Prospectively Reducing Workweeks for Overtime Exempt Employees - With a Commensurate Reduction in Salary - Does Not Necessarily Destroy the Exemption

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Employers grappling with workplace attendance issues in the wake of the COVID-19 coronavirus may soon face additional challenges resulting from a potential economic downturn. Media stories are already beginning to report on potential furloughs and layoffs. For some employers, reducing the workweek (e.g., from 5 working days to 4 working days) could be a reasonable business response. But would reducing the workweek affect the overtime exemption for exempt employees?

That question has been answered by the Tenth Circuit in In re Wal-Mart Stores, Inc., 395 F.3d 1177 (10th Cir. 2005), and the Illinois Appellate Court in Robinson v. Tellabs, 391 Ill. App. 3d 60 (1st Dist. 2009) (Illinois expressly incorporates the FLSA’s overtime exemptions, and this decision provides a thorough analysis of the
federal regulations, court decisions, and relevant U.S. DOL opinion letters). Both courts held that:

(a) prospectively reducing the base hours of exempt employees;

(b) with a commensurate reduction in base salary;

(c) for the purpose of addressing a genuine, bona fide business need;

does not destroy the overtime exemption.

Notably, these decisions relied upon, and applied “Auer deference” to, U.S. DOL Opinion letters finding that such reductions in workweek and salary are permissible when the reduction is made prospectively, for a proper purpose, and not so frequently that the employee is effectively transferred from a salaried to hourly. See DOL Opinion Letter WH-93, Nov. 13, 1970; DOL Opinion Letter, March 4, 1997; and DOL Opinion letter, Feb. 23, 1998. The Supreme Court’s affirmance of “Auer deference” in Kisor v. Wilke, 139 S. Ct. 2400 (2019), supports continued reliance on these opinion letters and decisions.

Prospective reduction of workweeks with a commensurate reduction in salaries is thus another potential arrow in the quiver for employers responding to the economic impact of COVID-19.

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