

## Summary of Fair Labor Standards Act Wage and Hour FAQs Regarding COVID-19 and Other Public Health Emergencies

As discussed in our *Act Now* Advisory entitled “[Department of Labor Issues OSHA, Wage/Hour, and FMLA Guidance Addressing COVID-19](#),” the U.S. Department of Labor’s Wage and Hour Division published questions and answers (“FAQs”) providing information on [common issues](#) that employers and employees face when responding to the 2019 novel coronavirus (“COVID-19”), including effects on wages and hours worked under the Fair Labor Standards Act (“FLSA”). Below is a detailed review of the [FLSA FAQs](#).

### *Work Schedule and Hours Modifications for Non-Exempt and Exempt Employees*

- The FLSA generally does not require employers that are unable to provide work to [non-exempt employees](#) to pay them for hours the employees would have otherwise worked; in other words, employers need not guarantee the normal work schedule of hourly, non-exempt employees if it becomes necessary reduce their hours. Employers should nevertheless remain up to date on federal legislation that may change this particular guidance (as detailed in our recent [Advisory](#)) for private employers with fewer than 500 employees in specific emergency circumstances.
- It remains the case that exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Exempt salaried employees are not required to be paid their salary in the weeks in which they perform no work.

### *Vacation Time Considerations for Exempt Employees*

- Employers that provide paid time off/vacation time may require that the leave be taken on specific days. Thus, an employer may direct exempt staff to take vacation or to debit their leave “bank account,” in the case of an office closure, whether for a full or partial day, provided the exempt employees receive in payment an amount equal to their guaranteed weekly salary. An exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee’s guaranteed salary for any absences occasioned by the office closure in order to remain exempt, provided the exempt employee has performed work that week. [Click here](#) to view a Department of Labor (“DOL”) opinion letter on this topic.

### *Employees on Government-Imposed Quarantine*

- The DOL encourages employers to be accommodating to employees who have been quarantined, by offering alternative work arrangements, such as telecommuting, or providing paid time off.

### *Amount of Hours and Type of Work Performed by Employees*

- The FLSA does not limit the number of daily or weekly hours an employee over 16 can work.
- The FLSA does not limit the type of work employees can perform; therefore, employees can be required to perform work outside the parameters of their respective job descriptions. However, employers with unionized workforces should carefully review their collective bargaining agreements to determine whether there are restrictions on any work performed outside employees' job descriptions.

### *FLSA Consideration for Individuals Performing Volunteer Work for a Public or Nonprofit Agency*

- *Public Agencies:* Individuals who volunteer their services to a public agency, e.g., a state, parish, or city or county government, in an emergency capacity will not be considered employees, or owed any compensation pursuant to the FLSA, if the individuals (1) perform such services for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation (the volunteer performing such service may, however, be paid expenses, reasonable benefits, or a nominal fee to perform such services); (2) offer their services freely and without coercion, direct or implied; and (3) are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer.
- *Nonprofits:* Individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious, or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.
- *Government Disaster Relief:* Where employers are requested to furnish their services, including their employees, in emergency circumstances under federal, state, or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No hours spent on the disaster relief services are counted as hours worked for the employer under the FLSA.

## *Telecommuting Considerations for Exempt and Non-Exempt Employees*

- An employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities about pandemics, public health emergencies, or other similar conditions. Telework also may be a reasonable accommodation. Employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the equal employment opportunity laws. (See the U.S. Equal Employment Opportunity Commission's publication [Work at Home/Telework as a Reasonable Accommodation](#) for additional information.)
- If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then employers must pay the same hourly rate or salary.
- For non-exempt employees, if telework is not being provided as a reasonable accommodation and employers do not have a collective bargaining agreement or other employment contracts, under the FLSA, employers are required to pay employees for only the hours they actually work, whether at home or at the employer's office.
- Pursuant to the FLSA, employers are not obligated to pay employees who are unable to telecommute as part of a mandatory work-from-home policy. However, exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.
- Pursuant to the FLSA, employers may not require employees to pay or reimburse them for business-related expenditures in connection with telework, e.g., Internet access, computer, additional phone line, or increased use of electricity, if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. In addition, employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the [Americans with Disabilities Act](#). (See the U.S. Equal Employment Opportunity Commission's publication [Work at Home/Telework as a Reasonable Accommodation](#) for additional information.)
- For non-exempt employees, employers are required to maintain an accurate record of hours worked for all employees, including those participating in telework or other flexible work arrangements, and to pay no less than the minimum wage for all hours worked and to pay at least one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek.

## *Use of Temporary Staff Agencies or Temporary Employees*

- In the event an employer brings on temporary employees from a staffing agency to supplement its workforce due to staffing shortages, the employer may be liable if the temporary employees are not paid in accordance with the wage requirements of the FLSA. Under the FLSA, an employee may be employed by one or more individuals or entities. If one or more of these employers are deemed joint employers, they may both be responsible—and jointly and severally liable—for the employee’s required minimum wage and overtime pay. The DOL recently updated and revised its regulations providing guidance regarding [joint-employer status under the FLSA](#). The final rule provides updated guidance for determining joint-employer status when an employee performs work for his or her employer that simultaneously benefits another individual or entity. The effective date of the final rule is March 16, 2020.

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