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

FLSA2007-6

February 8, 2007

Dear **Name*:**

This is in response to your request for an opinion concerning whether an employer may deduct from the pay or accrued leave time of an employee who is exempt under Fair Labor Standards Act (FLSA) § 13(a)(1)[1] for leave taken under your state's Leave Act without affecting the employee's exempt status. Based on a review of the information provided, it is our opinion that the employer may deduct full-day increments from an exempt employee's salary for leave taken under the Leave Act without affecting the employee's exempt status. The employer may also reduce an employee's accrued leave balance for the time an employee is absent from work even if it is less than a full day, provided the employee receives the full guaranteed salary.

You state that the Leave Act provides that "[a]n eligible employee shall be entitled to a total of 24 hours of [unpaid] leave during any 12-month period" to participate in a son or daughter's school activities, or to accompany a son, daughter, or elderly relative to routine medical or dental appointments, or in the case of elderly relatives, other professional services related to the elder's care. Under the Leave Act, employees may take unpaid leave in partial or full-day increments.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime exemption for "any employee employed in a bona fide executive, administrative, or professional 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 duties and salary are met. One such test requires that an otherwise exempt employee be paid on a salary basis as described in 29 C.F.R. § 541.602. For purposes of this response, we are assuming that the employees at issue meet all the general requirements for the exemption. Our response is thus limited to whether the deduction from pay or accrued leave time of an exempt employee defeats the salary basis requirement and, accordingly, renders the exemption inapplicable.

As noted in § 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. Subject to the exceptions provided in [29 C.F.R. § 541.602(b)], an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

One of the exceptions to the "no deduction" rule states that:

> [d]eductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

29 C.F.R. § 541.602(b)(1). Another relevant exception under 29 C.F.R. § 541.602(b)(7) provides that:

> [a]n employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act [FMLA]. Rather, when an exempt employee takes unpaid leave under the [FMLA], an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the [FMLA], the employer could deduct 10 percent of the employee's normal salary that week.

The type of leave allowed under the Leave Act does not appear to constitute the type of leave that would qualify under the FMLA. For example, the provisions of the FMLA do not apply to leave taken by an employee to participate in his or her son or daughter's school activities. *See* 29 C.F.R. § 825.112. We also note that under the FMLA, a covered employer may grant an eligible employee unpaid leave "[t]o care for the employee's . . . son, daughter, or parent with a serious health condition." *See* 29 C.F.R. §§ 825.112(a)(3), 825.114. Assuming, however, that there is no "serious health condition" underlying the routine medical or dental appointment of the employee's son, daughter, or parent, leave taken for such a reason does not qualify under the FMLA. Accordingly, the exception to the "no deduction" rule provided under 29 C.F.R. § 541.602(b)(7) does not seem to apply to leave taken under the Leave Act.

The Leave Act, therefore, appears to authorize leave "for personal reasons, other than sickness or disability." *See* 29 C.F.R. § 541.602(b)(1). Thus, an employer may make deductions from an exempt employee's pay for leave pursuant to the Leave Act only for full-day absences. Partial-day deductions not expressly authorized by the Part 541 regulations may render an employee's compensation not on a salary basis, thereby jeopardizing exempt status. *See* 29 C.F.R. § 541.603

With regard to whether the employer may deduct from the employee's accrued leave time for leave taken under the Leave Act, it is our position that where an employer has a benefits plan (*e.g.*, vacation time, sick leave), it is permissible to substitute or to reduce the accrued leave in the plan for leave taken under the Leave Act even if it is less than a full day without affecting the salary basis requirement, so long as the employee nevertheless receives 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 (or a negative balance) in the leave plan. *See* Wage and Hour Opinion Letter FLSA2005-7 (Jan. 7,

2005); 69 Fed. Reg. 22,122, 22,178 (Apr. 23, 2004) ("employers, without affecting their employees' exempt status, may take deductions from accrued leave accounts").

This opinion is based exclusively on the facts and circumstances described in your request and 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).**