

## **PARTIAL DAY DEDUCTIONS PERMISSIBLE FOR SALARIED EMPLOYEES - AS LONG AS THE DEDUCTION IS FROM AN EMPLOYEE'S LEAVE BANK AND DOES NOT RESULT IN A REDUCTION IN THE EMPLOYEE'S TAKE-HOME PAY**

By: *Peg O'Brien, Esq.*  
Email: [mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)  
Phone: 603.695.8631

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Earlier this week, Devine Millimet hosted an employment law seminar for an overflow crowd addressing "Time Away from Work." One of the many questions raised during the seminar concerned partial day deductions for salaried employees. As this is a frequent question raised by employers, we are following up with this E-Alert, which addresses the question: Is it permissible for an employer to require salaried exempt employees to draw down accrued, but unused sick or vacation time for ½ day absences from work?

For example, assume that a salaried exempt employee leaves work four hours early to attend a family member's college graduation. The employer requires the employee to draw down four hours from his/her accrued earned time off (or vacation or sick time) to cover the absence. Is this permissible or does it jeopardize the employee's status as a salaried employee exempt from the overtime requirements of federal Fair Labor Standards Act (FLSA)?

To be classified as exempt, an employee must meet two tests. First, the employee (except in certain computer-related occupations) must be paid on a salaried basis. Second, the employee must fit into one of the exempt categories: executive, administrative, outside sales, professional employment or highly compensated. To be considered as paid on a salaried basis, an employee must generally receive the same amount of pay regardless of the number of hours worked in a pay week or the quantity or quality of the work produced. While the FLSA allows employers to provide supplemental pay to salaried employees to reward noteworthy effort and contributions, employers are generally not permitted to pay less than the full salary amount, even where the employee works less than the full workweek.<sup>1</sup> So, in our example, an employee who leaves work 4 hours early cannot be docked four hour's pay and still be considered a salaried employee.

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<sup>1</sup>One significant exception to this rule is that an employee's salary may be reduced for absences on an hour-by-hour basis for absences protected by the Family and Medical Leave Act.

### **Labor, Employment & Employee Benefits**

**Mark Broth, Chair**  
603.695.8558  
[mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)

**Newton Kershaw**  
603.695.8571  
[nkershaw@devinemillimet.com](mailto:nkershaw@devinemillimet.com)

**Patricia McGrath**  
603.695.8537  
[pmcgrath@devinemillimet.com](mailto:pmcgrath@devinemillimet.com)

**Anthony Augeri**  
603.695.8725  
[aaugeri@devinemillimet.com](mailto:aaugeri@devinemillimet.com)

**Margaret O'Brien**  
603.695.8631  
[mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)

**Anne Scheer**  
603.410.1708  
[ascheer@devinemillimet.com](mailto:ascheer@devinemillimet.com)

**Laurel Van Buskirk**  
603.695.8565  
[lvanbuskirk@devinemillimet.com](mailto:lvanbuskirk@devinemillimet.com)

**DEVINEMILLIMET.COM**

[EMPLOYMENT@DEVINEMILLIMET.COM](mailto:EMPLOYMENT@DEVINEMILLIMET.COM)

But what if those four (4) hours are charged to the employee's sick leave or vacation leave accrual? For many years, the U.S. Department of Labor took the position that requiring, or even allowing exempt employees to use leave time in less than full day increments was evidence that the employee was actually being paid on an hourly basis. As a result, private employers were generally advised to only let exempt employees earn and use leave time in full day increments.

However, in 2007 the Department of Labor issued an Opinion Letter stating that as long as an employee receives his/her full salary for the pay week, it does not matter whether a portion of the salary came from an earned time off, sick leave, vacation, or other accrual account. The Department of Labor has also modified its Field Operations Handbook, which is the instructional manual for DOL compliance officers, to reflect this change in approach to salaried compensation. Accordingly, *an employer may allow salaried employees to accrue and use leave time in less than full day increments, including on an hour for hour basis. In this regard, salaried employees can be treated in the same manner as non-exempt employees.*

Of course, this assumes that the salaried employee has earned time off available to substitute for missed work hours. If an employee does not have any accrued leave, the exempt employee *cannot* be docked for the missed time. Consequently, in the above example, if the employee does not have four (4) hours remaining in his/her leave bank, then the employer may not deduct these 4 hours from the employee's pay. This would be considered an impermissible reduction in pay inconsistent with salaried employment.

The FLSA does permit employers to prorate salaries for employees absent from work for a full day for personal reasons, or if the employer offers an earned time off program and the employee does not have any leave time available. Salary pro-ration is also allowed for employees who are absent for full days as a result of disciplinary action resulting from violation of written safety or work rules. However, New Hampshire is more stringent and limits the ability of employer's to take advantage of the pro-ration options available under federal law. New Hampshire law does not allow employers to prorate the salary of an employee serving a disciplinary suspension unless the employee receives notice at least one pay period in advance. New Hampshire employers may pro-rate the salary of an employee absent for a full day for bereavement. But if an employee has exhausted available earned time off, a New Hampshire employer may only pro-rate a salary if the employee "voluntarily and without coercion" requests a day off without pay (and this is never permissible if the employee requests a day off for sickness).

Employers must proceed with caution whenever altering the salary – or related fringe benefits – of an exempt employee. In the event that an employee classified as "exempt" loses his/her "exempt" status, the employer may be required to pay overtime for all hours worked by the employee in excess of 40 hours (or the applicable threshold) for up to three years, plus

#### Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

300 Brickstone Square  
Andover, MA 01810  
T 978.475.9100  
F 978.470.0618

43 North Main Street  
Concord, NH 03301  
T 603.226.1000  
F 603.226.1001

applicable penalties. There is the additional risk that the loss of such status for a single employee may result in the loss of such exempt status for other employees in similar jobs, with the same potential liabilities for back pay of overtime and penalties. Thus, loss of exempt status can result in very significant financial liability for an employer. However, at the present time, the U.S. Department of Labor has approved partial day deductions for salaried employees, as long as the deduction is from the employee's leave bank only.

**The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at [employment@devinemillimet.com](mailto:employment@devinemillimet.com).**