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COVID-19: Pay Practices

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What's the Problem?

How should employers pay employees who have been sent home involuntarily – either because they display illness symptoms or as a preventative measure (e.g., quarantine after returning from travel to high-risk area).

What to Consider

Pay practices differ based on the specific issue and the employee's exempt or non-exempt status.

Can I send a non-exempt employee home without pay?

As a general rule, non-exempt employees must be paid for all time actually worked, but need not be paid for time when they perform no work. If an employer sends a non-exempt employee home, the employer should make sure the employee is paid for all work performed while at home. If the employee is sent home because the employee displays signs of illness, the employer would generally be able to mandate that the employee use available paid sick time (subject to certain state law requirements). Employees should be allowed to use other available paid time off in accordance with the employer's paid time off policies.

A trickier question arises when an employer sends a non-exempt employee home when the employee does not display illness symptoms (e.g., in cases of potential exposure). In those cases, the EEOC may take the position that the employer is perceiving the employee as disabled and, if the employee is sent home without pay, an argument could be made that the employee has suffered damages as a result of perceived disability by the employer. There are counter-arguments, but employers should evaluate each case individually and seek counsel. Employers should bear in mind that some states have specific requirements about use of sick leave, which may vary from the above.

Can I send an exempt employee home without pay?

Exempt employees are typically entitled to payment of their full salary for any week in which they perform work, without deductions made for absences occasioned by the employer or the operating demands of the business. Certain exceptions from that general rule apply in circumstances delineated in the United States Department of Labor's (USDOL) regulations. These exceptions include deductions in full-day increments for absences due to personal reasons, other than sickness or disability, and

deductions in full-day increments for absences caused by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice providing compensation for loss of compensation caused by such sickness or disability, etc. Other exceptions apply. You can reference the USDOL Q&A on COVID-19 issues [here](#).

The USDOL just released the following guidance:

The FLSA does not require employer-provided vacation time. Where an employer offers a bona fide benefits plan or vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). This will not affect the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

An employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.

So, a private employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, 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 absence(s) occasioned by the office closure in order to remain exempt. For more information, see WHD Opinion Letter FLSA2005-41.

Note of Caution: If an employer sends exempt employees home after the workweek has begun, and these employees have no paid time off available, this may be deemed an "absence occasioned by the demands of the business," which would entitle the employee to payment for the full workweek. You should seek legal counsel if you encounter such circumstances.

Do I have to pay employees if business shuts down because of a government mandate?

As mentioned above, non-exempt employees are generally not entitled to be paid for periods of time during which they perform no work – even if the reason why the non-exempt employee is not working is a government-mandated shutdown. For exempt employees, the FLSA does not permit employers to make deductions from employees' pay for partial or even full-day closures of less than an entire workweek, regardless of whether they are caused by the government. The only exception is when the employer's facility is shut down for an entire workweek, and exempt employees do not perform any work at all during the shutdown. Employers should, however, assess how realistic it is that exempt employees performing no work at all

for an entire workweek (e.g., checking e-mails or making phone calls).

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

According to USDOL, 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 you must pay the same hourly rate or salary. If this is not the case, and you do not have a union contract or other employment contracts, under the FLSA employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office.

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. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. If the Service Contract Act (SCA) or state or local laws regulating the payment of wages also apply, nothing in the FLSA or its regulations or interpretations overrides or nullifies any higher standards provided by such other laws or authority. (See the U.S. Department of Labor, Wage and Hour Division for additional information on the SCA or call 1-866-487-9243.)

What other pay-related issues should Employers consider?

Although the FLSA does not require this, employers should consider any potentially-applicable state law requirements regarding reporting pay or predictive scheduling.

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