
Coates' Canons Blog: Permissible Deductions from the Salaries of Exempt Employees

By Diane Juffras

Article: <https://canons.sog.unc.edu/permissible-deductions-from-the-salaries-of-exempt-employees/>

This entry was posted on October 08, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

The federal Fair Labor Standards Act permits employers to exempt employees from the law's overtime requirements if their job duties meet one of three duties tests (discussed previously here, here, here, here, and here) and, crucially, if they are paid on a salary basis (discussed previously here). What happens if an employer makes deductions from the salary of an exempt employee? As a general rule, deductions violate the salary basis test and destroy the exemption, making the employee eligible for overtime. This rule does have exceptions. This blog post discusses four circumstances in which the FLSA allows public employers to make deductions from the salary of an exempt employee without destroying the exemption.

1. Deductions for Absences in Excess of Accrued Sick or Vacation Leave. This is probably the most frequently used of the permissible exceptions to the rule prohibiting deductions from the pay of an exempt employee. The exception may be used only by *public* employers and only if they have adopted a policy crediting employees with paid sick, vacation or personal leave **and requiring** that an employee's pay be docked when an employee is absent for personal reasons or because of sickness or injury and has no accrued paid leave available. The deduction from salary may be taken in full-day increments or on a pro rata basis for less than a full day.

A public employer may also apply this exception when an employee does not bother to ask for permission to take time off or when the employee asks for permission to take leave, it is denied and the employee takes time off anyway. The exception also applies when an employee has accrued paid leave, but asks to be put on unpaid leave and the employer agrees.

The regulation authorizing this most useful exception may be found here. Note that the regulation also authorizes employers to furlough exempt employees by temporarily categorizing them as nonexempt (and thus requires them to pay these employees for any overtime worked) in workweeks during which the jurisdiction wishes to furlough its employees for budgetary reasons.

2. Deductions for Full-Day Disciplinary Suspensions for Exempt Employees. Under this second exception, an exempt employee who violates a generally applicable rule of workplace conduct may be placed on an unpaid disciplinary suspension but only in increments of a full-day. In other words, the employer may dock the employee's salary in increments of one day, two days, three days etc. It may not dock the employee's salary for the equivalent of two-and-one-half days of work, for example.

The workplace misconduct must be a violation of a rule that is written and that applies to all employees. As was the case with the excess leave exception discussed above, an employer must have a written policy in place before it can use the unpaid disciplinary suspension exception. This exception is found at 29 C.F.R. § 541.602(b)(5).

The regulation does not define the term "workplace conduct." It gives two examples, however. The first is of a violation of the employer's sexual harassment policy, and the second is of a violation of a policy prohibiting workplace violence. Both examples involve serious misconduct with the potential for employer liability for damages suffered by other employees. In the Preamble Discussion that accompanied the publication of the rule in the Federal Register, the U.S. Department of Labor gave two additional examples — a violation of an employer's written drug or alcohol policy or a violation of the employer's written policy concerning off-duty conduct or violations of law. See 69 Fed. Reg. 22177 for this discussion.

Given these examples, discretion would say that employers should not place exempt employees on an unpaid disciplinary

suspension for insubordination, excessive tardiness or for the vague offense of “conduct unbecoming a government employee.”

3. Docking an Exempt Employee’s Pay for Safety Violations. The FLSA regulations have long included a provision allowing employers to dock an exempt employee’s pay as a penalty for violation of a safety rule of major significance. This exception is poorly understood and North Carolina public employers have not made much use of it.

This exception is found at 29 CFR § 541.602(b)(4). The rule explains that “[s]afety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.” The relatively few cases in which this regulation is at issue demonstrate that this is a rule intended to prevent serious danger *to the workplace or other employees*. *The exemption does not appear to cover violation of safety rules designed to prevent danger to the general public.*

So, for example, a law enforcement officer’s failure to remain at his assigned post, sleeping while on duty or failing to report the loss of his service weapon have been found to put fellow officers at risk and thus to be violations of safety rules of major significance. A police officer’s failure to respond to a traffic accident has been found to jeopardize EMTs working at the scene and to be a violation of a major safety rule. A fire truck’s failure to respond to the correct address was found to be a violation of a safety rule of major significance because the delay in its arrival at the scene endangered fellow firefighters already at the scene.

In contrast, law enforcement officers did not violate a safety rule when they accepted free sausage sandwiches from a merchant, nor did an employee who failed to report absences from work. A fire captain’s failure to prevent subordinates from downloading pictures of nude women from the internet was also not a violation of a safety rule of major significance.

The regulation provides that a deduction for a violation of a safety rule of major significance may be made in any amount and need not be tied to the employee’s salary rate. Thus, this rule may be used to fine exempt employees as well as to suspend them.

4. Deductions for Partial First or Last Week of Work or for Partial Week FMLA Leave. An exempt employee’s first or last week of work may not be a full workweek. The FLSA allows an employer to pay a proportionate part of an exempt employee’s full salary for the time actually worked in the first and last week of employment. This exception is found in subsection (b)(6) of 29 CFR § 541.602. Similarly, an employee may begin or end a block of unpaid Family and Medical Leave Act leave midweek or may take intermittent FMLA leave – blocks of time amounting to less than a full workweek because of the flare-up of chronic conditions or for scheduled medical treatments. Subsection (b)(7) allows employers to pay a proportionate part of an exempt employee’s full salary for the time actually worked in a week in which FMLA leave has been used.

Links

- canons.sog.unc.edu/?p=7464
- canons.sog.unc.edu/?p=7537
- canons.sog.unc.edu/?p=7765
- canons.sog.unc.edu/?p=7812
- canons.sog.unc.edu/?p=7840
- canons.sog.unc.edu/?p=7385
- www.law.cornell.edu/cfr/text/29/541.710
- www.law.cornell.edu/cfr/text/29/541.602
- www.gpo.gov/fdsys/pkg/FR-2004-04-23/pdf/04-9016.pdf