

Legal Q&A

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Q Is a city required to pay its nonexempt employees while the city offices are closed due to a disaster or inclement weather?

A Generally, the Fair Labor Standards Act (FLSA) does not require an employer to pay a nonexempt employee for hours the employee did not work. As a result, whether the city is closed for part of a day, part of a week, or a full week or more, the city is not required to pay nonexempt employees for time they did not work even if such employees would normally be scheduled to work if the city were open. However, if a nonexempt employee receives a fixed weekly salary regardless of the number of hours the employee works during the workweek (commonly referred to as the “fluctuating workweek” pay method), the city must pay the employee his or her full weekly salary for any workweek in which any work was performed. *See* 29 C.F.R. §§778.114; 778.306. Nonetheless, a city may allow a nonexempt employee to use any applicable paid accrued leave balance to substitute for the time the employee is absent from work.

Q Is a city required to pay its exempt employees while the city offices are closed due to a disaster or inclement weather?

A With limited exceptions, exempt employees must be paid their full salary for any workweek in which they perform any work, regardless of the number of days or hours they work. *Id.* §541.602. As such, if an exempt employee works any part of a workweek in which the city is closed or cannot be reopened for less than a full workweek due to a disaster or inclement weather, the city must pay the employee his or her full salary for that workweek. A workweek is defined as a fixed and regularly recurring period of seven consecutive 24-hour periods. *See id.* §778.105. A city’s policies may require that an employee take vacation time, paid time off, or other applicable accrued leave to offset the days the employee did not work, whether full or partial days, provided that the employee receives in payment an amount equal to the employee’s guaranteed salary. *See* Wage and Hour Op. Letter FLSA2009-2 (Jan. 14, 2009). However, in instances where the employer does not provide paid leave benefits, the employee has no accrued paid leave to apply to the absences, a reduction of paid accrued leave will result in a negative leave balance, or an employee already has a negative leave balance, the city must pay the employee his or her full salary for the workweek. *See* Wage and Hour Op. Letter FLSA2005-41 (Oct. 24, 2005).

If a city is closed for a full workweek and an exempt employee performs no work during that workweek, the city is not required to pay the exempt employee for that workweek. 29 C.F.R. §541.602(a)(1). A city may allow the employee to use any applicable paid accrued leave during such absence.

A city should consult with its local legal counsel before making deductions to an exempt employee’s salary in response to a disaster or inclement weather as improper deductions can result in an exempt employee losing his or her exemption and becoming a nonexempt employee who is entitled to overtime pay.

Q Is a city required to pay an exempt employee if the city is open and the employee chooses not to report to work due to a disaster or inclement weather?

A If the city remains open during a disaster or inclement weather, and an exempt employee chooses not to report to work because of a disaster or inclement weather-related reason, such as transportation difficulties, and does not perform any work during such absence, the employee is considered to be absent for personal reasons. *Id.* §541.602(b)(1); Wage and Hour Op. Letter FLSA2005-41. When an exempt employee is absent for personal reasons, other than sickness or disability, an employer may deduct from the employee's salary one or more full day absences without violating the FLSA. *Id.* However, a city may require an exempt employee to use vacation time, paid time off, or any other applicable accrued paid leave to offset any full day or partial day absences. Additionally, a special rule applicable only to public sector employers, including cities, allows a city to deduct partial day absences for personal reasons from an exempt employee's salary when the employee has exhausted their accrued paid leave. 29 C.F.R. §541.710.

Q May a city require an exempt employee perform nonexempt duties during an emergency or disaster?

A Generally, in order for an exempt employee to maintain his or her exempt status, the employee's exempt duties must be the employee's "primary duty." The term "primary duty" means the principal, main, major or most important duty that the employee performs. *Id.* §541.700. Employees who spend more than half of their time performing exempt work will generally satisfy the primary duty requirement. *Id.* Although the time spent on exempt duties is a significant factor in determining whether an employee is exempt or not, it is not the sole test. *Id.* The primary duty test is an employee-specific, case-by-case inquiry with the major emphasis on the character of the employee's job as a whole.

The Department of Labor's recent COVID-19 and the Fair Labor Standards Act Questions and Answers (<https://www.dol.gov/agencies/whd/flsa/pandemic#q2>) provides that during a public health emergency declared by a federal, state, or local authority with respect to COVID-19, otherwise exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing their exempt status, provided they continue to be paid on a salary basis of at least \$684 per week. Although this directive from the Department of Labor may provide some latitude to cities to shift duties in response to the pandemic, employers should continue to monitor tasks performed by exempt employees to make sure that they are primarily performing exempt duties, and if they have to perform nonexempt duties, that they are not performing the nonexempt duties for a prolonged time period.

Q May a city provide hazard pay to employees during a disaster or emergency?

A State and federal law do not require a city to pay hazard pay to employees who perform hazardous or arduous tasks during an emergency or disaster. As such, whether to provide hazard pay to such employees is a local decision. A city that desires to provide hazard pay may do so if it determines that providing the extra compensation serves a public

purpose. *See* Tex. Const. arts. III, §52(a) (providing the legislature shall have no power to authorize any city “to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, . . .”). Additionally, a city should ensure that it complies with Article III, Section 53 of the Texas Constitution, which prohibits a city from giving employees pay increases retroactively. *See* Tex. Const. Art. III, §53; *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App. —El Paso 1971, no writ). Because cities are prohibited from granting additional compensation that is not agreed upon before work begins, the decision to provide hazard pay must be made in advance of the employee performing services that are entitled to hazard pay, otherwise, a retroactive payment after services have been performed would be considered an illegal bonus.

Additionally, hazard pay that is provided to a nonexempt employee must be included in calculating the employee’s regular rate of pay, which may affect the overtime compensation the employee is entitled to. *See* 29 C.F.R. §778.207.

Q May a city penalize an employee who leaves his or her place of employment to participate in an emergency evacuation order?

A Texas law prohibits an employer, including a city, from discharging or discriminating against an employee who leaves the employee’s place of employment to participate in a general public evacuation ordered under an emergency evacuation order or a local disaster declaration. *See* Tex. Lab. Code §22.002. An employer who violates this provision is liable for any loss of wages and employer-provided benefits incurred by the employee as a result of the violation. *Id.* §22.003. However, this provision does not apply to emergency services personnel, including fire fighters, police officers, emergency medical technicians, and other individuals who are required to provide services for the benefit of the general public in emergency situations, provided that adequate emergency shelter is provided for such individuals. *Id.* §22.004.

Q What is a furlough?

A The term “furlough” does not have an exact legal definition, but it is generally understood to mean mandatory unpaid time off from work for a certain time period that is limited in duration. A reduction in pay alone, without any corresponding unpaid time off, is typically not considered to be a furlough.

Employers typically use furloughs in times of significant economic downturn that are temporary in nature as an alternative to terminating or laying off employees or implementing across-the-board pay cuts. A furlough can be accomplished in a number of ways, including by reducing – for a certain time period – the number of hours or days an employee works with an equivalent reduction in pay or requiring an employee to take a certain amount of unpaid time off. A furlough may include all employees or may exclude some employees, such as employees who provide or support essential or critical services. Additionally, unlike a termination or a layoff in which there is a separation of the employment relationship, a furloughed employee is still considered to be an employee.

A city that is considering a furlough for all or some of its employees should work with local legal counsel to develop a policy that addresses, among other things, which employees will be subject to a furlough, who approves furloughs, how long a furlough will be in place, and what benefits, if any, an employee will continue to accrue during a furlough. A city should also review any contractual requirements, including any meet and confer agreements and collective bargaining agreements, before taking action to furlough employees who are subject to those agreements.

Q May a city furlough employees?

A Yes. Absent any contractual obligations, a city may furlough both exempt and non-exempt employees. Because an employer is only required to pay a nonexempt employee for the hours the employee actually works, a city may reduce the number of hours a nonexempt employee is scheduled to work provided that the employee is paid at least the minimum wage (currently at \$7.25/hour) for all hours worked and any applicable overtime pay.

The Fair Labor Standards Act provides that certain exempt employees (executive, professional, administrative, and certain computer employees) must be paid a “predetermined salary” (currently a minimum of \$684/week) for any workweek in which the employee works without regard to the quantity or quality of the employee’s work. 29 C.F.R. §541.602. Failure to do so generally results in the exempt employee losing his or her exempt status. However, a special rule, applicable only to public sector employers, including a city, allows for an exempt employee to retain his or her exempt status except in the workweek when a budget-required furlough is taken and the employee’s salary is reduced accordingly. *Id.* §541.710(b). This provision allows an exempt employee in a city to be on furlough for time periods that are less than full workweeks without the employee losing their exempt status. For example, an exempt employee can take every Tuesday (8 hours) as a furlough day, and the city is only required to compensate the employee for 32 hours worked during that workweek. During such workweek, the employee is treated as a non-exempt employee, is paid on an hourly basis, and is entitled to overtime pay if the employee works more than 40 hours. Cities should ensure that in a workweek when furlough is taken, the combination of worked hours and furlough hours do not exceed 40 hours, otherwise the exempt employee will be entitled to overtime pay. As such, a furlough policy should prohibit an exempt employee from performing any work on the day(s) when the employee is on furlough, including tasks such as checking or responding to emails or voicemails, answering phone calls, or attending meetings.

Cities that are contemplating a furlough may want to review the Department of Labor Fact Sheet #70 (<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs70.pdf>), which provides additional information on wages issues that may come up during a furlough.

Q May an employee use paid accrued time off to supplement the employee's pay during a furlough?

A Yes, but only if the city has a policy that allows for it. Some policies require or allow an employee to use paid accrued leave in lieu of a furlough. Others prohibit an employee from using any paid accrued time off to supplement the employee's pay during a furlough. Cities should carefully consider these options when drafting a furlough policy while taking into account the city's budget.

Q Is an employee's health insurance coverage impacted during a furlough?

A Whether an employee (and any dependents of the employee) who is on furlough will be eligible for continued group health insurance benefits with the city will depend on whether the health benefit plan documents allow benefits to continue when an employee fails to work the required number of hours specified in the plan documents. Some health benefit plans require that an employee work a specific number of hours (for example, 20 hours a week) in order to be eligible for health care benefits. A city considering a furlough should review the plan documents and any stop-loss policy to determine how coverage is affected during a furlough. If it is determined that continued coverage is unavailable for furloughed employees, a city may want to reach out to its health insurance carrier to determine if a waiver of any work hour threshold requirements is available for employees whose work hours are reduced as a result of a furlough.

The loss of health care benefits that results from a temporary reduction in the number of hours worked due to a mandatory furlough is a qualifying event that triggers the Consolidated Omnibus Budget Reconciliation Act (COBRA). 42 U.S.C. §300bb-1. A city that employs 20 or more employees and that offers health plan coverage must follow COBRA requirements, which include providing COBRA election notices to employees (and their eligible dependents) who have a qualifying event. *Id.* §300bb-2. The employee may elect to continue health coverage at the employee's own expense, but a city may also pay a portion of its employees' COBRA premiums if it finds doing so serves a public purpose. COBRA requirements apply even if the employee is furloughed for a short-time period, such as one month.