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Make a selection

NAVIGATION

- Career Opportunities
- Events Schedule
- Attorneys
- Offices
- Archives
- About BS&K
- Contact BS&K
- Home

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### Exempt Employees May Lose Pay For Staying Home During Inclement Weather (2/06)

By Nicholas J. D'Ambrosio, Jr., *Capital District Business Review*, February 10-16, 2006

A colleague of mine told me that his wife, a teacher, on the eve of a snowstorm likes to sing, "There'll be no school tomorrow if it snows."

Most employers, however, do not find snow days to be carefree. In addition to snow removal and treacherous driving conditions, employers must also address whether to close the business for the day or to stay open and deal with reduced staffing.

One issue that sometimes causes trouble for employers is adjusting the paychecks of employees who do not come to work because of inclement weather, especially when the employees are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act. The concern is whether reducing salary for weather-related absences can jeopardize an employee's exempt status.

#### Exempt employees

To qualify for exemption, employees must generally meet certain job-duty tests and be paid on a "salary basis" at not less than \$455 per week in most instances. "Salary basis" means that employees must be paid the same salary regardless of the quantity or quality of their work; the number of days or hours worked in a given pay period is irrelevant. To preserve the exemption, the employer may not generally deduct from an exempt employee's salary for working less than a full week.

#### Permissible deductions from exempt employees

An employer can deduct that employee's pay for missed time in certain limited circumstances. If the exempt employee performs no work during a particular workweek, the employer need not pay the employer for that workweek. Additionally, employers can deduct for:

- full-day disciplinary suspensions made in good faith for workplace misconduct, where the rule is applicable to all employees.
- Penalties imposed in good faith for infractions of safety rules of major significance--i.e., those that impose serious danger in workplace.
- Sickness or disability if the deductions are made according to a bona fide plan that provides wage supplement benefits--i.e., paid sick days.
- First and last week of employment.
- Unpaid leave taken under the Family and Medical Leave Act.
- Full-day absences for personal reasons (other than sickness or disability). Employers cannot deduct for absences related to military leave or jury duty.

#### Weather-related absences

Under recent guidance from the Department of Labor, an employer whose offices remain open may deduct for an exempt employee's voluntary full-day absence from work because of inclement weather. The DOL reasoned that this type of absence falls within the category of "full-day absence for personal reasons."

But, while an employer may deduct for full-day absences, it cannot deduct for missed time if the employee merely reports to work late. That is not to say that an employer is left with no recourse at all. The DOL has stated, and cases have supported, that employers can apply an exempt employee's accrued leave account, whether vacation or personal days, against partial-day absences and not violate the "salary basis" rule.

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Employers just cannot deduct the employee's pay for those partial-day absences.

If an employer closes its business because of a weather-related emergency, it must still pay its exempt employees for the entire week unless the business is closed for the full workweek. In other words, if exempt employees are ready, willing and able to work, their employer cannot deduct when it does not provide the work for them to perform.

For example, a major snowstorm hits the area and an exempt employee does not go to work although her employer remains open for business. If the employee misses one and one-half days of work, her employer may deduct one day's pay and apply the employee's accrued leave account against the other half day.

But, if the employer chooses to close its business for three days, it must still pay its exempt employees their full salary for the week. If it closes for an entire workweek, it does not have to pay them because the exempt employees performed no work whatsoever during the workweek.

Unless the employee is a teacher with paid snow days, the prospect of losing a day's pay may change the employee's tune to: "Never mind the snow, it's off to work I go!"

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