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Department of Labor provides employers with options for dealing with pay to exempt employees absent due to weather emergencies while at the same time preserving the exempt status of these employees.

## To Deduct or Not to Deduct Exempt Employee Absences During Weather Emergencies

By Joseph P. Harkins and Katherine A. Goetzl

In two recently released opinion letters, the Wage and Hour Division of the U.S. Department of Labor (DOL) provides guidance to employers regarding deductions from an exempt employee's salary due to absences during weather emergencies. The letters are available at [http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005\\_10\\_24\\_41\\_FLSA.htm](http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_10_24_41_FLSA.htm) and [http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005\\_10\\_28\\_46\\_FLSA.htm](http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_10_28_46_FLSA.htm)

The Fair Labor Standards Act (FLSA or "the Act") exempts employees who meet duty, salary level, and salary basis tests from the Act's minimum wage and overtime pay requirements. The salary basis test requires that an employee be regularly paid a predetermined amount that is not subject to deduction due to quality or quantity of work performed. Deductions from an exempt employee's salary are permitted in limited circumstances, such as full workweeks when no work is performed and full day absences for personal reasons. However, making improper deductions from an employee's salary can jeopardize the employee's exempt status, leading to back pay and penalties for misclassification.

### Deductions When the Employer Closes During Inclement Weather

When an employer closes because of adverse weather conditions for less than a full workweek, exempt employees

must be paid their full salary. According to the DOL, payment of the full salary is required because deductions cannot be made for absences caused by the employer or the operating requirements of the business when the employee is ready, willing and able to work. In this circumstance, the employer must pay the employee's full salary even if the employee has no accrued leave or has a negative accrued leave balance. However, the employer may debit the employee's leave bank account for full or partial day absences without putting the employee's exempt status at risk.

### Deductions When the Employer Remains Open During Inclement Weather

When an employer remains open during inclement weather, it must pay an exempt employee who has accrued leave his full salary, but may debit his leave bank account for full day or partial day absences. However, if the exempt employee has no accrued leave and fails to report for work, the employer does not have to pay him for any full day absence. In other words, the employer may place such an employee on leave without pay. The employer may not make a deduction for any partial day absence if the employee has no accrued leave and fails to report for work.

The DOL also responded to questions regarding deductions permitted when an

employer has a policy that employees who do not report for work during weather emergencies cannot use their accrued leave for the absence. The DOL determined that an employer with that policy may make salary deductions for any full day absence, but may not make deductions for partial day absences.

## Recommended Employer Action

Having a clearly communicated salary pay policy is essential for every employer. Such a policy should:

- prohibit improper deductions;
- include a complaint mechanism;
- reimburse employees for any improper deductions; and
- make a good faith commitment to ensure future compliance.

Generally, an employer should not lose the right to claim exemption status unless it willfully violates its salary pay policy by continuing to make improper deductions after receiving employee complaints. In order to reduce the risk of jeopardizing the exempt status of employees, employers should consult with counsel to implement such a salary pay policy or to have their existing salary pay policy reviewed and updated to reflect the DOL's guidance.

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