



October 24, 2005

FLSA2005-41

Dear *Name**,

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to leave taken by exempt employees, or leave directed by the employer, during situations where inclement weather occurs (such as heavy snow or other types of disasters).

As you know, section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay 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 duty, salary level and salary basis, as discussed in the appropriate section of the regulations, 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. Please note that revisions to 29 C.F.R. Part 541 were published as a final rule in the *Federal Register* on April 23, 2004 (69 FR 22122) and became effective on August 23, 2004 (copy enclosed).

An employee will be considered to be paid on a salary basis within the meaning of the regulations if under the employee's employment agreement the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. §541.602(a).

Section 541.602(b) details the limited exceptions to the general rule of the salary basis requirement prohibiting deductions from pay. Deductions may be made when the employee is absent from work for one or more full days for personal reasons, other than sickness or accident. Thus, if an employee is absent for one or more full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the employee's salary for such absences. See §541.602(b)(1). However, if an employee is "ready, willing and able to work, deductions may not be made for time when work is not available." 29 C.F.R. §541.602(a).

Deductions may also be made for absences of one or more full days occasioned by sickness or disability if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness or 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 and after the employee has exhausted the leave allowance thereunder. See 29 C.F.R. §541.602(b)(2).

You present three questions for which our responses follow:

1. During office closures due to inclement weather or other disasters, may a private employer direct exempt staff to take vacation (or leave bank deductions) or leave without pay without jeopardizing the employees' exempt status?

The FLSA does not require employer-provided vacation time. Where an employer has proposed a bona fide benefits plan, it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if the employee still receives in payment an amount equal to the employee's guaranteed salary. See Opinion Letters dated April 15, 1995; March 30, 1994; and April 14, 1992. However, an employee will not be considered to be paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. See 29 C.F.R. §541.602(a). Thus, if the employer closes the office due to inclement weather or other disasters for less than a full workweek, the employer must



pay the employee's full salary even if: (1) the employer does not have a bona fide benefits plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank.

Since employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s). Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account in the situation presented above, whether for a full or partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account or has a negative balance in the leave bank account still must receive the employee's guaranteed salary for any absence(s) occasioned by the employer or the operating requirements of the business.

2. If the private employer's offices remain open during inclement weather or other types of disaster, can exempt staff be directed to take vacation (or leave deductions) or leave without pay if they fail to report to work without jeopardizing the employees' exempt status?

As stated earlier, either leave bank or salary deductions may be made when the employee is absent from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made from the employee's salary for such absences. An absence due to inclement weather does not constitute an absence due to sickness or accident. Therefore, an employee who is absent due to inclement weather, such as because of transportation difficulties, is absent for personal reasons. In the situation described above, a private employer may require an exempt employee who fails to report to work to take vacation or make leave bank deductions without jeopardizing the employee's exempt status. When the office is open, an exempt employee who has no accrued benefits in the leave bank account does not have to be paid (i.e., may be placed on leave without pay) for the full day(s) s/he fails to report to work due to such circumstances as a heavy snow day.

3. If the private employer's employees are probationary or have used all of their accrued vacation (or leave bank) time, can the employer choose not to pay them for time not worked without jeopardizing the employee's exempt status? When asked to clarify, you stated that in this example an exempt employee chooses to stay home for a half day due to inclement weather.

Deductions from salary for less than a full day's absence are not permitted under the regulations. Therefore, where the employee's absence is for less than a full day, payment of an amount equal to the employee's guaranteed salary must be made even if the employee has no accrued vacation or other leave benefits. However, as stated in response to question #2, a deduction from an employee's leave bank or salary may be made for absences of one or more full days for personal reasons, other than sickness or accident. You may want to review the provisions in 29 C.F.R. §541.603, which address the effect of improper deductions from salary. An employer will lose the exemption if it has an actual practice of making improper deductions that demonstrates it did not intend to pay employees on a salary basis. See 29 C.F.R. §541.603(a). On the other hand, isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions. See 29 C.F.R. §541.603(c). Moreover, if an employer has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints. See 29 C.F.R. §541.603(d).

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 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. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that this letter is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosure: 29 C.F.R. Part 541

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