



May 5, 2003

FLSA2003-3NA

Dear *Name**,

This is in response to your request for an opinion as to whether an employer may deduct from an exempt employee's pay for a full sick day absence when the absence is not a serious health condition entitling the employee to leave under the Family and Medical Leave Act (FMLA); the absence does not qualify under the employer's short- or long- term disability plan; and the employee has exhausted paid sick leave under the employer's sick pay policy.

The sick pay policy provides that employees will earn one paid sick day every four months. The sick days may accumulate from year to year. The short-term and long-term disability plans cover disabilities as defined by the plans. An employee who meets that definition may become eligible for benefits under the short-term disability plan after he/she has worked 90 days on either the first day of disability in the event of an injury, or the eighth day of disability in the event of an illness. A disabled employee is eligible for benefits under the long-term disability plan after 90 days of receiving short-term disability.

As you know, 29 CFR Part 541.118(a) indicates that an employee will be considered to be paid on a salary basis within the meaning of the regulations if under his/her salary agreement he/she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his/her compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. The employee must receive his/her full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

Section 541.118(a)(3), however, indicates that deductions may be made from the salary for absences of one or more full days occasioned by sickness or disability (including industrial 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 both sickness and disability. Thus, if the employer's particular plan, policy, or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy, or practice or after he/she has exhausted his/her leave allowance thereunder.

Based on the information in your letter, it is our opinion that the exempt employee, in this instance, would be considered to be paid on a "salary basis" within the meaning of the regulations where the employer deducts from his/her pay for full sick day absences after the employee has exhausted his/her paid sick leave. This is so since the regulations provide that deductions for full sick day absences may be made from an exempt employee's salary if such deduction is made in accordance with the employer's bona fide sick leave policy, and the deduction is made after the employee has exhausted his/her sick leave. The fact that the absence is not due to a serious health condition as defined by the FMLA would not alter the outcome. If the absence were covered by the FMLA, the employer could make a pro rata deduction from the exempt employee's salary even for a partial day absence, based upon section 102(c) of the FMLA, 29 U.S.C. 2612(c).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm that is under investigation by the Wage and Hour Division, or that is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

We trust the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

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