



# Assessing The Risk:

## Wage and Hour Tip Of The Week

### Remote Access For Salaried Exempt Employees – A Salary Basis Risk

**TIP: Audit pay practices to ensure that exempt employees are not subject to impermissible salary deductions when they work remotely on a day off.**

These days, a day off may not actually be a day off. Blackberries, cell phones, and remote access make it much more difficult to leave the office behind. As a result, employers who review email, cell phone, or remote log-in records or who interview their employees or employees' managers may find that exempt employees are performing work -- sometimes a little and sometimes a lot -- on their days off.

If an exempt employee has taken a day off without pay, this "work" could present a problem. Employees classified as exempt under the FLSA's executive, administrative, and professional exemptions generally must be paid on a "salary basis." To be paid on a salary basis, an employee must be paid 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." 29 C.F.R. § 541.602(a). There are occasions when an employee may take one or more full days off without pay; but even small amounts of work-related activity may cause what was to be a full day off to become a partial day of work (or put another way, a partial-day absence). Partial-day absences cannot be deducted from an employee's salary.

The FLSA's regulations provide seven specific exceptions to the FLSA's salary basis requirement. Employers should pay particular attention to these two when managing employees who might perform work on days they intend to take off without pay:

- An employer may take a full-day deduction from an employee's salary where the employee takes off one or more full days for personal reasons other than sickness or disability. The employee's choice not to work justifies the deduction.
- An employer may take a full-day deduction when an employee takes one or more full days off for sickness or disability pursuant to the employer's bona fide plan, policy, or practice of providing compensation for illness. A bona fide plan usually will replace the pay that the employee otherwise would have lost for his absence so that the employee does not realize a reduction in his salary. When the employee has exhausted his sick leave bank, the employer may reduce the employee's salary for a full-day absence.

Important Note: When an employer applies paid leave (PTO or vacation pay) to meet the salary requirement, there is no “deduction from salary” under the FLSA. Under some state laws, however, an employee’s PTO bank cannot be deducted for hours that were actually worked by the employee during the day off.

In summary, to comply with the FLSA’s salary basis requirement, employers should ensure that salaried exempt employees receive their full day’s pay (through salary or a permitted combination of salary and PTO) for any day they take off from work, but during which they perform work on a blackberry, cell phone, remote email or any other means of communication. It can also help to train managers to respect employees’ days off by not requiring or permitting work on those days. Finally, keep in mind that this tip relates primarily to the FLSA and does not delve into the details of state wage and hour laws that may have their own, more stringent salary basis requirements.

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