

# Follow DOL Guidance When Reducing Salaries During the Pandemic

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**E**mployers are making difficult decisions as the coronavirus crisis continues, including whether to cut hours and pay in lieu of laying off workers. But employers should note that many wage and hour rules still apply during an economic slowdown.

Can an employer reduce an exempt employee's salary during the COVID-19 pandemic? Will the employee lose exempt status? Here's what the U.S. Department of Labor (DOL) and employment attorneys had to say:

## The Basic Rules

Under the federal Fair Labor Standards Act (FLSA), an employer can generally reduce exempt employees' regular salary for COVID-19-related reasons. However, the reduction cannot be made after the fact or based on the employer's day-to-day or week-to-week needs, according to the DOL.

"In other words, exempt employees must be paid their predetermined salary for any workweek in which the employee provided any services," said Lisa Reimbold, an attorney with Clark Hill in Los Angeles "As such, any pay reduction for an exempt employee can only apply to future workweeks."

The FLSA requires most businesses to pay employees 1 1/2 times their regular hourly rate for hours worked in excess of 40 in a workweek, unless employees fall under an exemption. The most common exemptions are administrative, executive and professional, which are collectively called white-collar exemptions.

Employees who fall under the white-collar exemptions must be paid on a salary basis of at least \$684 a week ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Labor-Department-Issues-Final-Federal-Overtime-Rule.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Labor-Department-Issues-Final-Federal-Overtime-Rule.aspx)) (\$35,568 annualized). Additionally, the employee's job duties ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/review-duties-tests-for-overtime-exemptions.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/review-duties-tests-for-overtime-exemptions.aspx)) must primarily involve executive, administrative or professional duties.

Employers can make bona fide changes for reasons related to the pandemic or an economic slowdown, but they can't make changes in an effort to evade the FLSA's requirements, the DOL said in updated guidance (<https://www.dol.gov/agencies/whd/flsa/pandemic#q19>) on July 20.

Employers should note that exempt workers still must be paid at least the minimum salary under the FLSA or applicable state law. Furthermore, employers need to check state laws to see if salary reductions are permitted.

"While the FLSA does not explicitly prohibit a bona fide fixed reduction in pay based on shortened workweeks due to economic conditions, state law may," Reimbold said. For example, the California Division of Labor Standards Enforcement Manual specifically provides that California law "will not permit a reduction in the salary of an exempt employee which is the result of a reduction in the number of hours in a workday or days in a workweek the employee is required to work."

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### Don't Link Pay to Hours Worked

Exempt employees are generally paid for the job duties they perform rather than the hours they work. "The salary cannot change from week to week or otherwise be tied to hours worked," explained Tammy McCutchen, an attorney with Littler in Washington, D.C. "Reduction in salary for exempt employees should not be done more than once or twice and should be for the duration of the crisis," she said.

Matthew Simpson, an attorney with Fisher Phillips in Atlanta, said he generally recommends keeping exempt employees at their new salary for three months or longer.

Employers that opt to reduce exempt workers' salaries should make it clear that the reduction is not related to reduced hours of work.

Michael Correll, an attorney with Reed Smith in Dallas, said, for instance, exempt workers should not be told that their salary will be reduced by 20 percent and, as a result, they only need to work four days per week.

Instead, Correll said, employers should communicate that salaries are being reduced as a business measure and that exempt workers are still expected to work as many hours as needed to complete their work.

"That said, employers can also communicate that they may have relaxed expectations for the number of hours exempt employees will be at work each week, as long as they do not attempt to frame the reduction in time as a direct offset for reductions in pay," he noted.

### Maintaining Exempt Status

When business needs change, employers still must be careful about shifting too much nonexempt work to exempt employees. Employees still have to meet the duties test under the applicable exemption.

For example, an employee who qualified for the FLSA's executive exemption ([https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17a\\_overview.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17a_overview.pdf)) prior to a slowdown and is no longer supervising at least two full-time employees (or employees with the equivalent hours of work) may no longer qualify as exempt. Additionally, an exempt outside salesperson who can't visit customers because of government lockdowns may no longer qualify as exempt, McCutchen noted.

However, the DOL has said in updated guidance ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/exempt-workers-perform-nonexempt-duties-during-covid.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/exempt-workers-perform-nonexempt-duties-during-covid.aspx)) that during the COVID-19 public health emergency, employees who fall under the FLSA's white-collar exemptions may temporarily perform nonexempt duties that are required by the emergency without losing their exempt status if certain conditions are met.

"While DOL has confirmed that exempt employees may temporarily perform some nonexempt duties during the COVID-19 pandemic, employers should ensure that employees continue to perform some exempt duties and limit the nature and duration of employees' nonexempt duties as much as possible," Simpson said.

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Can exempt employees who were put on an unpaid furlough (<https://www.usatoday.com/story/money/columnist/2020/08/04/whats-difference-between-furlough-and-layoff-ask-hr/5568666002/>) be asked to perform limited tasks, such as checking e-mails each week? McCutchen said they either can't perform any work or must be paid their full pre-furlough salary.

"The recommended practice is to reclassify the furloughed employees to nonexempt and pay them by the hour for any work time," she said.

Open and clear communication with employees is key. "Employers should work with counsel to make sure their messaging to employees meets the needs of their workforce while still avoiding compliance missteps," Correll said.

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