

OPINION LETTER

JUL 21 1997

Dear

This is in response to your request for an opinion as to whether your client's proposed plan for deducting wages from salaried exempt employees after the employees have exhausted their available sick leave is in compliance with section 541.118 of Regulations, 29 CFR Part 541.

The plan provides that an employee would accrue one sick day every two months (a newly hired employee would accrue the first sick day two months after commencing work). Deductions from the salary would only be made when the employee does not have any sick days accumulated for use, or when the employee has exhausted all of his or her sick days. The plan further provides that such deductions would be made when an employee is absent for one entire day, and the amount of salary deducted per day would be determined by dividing the employee's weekly salary by the average number of days worked per week by the employee over the past three months.

As you know, section 541.118(a) indicates that an employee will be considered to be paid on a salary basis within the meaning of the regulations if under his or her salary agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his/her compensation, which amount is not subject to reduction because of variations in quality or quantity of work performed. The employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

Section 541.118(a)(3), however, indicates that deductions may be made from the salary for absences of a day or more occasioned by sickness or disability (including industrial 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 both sickness and disability. Thus, if the employee's particular plan, policy or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he/she has exhausted his/her leave allowance thereunder.

Your client's plan appears to comply with the above requirements of the regulations in part; however, we take issue with the plan's method for determining the amount of salary deducted for the sick day absences. It is the Department's long standing position that where there is an understanding that a normal workweek consists of five or six workdays, the deduction permissible for a day of absence under section 541.118 must be calculated on the basis of one-fifth of a five-day workweek, or one-sixth of a six-day workweek, whatever the case may be.

Additionally, you ask if an employer may legally deduct the salary of an employee in a situation where the employee works at home about one-half hour reviewing files on a day in which the employee calls in sick. It is our position that a deduction cannot be made from the salary of a salaried exempt employee in such a situation, even when the employee spends only one-half hour reviewing files at home. The regulation provides that a deduction may occur only if the absence is for "a day or more." 29 CFR 541.118(a)(3).

Your second question, as far as we can determine, deals with a policy whereby your client's salaried exempt employees may "make-up" a sick day rather than having their salary deducted as specified in the Regulations. We call your attention to the fact that the scheduling of work hours of salaried exempt employees is the responsibility of the employer. Such an employee may be required to work any number of hours or days for his or her agreed upon salary. The responsibility for establishing a workable policy for "making up a sick day" (if the employer so chooses) rather than making a legal deduction from the salary of the employee is an obligation of the employer. The Regulations do not prohibit such a policy or provide guidelines for establishing one.

We trust that the above information is responsive to your inquiry.

Sincerely,

Michael F. Ginty
Director, Office of Enforcement Policy