

California Wage/Hour Update



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DLSE Issues Guidance On Deductions

By Bruce Larson (Irvine)

On November 28, 2009, the Division of Labor Standards Enforcement (DLSE) issued an opinion letter which should help shed some light on an area of the law which has long plagued California employers due to its ambiguity – namely, under what circumstances may employers make deductions from exempt employees' salaries without running afoul of the law?

This opinion responded to detailed questions asked by an employer. Although DLSE opinion letters are not binding as law, and courts are not bound to follow them, courts may refer to and follow them when deciding cases, and sometimes treat them as persuasive authority.

The Salary-Basis Test

By way of background, one requirement for an employee to qualify for the executive, administrative, or professional exemptions (which exempt the employee from, among other things, being entitled to overtime, or meal or rest periods) is that they be paid on a "salary basis." Further, employers generally cannot make salary deductions for absences of salaried exempt employees, and deductions may destroy the "salary basis" requirement for the white collar exemptions.

The general rule, subject to narrowly defined exceptions, is that an exempt employee who is paid on a salary basis is entitled to his or her full week's salary for any week in which the employee has worked without reduction as to quantity or quality of work performed. Thus, if an employer makes an improper deduction from the week's salary for partial weeks (or days) worked, the employee may be deemed as not being paid on a salary basis, and thus, the exemption may collapse and the employee may seek to recover unpaid wages for overtime and meal and rest breaks.

The application of this law becomes slightly more complicated when viewed in conjunction with vacation and sick-pay plans. Federal (and now California law) distinguish between deducting a paid-leave balance and deducting from an employee's salary, which is strictly regulated. Although an employer may never reduce an employee's salary for partial day absences, an employee's paid-leave benefits may be reduced in partial-day increments.

The prohibition against deductions from an employee's wages under the salary-basis rules is subject to several exceptions found in California law, which incorporates some, but not all, federal regulations on this subject. The exceptions followed by California allow for deductions from pay when a salaried-exempt employee is absent from work for one or more full days for personal reasons (other than sickness or disability) and for absences of one or more full days occasioned by sickness or disability if the deduction is made from a bona fide plan, practice, or policy of providing compensation for such sickness or disability.

Thus, although it is not permissible to deduct from a salary pro-rata for partial day absences, you may deduct from an employee's accrued vacation and sick time in part-day increments in connection with absences of less than a full day under a bona fide plan providing for such leaves without the employee losing his or her exempt status.

Benefit And Wage Deduction Examples

In its November 28th opinion letter, the DLSE answered the employer's questions regarding several different examples under which

employers may, in fact, make the salary deductions for partial and full day absences for salaried-exempt employees. The examples and related guidance given by the DLSE are summarized below.

Example 1: Full Day Absences For Personal Reasons and No Applicable Leave Available

The employee takes eight hours off (full day) for personal reasons and has the following leave balances: five hours of sick leave and zero hours of vacation. The employer's recommended action was to withhold 8 hours pay for the employee's full-day absence because the employer can deduct pay for a full day personal-leave absence when no vacation is accrued.

The DLSE agreed and applied the exception to the salary-basis rule that deductions from salary may be made pro-rata in full day increments when an exempt employee is absent from work for one or more full days for personal reasons. Thus, if no unused paid leave is available for vacation, the Company may deduct *from the salary* a full day's wages with no adverse effect on the employee's exempt status.

Example 2: Full Day Absences For Illness and No Applicable Leave Available

The employee takes eight hours off (full day) due to illness and has zero balances for both sick leave and vacation. The employer's recommended action was that the eight hours also be unpaid, and deducted from the salary because there are no respective sick leave or vacation balances which can be applied for the type of absence.

As in Example 1, the DLSE agreed that the regulations allow for full-day deductions from salary due to sickness "if it is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness and the employer is not required to pay for any portion of the salary for full-day absences for which the employee receives compensation under the plan."

Additionally, the regulation also expressly allows for deductions from pay for full day absences where the employee has not yet qualified under the plan, or after the employee has exhausted his or her leave allowance. Thus, deductions from pay may be made under these circumstances as well.

Example 3: Full Day Absences for Personal Reasons And There Is Sufficient Leave Balance

The employee takes eight hours (full day) off for personal reasons and has five hours of sick leave and eight hours of vacation. The employer's recommended action was to pay eight hours from accrued vacation leave.

The DLSE agreed that, when no work is performed by the employee for the entire day and there is sufficient applicable leave balance to apply for the type of absence (in this case, vacation), the employer's payment through a deduction from available vacation leave sufficient to cover the full day is consistent with California law.

Example 4: Full Day Absences for Illness And There Is Sufficient Leave Balance

The employee takes eight hours (full day) off due to illness, and has zero hours of sick leave and eight hours of accrued vacation. The employer

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recommended that eight hours be paid through reduction of eight hours of vacation based upon the Company's policy allowing an employee to use accrued vacation when no sick leave is accrued and requiring that an employee exhaust vacation prior to taking unpaid leave. Thus, since the employer's specific vacation plan contained this provision, the employer may deduct from the vacation leave to apply for the full day absence due to illness.

In both examples 3 and 4, the employer's recommended action was permissible because employees received the equivalent of their guaranteed salary for the full-day absence.

Example 5: Full Day Absences for Personal Reasons And There Is Insufficient Leave Balance

The employee takes 8 hours off (full day) for personal reasons with a leave bank of 5 hours of sick leave and 2 hours of accrued vacation. The employer's recommended action was to pay 2 hours vacation leave through a deduction from the vacation balance and 6 hours be unpaid for the balance of the full day off.

The DLSE agreed, reasoning that, under these circumstances, an employer may make an actual deduction from the exempt employee's equivalent salary for the full day because the employee is absent from work for one full day for personal reasons, other than sickness or disability. Thus, in this example the employer may make a deduction from salary even though the employee receives 2 hours of vacation pay.

Example 6: Full Day Absences For Illness And There Is Insufficient Leave Balance

The employee takes 8 hours off (full day) due to illness and has 5

hours of available sick leave and 2 hours of vacation. The employer's recommended action was that the employee be paid 5 hours (through deduction from sick leave), plus 2 hours (through deduction of available vacation), and 1 hour is unpaid.

The DLSE stated that although there is insufficient leave to account for the full day absence, the employer can deduct from the applicable leave balance so long as the employee receives payment in an amount equal to the guaranteed salary and doing so does not affect the employee's exempt status.

Therefore, the DLSE further stated that the employer cannot reduce the employee's compensation from the salary by one hour pro-rata because the salary can only be reduced for time lost due to illness in full-day increments once the sick pay bank is empty.

Example 7: Partial Day Absences For Personal Reasons With Sufficient Leave

The employee works two hours and takes six hours off for personal reasons, and has one hour of available sick leave and six hours of accrued vacation. The employer's recommended action was to pay the employee pro rata from the salary for working two hours and to pay the employee six hours of vacation (through a deduction from the available vacation bank of six hours).

The DLSE would permit the deduction from the vacation bank but not from the salary pro-rata for the part day worked. The DLSE reasoned that, although *leave* deductions under an employer policy for partial day absences do not violate the salary basis requirement, *salary* deductions for partial day absences are not permitted. Thus, the employer must pay the employee the full salary for that day, but the employer may deduct 6 hours from the available vacation leave balance.

Example 8: Partial Day Absences For Personal Reasons With Insufficient Leave

The employee works 3 hours and takes 5 hours off for personal reasons, and the employee has 5 hours of available sick leave and 0 hours of accrued vacation. The employer recommended that the employee be paid for working only 3 hours from the employee's salary pro-rata and 5 hours for the absence (absence with pay) because there was no vacation accrued. The DLSE made clear that the employee must be paid for the 3 hours the employee actually worked as well as the 5 hours of absence because there is no available leave to be applied to the 5 hours of absence and no deduction from the employee's salary can be made for partial day absences. The employee is thus paid a full day's wages in this example after working only 3 hours.

Conclusion

The above examples from the November 28th opinion letter provide some helpful illustrations and explanations for making deductions from exempt employees' salary and/or accrued leave for full and partial day absences. The opinion makes clear that a salary can never be deducted in less than full-day increments, and even then, only when one of the enumerated exceptions to the general rule applies.

It's also important to make sure that permissible deductions, including requiring an employee to use sick pay, then vacation pay, to cover time lost for illness, should be in an employer's paid leave policies. As such, it is important to review your leave policies to make sure that you are able to take advantage of these deductions.

For more information contact the author at blarson@laborlawyers.com or 949.851.2424.

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