

LIMITATIONS ON DEDUCTIONS FROM LEAVE BANKS FOR EXEMPT EMPLOYEES

By Karen Sutherland

LEGAL BACKGROUND

In order for an exempt employee to remain exempt from the overtime laws, the employee must be paid for any week in which the employee performs work. In other words, if an exempt employee takes a couple of days off during the week, the employer cannot dock his or her pay. This is part of the “salary basis test” for exempt employees under both the federal Fair Labor Standards Act (FLSA) and the state minimum wage act (MWA). There is also a “duties test” that employees must pass in order to be exempt, but for the purposes of this article, our focus is on the salary basis test.

An employee’s exempt status will be lost where the employee is “subject to” improper reductions in salary. An employee’s pay is “subject to” reductions where there is either an “actual practice” of making deductions or there is an employment policy that creates a “significant likelihood” of making salary deductions. Under the FLSA, there is a “window of correction” where an employer can fix an improper deduction from an employee’s salary without losing the employee’s exempt status. The MWA does not have a “window of correction.”

The salary basis test was recently revisited in a Washington State Supreme Court case called Webster v. Public School Employees, 148 Wn.2d 383 (2003). The Webster case addressed three key issues – whether a partial day deduction from an accrued leave bank was considered improper docking when required by an employer to cover absences during normal business hours, whether accrued leave is considered “salary,” and the effect of an employer improperly making a one-time deduction from an exempt employee’s salary.

1. Part-Day Deductions from An Exempt Employee’s Salary.

The Webster court held that deducting time from leave banks is inconsistent with salaried employment, and that a strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would not qualify as exempt. However, the court went on to hold that the practice of part-day docking should be considered in the context of the entire employment relationship to determine whether the employee is exempt or not. The court did not set forth a “bright line” test, but did make it likely that partial-day docking from a leave bank could affect the employee’s exempt status.

2. Is Accrued Leave “Salary”?

The Webster court held that accrued leave is not “salary,” but that deductions from accrued leave are a factor to consider in determining whether an employee is salaried (exempt) or hourly (nonexempt) because the Washington courts under the MWA determine exempt status by considering the entire context of the employment relationship.

3. The Effect of One Improper Deduction.

In Webster, the court held that a single improper deduction did not destroy the employee's exempt status. The case also implies, but does not specifically rule, that "one or two" isolated unpaid partial-week suspensions would not establish an actual practice of improper pay deductions.

PRACTICAL GUIDELINES

- Although the Webster court did not adopt a "bright line" test, the safest way for employers to handle this issue is not to have a policy or practice of partial-day deductions from exempt employee's leave banks.
- If partial-day leave bank deductions are taken for nonexempt employees only, the employers' policy should expressly say so.
- If an employer wants to take partial-day deductions from exempt employees' leave banks, the employer should be aware of the other factors that will be taken into consideration in determining if the employee is exempt or not, and try to fulfill as many of the other factors as possible in order to try to tip the balance in favor of exempt status. Since this is a fact-specific weighing test, the employer's determination of exempt status may not be upheld if partial-day deductions are taken from a leave bank. Periodically revisiting any partial-day leave bank deduction policy that applies to exempt employees with a lawyer is recommended because the law is likely to be further clarified by the courts or legislature in the future.
- Employer's disciplinary policies should not provide for deductions from exempt employee's salaries in specified circumstances (such as one or three-day suspensions without pay), even if the policy is never used. If suspensions without pay of less than a week are used for nonexempt employee discipline, it would help clarify matters if the policy on suspensions distinguished between exempt and nonexempt employees.
- Employers' leave policies should not provide for partial-day deductions from exempt employees' salary for non-disciplinary absences, such as for taking part of a day off for personal reasons, even if the policy is not enforced.
- If an employer makes an improper deduction once, all is not lost – however, the employer should take steps to make sure improper deductions do not occur again, and document that such steps have been taken.

The above suggestions are broad, general comments only, and are not legal advice, nor do they create an attorney-client relationship. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such as Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C. Karen Sutherland can be reached at (206) 447-7000 or by e-mail at ksutherland@omwlaw.com.