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# salary flexibility for exempt employees approved by dlse

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*MSK Client Alert*

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Employers whose business has slowed but who are trying to avoid laying off employees should take note of a new Opinion Letter from the California Division of Labor Standards Enforcement ("DLSE"), which approves temporary reductions in workdays and salaries for employees who are exempt from overtime requirements ("exempt" employees). *DLSE Opinion Letter 2009.08.19*. This opinion brings California law in line with the rule under the Fair Labor Standards Act and permits California employers to institute partial week furloughs without having to pay full salaries to exempt employees.

This represents a change from the DLSE's previous position, set forth in an Opinion Letter in 2002. *DLSE Opinion Letter 2002.03.12*. Then, the agency determined that for an employee to be classified as exempt, the employer must provide a "fixed and regular sum" to that employee. Accordingly, the DLSE deemed an employer proposal to make commensurate cuts in workdays and salaries a "subterfuge" to get around the overtime requirements and would not consider such employees to be truly "salaried exempt" if those cuts were made.

However, in its 2009 Opinion Letter on this same issue, employers are finally provided with more flexibility. The DLSE highlighted the fact that the company at issue was experiencing "significant economic difficulties due to the present severe economic downturn," and permitted the commensurate reduction in working days and salaries. Specifically, the employer was permitted to reduce employees' scheduled workdays from five to four per week, with commensurate 20% salary cuts.

An employer probably needs to have a *bona fide* slowdown in work needs, driven by the larger economic downturn, to take advantage of this new flexibility. Also, the DLSE emphasized that the reductions were intended by the employer at issue to be only "temporary" and that the employer intended "to restore both the full five-day work schedule and the full salaries of its exempt employees" once its business picked up.

## attorneys

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## practice areas

employment litigation & counseling

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Of course, employers must continue to follow all the other California and federal rules for maintaining employees' exempt status. To qualify, an employee must spend more than half of his or her working time performing truly "exempt" duties. (Generally, these are defined as executive, administrative, or professional duties involving "discretion and independent judgment.") Moreover, in California, exempt employees must receive a salary that is at least twice the state's minimum wage for a 40-hour week (i.e., at least \$640 per week or \$33,280 per year). Importantly, even if the required workweek is reduced to fewer than five days, exempt employees still must receive at least \$640 per week. In addition, absent an established legal exception (such as in accordance with a sick-leave plan), exempt employees must receive the entirety of their new salary in any workweek in which any work is performed.

Even with the new Opinion Letter, some caution is advisable. The DLSE's Opinion Letters are not binding on the courts, although they may be considered as persuasive. For any particular employer, there may be additional factors to consider, such as employment contracts, collective bargaining agreements, alternative workweek schedules, accommodations to particular employees, or other constraints. Employers should consult employment counsel before implementing any reductions to the working hours and salaries of their exempt employees.