



January 7, 2005

FLSA2005-7

Dear *Name\**,

This is in response to your request for an opinion concerning whether an employer may deduct from an exempt employee's Paid Time Off Bank (PTO) for absences of less than a day due to personal reasons, accident, or illness, as well as whether it is acceptable for the employer to reduce an employee's salary for absences of one or more full days due to illness or injury when the employee's PTO bank has been exhausted.

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 Regulations, Part 541. See copy enclosed. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary, 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 section 541.602 of the final Regulations.<sup>1</sup>

An employee will be considered to be paid on a salary basis if he or she <sup>2</sup>"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." 29 C.F.R. 541.602(a).

Deductions from salary may be made, however, when the 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. 541.602(b)(1).

Deductions from salary may also be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents), if the deductions are made "in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability." Thus, if the employer's particular plan provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability "may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder." 541.602(b)(2).

To respond to your specific concern about whether or not an exempt employee's accrued PTO leave bank may be reduced for partial day absences, the answer is yes. Where an employer has a 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 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 in payment his or her guaranteed salary. 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, where the employee's absence is for less than a full day. See opinion letters dated February 16, 2001, May 27, 1999; and December 4, 1998 (enclosed).

As stated above, the one or more full-day deduction requirement applies to deductions from an employee's salary, as opposed to a leave bank. Moreover, such deductions due to absences related to sickness or disability may only be made, without violating the salary basis of payment requirement, where

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As you are aware, the Department of Labor has published revised Part 541 regulations that took effect on August 23, 2004; see 69 FR 22122. The old rule addressed the issues you have raised at 29 CFR § 541.118. This opinion cites to the final regulations, but is applicable under both the old and the revised FLSA regulations, as there have been no changes in the specific areas about which you have inquired.



the employer has a bona fide sick leave plan. Id. Wage and Hour has found that a plan that has defined sick leave benefits which 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 impartially, and its design should not reflect an effort to evade the requirement that exempt employees be paid on a salary basis. Whether a particular plan is bona fide would, however, be based upon the actual design of and practices applicable under the plan. Significantly, a PTO plan may qualify as bona fide even though it is not exclusively for use during sickness or disability. Assuming that a bona fide plan exists, an employer can make deductions from an employee's salary for absences of one or more full days because of sickness or disability before the employee has qualified under the plan and after the PTO/sick leave has been exhausted. Of course, an employer is not required to establish a paid sick leave plan.

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 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 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.

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

Enclosures

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