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When May an Employer Dock an Exempt Employee's Pay for Absences?

An employer's docking the pay of a salaried, exempt employee may raise questions as to whether the employer is indeed paying the employee on a salary basis as opposed to paying the employee based on the quantity or quality of work performed. In this, the first part in a two-part series, we'll address employer pay docking of salaried exempt employee pay for absences. In Part Two, we'll address when employers can dock the pay of salaried exempt employees as a disciplinary or performance measure.

Under federal law, the following general rules apply to docking the pay of exempt employees for absences, but employers should also confirm with counsel that no state laws deviate from these principles:

1. The employer may dock the pay of an exempt employee for any workweek in which the exempt employee performs no work.
2. The first week and last week of employment: the employer may pro-rate the exempt employee's pay.
3. If an exempt employee takes a full day absence for personal reasons (not sickness or disability), the salary may be docked for that full day.
4. If the employer provides a bona fide sick leave plan (this normally includes any PTO plan that can be used for illness, and it need not be generous or even available for use immediately at hire, but confer with counsel to be sure yours qualifies) and the exempt employee takes a full day absence for illness or disability because he/she is out of leave or not yet eligible for leave, the salary may be docked for that full day.
5. Normally, an employer may not deduct an exempt employee's salary for a partial day absence (except where FMLA applies, see #6 below).

The employer has the following options for payment for partial days worked:

- a. Pay the employee for the full day and deduct the unworked portion of the day from available paid leave balances, if compliant with leave policies and local laws.
- b. If the employee has no paid leave balance applicable and available for use, use an advance of paid leave (creating a negative leave balance) to account for the unworked portion of the day.
- c. Pay the employee for the full day without deduction from any applicable and available paid leave source.

The employer has the following options for work rules addressing/impacting partial days worked:

- a. Refuse to approve partial day absences for salaried exempt employees. When partial day absences occur (such as where an employee becomes ill in the middle of the workday), pay via one of the methods above.
 - b. Require work to be made up during the workweek, being cautious to avoid making the employee's work seem non-exempt in character.
 - c. Address failures to timely complete work as a performance issue.
6. FMLA leave: this is the only exception to partial day absence deductions. For example, if an exempt employee is two hours late, the employer may not dock the employee's pay. If the employee is two hours late due to intermittent FMLA, the employer may dock the employee's pay for those two hours.
 7. If an employer has attendance rules or disciplinary consequences associated with incomplete work or unpaid absences, those also may apply to an exempt employee.

Employers should review their policies to ensure no provisions suggest employee pay reductions may be taken from exempt employees for attendance reasons in ways that violate these principles or other applicable laws. A mistaken pay docking decision may lead to a more costly issue than just the amount of pay that was docked.

If you have any questions or would like additional information, please contact Richard Lehr at 205-323-9260 or rlehr@lehrmiddlebrooks.com.