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November 23, 2009

Mary Cheung, Human Resources Director  
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1115 Mission Road  
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*Re: Deductions for Partial and Full Day Absences of Exempt Employees*

Dear Ms. Cheung:

This responds to your letter dated October 22, 2008, requesting an opinion from this office regarding permissible deductions due to partial day absences for vacation and sick leave taken by exempt employees based upon your company's ("Company") policies for accrued or banked vacation and sick leave.

In your letter, you set forth a series of scenarios positing different reductions in both sick leave and vacation balances for full or partial day absences and inquire whether the reductions are permissible under California law. It is the opinion of the Division of Labor Standards Enforcement (DLSE) that while it is impermissible to deduct *from a salary* of an exempt employee for partial day absences, the deductions from leave balances in connection with partial day absences due to vacation or sickness proposed in the Company's scenarios do not, in most scenarios presented in your letter, violate California law nor do such deductions cause the loss of an employee's exempt status. Each scenario is addressed individually below.

#### *Factual Background*

Your letter generally describes the Company's vacation and sick leave policies. Under the Company's policy, vacation leave is accrued by employees and is to be used for absences based upon any personal reasons including a vacation break, preparing for school examinations, and for absences due to illness (when there is no sick leave accrued or banked). Unused vacation is paid out to the employees upon separation from the Company. The Company policy also provides for the accrual of sick leave which employees subsequently use for absences due to illness, attending doctor's appointments, or providing medical care for family members. Unused sick leave is not paid out to employees upon separation. All accrued sick leave (except when requested leave is not related to illness) and vacation must be exhausted before any unpaid leave of absence is approved. In subsequent telephone discussions with this office, you confirmed that the Company's vacation policy requires that an employee use his or her vacation hours for illness when he or she does not have any sick leave accrued.

2009.11.23

You state your understanding of the Labor Commissioner's policies regarding deductions for partial day absences of exempt employees as allowing for deductions from accrued vacation and sick leave as follows: from deductions for personal reasons provided it is for 4 or more hours absence in a work day and there is vacation accrued and from sick leave (any hour) for illness as long as there is sick leave. You then pose several scenarios based upon two general categories of reasons for absences: time off for personal reasons (vacation) and time off for illness, with various scenarios from partial day to full day absences and varying available vacation and sick leave balances. In subsequent telephone discussions with this office, you also confirmed that a full day's work consists of 8 hours, that none of the various scenarios presented involves absences of less than 3 hours, and that deductions are not planned for absences that are less than 3 hours.

Before addressing the scenarios in your letter, the general principles for allowing for deductions for absences of exempt employees must be reviewed in order to place the scenarios and analysis in context, which will assist in understanding the scope and limitations for allowing such deductions.

One of the hallmarks for exempt status under both the federal Fair Labor Standards Act (FLSA) and California law which relieves an employer from overtime compensation requirements is that an employee must satisfy both a "salary" test and an applicable "duties" test (executive, administrative, or professional). Your inquiry addresses the impact on the salary test when an employer makes deductions for partial and full day absences, and accordingly this letter addresses only the salary test requirements.

### *The Salary Basis Test*

Under California law, an employee must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. (Labor Code §§ 515(a) and (c).) While there are several differences between the federal and state salary requirements (e.g. minimum dollar amounts), the DLSE follows the general federal interpretations under the FLSA salary basis test with respect to allowable deductions for absences to the extent there is no inconsistency with specific provisions in the Labor Code or IWC Orders. (DLSE Enforcement Policies and Interpretations Manual (June 2002) [hereafter "DLSE Manual"], §§ 51.6.4 and 51.6.6; DLSE Opinion Letter 2002.03.01 [the salary requirements of state law are generally consistent with the federal "salary basis" regulations set forth in 29 CFR § 541.118 (now § 541.602), including DLSE's enforcement position regarding deductions from salaries].)

An employee will be considered to be paid on a "salary basis" for purposes of the overtime exemption if he or she receives on regularly scheduled paydays a predetermined amount constituting all or part of his or her compensation which totals at least two times the California minimum wage per month which amount is not subject to reduction because of variations in the quality or quantity of the work performed. An exempt employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. (DLSE Manual § 51.6.8-51.6.9; 29 CFR §541.602(a).) Failure to meet the salary test results in the employee no longer being considered exempt and an actual practice of making

2009.11.23

improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. (29 CFR § 541.603(a).)

The prohibition against deductions from an employee's wages under the salary requirement is subject to several exceptions stated in 29 CFR § 541.602(b). The exceptions include and allow for deductions from pay when an exempt employee is absent from work for *one or more full days* for personal reasons other than sickness or disability (29 CFR § 541.602(b)(1); DLSE Manual § 51.6.14.3.) and for absences of *one or more full days* occasioned by sickness or disability (including work-related accidents) if the deduction is made from a bona fide plan, practice, or policy of providing compensation for such sickness or disability (29 CFR § 541.602(b)(2); DLSE Manual § 51.6.15.2.) The clear language in these referenced federal regulations allows for deductions from a salary only in increments of one full day.<sup>1</sup>

A corollary to the above recognized by the courts and the federal Department of Labor (DOL) is that an exempt employee's *salary* cannot be subject to reduction for absences less than a full day under the above stated federally recognized exceptions. (*See Abshire v. County of Kern*, 908 F.2d 483, *cert denied*, 498 U.S. 1068 (1991) [deducting an employee's salary for absences less than one day violates FLSA salary basis test]; *Conley v. P.G. & E.* (2005) 131 Cal.App.4th 260, 267; DOL Opinion Letter FLSA2007-6 (February 8, 2007) [partial day absences not expressly recognized by Part 541 regulations may render an employee's compensation not on a salary basis, thereby jeopardizing exempt status].) For example, the regulation for absences for personal reasons states:

Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two-full day absences. However, if an exempt employee is absent for one-and-a-half days for personal reasons, the employer can deduct only for the one full-day absence.

(29 CFR § 541.602(b)(1); *see also* DOL Opinion Letter FLSA2005-7 (January 7, 2005).)

A California court noted that the combined effect of the federal regulations (29 CFR § 541.602(a) and (b)(1)) is to "preclude employers from docking the pay of an employee for an absence of less than a day (a partial day absence)." (*Conley v. P.G. & E., supra*, 131 Cal.App.4th at

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<sup>1</sup> A different rule applies for treatment of absences due to unpaid leave under the federal Family Medical Leave Act (FMLA) and its effect on the salary basis test for exempt employees. "An employer is not required to pay full salary for weeks in which an exempt employee takes unpaid leave under the federal Family Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked." (29 CFR § 602(b)(7).) The DLSE recognizes that "adjustments in compensation and/or benefits are permissible where other statutory requirements are met, such as the family and medical rules that provide eligible employees with flexibility they need to take leaves on a "reduced leave" or "intermittent leave basis." (DLSE Opinion Letter 2002.03.01, p. 7.) The DLSE views both the FMLA and California Family Rights Act (CFRA) as enactments covered in 29 CFR § 602(b)(7).

p. 267 [footnote omitted].)<sup>2</sup> Thus, interpreting these federal rules to allow deduction from a salary for a partial day absence by an exempt employee would plainly contravene the hallmark characteristic of the salary test, namely that exempt employees receive a predetermined amount of compensation not subject to reduction because of variations in the quality or quantity of work performed. If an employer, in fact, docks employees' wages improperly, "then the employees do not meet the salary basis test, and are nonexempt for purposes of overtime pay." (*Conley, supra*, 131 Cal.App.4th at p. 267.)

Thus, when either of the two exceptions described in 29 CFR § 541.602(b)(1)-(2) are satisfied, an employer is allowed to make *full day deductions from pay* without the employee losing his or her exempt status.

### *Deductions from Leave Banks*

The above general rules regarding the salary basis test are often confused with and misapplied to a related but different rule applicable to *deductions from leave balances* for *partial day* absences of exempt employees under the FLSA. Your letter addresses the latter rule but the former rule is implicated insofar as it still preserves an exempt employee's right to full day compensation even for a partial day absence, as explained more fully below.

As previously stated, the general rule under the FLSA is that an employee will be considered paid on a "salary basis" if the employee regularly receives each pay period on a weekly or less frequent basis, "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." (29 CFR § 541.602(a), emphasis added.) Federal courts interpreting this language have found that "compensation" and "amount" in the regulation refers to "salary" and not paid leave time or fringe benefits, and thus, a reduction in paid leave time does not affect the employee's status as a salaried employee. (*Barner v City of Novato* (9<sup>th</sup> Cir. 1994) 17 F.3d 1256, 1261-1262 [deductions from accumulated paid leave time does not result in loss of exemption]; see also *Webster v. Public School Employees of Washington, Inc.* (9<sup>th</sup> Cir. 2001) 247 F.3d 910, 917 [extending *Barner* to apply to deductions where the accumulated leave is convertible to cash].)<sup>3</sup>

The DOL has further illuminated the effect of the federal interpretations with respect to partial day absences as follows:

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<sup>2</sup> Prior to August 24, 2004, when the referenced federal regulations were revised and renumbered as currently cited, the language now contained was previously in 29 CFR § 541.118. The revisions did not substantively amend the two federal regulatory exceptions discussed in this letter allowing for deductions under the salary basis test.

<sup>3</sup> According to the court in *Webster*, the rule announced in *Barner* is not restricted to public employees, i.e., is applicable to private sector employment. Since *Barner*, deductions of pay for partial day absences under certain circumstances due to personal reasons, sickness or disability without rendering public employees nonexempt are now specified in 29 CFR § 541.710, effective August 23, 2004. For this reason, the analysis here is limited to deductions for absences in private sector employment. (See DOL Opinion Letter FLSA2005-16 (April 11, 2005).)

Where an employer has a bona fide benefits plan (e.g. vacation time, sick leave), it is permissible to substitute or reduce the accrued leave in the plan for the time an exempt employee is absent from work, whether the absence is a partial or full day, without affecting the salary basis of payment, *if the employee nevertheless receives payment of his or her guaranteed salary*. Where the employee's absence is for less than a full day, payment of the employee's guaranteed salary must be made, even if an employee has no accrued benefits in the leave plan and the account has a negative balance.

(DOL Opinion Letter FLSA2006-32 (September 14, 2006), emphasis added; *see also* DOL Opinion Letter FLSA2005-7 (January 7, 2005).)

It must be noted that in California, vacation is afforded the status of a type of deferred compensation which is a wage and not a benefit as characterized by the DOL. (*See Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774.) In *Conley*, however, which involved a vacation leave policy implemented by the utility, PG & E, the California Court of Appeal specifically addressed the issue of deductions from an employee's *vacation leave bank* for partial days absences and concluded "that nothing in California law precludes an employer from following the established federal policy permitting employers to deduct from exempt employees' vacation leave, when available, on account of partial-day absences from work." (*Conley, supra*, 131 Cal.App.4th at p. 263.) The court noted that the exemption issue in the case presented one of first impression under California law. The court rejected the contention that an employer that requires its employees who have not exhausted their vacation leave to apply that leave to partial day absences constituted an impermissible reduction in the amount of compensation they receive based upon the quantity of work they perform. The court further rejected the contention that the practice specifically violates the employees' right to vacation pay under *Suastez*.

Although the federal salary basis test may require PG & E to give exempt employees *additional* time off for partial-day absences after they exhaust their vacation leave banks, under PG & E's vacation leave policy, PG & E's exempt employees do in fact *receive* all of the paid time off they have earned—they must simply use that accrued vacation time to make up for partial-day absences. In other words, because the deductions made from vacation leave banks of exempt employees represent days on which those employees have, in fact, taken at least four hours off work, PG & E's vacation leave policy neither imposes a forfeiture nor operates to prevent vacation pay from vesting as it is earned. All it does do is regulate the timing of exempt employees' use of their vacation time, by requiring them to use it when they want or need to be absent from work for four or more hours in a single day.

(*Conley, supra*, 131 Cal.App.4<sup>th</sup> at p. 270, underlined emphasis added; italic emphasis in original.)

The court noted that PG & E's policy was entirely consistent with the California Supreme Court's interpretation in *Suastez*, that Labor Code § 227.3 "does not purport to limit an employer's right to control the *scheduling* of its employees' vacations. [Citations.]." The court stated: "[c]learly, therefore, *Suastez* does not preclude PG & E from *requiring* its exempt employees to use their vacation leave, if available, when they want or need to take a partial day absence." (*Id.*; second italics added for emphasis)

*Conley* addressed only deductions from a vacation leave bank for a partial day absence for four or more hours and expressly stated that it did not intend to include an absence of less than four hours which was based upon PG & E's express vacation leave policy of making deductions from exempt employees' vacation banks for partial day absences. (*Conley, supra*, 131 Cal.App.4th at p. 267, fn. 6.) We read the court's statement of limitation as based upon the employer's deduction policy under the facts of the case at issue and not as establishing a limitation for allowing only such deductions to partial day absences of four or more hours. Indeed, our research has not revealed any federal standard or policy which states a "four or more hours" limitation exists for such deductions.

We further note that although the courts treat vacation similar to a sick plan for purposes of determining or maintaining exempt status when making deductions for full day or partial day absences, any vacation policy or sick leave plan which is used as a basis for reduction of leave balances will be subject to review under state law requirements for determining the validity of such plans. Thus, the DLSE continues to view vacation plans under the California Supreme Court's discussion in *Suastez* and does not read *Conley* as diminishing the status of accrued vacation as "wages" under Labor Code § 227.3.

Although the federal regulations make a clear distinction between absences due to personal reasons other than sickness or disability with absences occasioned by sickness or disability, the DOL views a "bona fide benefits plan" to include vacation time or sick leave. (*See* DOL Opinion Letters FLSA2006-32 (September 14, 2006), FLSA2007-6 (February 8, 2007) and FLSA2009-18 (January 16, 2009).) When reviewing any deductions from a vacation leave balance, DLSE reviews the matter to determine whether it is made in accordance with a *bona fide* plan, practice or policy of providing compensation for loss of salary occasioned by such absence. (*Conley, supra*, [employer's express policy (vacation policy) requiring deductions from vacation leave banks for partial days absences reviewed and determined as consistent with *Suastez* and not violative of federal salary basis test.])

Additionally, an employer remains, as always, obligated to compensate the employee with his guaranteed salary for any day in which the employee performs work, even in the absence of a sufficient amount of banked vacation leave from which a deduction for a *partial day* absence can be applied. This is a necessary consequence due to the general prohibition under the salary test that precludes docking an exempt employee's *compensation* based upon variations in the quantity of work (29 CFR § 541.602(a)) as well as the exceptions which allow only for full day reductions of compensation (and by implication, precludes partial compensation for less than a full day worked) as a result of an absence due to personal reasons such as vacation and for sickness or illness. (29 CFR § 541.602(b)(1)-(2).) This view is consistent with DOL's interpretation of the FLSA's regulations that "[w]here the employee's absence is for less than a full day, payment of the

employee's guaranteed salary must be made, even if an employee has no accrued benefits in the leave plan and the account has a negative balance." (DOL Opinion Letter FLSA2006-32 (September 14, 2006).)

Accordingly, while it is impermissible to deduct *from a salary* for partial day absences, the Company may *deduct from leave time balances* in connection with absences due to vacation or sickness of less than a full day under a bona fide plan providing for such leaves without the employee losing his or her exempt status.

### *Application to Specific Scenarios*

Based upon the above analysis of the law, we turn to the scenarios raised in your letter.

Preliminarily, several of the scenarios described in your letter reduce both sick leave and vacation leave balances for full or partial day absences. The Company has separately defined vacation and sick leave plans which we assume for purposes of this letter only are bona fide plans with accrual and established criteria regarding their use. Under the vacation plan, an employee must use vacation leave when there is unavailable sick leave. Our research has not revealed any prohibition against combining the two types of leave for a single partial day absence. What is critical is that the underlying policy and express requirements of the salary basis test are not undermined or contravened by the reductions from respective leave banks. Accordingly, the DLSE will be concerned where the deductions from both plans for a single partial day absence are used in a manner which contravenes the underlying salary basis requirements previously discussed, including any practice which is inconsistent with or contravenes the terms of the respective plans. Federal law recognizes and prescribes guidelines for the use of vacation and sick leave plans to compensate for absences. The Company's combined use of such leave balances in accordance with the described plans, by itself, does not appear to contravene the policies underlying the salary basis test.

#### Full Day Absences and No Applicable Leave Available

In described **Scenario A1**, the employee takes 8 hours off (full day) for *personal reasons* and has the following leave balances: 5 hours of sick leave and 0 hours of vacation. The Company's recommended action is that the 8 hours is unpaid because the employer can deduct pay for a full day absence when no vacation is accrued. In **Scenario B1**, the employee takes 8 hours off due to *illness* and has 0 balances for both sick leave and vacation. The Company's recommended action is that the 8 hours is also unpaid due to a full day of absence with no respective sick leave or vacation balances which can be applied for the type of absence.

These scenarios are subject to the exceptions (stated in 29 CFR § 541.602(b)(1)-(2)) to the general rule prohibiting the reduction from the guaranteed salary. The regulation expressly provides that deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons. (29 CFR § 541.602(b)(1).) The regulation also expressly allows for full day deductions from pay due to sickness "if it is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by

such sickness” and “the employer is not required to pay for any portion of the salary for full-day absences for which the employee receives compensation under the plan...” (29 CFR § 541.602(b)(2).) Additionally, the regulation also expressly allows for deductions from pay for full day absences where the employee has not yet qualified under the plan, or after the employee has exhausted his or her leave allowance.

Thus, if no leave is accrued or available for deduction for vacation (Scenario A1) or illness (Scenario B1), the Company may deduct *from pay* for a full day with no adverse effect on the employee’s exempt status.

*Full Day Absences And There Is Sufficient Leave Balance*

In Scenario A2, the employee takes 8 hours (full day) off for *personal reasons* and has 5 hours of sick leave and 8 hours of vacation. The Company’s recommended action is that 8 hours be paid through deduction of 8 hours from accrued vacation leave.

When no work is performed by the employee for the entire day and there is sufficient applicable leave balance to apply for the type of absence (in this case, vacation), the Company’s payment through a deduction from available vacation leave sufficient to cover the full day is compliant with the federal regulations and expressly authorized in the DOL opinion letters.

Similarly, in Scenario B2, the employee takes 8 hours (full day) off due to *illness*, and has 0 hours of sick leave and 8 hours of accrued vacation. The Company recommends that 8 hours be paid through reduction of 8 hours of vacation based upon the Company’s policy allowing an employee to use accrued vacation when no sick leave is accrued and requiring that an employee exhaust vacation prior to taking unpaid leave. Since the Company’s specific vacation plan provides that vacation leave must be used when there is no sick leave balance available (e.g. has not accrued or has been exhausted), the Company may deduct from the vacation leave to apply for the full day absence due to illness.

The same analysis applies to Scenario B3 where the employee takes 8 hours off due to *illness* and has 4 hours of available sick leave and 6 hours of accrued vacation leave. The Company’s recommended action is that 4 hours be paid through reduction in available sick leave balance and 4 hours paid through reduction from vacation since the Company’s policy allows vacation to be used for absences due to illness when there is no sick leave available. This action is permitted for reasons conceptually similar to Scenario B2 with the exception that there is available sick leave (4 hours) applied prior to applying vacation for the absence due to illness.

In each of the above scenarios, employees receive the equivalent of their guaranteed salary for the full day absence which is in accord with the DOL’s interpretation as authorized by the federal regulation that DLSE follows for purposes of enforcing the State’s salary basis test for exempt employees.



*Full Day Absences And There Is Insufficient Leave Balance*

In Scenario A3, the employee takes 8 hours off for *personal reasons* and has 5 hours of sick leave and 2 hours of accrued vacation. The Company's recommended action is that 2 hours be paid through deduction of available vacation leave and 6 hours is unpaid for the balance of the complete day off.

Under these circumstances an employer may make a deduction from the exempt employee's salary because the employee is absent from work for one or more full days for personal reasons, other than sickness or disability. (29 CFR § 541.602(b)(1); DLSE Manual, §§ 51.6.14.3.) Thus, the Company is not precluded from making a full day deduction from the salary.

The regulation does not expressly address nor prohibit the deduction of any available leave bank for such full day absences for personal reasons. In an opinion letter issued in 1999 by the DOL's Office of Enforcement Policy Fair Labor Standards Team, the DOL addressed the scenario of an exempt employee who takes a day off for personal reasons, but the employee has only enough leave time to cover part of that day. (See DOL Opinion Letter dated May 27, 1999 (1999 WL 1002408).) The DOL stated "[w]here an employer has proposed a bona fide benefits plan, it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his/her guaranteed salary."<sup>4</sup> The DOL opined, however, that if the employee is absent for a full day for personal reasons and there is only enough leave credit to cover a portion of the hours, "the employer may deduct [from the salary] from the employee for the remainder of that day without jeopardizing the exempt status of the employee." (*Id.*) Accordingly, for Scenario A3, the Company may deduct from the employee's salary due to the full absence for personal reasons and the exempt status of the employee is not jeopardized by paying the employee the two hours of available vacation leave and not paying the employee any salary for the remainder of the day.

In Scenario B4, the employee takes 8 hours off due to *illness* and has 5 hours of available sick leave and 2 hours of vacation. The Company's recommended action is that the employee be paid through 5 hours deduction from sick leave, 2 hours through deduction of available vacation, and 1 hour is unpaid. Under the federal regulation and DOL interpretation, deductions from pay are allowed only for a full day absence due to sickness or disability if the deduction is made in accordance with a plan or policy of providing compensation for loss of salary occasioned by the absence due to personal reasons (vacation) or sickness. Moreover, the regulation also provides:

The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions from such full-day absences also may be made before the employee has qualified under the plan, policy or practice and after the employee has exhausted the leave allowance thereunder." (29 CFR §541.602(b)(2).)

<sup>4</sup> See also DOL Opinion Letters FLSA2005-7 (January 7, 2005) and FLSA2006-32 (September 14, 2006).

Here, the leave allowances are not exhausted and are insufficient to cover the full day absence. As previously explained, however, DOL allows for reductions from available leave balances for partial and full day absences under a bona fide plan without affecting the salary basis of payment if the employee nevertheless receives payment of his or her guaranteed salary. It follows from this language that although there is insufficient leave to account for the full day absence, the Company may deduct (reduce) from the applicable leave balance (in order to exhaust the leave) so long as the employee receives payment in an amount equal to the guaranteed salary and doing so does not affect the employee's exempt status.

Accordingly, the Company may deduct from the available leave balances, including vacation which can be applied if sick leave is exhausted under Company's policy but the Company cannot reduce the employees pay for the 1 hour.

#### *Partial Day Absences For Personal Reasons*

Although not indicated in your letter, your vacation and sick leave practice appears to account for one-hour increments for applying deductions from leave balances. Federal regulation expressly allows an employer to use "the *hourly or daily equivalent* of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee" when calculating the amount of deduction from pay allowed under 29 CFR § 541.602(b). (29 CFR § 541.602(c))(emphasis added). The DOL also has found that leave deductions under an employer policy for partial day absences in half-day increments do not violate the salary basis requirement. (See DOL Opinion Letters dated December 4, 1998 (1998 WL 1147739) [PTO policy] and FLSA2006-32 (September 14, 2006) [vacation leave].) California law is in accord. (*Conley, supra*, 131 Cal.App.4th at p. 263 ["nothing in California law precludes an employer from following the established federal policy permitting employers to deduct from exempt employees' vacation leave, when available, on account of partial-day absences from work."].)

In Scenario A4, the employee works 2 hours and takes 6 hours off for personal reasons, and has 1 hour of available sick leave and 6 hours of accrued vacation. The Company's recommended action is to pay for working 2 hours and pay through deduction from available vacation (6 hours) because the employee is absent for 4 or more hours in the day.

The proposed recommendation is permissible but not for the stated reason, which is premised upon the employee being absent for 4 or more hours in a work day. As indicated previously, there is no legal requirement of an absence of "4 or more hours" in a workday that must occur prior to applying leave balances for partial day absences.<sup>5</sup> In any event, the proposed recommendation is permissible as previously discussed in this letter because federal and state law allows payment through deductions from available leave balances but requires that payment of the

<sup>5</sup> To the extent that your stated reason for applying specific deductions from vacation leave balances is based on your understanding of the limitation for applying vacation only for absences of 4 or more hours in a day (presumably, contemplating the *Conley* court decision) as indicated in Scenarios A4, A5, A6, A7, B5, B6, B7, and B8, we stated above that the holding in *Conley* appears to be based upon *that employer's* policy which limits deductions from a vacation leave balance for partial day absences of four or more hours. There is no indication that your *policy* has such limits, and thus, such requirement does not constitute a basis for partial day absences in your situation.

guaranteed salary must be made for any balance to which there is no available leave. Stated differently, the Company must pay the employee the full salary for that day but the Company may deduct 6 hours from the available vacation leave balance.

In Scenario A5, the employee works 3 hours and takes 5 hours off for personal reasons, and the employee has 5 hours of available sick leave and 0 hours of accrued vacation. The Company's recommendation is that the employee be paid 3 hours for working and 5 hours for the absence (absence with pay) because there is no vacation accrued.

Notwithstanding the inapplicability of the "4 or more hours" language to justify the recommended action, the employee must be paid for the 3 hours worked as well as the 5 hours of absence because there is no available leave to be applied to the 5 hours of absence and no deduction from pay can be made for partial day absences. (29 CFR § 541.602(a).) The employee is required to receive payment equivalent to a full day of guaranteed salary and is so paid under the Company's recommended action.

In Scenario A6, the employee works 4 hours and takes 4 hours off for personal reasons, and has 1 hour of available sick leave and 3 hours of available vacation leave. The Company's recommendation is to pay for working 4 hours, pay through deduction of available vacation (3 hours), and pay the remaining 1 hour absence (absence with pay) because there is insufficient vacation leave to cover the entire 4 hours absence.

Under this scenario, the employee is being paid his full salary but the Company is reducing the employee's vacation leave bank for hours actually taken. The recommended action is permissible as it provides payment equivalent to a full day of guaranteed salary by making payment for working 4 hours, paying through deduction of available vacation (3 hours), and providing absence with pay for the 1 hour remaining balance.

In Scenario A7, the employee works 5 hours and takes 3 hours off, and has 1 hour of available sick leave and 8 hours of accrued vacation. The Company's recommendation is that the employee be paid for working 5 hours and for 3 hours absence with pay because the deduction of vacation is not permitted for absences of less than 4 hours.

Notwithstanding the inapplicability of the "4 or more hours" language to justify the recommended action, the actual result under Company's recommendation is permissible. The Company's recommendation correctly provides payment equivalent to a full day of guaranteed salary by making payment for working 5 hours and providing absence with pay for the remaining 3 hours.

#### *Partial Day Absences Due to Sickness*

Where the employee works some part of the day but is absent for the balance of the full day due to *sickness*, the Company may reduce the sick leave balance (and if there is insufficient sick leave balance, then the vacation leave balance in such order in accordance with the plan or policy)

but still must ensure payment of an amount equal to the guaranteed salary for the balance of the full day even if an employee has no accrued benefits in the leave plan and the account has a negative balance. as described in the following scenarios provided in your letter.

In **Scenario B5**, the employee works 1 hour and takes 7 hours off due to illness and has 2 hours of available sick leave and 5 hours of accrued vacation. The Company's recommended action is to pay for 7 hours through deduction from available sick leave (2 hours) and vacation (5 hours used after sick leave exhausted per Company policy) leave balances and regular pay for 1 hour of work based upon the employee being absent for 4 or more hours in the workday.

Accordingly, the proposed recommendation in Scenario B5 is permissible because the Company applies available leave balances from sick leave (2 hours) and vacation (5 hours after exhaustion of sick leave per the policy), and the employee is paid for working 1 hour. Thus, the employee receives the equivalent of a full day of guaranteed salary.

In **Scenario B6**, the employee works 1 hour and takes 7 hours off due to illness and has 2 hours of available sick leave and 2 hours of accrued vacation. The Company's recommended action is to pay the employee for working 1 hour, pay for 4 hours by deductions from available sick leave (2 hours) and vacation (2 hours after exhaustion of sick leave per the policy), and pay 3 hours for absence with pay. The stated reason is that since the employee is absent for 4 or more hours in a workday, it will deduct all the sick leave and vacation accrued for 4 hours off, pay 3 hours absence with pay because there is insufficient sick leave and vacation accrued to account for 7 hours of absence in the day.

Notwithstanding the inapplicability of the "4 or more hours" language to justify the recommended action, the proposed recommendation is permissible under the explanations discussed in this letter which allows payment by deductions from available leave balances but requires that payment of the guaranteed salary must be made for any balance to which there is no available leave. In Scenario B6, the employer must pay the full salary but may deduct 4 hours from the available leave for sick leave (2 hours) and vacation (2 hours after exhaustion of sick leave).

In **Scenario B7**, the employee works 1 hour and takes 7 hours off due to illness, and has 0 hours of available sick leave and 2 hours of vacation. The Company's recommendation is similar to that described in Scenario B6 above but only deducts 2 hours from available vacation (made available because there is no available sick leave per policy). Notwithstanding the inapplicability of the "4 or more hours" language to justify the recommended action, the Company's recommendation correctly applies the applicable standards by providing for payment through deduction of 2 hours from available vacation leave, 5 hours pay for absence, and 1 hour for working which provides the equivalent of a full day of guaranteed salary.

In **Scenario B8**, the employee works 5 hours and takes 3 hours off due to illness, and has 0 hours of available sick leave and 4 hours of accrued vacation. The Company's recommended action is to pay for working 5 hours and pay for 3 hours absence (and applying no deductions from

Letter to Mary Cheung  
November 23, 2009  
Page 13

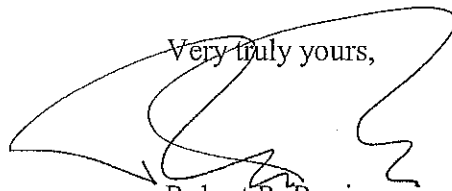
leave balances) because there is no available sick leave and deduction from vacation is not permitted for absences less than 4 hours.

Notwithstanding the inapplicability of the "4 or more hours" language to justify the recommended action, applying the standards discussed in this letter to Scenario B8, the Company may pay through deduction of 3 hours from accrued vacation (available due to absence of available sick leave per policy) and pay for working 5 hours which provides the equivalent of a full day of guaranteed salary.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

I hope the above sufficiently responds to your request for an opinion in this potentially confusing area of employment law and thank you for your interest in ensuring compliance with California's wage and hour laws.

Very truly yours,



Robert R. Roginson  
Chief Counsel

RRR:

cc: Labor Commissioner Angela Bradstreet

2009.11.23