Question received by e-mail at DLSE Info Web Site:

May 01, 2002

Dear DLSE,

We have had a member call with the following question:

They have an exempt employee who requested to work 4 days/10 or so hours. (This is a temporary trial period of approximately 6 months to determine whether or not it will work and if it does, other exempts may want to do the same thing.) If the exempt employee is absent, should they take 10 hours or 8 hours from the PTO account? If they do take 10 hours, would that jeopardize the exempt status for some reason (like the exempt employee might be perceived as being treated as an hourly, non-exempt employee?).

(Note: The individual who called was unsure what the manager discussed with the employee at the time of this agreement for the employee to work 4 days how the PTO would be affected.)

Your assistance with this issue is greatly appreciated. If you have additional information that would assist with this, please let me know.

If you need to discuss, please feel free to call me.

Thank you,

Wendy Platt

Employers Group

Los Angeles, CA

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Response By DLSE Info:

As you know, DLSE takes the position that "PTO", if not tied to an event (birthday, holiday, etc.) or a reason such as sick leave or jury duty, will be treated as vacation time. As you also probably know, the DLSE has taken the position that unless the exempt employee voluntarily absents him/herself for a period of a full day or more, vacation may not be used by the employer to make up the salary of the employee.

We assume, for purposes of this message, that any loss of time by the exempt employee would be a full day or more, and that the PTO (whatever the type, including that which is considered vacation) could be used.

With that fact scenario, we address your question which we see as: "If the employer and an exempt salaried employee have an agreement that the employee is expected to only work four days in a workweek, what would be the pro rated deduction from the employee's salary if the employee were to voluntarily absent themselves for a full day."

As you may know, in order to insure consistency with federal law, and so far as those regulations are consistent with California law, the DLSE has adopted the federal regulations dealing with "salary basis" found at 29 C.F.R. § 541.118. For purposes of enforcing the federal regulation, the federal courts have found it necessary to explain the rationale for the "salary basis" rule. In doing so, those courts have found it necessary to define the term "salary". The federal courts which have addressed the definition of "salary" have consistently held, as did the Third Circuit in *Brock v. Claridge Hotel and Casino,* 846 F.2d 180, 184 (3d Cir.), *cert. denied sub nom. Claridge Hotel & Casino v. McLaughlin,* 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988): [s]alary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it." In the Ninth Circuit, the court has concluded that: "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is

precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the ... quantity of work performed".... *Abshire v. County of Kern,* 908 F.2d at 486 (9th Cir.1994).

The federal Department of Labor has recognized, of course, that there may be agreements between employers and employees regarding the usual number of days per week that the salaried employee was expected to perform his or her services. For instance in an Opinion Letter published by the Wage and Hour Division of the Department of Labor dated July 21, 1997, the agency stated "it is the Department's long standing position that where there is an understanding that a normal workweek consists of five or six workdays, the deduction permissible for a day of absence under section 541.118 must be calculated on the basis of one-fifth of a five-day workweek, or one-sixth of a six-day workweek, whatever the case may be." The agency leaves no doubt, however, that the calculation is based on "a normal workweek", which, of course, would not preclude a lesser or greater number of workdays in some workweeks. That is the very nature of the "salary" basis: The employee is paid "not for the time spent on the job, but rather for the general value of services performed."

To take the position that there is such a thing as a "part-time" exempt category would simply be inconsistent with that rationale. This conclusion is supported by the fact that the federal regulation provides that the salary of an exempt employee must be paid during any time when the employer fails to provide work. Even the California legislation (See Labor Code §§ 515(a) and (c)) envisions payment for "full-time" employment. In addition, during the deliberations which culminated in the adoption of the current wage orders, this issue was raised before the Commission. (See January 28, 2000, pages 61-90) While it was pointed out that the language of AB 60 and the proposed interim wage order would not appear to permit a "part-time" exempt employee, there is nothing in the final wage order which would indicate that the IWC chose to remedy that situation.

Consequently, DLSE concluded that it was the intent of the IWC and the Legislature that the term "part-time" exempt employee is an oxymoron. This agency concludes that the federal enforcement posture mirrors that adopted by DLSE.

In addition, DLSE takes the position that, consistent with the DOL position, a "normal workweek" for exempt employees is either five or six days per week. Thus, an exempt employee's salary may not be reduced for voluntary absences by more than one-fifth.

Further, DLSE chooses to adopt the limitations of the U.S. Department of Labor regarding what constitutes a "normal workweek" (see DOL Letters, cited above) Thus, if your client wishes to hire an employee who meets all of the requirements of an exempt employee and limit the number of days per week that work will be made available to the employee, that is the prerogative of the employer. In fact, if the employee meets the duties test, applicable education test, and is paid a monthly salary at least two times the California minimum wage for full-time employment, the employee is exempt, and, therefore may be required to work as many hours a week or as many hours a day as the job duties require.

To adopt an enforcement position which allows employers and exempt employees to agree to a lesser number of work days than the normal five-day workweek, would, in our opinion, invite subterfuge. As pointed out above, there is no limit on the number of hours in a day which an exempt employee may be required to work without overtime payment. Thus, a workweek of four fourteen-hour days would not require overtime; nor, of course, would a three-day eighteen-hour day. Were we to recognize a four-day workweek for exempt status and allow the employer to reduce the wage of an exempt employee by one-fourth in the event the employee missed one day (regardless of the number of hours worked in the day), would open the flood gates to adoption of lengthy workdays in three-day or two-day workweeks which could lead to reduction of the exempt employee's salaries by one-third or one-half simply because the employee absented themselves for one day. DLSE does not believe that this was the intent of the California Legislature or the IWC.

H. Thomas Cadell, Jr.

Attorney for the Labor Commissioner