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Kathleen M. Paustian, Esq.

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Preserving the Status of Your Exempt Positions During Tough Economic Times

By Kathleen M. Paustian, Esq.

Many, if not most, employers are using creative solutions to cut back on employment expenses to avoid, or reduce, lay-offs or cuts in pay and benefits. For example, in 2008, the State of Utah went to four ten-hour workdays per week for non-emergency services, closing almost all state offices on Fridays. The "4/10 system" is credited with saving electricity and other operational expenses, as well as gas, because approximately 16,000 state workers make fewer commutes and citizens make fewer trips to state offices. It has also forced Utah to improve its online services so unemployment and other benefits recipients can file and ask questions online, saving a drive to a state office.

While such working arrangements are allowed under the federal Fair Labor Standards Act ("FLSA") and most state wage and hour laws, employers are advised to be careful when implementing alternative work hours. Employers must give their employees adequate pre-warning of such changes in hours or days of work. "Best practices" require that employers put such changes in writing distributed to all employees, ideally at least 30 days before the change is implemented. This written notice should reiterate existing wage and hour rules, such as required use of time clocks or other log-in devices and the requirement that all overtime be pre-approved.

Employers considering cutting workers' hours or furloughing employees should be cognizant of overtime issues and particularly of employee classification. Why classification? If an employer currently has employees, or job classifications, that are listed as "exempt" (sometimes referred to generally as "salaried"), it does not

want to lose this classification. How does an employer "lose" the exempt status for an employee or job classification? The state or federal Department of Labor ("DOL") conducts an audit of an employer's payroll practices and determines certain employees/job classifications should be changed from exempt to non-exempt. Then, the employer will, of course, have to start paying overtime on those newly non-exempt positions.

To help avoid these types of audits and potential resulting changes, the federal DOL issued a Fact Sheet in 2009 on furloughs and other reductions in pay and hours worked, which contained some important points for employers to remember:

- *Does an employer still have to pay non-exempt ("hourly") employees on the regularly scheduled payday if the employer is having trouble meeting payroll?* Yes, on the employer's regularly scheduled pay day, it must pay non-exempt employees at least minimum wage for hours worked and any overtime due.

- *Can an employer reduce the wages or hours worked for non-exempt workers?* Yes, employers can lower the hourly rate, so long as the new lower hourly rate meets federal and state minimum wage requirements. It is also legal to reduce the number of work hours for non-exempt employees. Of course, if an employer is unionized, the employer's collective bargaining agreement likely controls any reduction in pay or hours.

- *Can an employer put an exempt employee on temporary furlough or reduce the salary of an exempt employee during weeks she or he does work?* Any reduction in the predetermined salary of an exempt worker usually causes loss of the exempt classification for that employee and that job. However, during a documented business slowdown, an employer can reduce the salary of or furlough an exempt worker. The employer must be able to attribute the resulting pay cut to long-term business needs and prove that the pay cut is not related to the employee's quantity or quality of work or a ruse to avoid paying the predetermined salary. Plus, in an instance of wage reduction, the employee must still make a minimum of $455 per week before taxes to "save" the exempt classification. Bear in mind that any such reductions cannot be based on short-term business needs, such as a day-to-day or week-to-week cash flow problem.

Employers who become the target of a state or federal DOL audit such as the type just discussed would be wise to cooperate with the DOL to a reasonable extent. Prior to the on-site audit, the DOL will usually request documents or computer print-outs. An employer should be sure it understands precisely what the DOL is requesting before gathering any records. Employers should consider contacting the DOL or the investigator assigned to its case to ask for specifics and to narrow down the request as much as possible -- there may be the option of just producing only the payroll records requested. Do not turn over personnel files, I-9 Forms, or other

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documents from the Human Resources Department. When the DOL investigator/auditor makes his or her onsite visit, consider providing a conference room or other "visitors' room" rather than locating the investigator in the middle of the work space, such as in empty office surrounded by workers. However, keep in mind that the investigator does have the option of interviewing employees without a company representative or attorney being present.

Remember, along with the fines that can stem from such an audit, often come changes in job classifications. But by being especially careful with classifications in these difficult times, employers should be able to avoid losing the exempt status for their workers and jobs classifications.

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For employers interested in the most recent developments regarding the Milwaukee Paid Sick Leave Ordinance, please click here.