

Coronavirus and the Workplace

Part IV: Pay

March 3, 2020

With the expected spike of absenteeism, wage and hours problems can arise during a pandemic. Employers must always keep their obligations under the Fair Labor Standard Act ("FLSA") in mind in dealing with these issues. Additionally, employers should review the U.S. Department of Labor – Wage and Hour Division's guidance on Pandemic Flu and the Fair Labor Standards Act.

The very first question that employers must consider before deciding to not pay an employee for time missed from work is whether the employee is subject to the minimum wage and overtime requirements. The answer to that question will determine if and how the employee's pay can be withheld for absenteeism.

Non-exempt Employees

Non-exempt employees must be paid at least the minimum wage and are entitled to overtime pay. For these employees, employers only have to pay them for the time they worked. In other words, employers are not required to compensate non-exempt employees absent from work. Likewise, during a pandemic, these employees may be sent home without performing any work and not be paid for the time they would otherwise have worked.

However, employers must compensate non-exempt employees who perform work, regardless of whether they are at work. For example, if the workplace is closed down during pandemic, but non-exempt employees can or are required to work from home, they must be paid for the hours worked.

Exempt Employees

Employees who are properly classified as exempt under the FLSA are not entitled to overtime and are paid on a salary basis regardless of the number of hours worked. With limited exceptions, if an exempt employee performs any work during a week, he or she must generally be paid the full week's salary. An employer's practice of improper deductions from an exempt employee's salary may lead to declassification of the exempt status, in which case the employee will be entitled overtime.

If an exempt employee misses work during a pandemic, an employer may deduct from the employee's salary for:

- Full-day absences for sickness or disability, pursuant to the employer's sick leave policy, plan, or practice of providing compensation for salary loss caused by illness or disability.
- Full-day absences for personal reasons other than sickness or disability.
- Full-day or partial-day absences taken as unpaid leave under the Family and Medical Leave Act.

On the other hand, the employer may not deduct from the employee's salary for:

- Absences due to sickness or disability when the employer does not have a sick leave policy. However, if the employee misses the entire workweek, the employer does not need to pay the employee for the week missed from work.

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- Absences occasioned by the employer or by the operating requirement of the business, e.g., when the employer closes the workplace because of the pandemic. However, employers can require the employees to use accrued vacation or PTO for the days they are required to stay home and may require the exempt employees to make up lost work time.

This is the fourth of a four-part series. Please find parts 1, 2 and 3 here:

Part I: Safety

Part II: Non-Discrimination

Part III: Leave

This information is based on the facts and guidance available at the time of publication, and may be subject to change.