



FLSA2018-7

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division (“WHD”) reissue Opinion Letter FLSA2009-25. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter “for further consideration” and stated that it would “provide a further response in the near future.”

We have further analyzed Opinion Letter FLSA2009-25. From today forward, this letter, which is designated FLSA2018-7 and reproduces below the verbatim text of Opinion Letter FLSA2009-25, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

A handwritten signature in black ink, appearing to read "Bryan L. Jarrett".

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your letter requesting an opinion regarding whether a hospital may take deductions from the salary of an exempt Registered Nurse (RN) for absences of one or more full days, but based on the number of work hours missed, without running afoul of the requirements for the professional exemption under section 13(a)(1) of the Fair Labor Standards Act.¹ It is our opinion that when an employee misses an entire day of work, an employer may make deductions based upon the number of work hours missed.

Your client employs an RN who is paid a salary to be on call and available for surgery from 2:30 p.m. on Friday to 6:30 a.m. on Monday. The RN is not paid extra compensation when she is

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

called to the hospital for surgery. She is given one weekend of paid time off every three months. You ask us to assume that the RN otherwise meets all the requirements of the Part 541 exemption for learned professionals. Additionally, you have stated that the RN is paid a salary in excess of \$455 a week. The hospital would like to know the proper method for making a deduction from the RN's salary when the RN is not available to be called for all hours either on a Friday, Saturday, or Sunday. The hospital is aware that it may require the RN to use paid vacation or sick leave for the time missed. Your question is limited to occasions where the RN is unavailable for call for a full day rather than a portion of the day.

In order to qualify for the section 13(a)(1) exemption, employees must be paid on a "salary basis." For a plan to qualify as payment on a salary basis, the employee's predetermined salary amount must not be subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. § 541.602(a). Exempt salaried employees must receive their full salary for every week in which they perform any work, regardless of the number of days or hours they work. 29 C.F.R. § 541.602(b), however, provides several permissible deductions from an exempt employee's salary, including in relevant part:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.

29 C.F.R. § 541.602(b)(1) - (2), (5). Therefore, deductions from an exempt salaried employee's salary may only be made on a full-day basis. As explained in the preamble discussion of this section of the current rule, "[w]e believe that partial day deductions generally are inconsistent with the salary basis requirement, and should continue to be permitted only for infractions of safety rules of major significance, for leave under the Family and Medical Leave Act, or in the first and last weeks of employment." 69 Fed. Reg. at 22,178. As provided in 29 C.F.R. § 541.602(c),

[w]hen calculating the amount of a deduction from pay *allowed under paragraph (b) of this section*, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

(emphasis added). Therefore, under the express terms of section 541.602(c), an employer may calculate a deduction for a full-day absence based on the number of hours actually missed. Thus, for example, if the RN was scheduled to be on call Friday from 2:30 p.m. to midnight, but was

unable to work any hours that day for one of the reasons described in section 541.602(b), the hospital could deduct 9.5 hours from her salary (*i.e.*, the amount actually missed) in accordance with section 541.602(c). Again, however, you should note the deductions are not permissible if the employee is absent for less than one full day of work.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

***Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**