Partial-day absences for exempt employees: Who’s counting?

Key words: Exempt employees, overtime pay, partial-day absences.

For most salaried nurse anesthetists, the rules concerning partial-day absences read like a page out of Lewis Carroll. Where else but in Wonderland would you find a world in which the hours you work in excess of 40 per week don’t count to increase your pay, but the hours you miss because of a personal errand are counted to reduce your paid leave?

Consider the following situation (which plays itself out in many hospitals on a regular basis): Mary and Henry are nurse anesthetists. Mary is salaried; Henry is paid on a hourly basis. Both are eligible to accrue 2 weeks worth of paid leave each year, which is credited to a “leave bank” by the hospital. Both Mary and Henry are scheduled to work 40 hours per week. On Monday of week 1, Mary leaves work 2 hours early to accompany her mother to the airport; Henry also leaves 2 hours early to take his dog to the veterinarian. The hospital deducts 2 hours from the paid leave bank accounts for both Mary and Henry. Mary receives her regular salary and Henry receives straight-time pay for 40 hours. In week 2, both Mary and Henry work 50 hours. Mary again receives her regular salary, but Henry gets paid his straight time pay for 40 hours plus “time and one-half” (or 1.5 times his straight-time hourly rate) for 10 hours.

Why, Mary wonders, can the hospital count hours for purposes of reducing my paid leave but not for purposes of increasing my pay? The answer to Mary’s question is found in the distinction between being paid “on a salary basis” and being paid “on a hourly basis.” Under federal wage law, professional employees who are paid “on a salary basis” are not entitled to overtime pay (ie, they are exempt); professional employees who are not paid “on a salary basis” are entitled to overtime pay (ie, they are nonexempt). The difference between being “salaried” and being “hourly” if the hospital counts hours for purposes of making deductions from paid leave banks for salaried workers?

Although the US Department of Labor has issued fairly clear guidance on the effect of partial-day deductions on salaried status, this guidance has been rejected by several courts. This article will review the basic components of the salary basis test, its interpretation and application by the Labor Department and federal courts, and conclude with some general observations about the “proper” treatment of partial-day absences for exempt employees.
Any determination concerning the exempt status requirements for particular employees must be based in part on consideration of the wage payment law of the jurisdiction in question. Although many states adopt the same or substantially identical rules used by the US Department of Labor, a state-by-state review of wage payment laws is beyond the scope of this article.

**A brief history of time**

A basic tenet of federal wage payment law holds that professional employees compensated “on a salary basis” will be exempt from overtime pay requirements. Obviously, an employer would like to treat its professional employees as being “on a salary basis” because it does not have to pay overtime. “Hourly” employees receive a predetermined amount per hour worked. If there is insufficient work to justify a full week, or if there is so much work that more than 40 hours are required, the employee is paid based on the quantity of work performed. It is important to note that being salaried and being paid “on a salary basis” are not necessarily the same. Thus, an employee will not be exempt from overtime simply because he or she receives a salary. Salaried workers who do not meet all of the Labor Department’s requirements for exempt status will be entitled to overtime just like hourly workers.

The general requirements for determining whether an employee is paid “on a salary basis” are set forth in regulations issued by the Labor Department’s Wage and Hour Division. An employee is paid “on a salary basis” under these regulations if he or she regularly receives for each pay period a predetermined amount, such as a salary, constituting all or part of the employee’s compensation. This predetermined amount may not be subject to reduction because of variations in the quality or quantity of the work performed during the work week. An exempt employee must receive his or her full salary for any week in which he or she performs some work “without regard to the number of days or hours worked.” Wage payment obligations, including overtime requirements, may be governed by state as well as federal law.

But variations in the amount of work performed can affect even “salaried” workers. These Labor Department regulations allow employers to treat employees as exempt, yet make deductions for qualifying full-day absences. For example, deductions may be made when the employee is absent from work for a full day or more for personal reasons. Deductions also may be made for absences of a full day or more occasioned by sickness or disability (including injuries or illnesses covered by worker’s compensation) if the deduction is made in accordance with a bona fide sick and/or disability plan maintained by the employer. However, these regulations do not expressly authorize employers to make deductions from the salary of exempt employees for absences of less than a day. Thus, if an employer reduced an employee’s salary because of partial-day absences during a work week, the worker would ordinarily lose exempt status for that week and be treated as an hourly employee.

However, in a series of opinion letters issued during the past 12 years, the Labor Department has consistently ruled that deductions may be made from paid leave banks or accounts based on partial-day absences without affecting the employee’s exempt status so long as the employee’s predetermined salary is not subject to reduction. That is, the Labor Department has drawn a distinction between reductions in salary (which an employer may not do) and mandatory reductions in, or substitutions of, paid leave. The effect permits an employer to obtain at least 40 hours of service per week from salaried employees by adjusting paid leave without paying overtime when more than 40 hours are worked. For example, in 1987, the Labor Department was asked whether an employer may require an exempt employee who was absent for part of a work day to substitute a partial day’s paid leave or unpaid leave for the hours of absence. The Labor Department answered that “an employer can require an employee to substitute paid leave for such [partial-day] absences without losing the exemption for that week.” Likewise, in 1994, the Labor Department ruled that where “an employer has bona fide benefit plans, it is permissible to substitute or reduce the accrued leave in the plans for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his or her guaranteed salary.”

More recently, in 1997, the Labor Department affirmed its position that where “an employer has bona fide benefit plans for vacation, personal and sick leave, it is permissible to substitute or reduce the accrued leave in the plans for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment,...” provided that “[w]here the employee’s
absence is for less than a full day, payment of an amount equal to the employee’s guaranteed salary must be made even if an employee has not accrued benefits in the leave bank account, or if the leave account has a negative balance.”

In effect, the Labor Department has taken the position that paid leave banks are not part of an employee’s salary for purposes of the salary basis test. Thus, these banks may be reduced to reflect partial-day absences without affecting an employee’s exempt status so long as the employee’s salary is not reduced based on a partial-day absence.

A wrinkle in time

The Labor Department’s position has not been uniformly accepted by federal courts, and a division of opinion has developed on whether an employer can make deductions from a leave bank for partial-day absences without causing a salaried employee to lose exempt status. Several courts, particularly in the Midwest and on the West Coast, have held that deductions from employee leave banks for partial-day absences will destroy employees’ exempt status. For example, in Klein v Rush-Presbyterian St. Luke’s Medical Center, the US Court of Appeals for the 7th Circuit (which has federal appellate jurisdiction over Illinois, Wisconsin, and Indiana) ruled that the exempt status of a registered nurse was lost when her employer made deductions from her paid leave bank for partial-day absences. As a result, that nurse became entitled to overtime for all hours worked in excess of 40 in a work week. And in Abshire v County of Kern, the Court of Appeals for the 9th Circuit (which has jurisdiction over California, Arizona, Nevada, Hawaii, Alaska, Oregon, Washington, Montana, and Idaho) intimated that deductions for partial-day absences were inherently inconsistent with salary basis: “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 still not qualify as ‘salaried.’”

On the other hand, use of partial-day deductions from leave banks has specifically been endorsed by a number of courts. For example, in Caperci v Rite-Aid Corp., the US District Court for Massachusetts ruled that where paid leave is provided in addition to salary, the paid leave may be reduced for partial-day absences without affecting the employee’s exempt status. Similar reasoning was used by the US District Court for South Carolina in Aiken v County of Hampton, in which the court stated that “[a]ccrued leave and holiday pay are not a part of the predetermined pay plaintiffs receive each work week. Rather, they are fringe benefits Plaintiffs receive and their reduction is not equivalent to a reduction in pay. A reduction in paid leave time does not affect an employee’s status as a salaried employee.”

The division of opinion on the issue of partial-day, leave bank deductions is nowhere more distinct than in Virginia where the same court has endorsed both views. In Fire Fighters Local 2141. City of Alexandria, VA, the US District Court for the Eastern District of Virginia ruled that:

“While personal leave, sick leave and/or compensatory time may be part of an employee’s compensation package, it does not constitute salary. Moreover, ..., the Department of Labor stated that while deductions in salary are not permitted for absences of less than a day, an employer may require an employee to substitute paid leave for such absences without losing the exemption.”

Two years later, a different judge of the same court reached the contrary conclusion: “...the docking of leave weighs in favor of a finding of non-salaried status.”

Whose side is time on?

Despite the conflicting rulings among federal courts, opponents of deductions from paid leave banks for partial-day absences of salaried employees seem to be losing ground. The Abshire and Rush-Presbyterian decisions, issued by the US Court of Appeals for the 9th and 7th Circuits respectively, are the leading cases relied upon by opponents of partial-day deductions. However, in Piscione v Ernst & Young, the 7th Circuit appears to have retreated somewhat from its position in Rush-Presbyterian. In Piscione, the 7th Circuit rejected the plaintiff’s argument that his exempt status was lost because of his employer’s policy for reducing pay for partial-day absences. In doing so, the court relied upon the fact that the employee failed to produce any evidence that his salary was reduced due to partial-day absences, even though his vacation time could be reduced for such absences. The decision therefore strongly suggests that the existence of partial-day deductions from a paid leave bank would not necessarily upset exempt status.

In Barner v City of Novato, the 9th Circuit has apparently abandoned its position in Abshire by agreeing with a lower court’s conclusion that “deductions from the paid leave banks of plaintiffs for absences of less than one day did not constitute
impermissible deductions from salary as defined in [the Labor Department Regulations].” Specifically, the court ruled that a “reduction in the paid leave time does not affect the Plaintiffs’ status as salaried employees.”

The end of time

In conclusion, while the state of the law in each jurisdiction (as well as the state law in the jurisdiction) must be reviewed, the recent trend in federal judicial decisions seems to accept the longstanding position of the Department of Labor that employers may make deductions from paid leave banks of exempt employees for partial-day absences without adversely affecting their exempt status.

REFERENCES

(1) 29 C.F.R. §541.118(a).
(2) 29 C.F.R. §541.118(a)(2).
(3) 29 C.F.R. §541.118(a)(3).
(5) DOL Op. Let. (April 15, 1994). See also DOL Op. Let. (November 30, 1994) (“Q.5: Where the employee does not voluntarily use [paid] vacation or sick leave time for partial day absences, may the employer compel him/her to do so? A.5: Yes. The terms and conditions of use of such leave is a private matter between the employer and the employee in question.”)
(7) 1 W.H. Cases 2d (BNA) 537 (7th Cir. 1993).
(8) 908 F. 2d 483 (9th Cir. 1990).
(9) 908 F. 2d at 487 n. 3.
(12) 977 F. Supp. at 397.
(14) 720 F. Supp. at 1232. See also Kuchinskas v Broward County, 1 W.H. Cases 2d (BNA) 1039 (S.D. Fla. 1993).
(16) 5 W.H. Cases 2nd (BNA) 361 (7th Cir. 1999).
(17) 17 F. 3d 1256 (9th Cir. 1994).
(18) 17 F. 3d at 1261-62.
(19) Ibid. The court sought to downplay the change in its position by characterizing the portion of the Abshire decision relating to leave bank deductions as nonbinding “dicta.”

AUTHOR

Robert D. Webb, JD, is an attorney at Nutter, McClennen & Fish, LLP, in Boston, Mass. Mr. Webb is a member of the Nutter, McClennen & Fish, LLP ERISA and Employee Benefits Group, concentrating in employment compensation, benefits, and working condition issues.