



CLIENT ALERT EMPLOYMENT & LABOR

Can You Reduce the Hours/Salaries of Exempt Employees to Get Through the COVID-19 Crisis?

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Many businesses that continue to operate during the COVID-19 crisis are suffering a significant drop in revenue and, understandably, are looking at cutting payroll. One logical solution is to lay people off – a feasible alternative if done the right way. We can assist with this. Another logical solution is to keep as many people as possible employed by reducing employee compensation. You can do that fairly easily with non-exempt (hourly) employees, so long as they are paid at least minimum wage. But when it comes to exempt employees, there are issues which, if mishandled, can cost an employer dearly.

One of the key factors that makes an employee an exempt employee (that is, exempt from overtime requirements) is that *an exempt employee's salary cannot be tied to the number of hours the employee works*. Here is a shocker for most employers: with arcane exceptions, if an exempt employee works for only a brief time, say a half hour, during a work week, and was ready and able to work the other days in the week but there was not enough work for the employee to do, *the exempt employee must still be paid his/her full weekly salary*. Otherwise, the exempt employee's pay would be tied to hours worked, which is unlawful. There are two ways to handle this.

One alternative: If you are willing to risk the potential damage to morale, convert some or all your exempt employees to hourly employees, and pay them only for the hours they work (plus overtime). This could be a bitter pill for managers and executives, but if layoffs are the alternative, it may be acceptable. Depending on the circumstances, there may be further complications on which you will need guidance.

Another alternative: You are permitted to reduce the salaries of exempt employees to address *long term* business needs, *not* week to week fluctuations in business but, again, *you cannot tie the compensation reduction to number of hours worked*. The DOL does not define "long term." A minimum of three months is typical, but these are not typical times. If you go this route, the *written* message to the affected exempt employees must be that in the effort to minimize layoffs, salaries will be reduced by X%, *but they are still expected to do their jobs ... no mention of reduced schedules or, again, you will be tying pay to hours worked*. Do it across the board within departments or the implication will be that you are selecting employees who will be working fewer hours to receive reduced pay. There are, again, some further complications that will require assistance.

Four significant cautions:

First, to maintain exempt status, employees must make at least \$684/week. Otherwise, they will be considered non-exempt, they must keep time, they must be paid overtime, and so on.

Second, depending on the terms of the group policy, if employees work less than a certain number of minimum hours per week, their entitlement to health insurance coverage can be at risk.

Third, be careful about the selection and implementation process – this is an area ripe for age and other discrimination claims. Documentation showing that you based your decisions on proper criteria will be important.

Fourth, if an employee has an employment agreement that says the employee can only be terminated for cause and that he/she will be paid \$X salary, there are some complications that will have to be addressed before a salary reduction can be implemented. Even for employees at will, counsel will need to be involved to draft the proper notices.

Let us know if we can help.

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The Wisler Pearlstine team of employment attorneys is ready to address your COVID-19 questions and concerns. Please contact any of us if you have concerns about the impact of COVID-19 in the workplace.

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