

Woska Associates
Employment Law Group

March 2005
Rev. 4/12

Employment Law Forum

FLSA – Partial Day Absences Deductible for Exempt Employees

The United States Department of Labor (DOL), in a January 7, 2005 opinion letter issued by the Wage and Hour Division, confirms that employers may take partial day deductions from a salaried, overtime exempt employee's vacation or personal time off accumulation for absences of less than a full day without causing the loss of the exempt status as long as the deduction occurs under a bona fide benefits plan.¹ A "bona fide benefits plan" is considered to be a plan that has defined sick leave, vacation, or personal time off benefits, that has been communicated to eligible employees, and operates as it is described in the plan.

The opinion letter was written in response to a question about taking partial-day deductions from an exempt employee's Paid Time Off bank (PTO) for absences of less than a day due to personal reasons, accident, or illness. DOL was also asked 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.

With respect to full day absences, DOL responds: "Deductions from salary may be made . . . 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."²

Leave Bank Deductions Distinguished from Loss of Salary

DOL reports that their interpretation of the new regulations is consistent with the previous regulations with respect to partial day deductions being made from PTO banks. DOL has also made clear that employers *cannot* reduce an exempt employee's salary for absences of *less than a full-day*, even if an employee does not have accumulated earnings in his or her PTO bank.³ "Payment of the employee's guaranteed salary must be made, even if an employee has not accrued benefits in the leave plan and the (PTO) account has a negative balance, where the employee's absence is for less than a full day."⁴

California Does Not Allow Deductions for Partial Day Absences

The several states may impose overtime obligations and create exemptions and related regulations different than those under federal law. The Fair Labor Standards Act (FLSA) establishes the minimum requirements concerning pay, overtime, exemptions, and related rules. The individual states may adopt more restrictive standards than federal law.

California public employees are covered by the pay provisions of the FLSA and not state law. Private sector employees are covered under state law. Deductions from PTO or vacation leave banks for partial day absences are *not* permissible under California law.⁵ The distinction between federal and California state law is that the former considers PTO and vacation banks as a “benefit.” The federal interpretation of a benefit is to provide a source of salary when an employee is away from work. Under California law the employer has an independent obligation to pay the exempt employee’s salary. PTO or vacation leave banks are considered *accrued wages that are not subject to forfeiture*.⁶ Accrued wages are considered vested when earned. (For further information concerning the California Supreme Court’s decision regarding accrued wages, see *Woska Associates* article “Vacation Pay – Revisiting *Suastez*.”).

In addressing accrued wages, the California Labor Commissioner states: “If an employer already has a pre-existing obligation to pay full salary to an exempt employee who takes part of a day off for personal reasons, or who is furloughed for part of a week, that obligation cannot be discharged by requiring the employee to use his or her own *accrued wages* to pay his or her salary.”⁷

Loss of Exempt Status

An employer that is in violation of the salary basis provisions of federal or state law concerning exempt employees may be liable for back-pay for overtime worked by employees for up to three years in addition to applicable penalties.⁸ There is the additional risk that the loss of exempt status for any employee may result in the loss of exempt status for all employees in the same or similar jobs, with the same potential liabilities for back pay and penalties.

¹ Wage and Hour Division Opinion Letter (January 7, 2005).

² C.F.R. 541.602(b)(1).

³ C.F.R. 541.602(b)(2).

⁴ Opinion Letter (January 7, 2005).

⁵ California State Labor Commissioner Opinion Letter (August 30, 2002).

⁶ California Labor Code §227.3; *Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 774 (1982).

⁷ Opinion Letter (August 30, 2002).

⁸ C.F.R. 551.702.