

## Best Practices: Wage and Hour

# Work Furloughs as a Result of Sequestration: How to Pay Exempt Employees

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*These days, our government's financial fixes are short-lived. Even if Congress and the administration come up with a way to avoid sequestration in the next few days, we'll likely face the same risk of running out of money in a few months. And once again, public employers, contractors and others who rely on the government for funding will face the risk of a shutdown.*



*Among the many things employers have to worry about under such circumstances is employee pay. For most hourly workers, the issue is a no-brainer. When employees don't work, there is usually no legal obligation under the Fair Labor Standards Act to pay them. But what about FLSA exempt workers? Must they be paid? Should they be paid? And what can employers do if they have made a mistake in how they paid employees during the time they didn't work? In this piece we answer those questions, and others.*

### Full-week Furloughs or Absences Do Not Require Pay

Most executive, administrative and professional employees, and some computer employees, need to be paid on a "salary basis" in order to be exempt from the minimum wage and overtime rules of the Fair Labor Standards Act. (See *Fair Labor Standards for Private Employers* ¶300 for more on these "white collar exemptions" in the private sector; and see *Fair Labor Standards for Public Employers* ¶200 for more on these exemptions in the public sector.)

U.S. Department of Labor regulations (29 C.F.R. §541.602(a)) provide that employees are paid on a salary basis if they receive each pay period a predetermined amount constituting all or part of their compensation, which is not subject to reduction because of variations in quality or quantity of work performed. This means that exempt employees must receive their full salary for any week in which they perform any work without regard to the number of days or hours worked.

The regulations make clear that: "Exempt employees need not be paid for any workweek in which they perform no work" (29 C.F.R. § 541.602(a)). As such, when a place of work is closed for a full week, whatever the reason, employees need not be paid for that week (Wage-Hour Opinion Letter, April 30, 1975). Thus, employees who are furloughed for an entire week need not be paid at all for that period. (Don't stop reading here; below we offer a cautionary note about what it means to miss work in the age of remote email access, cell phones, the BlackBerry®, etc.)

### Partial-week Furloughs Could Defeat FLSA-exempt Status

If exempt employees' time off is less than a full workweek, furloughs must be handled differently. The regulations (29 C.F.R. §541.602(a)) state:

An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

A furlough imposed by a government contractor or grantee affected by a federal government shutdown is covered by this rule prohibiting deductions "for time when work is not available." Thus, if any employer willfully deducts pay for a partial-week furlough, affected employees would lose their exempt status.

*Solutions When Faced With Furloughs*

This requirement may cause extreme hardship to employers that must pay employees for work that was never performed. One possible solution is to reassign these employees to commercial work, if that is available, or to business development or privately funded research and development projects. Employers also should note that they may deduct from exempt employees' leave banks for full or partial days when those employees are instructed not to report to work because of budgetary constraints or lack of work, so long as employees' weekly salaries are not reduced (Wage-Hour Opinion Letter, April 6, 1995; Wage-Hour Opinion Letter No. FLSA2009-18, Jan. 16, 2009).

#### *What About Planned Furloughs?*

This discussion addresses an unplanned furlough, such as that caused by an unexpected government shutdown or sudden budget cuts that reduce the funding available for a government contract. In contrast, a company that decides in advance, and with no improper motive, to reduce costs by shortening the workweek may also reduce the salaries of exempt employees by any amount it chooses, so long as those salaries remain above the minimum FLSA thresholds for exempt employees (Wage-Hour Opinion Letter, Nov. 13, 1970).

In the case discussed in that opinion letter, for example, the employer reduced the fourth workweek of each month from five to four days with no effect on its exempt employees' status. Thus, if a government contractor or grantee plans, on a going forward basis, to reduce its workweek because of reduced funding, and if that reduction lasts for an extended period — say, two or three months — then the employer could reduce the pay of exempt employees by a proportional amount. It must be emphasized, however, this is not permitted when an employer calls exempt employees at home and requires them to take the day off or sends employees home early in the workweek due to “occasional unplanned and transitory periods” of low workload (Wage-Hour Opinion Letter No. FLSA2009-18, Jan. 16, 2009).

#### **Leave Bank Deductions Are Permissible**

The Wage and Hour Administrator has stated in several opinion letters that employees who have exhausted their annual leave or have not yet qualified for annual leave must be paid for the full day. However, in a letter dated Nov. 30, 1994, the Deputy Assistant Administrator said that advancing future, unaccrued leave and then docking from that leave also is permitted. While this letter is not a basis for reliance under the Portal-to-Portal Act, the existence of negative balances in leave banks of exempt employees is implicitly approved in many Wage-Hour Opinion Letters. Note, however, an employer that allows an exempt employee to maintain a negative balance in a leave bank may not recover that negative balance from the employee's final paycheck (see 69 Fed. Reg. 22,178 (April 23, 2004)).

#### **Working Time in the Technology Age**

As noted above, an exempt employee must be paid for the full workweek if he or she performs any work during the workweek unless the employee's leave bank is charged for the time not worked. As such, it is important to remember that the definition of work under the FLSA focuses on whether the employee *actually worked*, not on whether the employee was *at work*. Thus, in this age of remote email access, prolific cell phone use, and devices for checking email and voice mail on-the-go, an employer that furloughs its employees (or intends for any legitimate reason not to pay them) *must* establish a clear policy prohibiting work from home. It might even be prudent for employers to block remote email access for such employees if possible.

#### **Window of Correction and Safe Harbor Policies**

By the time this article appears, employers may already have paid (or docked) their exempt employees for the periods affected by sequestration. For employers that violated the salary basis test, all hope is not lost. First, the “window of correction” (29 C.F.R. §541.603(c)) states:

Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

In the preamble to the regulations, DOL explains that: “Inadvertent deductions are those taken unintentionally, for example, as a result of a clerical or time-keeping error.” However, DOL has not defined “isolated.”

Also, the regulations contain a so-called “safe harbor” that permits an employer to preserve an employee’s exempt status even when an employer had an actual practice of making improper deductions; that is, when the deductions were more than isolated and inadvertent. Subsections (b) and (d) of 29 C.F.R. 541.603 provide that an employer that has an “actual practice of making improper deductions” will lose the exemption *only* for:

The time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.

And if the employer: (1) has a “clearly communicated policy” that prohibits improper pay deductions; (2) has a complaint mechanism; (3) reimburses employees for improper deductions; *and* (4) makes a good faith commitment to comply in the future, it will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

### **Employer Take-away**

Both private and public employers can be impacted by government shutdowns or, in the possible future, sequestration spending cuts. While such events do not affect nonexempt hourly wage employees, they can have significant FLSA ramifications for exempt employees — to include removing their exemption and therefore, in certain situations, entitling them to full pay even on days when no work was performed. However, employers should remember that leave bank deductions are permissible and full-week furloughs do not require pay. And in the event that an employer makes a deduction, it could be protected by the window of correction and/or safe harbor policies. Before making any deductions, however, employers should consult with an attorney, as improper deductions can result in thousands (or even millions) of dollars in damages.

For more on wage deductions in the private sector, please see *Fair Labor Standards for Private Employers* ¶554.

For more on wage deductions in the public sector, please see *Fair Labor Standards for Public Employers* ¶596.

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