



Assessing The Risk:

Wage and Hour Tip Of The Week

Taking Advantage of the Safe Harbor Provision for Improper Deductions from an Exempt Employee's Salary

TIP: Have a clearly communicated policy prohibiting impermissible deductions and act fast if you learn an error has occurred.

One of the requirements of most white-collar exemptions is that the employee is paid on a "salary basis," that is, he or she is paid a salary that is not subject to deductions because of the quality or quantity of work. With few exceptions, an exempt employee receives the same pay no matter how many hours he or she puts in during a work week.

Under the salary basis rules, an employer can legitimately deduct from the weekly salary for several reasons. For example, deductions can be taken for full day absences taken by the employee for purely personal reasons other than sickness or disability, for the time the employee is on an unpaid disciplinary suspension, or for a partial week's work at the beginning or end of employment. In those cases, the employer can pay a *pro rata* share of the weekly salary reflecting the days actually worked. However, permitted deductions must be made in full day increments.

By contrast, deductions are not allowed for absences caused by, for instance, jury duty, temporary military duty, a partial-week closure of the business, or any absence that is less than one full day.

What happens if the employer violates these obviously complex rules? Say the employer deducts for two days when the employee was absent for a day and a half for personal reasons? Or, say all exempt employees are deducted during a week the business was closed for two days due to a national holiday? Unfortunately, if the facts show that the employer **did not intend** to pay on a salary basis, the exemption for the affected employees will be lost. Intent is determined by looking at factors such as the numbers of improper deductions, employees affected and managers involved in making the deductions, and the time period over which they occurred. Loss of the exemption, of course, could lead to liability for unpaid overtime and other bad consequences of improperly classifying employees.

The good news is that there are two avenues for avoiding loss of the exemption, even if improper deductions have been made. The first (so-called "window of correction") has very limited use. It applies only when the deduction was "isolated or inadvertent" (think clerical or book-keeping error). If the improper deductions are promptly reimbursed, the exemption will be saved, notwithstanding the unintentional error.

Importantly, the federal regulations also contain a "safe harbor" provision that can allow employers to save the exemption even when the improper deductions were not isolated or inadvertent. For example, if the company has a policy prohibiting improper deductions, but a manager at a facility routinely (but incorrectly) docks the pay of engineers at that facility for

partial-day absences, this would lead to clearly improper deductions. However, the safe harbor rule holds that exemption will **not** be lost if **all** of the following are true: The employer (1) has in place a **clearly communicated policy** prohibiting improper pay deductions, **including a complaint procedure**, (2) reimburses employees for any improper deductions, (3) makes a good faith commitment to comply in the future, and (4) does not continue to violate the rules by continuing to make improper deductions after complaints have been received.

No matter which remedy may apply, being aware of these rules allows for prompt and appropriate action if improper deductions occur. One relatively painless preventative measure is to adopt, communicate and follow a “safe harbor” policy for improper salary deductions.

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