

Client Alert

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Wages for Furloughed Employees

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As the government shutdown winds on, many government contractors and clients have faced stop work orders from the government. Contractors have in turn furloughed their own idle employees. While this is a reasonable and necessary response to the shutdown, contractors must be careful to act in compliance with Fair Labor Standards Act, 29 U.S.C. 201, *et seq.* (“FLSA”)¹, lest they inadvertently add to their costs or put their employees’ exempt status at risk.

Under the FLSA, employees are divided into two categories. They are either classified as exempt from some or all of the provisions of the FLSA, or they are non-exempt, that is, subject to all of the provisions of the FLSA. The classification of a position depends upon a number of factors including the type of work the employee is performing, how he or she is paid, and how much he or she earns per week. Non-exempt employees are subject to FLSA’s minimum wage and overtime provisions, while exempt employees are not. To be exempt, an employee must be paid on a salary basis, paid for the job he or she performs, not the hours worked. By contrast, “non-exempt” employees are typically on an hourly basis, and they must be paid for each hour they are “suffered or permitted” to work.

Because of the criteria to maintain exempt status, exempt and non-exempt employees are treated differently during the furlough. Non-exempt employees may be furloughed without concern for their FLSA status—as usual, they must be paid for the hours worked during a given workweek.² If they do not work during a workweek, such as due to a furlough, they are simply not paid.

Contractors must exercise more caution in furloughing exempt employees, however, to protect the employees’ exempt status. Under the FLSA, if an exempt employee performs *any* work during *any* portion of a workweek—including checking emails or making calls from home—he or she must be paid the full salary for the workweek. There are exceptions for (i) full days during which the employee is voluntarily absent (such as a day off after all accrued vacation is exhausted) and (ii) absences covered by a bona fide sick leave policy. If an exempt employee does not perform any work at all during a workweek, regardless of whether the absence is voluntary or involuntary, the employer need not pay the employee his or her salary for the week. Thus, if employees are furloughed for full workweeks, there should be no issue. The problem arises when the furlough starts or stops in the middle of a workweek.

¹ Employers must also comply with state wage and hour laws which may be more stringent than the FLSA.

² Workweeks are defined as a continuous 7 day period designated by the employer, e.g., 12:00 a.m. Sunday to 11:59 p.m. Saturday. The workweek can start any day and time of the week designated by the employer as long as the employer is consistent.

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If an employer violates the rules and fails to pay full salary for a workweek during which an employee performed work, the employee's exempt status may be jeopardized.³ If the violation is inadvertent and isolated, the exemption will not be lost so long as the employer reimburses the employee for any improper deductions. If the employer exhibits an intent not to pay exempt employees on a salary basis—as evidenced by a pattern of deducting wages from salary for individual days not worked—the employee can lose his or her exempt status for the period during which improper deductions were made. In addition, other employees in the same job classification who work for the same manager who made the improper deduction will also lose their exempt status.

For any period during which an otherwise exempt employee is deemed non-exempt, the employer is liable for overtime pay at the premium rates normally enjoyed by non-exempt employees for all hours worked in excess of 40 in a workweek. The employer could also be liable for civil penalties—including treble damages for willful violations of the FLSA—and could expose itself to class action lawsuits which remain popular with plaintiffs' lawyers who may recover statutory attorneys' fees if successful.

During the shutdown, some contractors have required exempt employees to use their accrued vacation to cover otherwise unpaid time off. While this practice is generally acceptable (subject to state law), if an employee works part of a workweek but does not have enough accrued vacation to cover the days not worked and the employer does not pay him for the full workweek, the employee may lose his exempt status for that workweek. Similarly, if the government lifts a contractor's stop work order in the middle of the week, it could result in the same dynamic.

The shutdown imposes a significant burden on contractors even without the risk of running afoul of wage and hour laws. We advise care in calculating wages owed (and not owed) to furloughed employees to avoid incurring any additional burdens as a result of the shutdown. We are available to employers with furloughed employees who are unsure how to calculate wages. Most of all, here is to hoping the shutdown ends soon!

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³ 29 C.F.R. §541.603

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