

## REDUCED WORK WEEK MAY ALTER EMPLOYEE'S EXEMPT STATUS

By: Peg O'Brien  
Email: [mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)  
Phone: 603.695.8631

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The faltering economy is causing many businesses to consider cost-saving measures, such as reduced work weeks and mandatory furloughs, in an effort to avoid permanent lay-offs. While this is a laudable goal, employers should be aware these alternative work schedules present potential problems under the Fair Labor Standards Act ("FLSA"). In January 2009, the Department of Labor ("DOL") published three "opinion letters" addressing this topic. Below is a discussion of the three letters, as well as an overview of the FLSA provisions at issue.

### Legal Basis For Declaring An Employee Exempt

The FLSA provides an exemption from the minimum wage (note: most employees are not exempt from state minimum wage laws) and overtime requirements for any employee who (a) is employed in a bona fide executive, administrative, outside sales or professional capacity and (b) is paid on a "salary basis." This article is limited to the "salary basis" component.

An employee will be considered to be paid on a "salary basis" if the employee receives a predetermined amount of pay on a weekly, or less frequent basis, and that amount is not subject to reduction based upon the quality or quantity of work. See [29 C.F.R. 541.602\(a\)](#). Importantly, the employer must pay the employee his/her entire salary for any pay period in which the employee is ready, willing and able to work, or has worked any portion of the pay period. An employer may not classify an employee as "exempt" if deductions are taken from the employee's salary for absences occasioned by the employer or the operating requirements of the business. If an employer knowingly misclassifies an employee as being paid on a "salary basis," and therefore "exempt," it may be liable for overtime compensation for such employee retroactive for up to three years.

### Labor, Employment & Employee Benefits

Mark Broth, Chair  
603.695.8558  
[mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)

Aaron Gilman  
978.475.9100  
[agilman@devinemillimet.com](mailto:agilman@devinemillimet.com)

Newton Kershaw  
603.695.8571  
[nkershaw@devinemillimet.com](mailto:nkershaw@devinemillimet.com)

Karen Levchuk  
603.695.8618  
[klevchuk@devinemillimet.com](mailto:klevchuk@devinemillimet.com)

Patricia McGrath  
603.695.8537  
[pmcgrath@devinemillimet.com](mailto:pmcgrath@devinemillimet.com)

Anthony Augeri  
978.475.9100  
[aaugeri@devinemillimet.com](mailto:aaugeri@devinemillimet.com)

Margaret O'Brien  
603.695.8631  
[mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)

Anne Scheer  
603.410.1708  
[ascheer@devinemillimet.com](mailto:ascheer@devinemillimet.com)

Laurel Van Buskirk  
603.695.8565  
[lvanbuskirk@devinemillimet.com](mailto:lvanbuskirk@devinemillimet.com)

Anne Trevethick  
603.695.8725  
[atrevethick@devinemillimet.com](mailto:atrevethick@devinemillimet.com)

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

## DOL Opinion Letters Addressing Employer Adjustments to Exempt Employees' Workweek in a Down Market

In response to inquiries from employers regarding the impact of short-term staffing adjustments to the exempt status of employees, the DOL recently reiterated some of its long-standing policies in three separate opinion letters.

*Plant Shutdown of Less Than One Week:* In this opinion letter, the employer proposed to require exempt employees to use accrued vacation time during a plant shutdown of less than a full work week. The DOL concluded that the employer may require exempt employees to use accrued vacation time for any absence, including one resulting from a plant shutdown, without affecting their exempt status, provided that the employee receives payment in an amount equal to their predetermined salary. The DOL cautioned that an "an exempt employee who has no accrued vacation benefits or has a negative balance still must receive the employee's guaranteed salary for any absence(s) occasioned by the employer or the operating requirements of the business."

*Deductions for Voluntary and Mandatory Time Off:* In this opinion letter, the employer proposed to reduce the hours worked by exempt employees due to short-term business needs. In such cases, the employer planned to offer voluntary time off (VTO), where employees may, at their option, use accrued paid time off, but continue to accrue employment benefits. The employer would approve VTO on a first-come first-serve basis. If there were insufficient volunteers for VTO, the employer planned to require mandatory time-off (MTO). Exempt employees could use accrued paid leave or take unpaid MTO. If an exempt employee chose not to use any accrued paid leave or did not have enough paid leave, the employer planned to deduct the amount equal to the VTO or MTO from the employee's salary. If the VTO or MTO lasted an entire workweek, the employer would not pay the salary for that pay period.

The DOL concluded that the salary deductions proposed by the employer for exempt employees who have no available accrued paid time-off or who choose not to use accrued paid time-off do not comply with the salary basis test because they were deductions in salary that resulted from the "operating requirements of the business." If an employee is "ready, willing and able to work," deductions may not be made for time when work is not available. In this particular case "deductions from salary due to the day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis requirement is intended to preclude." Accordingly, the employer was cautioned against making salary deductions for MTO for exempt employees lasting less than a workweek without causing the loss of the exempt status.

### Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

300 Brickstone Square  
Andover, MA 01810  
T 978.475.9100  
F 978.470.0618

43 North Main Street  
Concord, NH 03301  
T 603.226.1000  
F 603.226.1001



The employer is free, however, to reduce the salary of exempt employees who take MTO for an entire workweek. See [29 C.F.R. 541.602\(a\)](#) (“Exempt employees need not be paid for any workweek in which they perform no work.”).

The DOL noted that deductions may be made when exempt employees voluntarily take time off for personal reasons, other than sickness or disability, for one or more full days. The employee’s decision to take VTO must be completely voluntary and not “occasioned by the employer or by the operating requirements of the business.” NOTE: While it may be permissible under the federal FLSA, this deduction is usually not permissible under the strict requirements of New Hampshire’s state wage and hour law. See [RSA 275:43-b, I, e.](#)

*Deductions for Paid Time-Off:* In this opinion letter, the employer proposed to require exempt employees to stay home or leave work early during periods of insufficient work and deduct the non-work time from the employee’s accrued paid time-off accounts. The employees would receive their regular salaries so long as they had sufficient hours in their PTO accounts. If an employee’s accrued time-off was exhausted, the employee’s regular salary would be reduced in full day increments (but never reduced below the \$455.00 minimum).

The DOL reiterated that an employer can substitute or reduce an employee’s accrued paid time off for the time an employee is absent for work, even if the absence is directed by the employer because of lack of work, without affecting the employee’s exempt status, provided that the employee receives an amount equal to his/her guaranteed salary. An employer cannot, however, make deductions which result in the employee receiving less than his/her full salary where the employee has insufficient accrued paid time off to cover his/her non-work times. An employer must pay the employee’s full salary under those circumstances for any non-work time.

In addition, the employer asked whether it could schedule the exempt employee for less than forty hours and reduce the employee’s pay if the employee’s accrued paid time-off is exhausted. The employer would require the employee to be away from work for one day a week and only pay the employee for four days. The DOL concluded that this *short-term and unpredictable adjustment* would violate the salary basis test. In contrast, the DOL noted that a *permanent change* in an exempt employee’s regular workweek schedule (e.g., permanently reducing five day workweek to four day workweek) with a corresponding reduction in salary will not jeopardize an employee’s exempt status, as long as the employee continues to receive at least the \$455.00 salary minimum.



## Conclusion

These DOL opinion letters highlight that any deduction from an exempt employee's salary should be scrutinized under the FLSA and the applicable state wage and hour laws. Misclassification of an employee's status can lead to significant and unnecessary costs. Employers interested in discussing strategies for implementing short-term staffing adjustments in an effort to save costs may contact any member of Devine Millimet's Labor and Employment Practice Group.

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