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“Paid Time Off for Partial Day Absences and Maintaining “Exempt” Employee Status”

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On January 7, 2005, the U.S Department of Labor (DOL) issued an Opinion Letter confirming that employers may deduct less than a full day from a salaried, overtime-exempt white-collar employee’s PTO bank for absences due to personal reasons, accident, or illness, without causing the loss of the exempt status of the employee. This opinion letter confirms what had been the DOL’s position under the previous regulations regarding the white-collar exemptions for executive, administrative and professional employees and resolves what had become an issue under the new regulations.

Background

The federal Fair Labor Standards Act (FLSA) requires the payment of the minimum wage and overtime to all employees who are covered by the Act, unless the employees fall in one of the exemptions from the Act. The white-collar exemptions apply to certain executive, administrative, professional and outside sales employees.¹ In order to be exempt, executive employees must be paid a salary in a particular form and administrative and professional employees must be paid on a salary or a fee basis. A “fee” is a fixed sum for a particular project and few employees are compensated on a fee basis.² An executive, administrative or professional employee who is not paid a fee or the prescribed salary will not be overtime exempt, regardless of the employee’s duties.³

As a basic rule, an overtime-exempt, white collar employee must be paid his or her salary for any week in which the employee performs any work. An employee’s salary may not be

reduced in any workweek because of variations in the number of hours worked or the quality or quantity of the work performed.⁴ A salary may be reduced for absences on an hour-by-hour basis for absences protected by the Family and Medical Leave Act. If an individual is permitted to take such intermittent leave, but the employer is not covered by the FMLA, or the individual employee does not meet the qualifying criteria for FMLA leave, deduction of salary for a partial day cannot be made without compromising the employee’s exempt status. In addition, a salary may be reduced when an employee is suspended for violation of written work rules of general applicability and for initial and final partial weeks of work. A salary cannot be reduced for absences of a partial week, whether for a full day or not, for military, jury and witness duty, or for a lack of work.

Allowed Absences of a “Day or More”

Deductions may also be made from salaries for absences of a full day or more for vacation or sickness or accident, but the regulations do not explain how paid time off benefits are to be integrated with the salary pay requirement for partial-day absences.

Deductions may be made from an employee’s compensation to account for absences of a “day or more” for personal reasons other than sickness or accident. Thus, an employee need not be paid for a full day of absence to attend to personal business or to “go fishing.” An employee need not be paid for such a day of absence, or the employee can be

¹ This article does not attempt to review all of the criteria which need to be met in order to qualify for exempt status as a white-collar employee. For an explanation of all of the criteria, see Littler Mendelson’s *The National Employer*, Chapter 21.

² 29 C.F.R. § 541.605.

³ Physicians, lawyers, and teachers need not be paid

a salary or a fee in order to be overtime exempt. 29 C.F.R. §§ 541.303, 541.304. Certain computer professionals can be overtime exempt if paid on a salary or at a rate of not less than \$27.63 per hour. 29 C.F.R. § 541.400.

⁴ All references to “employees” are to overtime-exempt white-collar employees.

paid any accrued paid time off benefit for such an absence.

Deductions may also be made for absences of a day or more due to sickness or accident if “made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability.” A benefit plan that has defined sick leave benefits, and which has been communicated to eligible employees, and operates as it is described in the plan, will generally be considered by the DOL to be a “bona fide” plan. The plan must be administered impartially and cannot be designed for the purpose of evading the requirement that exempt employees be paid on a salary basis. Of course, if the employer has a bona fide sick leave plan in place, it may still deduct from the employee’s salary for absences *in excess of a full day* in the event that the employee’s PTO bank has been exhausted. As long as an employer maintains a plan that provides such a benefit, an employer need not pay for absences that are not covered by the plan (For example, where the employee has not yet qualified for coverage, or where the employee has exhausted accrued benefits). In the absence of such a “bona fide plan” such deductions may not be made.

These two DOL rules do not explain whether making a deduction from an employee’s vacation or sick leave or, the two combined as a paid time off (PTO) benefit for a partial-day absence would compromise the salary pay requirement.

Reduction of the Employee’s PTO Bank – Clarification of DOL Rules

The recent Opinion Letter issued by DOL indicates that an employer may reduce an exempt employee’s accrued PTO hours for either partial, or full day, absences. Such reduction may be made, provided that the employer has an established benefit plan

(vacation, sick leave, or PTO plan). Also, the reduction in the accrued PTO hours must not result in a reduction of the employee’s guaranteed salary for the week in which the hours are reduced. Payment of the employee’s salary must be made for a partial-day absence for personal reasons or sickness or accident even if the employee has no more vacation, sick leave or PTO hours remaining, and even if there is a negative balance in the employee’s PTO account.⁵

An employer may not reduce an employee’s final salary to make up for an employee’s taking more paid time off than the employee had accrued. Deductions for such purposes may result in an employer making delayed deductions for partial day absences and otherwise violating the salary pay rule.

Consequences of Not Paying the Required Salary

There is good reason to take the salary pay rule very seriously. In the event that an employee classified as exempt loses their exempt status, the employer may be required to pay back-pay for any overtime worked by the employee for up to three years, plus applicable penalties. There is the additional risk that the loss of such status for any employee may result in loss of exempt status for all employees in the same or similar jobs, with the same potential liabilities for back pay and penalties. Thus, loss of exempt status can result in very significant financial liability to the employer.

Effect of State Wage and Hour Statutes

Complying with the salary pay requirement for overtime-exempt status under the FLSA may not meet all of an employer’s obligations regarding salary compensation. States are free to impose overtime obligations and create exemptions that are different than those in the FLSA. A state can create an overtime exemption that has a more restrictive salary

pay requirement than does federal law. In order to comply with all of its obligations, an employer must comply with the requirements of both federal and state law.

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⁵ The case law, “although not unanimous, strongly supports the view that the partial day absences of exempt employees may be charged to paid leave

accounts.” *Caperci v. Rite Aid Corp.*, 43 F. Supp. 2d 83, 93 (D.C. Mass. 1998) This decision contains a good review of the decisions of various courts that

generally support the position taken by DOL.