



The Vacation Nobody Wants

Insights

3.01.09

(Labor Letter, March 2009)

The difficult financial environment is causing many employers to consider cost-savings in the area of employee compensation. The ideas sometimes include a temporary or intermittent scheduling of unpaid days off for employees whom the employer classifies as exempt executive, administrative, or professional employees under the federal Fair Labor Standards Act.

As employers consider what to do, they should be careful not to undercut the "salary basis" of payment that is necessary in order to treat most such employees as exempt. Hard times will not be a defense to the substantial liability that usually results when employees no longer qualify for an FLSA exemption.

What's Required

Paying on a "salary basis" means that an employee regularly receives each pay period a fixed, predetermined amount of money (of at least \$455 per week) for every workweek in which the person performs any work. U.S. Labor Department rules provide that, with some exceptions, this amount cannot be subject to reduction based upon the number of hours or days the employee works. More to the point, the salary may not be docked for absences during a workweek caused by the employer or by the organization's operating needs.

For example, DOL has considered situations in which employers facing business downturns curtailed operations by shutting down for a day or two in one or more workweeks. In its view, the "salary basis" rules did not permit docking exempt employees' salaries for those unworked days. It did not matter that the employers were trying to avoid layoffs or to preserve the employees' job security.

Finding A Workaround

But employers do have at least some options. One of them is to reduce exempt employees' salaries (temporarily or otherwise) on a *going-forward* basis, such as in connection with implementing a shortened work schedule. To meet the exemption rules, each employee's new salary rate still must be at least \$455 per week and must still be paid consistently with the "salary basis" rules. That is, the lowered salary could be docked only when those rules allow it, which would not include days off in a workweek due to shutdowns.

Another possibility grows out of the principle that the salary need not be paid for any workweek in which the exempt employee performs no work. If the employee is furloughed for one or more entire workweeks, then the "salary basis" rules do not require that he or she be paid any of the salary in those instances.

Of course, you can't say that employees have performed no work if they take work home to do it there instead, handle matters by telephone, log-in remotely by computer to perform duties from outside the office, and so on. And remember, the relevant time period is the seven-day *workweek* the employer has established and documented for the employees as is required under the FLSA; this is not necessarily the same as a calendar week or a scheduled week.

Getting DOL Backup

Whether you pursue one of these avenues or others, implement such arrangements only after careful, advance planning. For one thing, in today's supercharged wage-hour litigation environment, it can be important that an employer documented its reliance upon DOL authorities in doing what it did. DOL opinion letters have approved some downturn-related measures employers adopted in the past.

And state or local laws might impose their own additional requirements or limitations curtailing your alternatives. For instance, a jurisdiction might require advance notice of a particular content and length before an employee's pay is reduced, or it might interpret its own salary-based exemptions so as to preclude steps the FLSA's versions allow.

The bottom line is this: even if the pressure is on, resist the temptation to act in haste where these matters are concerned.