

Labor & Employment Alert
March 20, 2020

**U.S. Department of Labor Issues Guidance on
COVID-19 and the FLSA**

Installment 3 of the MHTL COVID-19 Client Alert

In addition to issuing guidance on OSHA and COVID-19, which we covered in our Labor & Employment Alert issued on March 15, 2020, the U.S. Department of Labor also issued Questions and Answers on COVID-19 and the Fair Labor Standards Act (FLSA), and COVID-19 and the Family and Medical Leave Act (FMLA). This edition of the Client Alert will highlight the Questions and Answers provided by the DOL regarding the FLSA.

**QUESTIONS & ANSWERS RELATING TO COVID-19 OR
OTHER PUBLIC HEALTH EMERGENCIES & THE FLSA¹**

1. How much must employees be paid for working a partial week because the employer's business is closed or reduced due to COVID-19?

Non-exempt employees must be paid for hours actually worked. The FLSA does not require employers who are unable to provide work to non-exempt employees to pay them for hours the employees otherwise would have worked.

CAVEAT: Under Massachusetts law, employees (excluding those who work for charitable organizations) who are scheduled to work 3 or more hours, and are not provided with the expected hours of work, are entitled to at least 3 hours of “show up” pay.

Exempt salaried employees must receive their full salary in any week in which they perform any work, subject to very limited exceptions. A private employer can direct exempt employees to take vacation or debit a leave account in the case of an office closure, whether for a full or partial day, provided the employees receive payment in an amount

¹ Of course, terms of a collective bargaining agreement in a union workplace, individual employment contracts, and/or employer policies may impose limitations on employer actions even if such actions are permissible under the FLSA. Accordingly, where applicable, such contractual and policy provisions must be considered.

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equal to their guaranteed salary. However, if an exempt employee has not accrued benefits in a leave account or has limited accrued leave such that the leave account debit would result in a negative balance, the employee still must receive their guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.

2. Do employees have to be paid when they are not working during a government-imposed quarantine?

Under the FLSA, employers are not required to pay **non-exempt** employees for hours they do not work. With respect to **exempt** employees, employers do not need to pay their salary in weeks in which they perform no work. However, similar to #1 above, if exempt salaried employees work a partial week because of a government-imposed quarantine, they must receive their guaranteed salary, which can partially or totally be paid from accrued leave or vacation.

IMPORTANT: Under the newly-passed federal “Families First Coronavirus Response Act,” employees will be entitled to 2 weeks of Emergency Paid Sick Leave paid by the employer for a number of reasons, including: “The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19”. Our Client Alert on the Families First Coronavirus Act, which we published earlier today, can be found here: <https://www.mhtl.com/2020/03/20/sweeping-federal-legislation-passed-related-to-covid-19/>.

CAVEAT: While not required, the DOL’s Wage and Hour Division (WHD) encourages employers to be accommodating and flexible with workers affected by government-imposed quarantines by offering alternative work arrangements, such as teleworking, and/or additional paid time off.

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3. May an employer encourage or require employees to telework² (i.e. work from an alternative location such as home) as an infection control strategy?

Yes, subject to any limiting provisions in collective bargaining agreements and individual employment contracts.

CAUTION: Employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by EEO laws.

CAUTION: For employees working from an alternative location, an employer is still required to maintain accurate records, including hours worked each day and dates worked each week.

CAUTION: Employers who encourage or require employees to telework would be wise to make it clear that such an arrangement is temporary, does not establish a precedent, and is being offered to employees exclusively as a result of the public health emergency/global pandemic created by COVID-19 and to contribute to the containment of the spread of COVID-19 as requested by government authorities. Otherwise, a telework arrangement could create a precedent for future requests for telework as a reasonable accommodation under the ADA and/or the Massachusetts disability discrimination law.

4. Do employers have to pay employees their same hourly rate or salary if they work at home?

Generally, yes. The FLSA requires employers to pay **non-exempt** workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek, whether they work at home or in the employer's facility. With respect to **exempt** salaried employees, they must receive their

² In certain circumstances, telework may be required as a reasonable accommodation for employees who cannot risk exposure to COVID-19 because of an underlying disability. In these cases, telework is not automatic, but rather may be considered in the context of the interactive process for determining whether telework is reasonable under the circumstances.

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full salary in any week in which they perform any work, whether they work at home or in the employer's facility, subject to very limited exceptions.

In addition, if a collective bargaining agreement or an individual employment contract requires payment of the same hourly rate or salary for telework, the same rate or salary must be paid.

5. If an employer bars employees from working from their current place of business and requires them to work at home, will employers have to pay those employees who are unable to work from home?

No. Under the FLSA, employers generally only have to pay **non-exempt** employees for the hours they actually work, whether at home or in the employer's facility. **Exempt** salaried employees who do not perform any work in a week because they are unable to work from home do not have to be paid. **Exempt** salaried employees must receive their full salary in any week in which they perform any work, whether they work at home or in the employer's facility.

CAVEAT: While not required, when not all employees can work from home, WHD encourages employers to consider additional options to promote social distancing, such as staggered work shifts.

6. Are employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Employers may not require **non-exempt** employees to pay for the cost of providing the tools and equipment to work from home if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. For **exempt** employees, payment of such costs may be considered an unlawful deduction.

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7. Do OSHA's regulations and standards apply to the home office?

Probably not. OSHA does not have any regulations regarding telework in home offices. OSHA issued a directive in February 2000 stating that it will not conduct inspections of employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect employees' home offices. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy regarding home offices. If an employee makes a specific complaint, OSHA may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

8. Can employers require additional hours of work per day or per week?

Yes, subject to restrictions on employment of minors imposed by federal and/or Massachusetts law. **Non-exempt** employees who work more than 40 hours per week are entitled to overtime. Additionally, workers in certain industries, such as transportation, airline, and/or health care may be limited to hours per day or week by other state and federal laws and regulations, collective bargaining agreements, and/or individual contracts. For industry-specific guidance, it is advisable to consult your legal counsel before imposing additional work hours as a result of the COVID-19 outbreak.

9. Can an employee be required to perform work outside their job description?

Yes, subject to restrictions on work duties of minors imposed by federal and/or Massachusetts law.

CAVEAT: Assigning work outside of an employee's job description may be limited by a collective bargaining agreement and/or employer policy. Accordingly, employers should consult legal counsel if they expect to assign employees work outside of their job description during the COVID-19 pandemic.

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10. If individuals volunteer to a public agency, are they entitled to compensation?

Probably not. Individuals who volunteer their services to a public agency (such as a state, city or county government) in an emergency capacity are not considered employees due compensation under the FLSA if they:

- 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;
- Offer their services freely and without coercion, direct or implied; and
- Are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer.

Massachusetts has a slightly more rigorous standard for determining whether workers are volunteers under the Massachusetts Minimum Wage Law and considers the following factors:

- The nature of the entity receiving the services;
- The receipt by the worker of any benefits, or expectation of any benefits, from their work;
- Whether the activity is less than a full-time occupation;
- Whether regular employees are displaced by the “volunteer;”
- Whether the services are offered freely without pressure or coercion; and
- Whether the services are of the kind typically associated with volunteer work.

Accordingly, when determining if so-called volunteers are entitled to compensation, employers should consider both the FLSA and the Massachusetts factors.

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11. If individuals volunteer to a private, not-for-profit organization, are they entitled to compensation?

Probably not. 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.

Similarly, as discussed in #10 above, when determining if so-called volunteers are entitled to compensation, employers should consider both the FLSA and the Massachusetts factors.

When 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.

12. In the event an employer brings on temporary employees from a staffing agency to supplement its workforce due to staffing shortages, is the employer liable if the temporary employees are not paid in accordance with the wage requirements of the FLSA?

Perhaps. In some cases, an employee may be employed by more than one employer. Where employers are deemed "joint employers," both employers are responsible for the employee's required minimum wage and overtime pay. The U.S. Department of Labor recently revised its regulations regarding determination of joint employer status which became effective on March 16, 2020. <https://www.dol.gov/agencies/whd/flsa/2020-joint-employment>. Employers should consult their legal counsel if they have questions about whether they may be a joint employer with another entity.

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13. Do asymptomatic employees have to be paid when they are not working due to a self-imposed quarantine because they do not want to risk COVID-19 exposure in the workplace?

It depends. **Non-exempt** employees must be paid for hours actually worked. The FLSA does not require employers to pay non-exempt employees who do not work due to a self-imposed quarantine for hours they otherwise would have worked. For **exempt** salaried employees deductions for one or more full days may be permissible if it is determined that such employees are absent for personal reasons. While it is far from certain, an employee who does not have COVID-19 and/or is not displaying any symptoms of COVID-19, but who elects not to work to avoid risk of exposure, may be absent from work for a personal reason. Deductions from pay for absences due to personal reasons, other than sickness or disability, are permissible. Additionally, employees may be able to access paid time off during a self-imposed quarantine under employer-provided part time off policies. In any event, employers are well-advised to consult with their legal counsel before taking any deductions from exempt salaried employees.

Also, employees may be eligible for unemployment benefits due to COVID-19 induced unemployment when they are not working due to the reasonable risk of exposure in the workplace.

For more information, the full FLSA question and answer set can be found at <https://www.dol.gov/agencies/whd/flsa/pandemic>. Also, please make sure to check state and local provisions pertaining to pay and compensation requirements, and to stay alert to new laws and regulations being enacted at the federal and state levels which may have employee pay implications.

As the COVID-19 outbreak continues, there are likely to be many more questions related to requirements for employee pay, pay issues in light of employer mandates to stay home, and pay issues in light of government-imposed quarantines. We will keep you updated as legal developments unfold.

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This Client Alert was written by Nan O'Neill, and reviewed with Kathryn Murphy, Kier Wachterhauser, and Katherine Hesse. If you have any questions, please contact Nan O'Neill, or the attorney responsible for your account, or call (617) 479-5000.

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