



New York State Department of Labor
Andrew M. Cuomo, Governor
Colleen C. Gardner, Commissioner

January 12, 2011

[REDACTED]
[REDACTED]
[REDACTED]

Re: Request for Opinion
Leave Time
RO-10-0194

Dear [REDACTED]:

This letter is written in response to your letter dated December 27, 2010, in which you inquire as to the permissibility of an employer's docking your salary for time missed at work due to a severe snowstorm. Your letter states that you are an "exempt-salaried" worker for a not-for-profit organization in Buffalo, New York, and that during a recent snowstorm, you were unable to make it to work for two consecutive days. As a result of you not having sufficient paid leave time to make up for your scheduled work hours, as is required by your employer's written policy, your salary was docked. Your letter inquires as to the permissibility of your employer's docking of your salary.

As a matter of general law, neither federal nor New York State law requires that an employer provide vacation, personal or sick paid time off to its employees. These are benefits generally provided at the discretion of the employer, or based upon an employee contract or collective bargaining agreement. While there is no requirement for an employer to provide such benefits to its employees, please be advised that Section 198-c of the New York State Labor Law provides that an employer who is a party to an agreement to pay or provide benefits or wage supplements to an employee (which would include paid time off), but who fails, neglects, or refuses to abide by the terms of such agreement, is in violation of the Labor Law and may be found guilty of a misdemeanor. In this regard, New York's courts have stated that "[a]ll that is required by section 198-c is that an employer abide by the terms of his agreement to provide benefits," (*See, Glenville Gage Co., Inc. v. Industrial Board of Appeals*, 70 AD2d 283, 286 (3rd Dept. 1979), *aff'd* 52 NY2d 777 (1980)). Such agreements need not be in writing. They can be established through credible evidence of an employer's longstanding policy and practice or unwritten agreement with employees. It is additionally worth noting that employers are

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required to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays, and hours. (Labor Law §195(5).) However, a failure by an employer to provide such written notification will not relieve the employer from its obligations under that policy, notwithstanding the fact that it was not put in writing. (*In re Center for Financial Planning*, PR-06-059 (Industrial Board of Appeals, 2008).)

While your letter does not provide the details of your employer's leave policy, your letter's reference to the employer's "policy book" indicates that your employer's policy is in writing and was provided to you as required by Labor Law §195(5). Assuming the actions taken by your employer in docking your pay were done in line with the terms of that "policy book," it appears that such actions are permissible under the New York State Labor Law.

It is additionally worth noting that the manner in which an employer implements its sick, vacation, and personal leave policy may have an effect on an employee's status with regard to eligibility for overtime pay under the Federal Fair Labor Standards Act. A fact sheet developed by the U.S. Department of Labor regarding the salary basis requirement for a number of exemptions to the Federal overtime provisions is enclosed for your review. Additional information with regard to the Federal Fair Labor Standards Act may be found at the U.S. Department of Labor's website at www.dol.gov.

This opinion is based exclusively on the facts and circumstances described in your letter dated December 27, 2010, 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. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By: 
Michael Paglialonga
Assistant Attorney II

Enclosure: FLSA Fact Sheet No. 17G
cc: Carmine Ruberto

Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, computer and outside sales employees.

Salary Basis Requirement

To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$455 on a salary basis *or* on an hourly basis at a rate not less than \$27.63 an hour.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

Effect of Improper Deductions from Salary

The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

Safe Harbor

If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Fee Basis

Administrative, professional and computer employees may be paid on a "fee basis" rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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