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

From: Wendy Platt
[SMTP:Wplatt@EmployersGroup.com]
Sent: Tuesday, July 02, 2002 4:59 PM
To: DLSE Info
Subject: Exempts on Vacation picking up messages and e-mails

Dear DLSE:

Your assistance is appreciated regarding the following questions.

A. Please provide an opinion as to how DLSE would construe an exempt employee, while on vacation, picks up voice mails and e-mails, perhaps for a total of 10 - 15 minutes during the whole vacation week.

- Would this be counted as work and the day be counted as a work day?

- Would the week in which this work would be done be counted as a work week, thereby negating the vacation -- the whole week?

B. Wouldn't 10 - 15 minutes be "de minimis" and not negate the vacation?

C. If the exempt employee who is on vacation picked up voice mails and e-mails for 10 - 15 minutes each day, would that affect all the vacation?

Thank you for your assistance. Please feel free to provide additional information as appropriate.

Also, if you would like to call to discuss, please feel free to do so.

Thank you,
Wendy Platt
Employers Group
Los Angeles
(213) 765-3934

Response By DLSE Info:

Please be advised that DLSE has addressed this issue in past e-mail responses; but not in the context that you have phrased your question.

In an e-mail received on April 7, 2002, the following question was asked:

> *"Under what circumstances may an employer dock a Director level person's wages? I've read somewhere that they are not allowed to dock wages if the person works a portion of the day. Does that include remote work from home (part of my job requires I be able to log into the network remotely when necessary)? How about if I provide phone support during the day, answering questions, walking people through procedures, and generally being available?"*

DLSE Info responded to that question as follows:

> "The law (29 C.F.R. 541.118, the federal regulation which defines salary basis for purposes of the FLSA, is the basis for the California enforcement policy) states that the salary must be a 'pre-determined amount constituting all or part of his [the employee's] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.' Deductions may be made, however, 'when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident.' The language is 'absents himself from work' but the term 'work' is not defined in the regulation.
>
> "Obviously, if the 'work' assignment is outside of the office environment then the employee would still be at 'work' for purposes of the salary. In the situation you describe, it is not clear if the home is the 'work' assignment. However, the Department of Labor of the United States Government has issued an Opinion Letter (dated July 21, 1997) which deals with the question of whether an exempt employee who is off and works at 'home about one-half hour reviewing files' may have a deduction made from his or her salary. The DOL's announced position was that 'a deduction cannot be made from the salary of a salaried exempt employee in such a situation, even when the employee spends only one-half hour reviewing files at home. The regulation provides that a deduction may occur only if the absence is for "a day or more".' The DLSE adopts this position. However, your question about whether you would be entitled to the day's pay for 'generally being available' would, we think, depend upon the agreement with the employer. If, for instance, the employer required you to 'generally be available' a deduction may not be taken for the full-day absence. On the other hand, the employee may not unilaterally absent himself and simply announce that he will 'generally be available'. If the employer calls the employee (or authorizes others to call) with work related issues, however, then the employee's salary is not subject to deduction."

As you can see, the DLSE response was consistent with the approach of the U.S. Department of Labor's position as outlined in the letter of July 21, 1997, regarding any deduction from salary for work at home. The DOL response was in the context of an employee who – under the terms of a bona fide sick leave plan – took a full day off sick and spent "one-half hour reviewing files" on that day. There is no indication in the DOL letter that the employer "required" or "expected" the work to be performed. The response is premised simply on the fact that the employee spent the time performing the work. The DOL response also did not indicate that there was any "de minimis" test which would be applied by the Department. As you know, California employers are subject to both the federal and the state law in this area – whichever is the more beneficial to the employee. We would, therefore, be remiss in our obligations to the employer community in California were we to provide an enforcement policy which would not meet the basic requirements of the federal enforcement policy.

The question submitted to DLSE in the April e-mail – and the response thereto – did not directly address the question of an employer's obligation to pay an exempt employee for a full day of work where the employee "picks up voice mails and e-mails". However, DLSE's response did indirectly address the question of whether the work was required by the employer and the concomitant problem of whether the employee may unilaterally choose to engage in work and, thus, obligate the employer to continue his or her salary for that day. DLSE took the position that the employee may not "unilaterally absent himself" but contend he was "generally available" so as to defeat the expectations of the employer.

Unless the employer requires that the exempt employee perform some work on a day the exempt employee has absented himself, there is no reason that the employer may not dock the pro rata amount of the exempt employee's salary for the full-day absence. On the other hand, if the employer requires

(directly or indirectly) that the employee perform work (de minimis or not) on any day when the exempt employee has ostensibly absented himself for a full day, the exempt employee's salary may not be docked.
We believe that this policy would meet the basic requirements of established federal enforcement policy.

There is no case on point and the usual rules surrounding the payment of overtime, wherein the employee must show that the employer had "actual or constructive notice" of the fact that the work was performed (*Davis v. Food Lion*, 792 F.2d 1274 (4th Cir.1986); *Forrester v. Foodliner,* 646 F.2d 413 (9th Cir.1981)), do not apply. These cases, of course, arise under the requirements of the federal law (mirrored in the IWC Orders) that a non-exempt employee is entitled to be paid for all hours the employee is "engaged, suffered or permitted" to work. There is no such requirement in regard to exempt employees.

Unlike the non-exempt employee, the exempt employee's compensation must be based on a salary. The federal courts which have addressed the definition of "salary" have 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).

To take the position, therefore, that the amount of time an exempt salaried employee actually spends performing a duty should be the measure of the compensation that employee is entitled to receive for that day is inconsistent with the concept of salary.

We are not unaware of the realities of the workplace. Many exempt employees feel a need to keep in touch with the work site. However, a blanket endorsement of a test which would provide that all exempt employees may be expected to work 10-15 minutes (or any other amount) in a day in which they are absent from work for personal reasons and for which the employer's obligation to continue their salary is excused, would not be possible.

For the exempt employee who might feel the need to perform de minimis duties, we do not feel that we should discourage such activity. Neither, however, do we feel that the California courts would allow an employer to require (directly or indirectly) any such activity while at the same time allowing the employer to deduct the day from the employer's weekly salary obligation.

Thank you for your continued interest in California labor law.

H. Thomas Cadell, Jr.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
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