



Electronic Dispatch

Labor and Employment Law Information Memo

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[Go to BS&K Labor and Employment Law Home Page](#)

U.S. DEPARTMENT OF LABOR ISSUES TWO OPINION LETTERS REGARDING TREATMENT OF EXEMPT EMPLOYEES

The U.S. Department of Labor (“USDOL”) recently issued two opinion letters that clarify what requirements an employer may permissibly impose on exempt employees without losing the benefit of the exemption. In the first opinion letter, the USDOL addressed whether an employer may require exempt employees to work 45 or 50 hours per week and make up work time lost due to personal absences of less than one day. In the second opinion letter, the USDOL addressed whether an employer may deduct from an exempt employee’s salary for damage to or loss of the employer’s equipment caused by the exempt employee.

This information memo explains the requirement that exempt employees be compensated on a salary basis, and summarizes the USDOL’s two recent opinion letters.

Compensation of Exempt Employees on a “Salary Basis”

In general, the Fair Labor Standards Act (“FLSA”) requires employers to pay employees one and one-half times their regular rate of pay for hours worked in excess of 40 in a work week. Certain types of employees, such as executive, administrative, and professional employees, are exempt from this requirement, and are not eligible to receive overtime pay. The exemptions for executive, administrative, and professional employees are commonly referred to as the “white-collar exemptions.”

To fall within one of the white-collar exemptions, an employee must not only perform certain specified types of duties, an employee must also be paid “on a salary basis.” Employees are paid on a “salary basis” when they receive a fixed salary regardless of the number of hours worked in a work week, and their pay is not reduced because of variations in the quality or quantity of the work performed. Under the FLSA, an employee must receive a minimum salary of \$455.00 per week to fall within one of the white-collar exemptions. Under New York law, an employee must receive a minimum salary of \$506.25 per week to fall within one of the white-collar exemptions. Employers in New York State are obligated to adhere to this higher salary requirement to classify an employee as exempt.

Under the USDOL’s regulations, an employer may make deductions from an exempt employee’s salary under certain circumstances and for certain purposes without violating the salary basis requirement. For example, an employer may make deductions from an exempt employee’s salary when the employee is absent for a full day if: (1) the absence is for personal reasons other than sickness or injury; or (2) the absence is because of sickness or injury, as long as the employer has a *bona fide* plan, policy, or practice providing for the deduction. An employer may also deduct from an exempt employee’s salary in imposing an unpaid disciplinary suspension of one or more full days, as long as: (1) the suspension is imposed in good faith for infractions of workplace conduct rules; and (2) the suspension is imposed pursuant to a written policy applicable to all employees.

The USDOL’s Recent Opinion Letters

In the first of its two recent opinion letters, the USDOL addressed the issue of whether an employer may require exempt employees to work 45 or 50 hours per week and make up work time lost due to personal absences of less than one day, without violating the salary basis requirement and losing the benefit of the exemption. The employer that sought the USDOL’s opinion on this issue indicated that it did not intend to dock the salary of an exempt employee who did not meet these requirements, but did intend to impose disciplinary consequences on exempt employees who consistently failed to meet these requirements.



The USDOL advised that as long as the employer did not dock an exempt employee's salary for failing to work the minimum number of hours or failing to make up lost work time, the employer was free to implement both of its work rules without losing the exemption. The USDOL stated that "the number of hours worked by an employee who is exempt . . . is a matter to be determined between the employer and the employee." The USDOL also stated that "an employer may require an exempt employee to make up work time lost due to personal absences of less than one day without loss of the exemption." The USDOL further explained that an employer may even require an exempt employee to record and track hours and to work a specified schedule without affecting the employee's exempt status, as long as the employer did not make deductions from the employee's salary for failing to adhere to such requirements.

The USDOL also cautioned, however, that an exempt employee's failure to work the required number of hours or failure to make up lost work time would not constitute a violation of a "workplace conduct" rule that would enable the employer to impose an unpaid disciplinary suspension of one or more full days. The USDOL stated that the term "workplace conduct" was not intended to include performance or attendance. Accordingly, an employer that imposes an unpaid disciplinary suspension on an exempt employee who violates these performance or attendance rules would lose the exemption. An employer would be permitted to enforce these performance or attendance rules by using other types of disciplinary consequences, such as verbal or written reprimands.

In the second of its recent opinion letters, the USDOL addressed the issue of whether an employer may deduct from the salary of an exempt employee for damage to or loss of the employer's equipment (such as a cellular telephone or a laptop computer), without violating the salary basis requirement and losing the benefit of the exemption. The USDOL advised the employer that deductions for this purpose are not authorized by the regulations and would result in a loss of the exemption. The USDOL further explained that such deductions would be akin to deductions based on the quality of work performed by an exempt employee, and would constitute a violation of the salary basis requirement. The USDOL also stated that an employer could not circumvent this result by paying an exempt employee's full salary, but requiring an exempt employee to reimburse the employer for property loss or damage. According to the USDOL, that would also constitute a violation of the salary basis requirement and would result in a loss of the exemption.

The USDOL also stated that, under the FLSA, deductions may be made from a nonexempt employee's wages for damaged or lost property, as long as the deductions do not reduce the employee's wages below the statutory minimum wage. However, it must be emphasized that the USDOL only addressed federal law on this issue. Many states, including New York, have specific statutes that prohibit an employer from deducting from a non-exempt employee's wages except for specified purposes. New York Labor Law § 193 provides that an employer may not make any deduction from the wages of a non-exempt employee, except deductions which are: (1) made in accordance with any law, or any rule or regulation issued by a governmental agency; or (2) expressly authorized in writing by the employee and are for the benefit of the employee. Accordingly, employers in New York State may not make any deductions from a non-exempt employee's wages for damaged or lost property even if those deductions would not reduce the employee's wages below the statutory minimum wage.

If you have any questions regarding the USDOL's two recent opinion letters or need any advice or assistance with respect to any wage and hour matters, please contact:

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