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

FLSA2009-14

January 15, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether your client's proposed staffing adjustment policy affects its employees' exempt status under section 13(a)(1) of the Fair Labor Standards Act (FLSA).[1]

Your client proposes occasionally reducing the hours worked by exempt employees due to short-term business needs (*e.g.*, low patient census). In such cases, the employer offers "voluntary time off" (VTO), where employees may, at their option, use paid annual, personal, or vacation leave, but continue to accrue employment benefits. The employer approves VTO on a first-come, first-served basis. If there are insufficient volunteers for VTO, the employer requires "mandatory time off" (MTO) under a seniority-based rotational method. Exempt employees required to take MTO may use accrued paid leave or take unpaid MTO. If the employee elects not to use accrued paid leave or does not have sufficient accrued paid leave to cover the VTO or MTO, the employer deducts the amount equal to the VTO or MTO from the employee's salary, if it is shorter than one workweek. For unpaid VTO or MTO lasting an entire workweek, the employer does not pay the salary for that pay period. Salaried exempt employees may take VTO or be assigned MTO in one-day increments.

Section 13(a)(1) of the FLSA exempts from minimum wage and overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity" as defined in 29 C.F.R. Part 541. An employee qualifies for exemption if the duties and salary tests are met. You ask that we assume the employees meet the duties test. We also assume the employees in question receive at least $455 per week. *See* 29 C.F.R. § 541.600. Under 29 C.F.R. § 541.602(a),

> [a]n employee will be considered to be paid on a "salary basis" . . . if the employee regularly receives each pay period . . . 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. . . . An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

[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.

It is our opinion that salary deductions due to a reduction of hours worked for short-term business needs do not comply with § 541.602(a) because they result from "the operating requirements of the business." 29 C.F.R. § 541.602(a). Thus, "[i]f the employee is ready, willing and able to work, deductions may not be made for time when work is not available." *Id.* Deductions from the fixed salary based on short-term business needs are different from a reduction in salary corresponding to a reduction in hours in the normal scheduled work week, which is permissible if it is a bona fide reduction not designed to circumvent the salary basis requirement, and does not bring the salary below the applicable minimum salary. *See* Field Operations Handbook § 22b00; Wage and Hour Opinion Letter FLSA2004-5 (June 25, 2004) ("[R]ecurrent changes in the normal scheduled workweek . . . more likely would appear to be designed to circumvent the salary basis requirement.").[2] Unlike a salary reduction that reflects a reduction in the normal scheduled work week and is not designed to circumvent the salary basis requirement, deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis requirement is intended to preclude. Therefore, in this instance, salary deductions due to MTO lasting less than a workweek violate the salary basis requirement and may cause the loss of exempt status.[3] The employer is not, however, required to pay the salary for MTO of a full workweek. *See* 29 C.F.R. § 541.602(a) ("Exempt employees need not be paid for any workweek in which they perform no work.").

Section 541.602(b)(1) 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." Salary deductions, therefore, may be made when exempt employees voluntarily take time off for personal reasons, other than sickness or disability, for one or more full days. For instance, an exempt employee paid $500 per week on a salary basis may take VTO for personal reasons for four days in a workweek and receive one fifth of the salary. The employee's decision to take VTO, however, must be completely voluntary and not "occasioned by the employer or by the operating requirements of the business." 29 C.F.R. § 541.602(a)

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

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[2] You ask generally whether, in cases where an exempt employee loses exempt status because of a payment of a salary of less than $455 a week, the resumption of the payment of not less than $455 per week in the succeeding weeks result in resumption of exempt status. Generally, "if an employer changes the duties or reduces the wages so that an employee is not exempt during a given period, the loss of status would be effective only after the change." Wage and Hour Opinion Letter, 1998 WL 852696 (Feb. 23, 1998). "It is possible to change the position back to an exempt status if the employee subsequently receives [the required minimum] salary . . . However, the exemption may be lost if the changes in status occur so frequently that one can conclude that the employee is not really paid [the required minimum salary]." *Id.*

[3] For employees on MTO, the "employer[], without affecting [the] employees' exempt status, may take deductions from accrued leave accounts" provided employees receive their guaranteed salary. 69 Fed. Reg. 22,122, 22,178 (Apr. 23, 2004).

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,

Alexander J. Passantino
Acting Administrator

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