



**FLSA2006-32**

September 14, 2006

Dear **Name\***:

This is in response to your request for an opinion concerning whether your client's sick/vacation leave plan qualifies as a bona fide plan under the regulations implementing section 13(a)(1) of the Fair Labor Standards Act (FLSA). Based on the analysis below, we conclude that the sick/vacation plan you described is a bona fide plan.

Your client's sick/vacation leave plan provides, in pertinent part:

One year after [the] start date the employee is eligible for 40 hours off with pay. After two years the employee will receive 80 hours off with pay. After 10 years[, the employee will receive] 120 hours [off with] pay. All vacation must be taken in . . . full work day [increments,] not an hour at a time. [For e]xample some departments may work 10 hour days[, which means those employees would be entitled to 4 days off.] Also one sick day is paid per year. [Salespeople] must take vacation one week at a time.

In subsequent letters clarifying your client's leave plan, you state that, for purposes of this request, we are to assume that the employees in question otherwise qualify for the exemptions under FLSA section 13(a)(1). You note that one sick/personal day is provided per year to allow employees to take their birthdays off, use as a sick leave day, or for any other reason. The plan also allows an employee who is ill, or who has a doctor's appointment, to use vacation leave in half-day increments. In addition, under the plan, a salaried employee's leave balance will not be reduced for situations such as arriving one to two hours late to work due to illness or a doctor's appointment. The plan does not allow employees to accrue vacation and sick leave; leave earned each year must be used by the employee's anniversary date. An AFLAC short- or long-term disability plan is offered to all employees at their own cost.

You ask whether the sick/vacation leave plan as described allows the employer to make salary deductions for employees who have either (1) not qualified for leave or (2) exhausted their leave allowance.

FLSA section 13(a)(1) provides a complete minimum wage and overtime exemption for any employee employed in a bona fide executive, administrative, professional, computer or outside sales capacity, as those terms are defined in 29 C.F.R. Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duty and salary, as discussed in the appropriate sections of the regulations, are met. One such test requires that an exempt employee be paid on a salary basis, as described in 29 C.F.R. § 541.602. The section relevant to your inquiry is 29 C.F.R. § 541.602(b)(2), which relates to deductions from pay in the context of a bona fide sickness or disability plan.<sup>1</sup>

<sup>1</sup> The Department issued revisions to the 29 C.F.R. Part 541 regulations exempting certain executive, administrative, professional, computer and outside sales employees, that were published as a final rule in the

As stated in 29 C.F.R. § 541.602(a),

[a]n employee will be considered to be paid on a “salary basis” . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

This section further provides that the salary basis requirement is not met if an employer makes deductions from the employee’s predetermined compensation except for limited circumstances enumerated in 29 C.F.R. § 541.602(b).

One permitted deduction is:

for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee’s salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. . . .

29 C.F.R. § 541.602(b)(2).

Where an employer has a bona fide benefits plan (*e.g.*, vacation time, sick leave), it is permissible to substitute or reduce the accrued leave in the plan for the time an exempt employee is absent from work, whether the absence is a partial day or a full day, without affecting the salary basis of payment, if the employee nevertheless receives payment of his or her guaranteed salary. Where the employee’s absence is for less than a full day, payment of the employee’s guaranteed salary must be made, even if an employee has no accrued benefits in the leave plan and the account has a negative balance. *See Wage and Hour Opinion Letter FLSA2005-7 (Jan. 7, 2005)*. We note that an employer is not required to establish a paid sick leave plan; if an employer does not have a bona fide sick leave plan for its exempt employees, however, it may not make deductions from their salaries for absences due to sickness or disability without violating 29 C.F.R. § 541.602(b)(2).

The Wage and Hour Division has found that a plan that has defined sick leave benefits that have been communicated to eligible employees, and that operates as described in the plan, will in general qualify as bona fide. In addition, to be bona fide, the plan must be administered

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Federal Register on April 23, 2004 (69 Fed. Reg. 22,122). The revised 29 C.F.R. Part 541 regulations went into effect on August 23, 2004. The old rule addressed the issues you have raised at 29 C.F.R. § 541.118. This opinion cites to the revised final regulations, but is applicable under both the old regulations and the revised final regulations, as there have been no changes in the specific areas about which you have inquired. *See Wage and Hour Opinion Letter FLSA2005-7 (Jan. 7, 2005)*.

impartially, and its design should not reflect an effort to evade the requirement that exempt employees be paid on a salary basis. *See* Wage and Hour Opinion Letters FLSA2005-7 (Jan. 7, 2005) and August 15, 1972 (copy enclosed). It is also our position that a reasonable number of absences on account of sickness ordinarily must be allowed without loss in pay to exempt employees. *See* Wage and Hour Opinion Letter March 8, 1945 (copy enclosed). Whether a particular plan is bona fide would be based upon the actual design of and practices applicable under the plan.

Given the fact-specific nature of the inquiry, there is no bright-line test articulating how many days and how short a waiting period are required for a plan to be bona fide. The Wage and Hour Division, however, previously has approved leave plans that allow for at least 5 days of sick leave per year as bona fide under the regulations. *See* Wage and Hour Opinion Letters July 21, 1997; November 20, 1995; April 14, 1992; and August 15, 1972 (copies enclosed). Moreover, with respect to a qualifying period, the Wage and Hour Division previously deemed a leave plan that required one year of service prior to payment of sick pay benefits to be bona fide. *See* Wage and Hour Opinion Letter March 1, 1982 (copy enclosed).

With regard to your client's sick/vacation leave plan, we note that the employer provides an employee one week of vacation and one day of sick/personal leave (6 days total) after one year of employment, two weeks of vacation and one day of sick/personal leave (11 days total) after two years, and three weeks of vacation and one day of sick/personal leave (16 days total) after ten years of employment. Salaried employees may use the leave in half-day increments when they are ill, and they do not have to use leave if they are out for only an hour or two due to illness or a doctor's appointment. Because an employee under this plan is able to use vacation leave for sickness or illness, your client's plan in practice provides the same level of sick leave coverage as the plans identified above—plans we previously have concluded provide a sufficient amount of leave to allow a reasonable number of absences without loss in pay to exempt employees. Given our opinion that the amount of sick leave provided by your client's sick/vacation leave plan is adequate and the qualifying period of one year under the plan is acceptable, we believe that your client's leave plan qualifies as a bona fide plan, provided that the sick/vacation leave plan is communicated to eligible employees, operates as described in the plan, and is administered impartially. Therefore, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such a plan and after the employee has exhausted his or her leave allowance thereunder.

This opinion relates solely to the application of the FLSA and is based exclusively on the facts and circumstances described in your request. This opinion is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Paul DeCamp  
Administrator

**\* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**