

Ask the Attorney: PTO issues and FLSA compliance

We asked our expert lawyer to answer a few HR professionals' employment law questions.

Nancy Delogu is a Washington, D.C.-based attorney with Littler Mendelson, the nation's largest employment law firm. Nancy has extensive experience defending employers in employment disputes before federal and state courts on a variety of workplace issues, including harassment, discrimination, overtime, privacy and disability issues.

Q: “Regarding the FLSA, a salaried exempt computer professional puts in for 16 hours vacation but ends up with 92 actual work hours for the 80-hour pay period. He/she does not delete the vacation hours from their timesheet, and I am being instructed to still take the vacation time from their PTO bank. Of course, I know that this is not fair. However, is this even legal?”

“One more FLSA scenario: A salaried exempt employee works 102 actual work hours during an 80-hour pay period. Of course, he/she is paid their regular salary for that pay period. The following pay period, they only work 78 hours. I am being instructed to make them use PTO for the two additional hours to make a full 80 hours. Again, is this allowed under FLSA?” — Donna, New Jersey

A: Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. As a rule, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.”

Exempt computer professionals may fall into a slightly different category—they may be paid either on a weekly or an hourly basis, as long as they meet a minimum compensation threshold— but your example suggests that this professional is earning a weekly or biweekly salary.

Deductions from exempt employees' pay are permissible only in limited circumstances, most commonly when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability, or for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness. In other words, you can substitute paid sick leave in lieu of wages when an employee is out sick for one or more (full) days.

Failing to pay on a salary basis has consequences. An employer will lose the exemption and have to pay overtime if it has an “actual practice” of making improper deductions from salary. If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions. However, isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

You can find this information and additional detail at the U.S. Department of Labor's Wage & Hour Division internet site, which posts fact sheets on this and other wage payment issues, [here](#).

Q. The FLSA requires that we pay the full salary for any week in which the exempt employee performs any work. We have a sick leave plan for all employees included in our paid time off—or PTO—plan. If an exempt employee calls off sick, we dock her PTO available, which includes sick or vacation. In other words, our PTO isn't split into sick and vacation pay. Can we dock this bank until it's gone before we pay her for nonwork days?

A. Yes, as long as she still receives her full salary for any week in which she performs any work, even after the PTO bank is exhausted. Otherwise, you may risk losing her exempt status.

Q: "Our company gives bonus time for hours worked over 48 weekly. Can this time that they have already earned be used to fill in time lost? For example, a superintendent has 30 hours banked of bonus time. They worked 28 hours the following week; would it be legal to take his bonus time to bump up hours worked? He is an exempt employee." - Anonymous, North Carolina

A: I'm not sure what you mean by "gives bonus time for hours worked," but I assume it is some sort of additional pay. Your question implicates at least two provisions of the Fair Labor Standards Act (FLSA): the salary-pay rule and the concept of "compensatory" time off. Your question concerns me foremost because you suggest that somehow you are counting his hours worked from one week to another. If an individual is to be considered a salaried overtime exempt worker, the "salary pay" rule dictates that he is entitled to receive the same salary each week regardless of whether he has worked more or fewer than 40 hours in that week. The only time that you can deduct from an individual's salary is if he misses one or more whole days of work. Any day on which any work is performed must be compensated fully.

What is more, failing to treat workers who are exempt from overtime as hourly, by counting their hours worked and awarding additional monies for additional time worked may actually destroy their overtime exempt status. Moreover, the concept of "compensatory" time— tracking and then substituting hours worked over a 40 in a certain week to even out a week in which fewer than 40 are worked— is not permitted under the FLSA unless the hours are substituted in the same pay period, at least for private-sector employers.

If your employee has missed entire days of work in the second week, you are entitled to dock his salary for those days. Typically, workers substitute PTO (if available) in these circumstances so that they do not lose wages for the week. It is possible that the bonus program you describe is actually a program that allows the accrual of additional PTO, but it doesn't sound as though this is the case.

I advise you to review your bonus program with a local qualified employment lawyer who can help you determine if the program fits your needs and the FLSA salary pay requirements, and if not, to revise it so as to ensure compliance.