

A high-angle photograph of a person with dark hair and glasses, wearing a grey hoodie, sitting at a white desk. They are looking down at a laptop. To the left, a hand holds a tablet. The desk is cluttered with a blue folder, a green apple, a pen, and some papers with sticky notes. The background shows a wooden floor and a white chair.

Coronavirus (COVID-19) Wage and Hour Considerations for Employers

March 26 | 2020



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Wage and hour fundamentals

This might sound familiar...

- “Pandemic” and “coronavirus” aren’t mentioned in the FLSA or any state wage and hour laws.
- The legal fundamentals are the same as they’ve been for years.
- If you have a firm grasp on these fundamentals, you will be able to navigate many of the different situations that may arise as a result of the coronavirus (COVID-19) pandemic.
- One of the most important things to remember is that your options will differ significantly depending on whether employees are classified as exempt or nonexempt. So break out those 2019 overtime plans!
- You can potentially reclassify employees. Easier to go from exempt to nonexempt than vice versa. But tread carefully; this is not a short-term solution.
- Don’t forget: Changes in job duties can result in changes in classification!



Nonexempt / hourly employees

Back to the basics

- The basic formula: Nonexempt employees must be paid a minimum wage, plus any overtime, for all hours worked in a workweek.
- In general, minimum wage and overtime will not be directly affected by coronavirus.
- Hours worked is what might trip you up.



Nonexempt / hourly employees, cont.

Let's review hours worked

- In general, hours worked = all the time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." This covers *a lot*.
- [Off-the-clock work](#) – Employees must be paid even if they work beyond a scheduled shift.
- [Waiting time / on-call time](#) – Things can get pretty ambiguous here.
- [Scheduling laws](#) – OR, NY and several cities including NYC, San Francisco, Seattle – note the possibility of exemptions for situations beyond an employer's control
- [Show-up time / Reporting time](#) – CA, CT, DC, MA, NH, NJ, NY, OR, RI
- [State meal and rest break requirements](#)
- In general, location does not matter (exception: on-call time)



Exempt / salaried employees

The salary basis rule

- The “salary basis rule”: Exempt employees must regularly receive a predetermined amount that is not subject to reduction because of variations in the quality or quantity of the work performed.
- With a few exceptions, exempt employees must receive their full salary for any week during which they perform any work - without regard to the number of days or hours worked.
- However, **exempt employees need not be paid for any workweek during which they perform no work.**
- An employee is not paid on a salary basis if deductions are made for absences occasioned by the employer or by the operating requirements of the business. **If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.**



Exempt / salaried employees, cont.

Exceptions to the salary basis rule

- Exception 1: Absences from work for one or more full days for personal reasons, **other than sickness or disability**.
- Exception 2: Absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.
- Exception 3: Unpaid FMLA leave
- (Note: There are other exceptions that are not relevant to the coronavirus pandemic, such as for jury duty and disciplinary suspensions.)



Exempt / salaried employees, cont.

PTO / leave banks

- A private employer may direct exempt staff to take vacation or debit their leave bank account during office **closures** due to inclement weather or **other disasters**, whether for a full or partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary, without jeopardizing the employees' exempt status. – [DOL Opinion Letter FLSA2005-41](#), [COVID-19 and the Fair Labor Standards Act Questions and Answers](#)
- But what if the office is *open* and the employee does not come into work? Does the coronavirus pandemic qualify as “other types of disaster”? Does an absence due to the coronavirus pandemic not constitute “an absence due to sickness or accident” (as long as the employee is not sick or otherwise exhibiting symptoms of the coronavirus)?



Exempt / salaried employees, cont.

Prospective reductions in pay

- You can reduce exempt employees' salaries.
- However, the reduction must be the result of an economic slowdown and not an attempt to evade the salary basis rule.
- Employees will lose exempt status if reductions from predetermined pay are occasioned by a day-to-day or week-to-week determination of the operating requirements of the business. Permissible prospective reductions reflect the long-term needs of the business, while impermissible short-term, day-to-day or week-to-week reductions reflect an absence from scheduled work occasioned by an employer or its business operations.
- No case law as of yet, but it is likely a global pandemic would qualify as “long-term needs.”



Remote work

In the eyes of the law, the “workplace” is any place work is performed

- With few exceptions, the wage and hour fundamentals we discussed earlier apply regardless of where an employee works – at home, at the office, at the store, at the factory.
- The burden to track working time still falls mostly on the employer.
- Comply with [federal](#) and [state](#) recordkeeping requirements.
- Adopt a [timekeeping policy](#) and include a [timekeeping statement](#) in employee handbooks.
- Educate employees about working time (*reasonable diligence* standard).
- Consider having employees sign acknowledgments that reported time is correct.
- Remember, even a small amount of work – answering emails, etc. - can trigger the salary basis for exempt employees.



Potential shutdowns

Quarantine / furlough / business necessity / government-ordered closure

- Consider paying employees anyway
- Weigh labor costs against other concerns like employee morale, retention, slowing the spread of COVID-19
- Questions to ask:
 - Is the employee exempt or nonexempt?
 - How long is the closure? A full workweek? Or a smaller increment?
 - Is the employee willing and able to work?



Changes in schedules

A lot of flexibility here

- Check [scheduling laws](#).
 - Some of these laws provide exemptions during natural disasters and other emergencies.
- Review things outside the scope of wage and hour, such as collective bargaining agreements and employment contracts.
- Remember, there are [restrictions on working time](#) for employees who are minors.



Changes in compensation

Important considerations

- For nonexempt employees:
 - Minimum wages, prevailing wages, living wages, etc.
 - Reasonable accommodations under ADA
 - Collective bargaining agreements
 - Some states require advance notification
- For exempt employees:
 - Remember, you can make prospective reductions
 - Must meet the new federal minimum of \$684 plus any applicable [state minimum salary levels](#)



How XpertHR can help

Resources

- [Coronavirus \(COVID-19\): Workplace Resource Center](#)
- [Coronavirus \(COVID-19\): Wage and Hour](#)
- [Coronavirus \(COVID-19\): Temporary Disability Insurance and Unemployment Insurance](#)
- [Coronavirus \(COVID-19\): Remote Work](#)
- [Coronavirus \(COVID-19\): Jobs That Require On-Site Attendance](#)
- [Coronavirus \(COVID-19\): Employee Leave Laws](#)
- [Coronavirus \(COVID-19\): Federal, State and Local Resources for Employers](#)
- [Coronavirus \(COVID-19\): Benefits](#)
- [Coronavirus \(COVID-19\): FAQs](#)



Coming up...

Next in this series

- **Tuesday, March 31:** Coronavirus (COVID-19): Leave Considerations for Employers under the Families First Coronavirus Response Act
- **Thursday, April 2:** Coronavirus (COVID-19): Health and Safety Considerations for Employers
- **Tuesday, April 7:** Coronavirus (COVID-19): Remote Work Engagement Solutions for Employers
- **Thursday, April 9:** Coronavirus (COVID-19): Benefit Considerations for Employers
- **Tuesday, April 14:** Coronavirus (COVID-19): Payroll Considerations for Employers
- **Thursday, April 16:** Coronavirus (COVID-19): Leave Considerations for Employers on the State and Local Level

The logo for XpertHR, with 'Xpert' in a white sans-serif font and 'HR' in a white sans-serif font inside a white square. The background of the top half of the slide is a blurred image of a woman's face in profile, looking out over a city at night with bokeh lights.

XpertHR

Thank You!

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