

Delaware Employment Law Letter

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WAGE AND HOUR LAW

DOL weighs in on mandatory make-up time and deductions for exempt employees

by Scott A. Holt

There's an old saying that one of the great things about classifying employees as exempt from the Fair Labor Standards Act (FLSA) is that you can work them for as many hours as you want without having to pay a penny of overtime. Of course, the downside is that if you don't have the employees properly classified (i.e., they're nonexempt), you could end up owing them a bundle of overtime pay. Two areas that have always caused some confusion for employers are to what extent you can require an exempt employee to make up time for absences and when you can make deductions properly from an exempt employee's salary. In recent opinion letters, the U.S. Department of Labor (DOL) has issued guidance to employers on those tricky areas.

Make-up time for exempt employees

In the first situation, an employer asked the **DOL** whether it was permissible to require exempt employees to work either 45 or 50 hours a week. The employer also wanted to know if it could require the exempt employees to make up work time lost because of personal absences of less than a day.

The **DOL** found that neither requirement would jeopardize the employee's exempt status. On the first question, the department found that an employer was generally free to determine the number of hours worked by an exempt employee. It's also permissible to record and track hours of exempt employees and require them to work specific schedules.

The **DOL** also found that you can require an exempt employee to make up missed time from the office, even for partial-day absences. Thus, under the department's interpretation of the FLSA, you're free to implement such a rule without the loss of the exemption. It cautioned, however, that you mustn't reduce an employee's salary if he fails to make up the partial-day absence. Such a reduction would jeopardize his exempt status and possibly entitle him to overtime pay.

Deductions for damaged or lost company property

The second opinion letter involved an employer that wanted to know whether it could require an exempt employee to reimburse it for damage or loss of company equipment, either through a salary deduction or by requiring the employee to pay directly out of pocket. In the case, the employer wanted to impose a "fine" on its exempt employees who damaged equipment, such as cellular phones and laptop computers, they used while performing their jobs.

The **DOL** found that such a deduction would be impermissible under the FLSA since it would violate the rule that prohibits reductions in an exempt employee's salary because of the quality of the work performed. Significantly, the department stated that it wouldn't matter whether the employer implements such a policy by making periodic deductions from employees' salaries or by requiring them to make out-of-pocket reimbursements from compensation already received. Either approach, it said, would result in employees not receiving their predetermined salaries that couldn't be reduced because of the quality of work performed.

The **DOL** went beyond the issue of deductions directed at exempt employees and also addressed whether an employer may make deductions from a nonexempt employee's wages for damaged or lost company property. The department noted such a deduction also would be prohibited if it reduced the nonexempt employee's wages below the statutorily required minimum wage and overtime premiums. Again, it found that it wouldn't matter if the "fine" was in the form of a wage deduction or a requirement that the employee make an out-of-pocket reimbursement.

Impact on Delaware wage laws?

Although the **DOL** opinion letters address only the federal FLSA, there may be implications on Delaware law, particularly with regard to wage deductions. Most of you know that under the regulations defining the Delaware Wage Payment & Collection Act, you can't make a deduction from an employee's pay for damaged or lost property that belongs to you. Many employers have asked employees, however, to make "voluntary" out-of-pocket reimbursements for such losses. Those requests often take the form of a written agreement or

policy that requires the employee to pay for the damaged or lost property. In light of the **DOL's** recent interpretation of pay deductions, Delaware employers may want to revisit whether those agreements or policies are in reality "voluntary" or if they in fact run afoul of both federal and state wage laws.

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