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The Practitioner Employment Law

Wage Games

Law on Docking Exempt Employees' Salaries Is in Flux

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Determining whether employees are exempt from certain wage-and-hour laws is not easy. Determining when an employer can dock an exempt employee's salary while maintaining the exemption is even more difficult.

On May 30, the chief counsel for the Division of Labor Standards Enforcement issued a letter that was believed to change dramatically all employers' payroll practice. Human-resource professionals, payroll clerks and business owners were poised to modify their practices to ensure compliance with this new law. However, the letter was withdrawn quickly, leaving California employers in a state of flux.

In the past, most employers believed that they were entitled, under certain circumstances, to dock an exempt employee's weekly pay if the employee performed no work during the entire workweek. For example, if an exempt employee performed a full week of jury duty and performed no work for the employer during that time, it was believed the employer could dock the exempt employee's pay for that week (unless the employer had a practice to the contrary). However, the opinion letter indicated a "monthly" standard would be used. That is, if the exempt employee performed any work during the calendar month, the division asserted that the employer was prohibited from docking the employee's pay for the entire month.

The controversy began with AB60, which became effective Jan. 1. To qualify for the exemption under AB60, an executive, administrator or professional had to be paid a "monthly salary" equivalent to at least two times the minimum wage. In the opinion let-

ter, the division stated that, since the Legislature focused on a monthly salary when it implemented AB60, the division also should do so and focus on an employee's monthly salary when analyzing deductions from an exempt employee's pay.

In the May 30 letter, the division analyzed federal laws and regulations describing instances when an employer may dock an exempt employee's salary and patterned its own enforcement on the federal provisions.

■ **Deductions based on quantity or quality of work performed.** According to the letter, an exempt employee must receive, on regularly scheduled paydays, a predetermined amount of salary. The amount is not subject to reduction because of variations in the quality or quantity of the employee's work.

■ **Absences occasioned by employer or by operating requirements of the business.** The division stated that, if the employee is "ready, willing and able to work," the employer may not dock an exempt employee's pay for times when work is not available. Thus, if the employer temporarily closes its doors because of business conditions, the exempt employee must receive his or her salary, even if the employee is not working for part of the calendar month. The same rule would have applied if employers close their operations during, for example, the December-January holiday season. Nor could the employer resort to vested vacation to pay the employee's salary. This is because the employer is obliged to pay the accrued vacation. As noted by the division, "This is simple contract law. One cannot use an obligation on already has (to pay vested vacation) to pay another obligation (to continue the salary of the exempt employee)."

■ **Absences occasioned by sickness or accident.** With limited exceptions, an employer may not dock an exempt employee's salary for absences because of sickness or accident. However, under the letter, if an exempt employee is absent because of sickness or accident and the absence exceeds a full calendar month, the employer may dock the employee's pay for the month.

If the employer has a bona fide sick-leave policy, and if the employee is absent because of sickness or disability and has exhausted his or her accrued sick leave under the policy, the employer may then dock the exempt employee's pay for each full day's absence that exceeds the employee's accumulated sick leave under the employer's policy. The division pointed out that only sickness or disability plans paying the full salary will be recognized for this exception. The employer may not draw on other salary sources (like vacation) to pay for pre-existing obligations such as salary. However, if the employee works at home (i.e., returns phone calls to clients), then the employee is likely to argue that this is "work" and claim that the salary should not be docked for that day.

■ **Penalties.** Unlike the federal regulations, which impliedly allow an employer to impose "penalties" for infractions of safety rules, the division concluded that employers may not discipline employees by docking an exempt employee's pay.

■ **Jury duty, witness duty, temporary military leave.** The letter said that generally, an employer may not dock an exempt employee's monthly salary for absences because of jury duty, attendance as a witness or temporary mili-

tary leave. However, if the employee is absent for one full calendar month and performs no work during that month, then the employer is not required to pay the employee for that month. As noted above, if the employee returns phone calls to clients and performs other work during the month, then employers should consider whether refraining from docking the employee's pay for the absence would be prudent.

■ **Ramifications if employers make unauthorized deductions.** Under the letter, if the employer mistakenly violates the rules and makes an improper deduction from an exempt employee's salary, the employer risks losing the exemption and may be exposed to a claim for overtime premium payments. However, the division stated the employer will not lose the exemption if it promptly corrects the error on discovery and agrees in writing to comply in the future.

■ **Current state of the law.** On June 22, after receiving strong reactions from employers, the California labor commis-

sioner withdrew the May 30 opinion letter. The division stated that it intended to "seek clarification of the criteria for determining the correct interpretation of 'salary' in this context, and to follow the policy which results, on both current and future claims and cases." To date, the division has not clarified the criteria for the interpretation of "salary," and the controversy remains. Though the letter will not be enforced, there is no guidance as to whether a monthly or weekly basis must be considered when making decisions on docking an exempt employee's salary.

■ **Steps to follow.** Employers would be wise to take the following steps:

- ◆ Stay tuned for the division's decision on whether a weekly or monthly basis may be used.
- ◆ After the decision, examine pay practices for exempt employees and adjust any non-compliant practices.
- ◆ Review and revise (as appropriate) any policies and employee handbooks that evidence affected policies.

- ◆ Consider implementing an attestation form so that exempt employees can acknowledge that they performed no work during extended absences from work (i.e., while on lengthy jury duty).
- ◆ Engage legal counsel to review existing policies and to discuss whether deductions would be appropriate in any given situation.



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