



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

FLSA2009-18

January 16, 2009

Dear **Name***:

This is in response to your letter on behalf of your client, a health care provider, regarding whether certain deductions from a paid time-off (“PTO”) plan affect the exempt status of executive, administrative, and professional employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA).¹

Your client proposes requiring salaried exempt employees to stay home or leave work early during periods of insufficient work (“periods of low patient census”) and deduct the non-work time from the employees’ accrued paid time-off accounts. The employees will receive their regular salaries so long as they have sufficient hours in their PTO accounts to cover the non-work periods. If an employee’s accrued PTO is exhausted, the employee’s salary will be reduced in full-day increments, except that in no event will an employee’s salary be reduced below the minimum salary required for exemption, \$455 per week.

The FLSA provides an exemption from the minimum wage and overtime requirements for “any employee employed in a bona fide executive, administrative or professional capacity,” as those terms are defined in 29 C.F.R. Part 541. 29 U.S.C. § 213(a)(1). To qualify for the exemption, the employee must meet certain tests related to job duties and the amount paid on a salary basis. Your letter addresses only the salary basis requirements in [29 C.F.R. §§ 541.600-541.606](#) and this opinion is limited to that question.

To qualify as exempt, most executive, administrative, and professional employees must be paid on a salary basis.

An employee will be considered to be paid on a “salary basis” within the meaning of these regulations if the employee 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

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.

not subject to reduction because of variations in the quality or quantity of the work performed.

Id. [§ 541.602\(a\)](#) (emphasis added).

As noted in the preamble to the 2004 regulations, since the 1940s the Department has maintained that a salary test is a valuable index in determining the bona fide status of an executive, administrative, or professional employee.² In 1944, the Wage and Hour Division clarified that the salary basis requirement means, among other things, that the amount paid is not subject to reduction because of variation in the number of hours worked or in the quantity or quality of the work performed during the pay period. *See id.*

Subject to specific exceptions found in the regulations, an exempt employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. In no event can any deductions from an exempt employee's salary be made for full or partial day absences occasioned by lack of work:

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.

Id. § 541.602(a).

Employers can, however, make deductions for absences from an exempt employee's leave bank in hourly increments, so long as the employee's salary is not reduced. If exempt employees receive their full predetermined salary, deductions from a leave bank, whether in full day increments or not, do not affect their exempt status. *See* 69 Fed. Reg. 22,122, 22,178 (Apr. 23, 2004); Wage and Hour Opinion Letter February 18, 1999 (copy enclosed).

Your letter presents two specific questions for which our response follows.

1. Are exempt employees who are "required to take PTO during periods of "low patient census" in danger of losing their exempt status?

As indicated above, an employer can substitute or reduce an exempt employee's accrued leave for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis of payment, provided that the employee still receives in payment an amount equal to the employee's guaranteed salary.

An employee will not be considered to be paid "on a salary basis," however, if any deductions from the salary are made for full or partial day absences occasioned by the employer or by the operating requirements of the business. *See* 29 C.F.R. § 541.602(a).

² *See* 69 Fed. Reg. 22,121, 22,176-22,179 (Apr. 23, 2004).

If an employer requires that an exempt employee work less than a full workweek, the employer must pay the employee's full salary even if: (1) the employer does not have a bona-fide benefits plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits, and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank. *See* Wage and Hour Opinion Letter [FLSA2005-41](#) (Oct. 24, 2005). *See also* Wage and Hour Opinion Letters May 27, 1999, February 18, 1999, May 23, 1996, and April 6, 1995 (copies enclosed).

2. If an exempt employee's accrued PTO is exhausted and the periods of low patient census continues, could your client schedule the exempt employee for less than forty hours and reduce pay accordingly?

In your letter you state that, if an exempt employee's accrued PTO is exhausted, in periods of low patient census the employee "would be sent home and paid a reduced salary for the week." You further state that the employee "would be away from work for one day during the week and receive pay for four days. This practice would only be done in full-day increments for a short period of time." In light of the requirements in 29 C.F.R. § 541.602(a), as discussed above, such full or partial day reductions in compensation would mean that the employee is not paid on a fixed and guaranteed weekly salary basis without regard to the quantity of work performed.

Your letter referred to Wage and Hour Opinion Letter November 13, 1970, to support the view that such reductions in the salary paid to exempt employees would be permissible. The circumstances addressed in that opinion letter are, however, distinguishable from those you describe in your request. The employer discussed in the November 13, 1970 opinion letter was considering a permanent change in the work schedule from 52 five-day workweeks to 47 five-day workweeks and 5 four-day workweeks. In that case, the salary basis requirement was not circumvented because all the exempt employees were to be paid according to a bona fide reduction of one-fifth of their salaries for a fixed schedule of five annually recurring four-day workweeks.

As explained in Wage and Hour Opinion Letter February 18, 1999:

Consistent with this position, we have stated that a fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment. Therefore, the exemption would remain in effect as long as the employee receives the minimum salary required by the regulations and meets all the other requirements for the exemption.

The same reasoning was observed in Wage and Hour Opinion Letter April 30, 1975 (copy enclosed):

Under the circumstances present in your situation, a fixed reduction effective during the period when the plant operates on a four day

workweek due to economic conditions would appear to be [a] bona fide [reduction in salary] and the exemption would remain in effect.

By contrast, your letter describes a plan in which exempt employees are called at home and required to take the day off, or are sent home early in the workweek, “during occasional unplanned and transitory periods of low patient census.” Deductions from pay in full day increments would be made whenever the employee’s paid time-off leave was exhausted. Unlike a salary reduction that reflects reduction in the normal scheduled workweek and is not designed to circumvent the salary basis, 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 test is intended to preclude. Such a plan is, therefore, inconsistent with the guaranteed salary basis of payment required by the regulations.

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 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 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).**