

LEGAL UPDATES

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DOL Releases Opinions on Reducing Hours for Salaried Employees

In these difficult economic times, many employers are looking for ways to reduce labor costs without costing employees their jobs. One option commonly considered is a reduction in hours. For hourly employees, a reduction in hours can be easily achieved. Provided all relevant benefits plans and state laws are considered and satisfied, an employer can reduce the number of hours assigned to **hourly** employees and pay them accordingly.

Unfortunately, making reductions in salary paid to salaried exempt employees (based on a reduction in hours or any other reason) is not as straightforward. To qualify as exempt under the Fair Labor Standards Act (FLSA), an employee's position must satisfy several requirements. One of those requirements is that the employee be paid on a salaried basis. According to the regulations, this means that the employee receives "a predetermined amount ... which amount is not subject to reduction because of variations in the quality or quantity of the work performed." If an employer makes improper deductions from an exempt employee's "predetermined amount" based on the "quantity" of work performed, it runs the risk of losing the exemption for that employee and all others in the same job classification.

Over the past several months, the attorneys at Husch Blackwell Sanders have been advising clients on how to lawfully achieve these reductions. On Friday, March 6, 2009, the U.S. Department of Labor (DOL) issued several opinion letters that echo some of the approaches proposed by Husch Blackwell Sanders. (FLSA2009-18; FLSA2009-14; FLSA2009-2)

In summary, these DOL opinion letters endorse the following:

1. Employers may require mandatory time off in full-**week** increments. In this situation, provided the employees perform no work during the week,

employers do not need to pay or replace the employees' salaries through any wage-replacement program, like a PTO bank.

2. Employers may require mandatory or "voluntary" time off in full- or partial-**day** increments **only** to the extent the salary is replaced through a wage-replacement program. In this situation, employers can force employees to use accrued time-off provided by a wage-replacement program, even in increments of less than one workweek, and when operating requirements dictate (i.e., when business is "slow").
3. Employers may require a reduction of hours in a normal scheduled workweek (i.e., full-**day** increments), if the reductions are made according to a "fixed schedule" and not "day-to-day or week-to-week determinations of the operating requirements of the business." In this situation, employers do not need to pay or replace the employees' salaries through any wage-replacement program. **Caution:** Employers should consult with counsel before pursuing this option. While the practice is permissible under the regulations, and specifically endorsed in the DOL's FLSA2009-18 opinion letter, even slight factual variations could result in improper deductions.

Employers should also be aware of the effect that these types of reductions could have on certain work visas, like H-1B visas. If an employer has committed to sponsoring a foreign employee, the employer is obliged to notify the government of this type of change in the terms and conditions of employment before they become effective with respect to that employee. If an employer is considering making these types of labor reductions, it should consider the impact the reductions could have on its employees with work visas.

While the reductions described above constitute some of the available means to reduce hours and salary for exempt employees, other options are not covered in the recent opinion letters. For a full and reliable analysis on the best way to reduce hours and salary for exempt employees, we strongly recommend consultation with experienced employment counsel. Of course, though persuasive in many courts, the DOL's recent opinion letters do not hold the force of law. Court opinions examining these issues and relevant state laws must always be considered as well, further supporting the notion that counsel should be involved.

What This Means To You

These opinion letters provide added support for the advice already being given to clients by the Labor and Employment attorneys at Husch Blackwell Sanders. However, they only cover a few factual scenarios. Other factors may impact how an employer can lawfully reduce hours, and other methods can be preferable to deal with those factors. If your company is considering reducing hours for salaried exempt employees, consult with legal counsel prior to doing so to avoid the significant liability associated with wage and hour litigation, which has become one of the most common claims in employment litigation today.

Contact Info

If you have any questions about these opinion letters, please contact one of the firm's Labor & Employment attorneys.

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