

MINIMUM WAGE AND OVERTIME GUIDANCE

An employer's responsibilities under the Fair Labor Standards Act (the Federal wage and hour law, or "FLSA") and under the Illinois Minimum Wage Law ("IMWL") have not changed or been canceled by the COVID-19 crisis. If employees have been sent home to work, the employer is still responsible for, among other things, paying at least the minimum wage; paying time and one-half the regular rate ("overtime pay") for all hours worked in excess of forty (40) in a work week; and maintaining accurate time and attendance records under both of these laws as well as under the Illinois Unemployment Insurance Act. Here is some guidance for accomplishing those tasks.

Nonexempt ("hourly") employees

Nonexempt, or, as they are known in everyday language, hourly, employees, must be paid for every hour they work, no more and no less. If such employees have been sent home and they are not working, they do not have to be paid. If such employees have any accrued PTO or vacation time, they can use that time until it runs out. If not, it is unpaid time.

If nonexempt (hourly) employees are working from home, the employer must keep track of their time. If the employer has the technology to accomplish that by, for example, monitoring an employee's time on-line, that is one way of maintaining accurate time and attendance records. More likely is that the employer and employee will discuss and reach an agreement – preferably in writing – on working from home, utilizing the honor system. Remember, however, that the burden for maintaining accurate time and attendance records still falls on the employer.

USDOL and IDOL will likely accept such work-at-home agreements. The likelihood of acceptance is heightened if the agreements are in writing (I am, after all, an attorney!) and if they cover all the relevant circumstances of employees' work situation, including details about start times, stop times, breaks and meal times.

Any work-at-home agreement, whether written or verbal, should include the following:

- Clearly define the basic hours during which the employee is to be working and expected to be accessible by phone, email, text, Skype, etc.
- Remind the employee that the employer's policies regarding attendance, breaks and lunch, hours, confidentiality, technology, etc., remain in full force and effect.
- Confirm with the employees that each is expected to accurately, reliably, and consistently report her/his time working, subject to verification by employer.
- Overtime **is not authorized** without the express, preferably written consent, of the employer.
- If the cost of technology, mobile phone, etc., is an issue, the employer should be prepared to pay for it directly or through reimbursement to the employee upon the receipt of proof of the expense.

Remember, as well, that for non-exempt employees, the employer may reduce their working hours, prospectively, and/or their hourly rate (as long as it is equal to or more than the minimum wage), again prospectively only, in an effort to remain financially viable, keep more employees working, at least part-time, or for other reasons.

Exempt (“salaried”) employees

Exempt, or, as they are commonly known, salaried employees, are paid a set salary for every work week or pay period during which they work. As might be expected, there are fewer working-at-home issues with such employees. As long as they are working, they are paid their salary. However, the employer still has the responsibility for maintaining accurate time and attendance records for these employees, and the employer may still require such employees to substantiate their time and attendance.

If the employer closes and, as a result, exempt employees are not working, the law does not require that they be paid. If such employees have accrued vacation or PTO, they can choose to use that time to continue to be paid for the length of their accrued vacation or PTO. Upon the exhaustion of such vacation or PTO time, and assuming that the employee is not working, such an employee does not have to be paid.

Unlike non-exempt employees, the USDOL has taken the position that the salary of an exempt employee cannot be prospectively reduced based upon short term economic conditions, as seem to be present now. The key here is “short term economic conditions.” Accordingly, if

such an employee's schedule was prospectively and **permanently** reduced with a commensurate reduction in salary, it appears that would be acceptable to the USDOL.

The key consideration here seems to be whether the action taken by the employer in prospectively reducing a schedule coupled with a commensurate reduction in salary, on a permanent basis, would be considered a bona fide reduction not intended to circumvent the salary basis test. We may have to wait and see what happens in such a circumstance.

I encourage you to view the USDOL-FLSA Covid-19 FAQs at <https://www.dol.gov/agencies/whd/flsa/pandemic> and the IDOL FAQs at <https://www2.illinois.gov/idol/Pages/default.aspx>; among other resources. Of course, should you have any questions or issues with the FLSA, IMWL, or other employment or labor laws, please email me or call my office - 312-857-0100 - or my cell - 312-391-0100.