



April 11, 2005

FLSA2005-16

Dear **Name***,

This is in response to your request for an opinion regarding the application of the Fair Labor Standards Act (FLSA) to the **Name*** policies concerning timesheets and partial-day salary docking.

Name* is a statutorily created political subdivision of the State of Colorado organized under the **Name*** Act, Colorado Revised Statutes 32-9-01. The majority of **Name*** employees are paid on an hourly basis although the **Name*** also employs salaried staff. Some of **Name*** salaried staff, including in-house attorneys, are in positions that are generally considered “exempt” employees as that term is defined in 29 C.F.R. Part 541, and therefore not entitled to received overtime payments.

Name* exempt employees are paid a predetermined salary, not at an hourly rate. **Name*** exempt employees’ pay does not fluctuate from workweek to workweek. **Name*** exempt employees who are absent from work for less than a day are required to substitute paid leave. If an employee has exhausted available paid leave, unpaid leave may be authorized in accordance with the Family and Medical Leave Act (FMLA) or, if the requested unpaid leave is not FMLA-qualifying, by the employee’s department head with advance permission. If the employee has exhausted available paid leave, the employee’s pay is docked if the employee works less than eight hours, whether the leave is FMLA-qualifying intermittent leave or is non-FMLA qualified. The **Name*** salaried employee handbook states that attendance is an essential function of every job, and their performance appraisal system includes a “core goal” of dependability, which takes into account attendance and punctuality, among other factors. Thus, a FLSA overtime exempt employee’s performance evaluation may be adversely affected by non-FMLA-qualifying absences from work of full or partial days. An exempt employee may also receive corrective action for submitting inaccurate timesheets, including failure to correctly record absences of full or partial days, or for failure to obtain permission for unpaid leave (i.e., for being absent without leave).

Name* salaried employees, including exempt employees, are required to submit biweekly timesheets. Employee timesheets track hours spent by employees working in various “cost centers.” It has been **Name*** policy and practice for many years to require all salaried employees, including in-house attorneys, to submit timesheets. **Name*** uses the timesheets to track hours spent working in various cost centers (which are used to prepare departmental budgets), to track eligibility for overtime for non-exempt employees, and to determine compensatory time off for exempt employees.

Name* employees, including exempt employees, accrue personal leave (i.e., vacation) and sick leave. **Name*** requires deductions from pay for absences for personal reasons, illness, or injury when leave is not used, including partial day absences. For example, if an **Name*** exempt employee has exhausted personal and sick leave and is absent from work for part of a day for intermittent FMLA leave, **Name*** requires a deduction from pay. Similarly, if an **Name*** exempt employee has exhausted personal and sick leave and is absent from work for part of a day for non-FMLA-qualifying leave, **Name*** may grant permission for the unpaid leave but requires the absence from work to be unpaid.

Name* requests that DOL address its concerns regarding partial-day unpaid leave deductions for exempt employees, salary basis and time keeping requirements for in-house attorneys, and the FMLA exception for deducting partial-day unpaid leave for all exempt employees.

Please note that the Department of Labor issued revisions to 29 C.F.R. Part 541, effective August 23, 2004. See 69 Fed. Reg. 22122 (April 23, 2004). Our response is applicable under the new regulations. Under 29 C.F.R. §541.710 (copy enclosed), public sector employers may establish pay systems that include salary deductions for absences of less than a day for employees exempt under Section 541.100, 541.200, 541.300, or 541.400. Such a pay system must be “established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave.” 29 C.F.R. 541.710(a).



The pay system may require that deductions from pay shall be taken for absences for personal reasons or illness or injury when leave is not used by the employee because (1) permission for leave has not been sought or has been sought and denied; (2) accrued leave has been exhausted; or (3) the employee chooses to use leave without pay.

*Name** pay system is not expressly established by statute, ordinance, or regulation, but is established by policy and practice. *Name** practices are intended to control and track employee entitlement to pay and benefits. *Name** contends, and we agree, its pay practices are established “pursuant to principles of public accountability.”

*Name** in-house attorneys are all required to be holders of valid certificates permitting the practice of law in Colorado (i.e., including current admission to the Colorado bar and courts), and are actively engaged in the practice of the profession. Under 29 C.F.R. §541.304(d) (copy enclosed), a holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, is exempt from the salary or fee requirement. Licensed professional attorneys do not lose their exempt status under 29 C.F.R. 541.300 when deductions for absences of less than a day are made from their salary.

You state that it has recently been suggested that *Name** is violating the FLSA and endangering the exempt status of its in-house attorneys by requiring such attorneys to track their time on an hourly basis. Employees who are exempt under section 13(a)(1) of the FLSA as bona fide executive, administrative, and professional employees do not lose their exempt status when they are required by their employer to track their time on an hourly basis. Please see opinion letter dated July 9, 2003 (copy attached) for further discussion and the preamble to the new final rule at 69 Fed. Reg. 22178 (copy enclosed).

It has also been suggested that *Name** may be violating the FLSA and “treating its salaried employees as hourly” by (1) requiring partial-day docking of pay for in-house attorneys who have exhausted their paid leave and who seek to be absent for part of a day for FMLA-qualifying and/or non-FMLA qualifying purposes and (2) including (non-FMLA qualifying) absences from work by in-house attorneys as a factor in evaluating performance of the attorneys. As stated above, the salary basis requirement does not apply to licensed, practicing attorneys. Therefore, the FLSA overtime exemption for *Name** salaried attorneys is not lost by requiring partial docking of their salary when they have exhausted their paid leave and are absent for part of a day for non-FMLA-qualifying purposes. Moreover, *Name** complies with 29 C.F.R. §541.710 when it deducts for a partial day absence from the in-house attorney’s salary for a non-FMLA-qualifying absence when the employee has exhausted paid leave.

*Name** is not in violation of the FLSA when it includes absences as a factor in performance evaluations of its attorneys. The FLSA contains no provision that in any way limits the factors that may be considered in employee performance evaluations. However, section 105 of the FMLA and its implementing regulations at 29 C.F.R. §825.220 (copy enclosed) prohibit employers from interfering with, restraining, or denying the exercise of (or attempts to exercise) any right that is protected by the Act. Employers are specifically prohibited from discriminating against employees who have used FMLA leave by using paid or unpaid FMLA leave as a negative factor in any employment action, such as hiring, promotions or disciplinary actions. Using paid or unpaid FMLA-protected leave against an employee in a performance evaluation would be considered discrimination. Non-FMLA leave is not protected by the statute.

As you correctly note in your letter, leave taken under the FMLA may be unpaid. Pursuant to section 102(c) of FMLA and the regulations at 29 C.F.R. §825.206(a) (copy enclosed), employees determined to be exempt under section 13(a)(1) of the FLSA will not lose their exempt status as the result of unpaid FMLA leave, because the FMLA allows an employer to dock an exempt employee’s salary for FMLA-protected partial day absences without affecting their exempt status. The Department’s position is further clarified by interpretive letter FMLA-89, dated July 3, 1997, which is attached for your convenience.



This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, explicit 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 request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue 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.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures

Note: * The actual name(s) was removed to preserve privacy