cause a reduction in salary – deductions from an exempt employee’s fixed salary violate the FLSA and risk the loss of the employee’s exempt status.

The employer proposed occasionally to reduce the hours worked by exempt employees because of short-term business needs. The employer further proposed to offer “voluntary time off” (VTO) that would allow an employee, at his or her option, to use paid annual, personal, or vacation leave but continue to accrue employment benefits. The employer would approve the VTO on a first-come, first-served basis. If there were insufficient VTO volunteers, the employer would thereafter require “mandatory time off” (MTO) under a seniority-based rotational method. Exempt employees who were required to take MTO could use accrued paid leave or take unpaid MTO. If the employee elected not to use accrued paid leave, or did not have sufficient accrued

leave in his or her leave bank to cover the VTO or MTO, *the employer would deduct the amount equal to the VTO or MTO from the employee's salary*, if it was shorter than one workweek. For VTO or MTO lasting an entire week, the employer would not pay the salary at all for that pay period.

The DOL stated that these salary deductions due to MTO lasting less than a workweek did not comply with the FLSA because they resulted from the "operating requirements of the business." The employer is not, however, required to pay the salary for MTO of a full week.

The DOL made a distinction between this type of unacceptable salary reduction and a formal salary reduction that reflects a reduction in the normal scheduled workweek (such as a fixed long-term reduction in salary effective during an extended period when a company operates a shortened workweek due to economic conditions). The DOL concluded that the latter could be a bona fide reduction in salary that would not affect the exemption.

Reductions in salary for occasional, unplanned periods of insufficient work are unacceptable

Similarly, in [FLSA 2009-18](#), the employer at issue proposed a requirement that salaried exempt employees stay home or leave work early during periods of insufficient work, and the non-work time would be deducted from the employees' accrued paid time off (PTO) accounts. The employees would receive their regular salaries so long as they had sufficient hours in their PTO accounts to cover the non-work periods. If the PTO bank was exhausted, the employee's salary would be reduced in full-day increments, but in no case below the mandatory \$455 per week.

Consistent with [FLSA 2009-2](#), the DOL responded that the employer could substitute or reduce an exempt employee's accrued leave for the time the employee is absent from work – even in less than full-day increments and even if directed by the employer because of lack of work – without affecting the salary basis requirement; however, the employee still must receive payment in an amount equal to his or her guaranteed salary in any week in which the employee does work. The employer could not deduct from the employee's salary if he or she had no accrued benefits in the leave bank or if reducing the accrued leave bank would result in a negative balance.

The employer also wanted to know whether, assuming the employee's PTO was exhausted and the periods of insufficient work continued, it could schedule the exempt employees for less than 40 hours in a week and reduce pay accordingly during "occasional unplanned and transitory periods of low patient census." Specifically, the employer wanted to send the exempt employees home and pay them a reduced salary for the week (e.g., the employee would be away from work for one day during the week and receive pay for four days). The DOL held that such deductions for day-to-day or week-to-week determinations of the operating requirements of the business (contrasted with formal permanent decisions to operate a facility for four days each week instead of five, with a corresponding reduction in salary) could risk the loss of the employees' exempt status.

Action item for employers

Employers should review any economic downturn policies that may have the unintended effect of violating the FLSA or any applicable state laws and putting their exempt employees' status at risk.

NORTH CAROLINA IMMIGRATION COMPLIANCE UPDATE

North Carolina does not currently have a state employment verification law as does South Carolina. However, several bills are pending in the legislature that propose various mechanisms for state-level enforcement of federal immigration laws. Of particular note is Senate Bill 32, which on July 7, 2009 passed the North Carolina Senate Commerce Committee and has been referred to the Appropriations Committee.

As currently written, Senate Bill 32 would require all employers, including private sector employers, regardless of size, to participate in the E-Verify program beginning on January 1, 2010. The bill would also authorize state agencies to inspect employers for compliance with immigration laws. Upon a showing that a violation has occurred, state agencies could revoke any business-related licenses of an employer.

We will continue to monitor Senate Bill 32 and other proposed North Carolina immigration compliance legislation and to provide updates on requirements impacting employers in the state.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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