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Making Salary Deductions for Less than One Day's Absence: the Effect on Fair Labor Standards Act Exemptions

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A public employee may be designated exempt from the Fair Labor Standards Act (FLSA)[1] if he or she is salaried—that is, if the employee is a salaried executive, administrator, or professional. Three federal circuit courts have recently rendered differing opinions on the following question: If an employer makes deductions from such an employee's paycheck for absences of less than a full day, does that mean the employee is not truly salaried, as defined by the FLSA, and thus cannot be exempt? Some employees have argued yes; they want to be subject to the FLSA because then they must be paid overtime for hours worked in excess of a standard workweek.[2]

This bulletin discusses the three recent decisions and offers guidance to local governments on how best to comply with the FLSA.

The FLSA and Exemptions for Salaried Employees

The Fair Labor Standards Act exempts from the overtime pay requirement "any employee employed in a bona fide executive, administrative, or professional capacity. . . ."[3] The U.S. Department of Labor (DOL) has issued regulations defining these exemptions. Although there are differing requirements concerning the duties and responsibilities for the three exempt categories, all three share a common requirement that the incumbent be paid "on a salary basis" at least $250 per week.[4]

In explaining the salary requirement, the DOL regulations say:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.[5]

Note that the general rule is that a salaried employee's paycheck is not subject to deductions

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1. 29 U.S.C. §§ 201-219, *amended by* Pub. L. No. 99-150 (1985).

2. 29 U.S.C. § 207. Note that the standard may be forty hours (for most nonexempt employees) or more under Section 207(k) for law enforcement or firefighter personnel.

3. 29 U.S.C. § 213(a)(1).

4. The long test and the short test for executives are found at 29 C.F.R. §§ 541.1. and 541.101. The long test and the short test for administrators are found at 29 C.F.R. §§ 541.2 and 541.201. The long test and the short test for professionals are found at 29 C.F.R. §§ 541.3 and 541.301.

5. 29 C.F.R. § 541.118(a).

due to absences from work, but rather is a predictable amount determinable in advance. The regulations then provide certain exceptions to this general rule, which state that pay deductions may be made when an employee absents himself for a day or more for personal reasons, sickness, or disability, in accordance with a bona fide plan, policy, or practice adopted by the employer, without jeopardizing the employee's status as salaried.[6]

The regulations also provide that "the effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case" and that where an impermissible deduction is inadvertently made, "the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future."[7]

The Department of Labor has also issued two wage and hour opinion letters concerning payment on a salary basis. The first of these, issued in 1986, essentially reiterated the regulations noted above and held that where deductions from the salary of otherwise exempt employees were made for absences of less than a day for personal reasons, sickness, or disability on a regular and recurring basis, the employees could be deemed nonexempt (although the DOL did not make a determination on the facts before it).[8]

The second letter, issued in 1987, held that the salary test is inapplicable to persons covered by a state or local statute that precludes payment of regular compensation to absent public employees.[9] The opinion letter stated that the statute must have been in effect before April 15, 1986 (the effective date of the FLSA for public employers). There is no such provision in the General Statutes of North Carolina, however, and so this exception is inapplicable to public employers in this state.

An argument could be made that even though there is no General Statutes provision on the matter, the North Carolina Constitution bars payment to absent public employees under either the public purpose limitation clause or the privileges and emoluments clause. Article V, Section 2(1) of the North Carolina Constitution limits the expenditure of public funds (which would include employee salaries) to those activities that serve a public purpose. Since the absent employee has performed no work, one could argue, then paying the employee would violate the public purpose limitation. Similarly, Article I, Section 32 of the North Carolina Constitution prohibits privileges or emoluments to persons except in consideration of public services. Again, the argument would be that since there was no service, then there should be no pay.

Neither argument, however, would be persuasive. Note that the only time a similar argument has been made, it failed. In *Abshire v. Kern County*,[10] discussed below, the Ninth Circuit Court of Appeals held that a similar prohibition in California's constitution—against gifts of public funds—did not, under the FLSA, mandate a reduction of public employees' pay for absences from work. Note also that the DOL policy only defers to express provisions in state statutes, not to state constitutional limitations.

Thus the Fair Labor Standards Act, the implementing regulations, and the opinion letters of the Department of Labor set forth the circumstances under which public employees in administrative, executive, or professional positions may nonetheless be deemed nonexempt because their pay policies treat them as nonsalaried.

Following are discussions of the three recent court decisions interpreting the Fair Labor Standards Act.

Court Decisions Interpreting the FLSA Salary Requirement

Abshire: Exemption Denied

In *Abshire v. Kern County*, a class action was filed by the battalion chiefs working for the Kern County Fire Department in California. They sought back overtime pay under the FLSA. Each battalion chief was paid a salary on a biweekly basis, in an amount in excess of $250 a week. Under Kern County personnel policy, however, a chief's pay was subject to deductions for absences of less than a day if an absence could not be paid as vacation leave, sick leave, or accrued compensatory time off. Although this policy authorized deductions for absences of less than a day, no battalion chief had ever actually had pay deducted under the policy.

The Ninth Circuit Court of Appeals held that because the battalion chiefs could theoretically have their pay docked for such absences, they were not

6. 29 C.F.R. § 541.118(a)(2) and (a)(3).
7. 29 C.F.R. § 541.118(6).
8. W.H. Op. Ltr. (Jan. 15, 1986).
9. W.H. Op. Ltr. (Jan. 9, 1987).
10. 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785, *reh'g denied*, 111 S. Ct. 1341 (1991).

salaried employees and were thus nonexempt under the FLSA:

> Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed.[11]

The court noted that if, for example, a battalion chief took four hours of vacation leave when he had only three hours due him, his pay for that period could theoretically be reduced by one hour. The court said that "[t]his scheme of compensation simply does not comport with the requirements"[12] of the FLSA.

The court also found that the battalion chiefs received overtime pay or compensatory time for every tenth of an hour which they worked outside their regular schedule. Such compensation for extra hours worked was also not consistent with salaried status, in the court's view.[13]

***Atlanta Firefighters*: Exemption Upheld**

Shortly after *Abshire* was decided, the Eleventh Circuit issued its decision in *Atlanta Professional Firefighters Union v. Atlanta*.[14] In this case, the union representing the Atlanta firefighters argued that captains in the department had incorrectly been exempted from the FLSA. As noted earlier, the DOL regulations say that a salary may not be subject to reduction because of variations in the quality or quantity of work produced. The captains in Atlanta worked varying numbers of shifts in a 28-day cycle. When a captain worked four 24-hour shifts in a two-week period, he was paid for 96 hours; when he worked five shifts in the next two-week period, he was paid for 120 hours. The result was that the captains received different paycheck amounts based on their hours worked, which, the union argued, meant that they were not paid on a salary basis.

The majority opinion held that this arrangement did not violate the FLSA's salary provisions and that the captains were exempt:

> [T]he scheduling needs of the fire department and the number of groups make it impossible for the City to schedule captains to the same number of days each pay cycle. Although captains do not receive the same pay each pay period, this fact does not preclude a finding that they are paid a predetermined amount. . . . [E]ach captain knows at the beginning of each year the exact amount of pay for each nine-day cycle or ten-day cycle. Consequently, we conclude that captains are paid a predetermined amount.[15]

Judge Godbold dissented on this point, stating that since the captains did not receive a fixed salary but in fact received fluctuating pay based on time worked, "this is hourly pay, pure and simple, not salary."[16] He added that although the fluctuations were predictable a year in advance, the fact remained that payment fluctuated based on variations in the quantity of work.

The union also argued that under an Atlanta ordinance all employees were subject to having their pay reduced for tardiness or for violation of fire department regulations. In other words, as in *Abshire*, the union argued that because the city ordinance authorized reduction in compensation for absences of less than one day, the captains did not meet the salary test requirements of the DOL. Also as in *Abshire*, majority opinion found no evidence that any captain had in fact ever suffered a reduction in pay for this reason. But unlike the Ninth Circuit Court in *Abshire*, the Eleventh Circuit Court then based its conclusion on the practice, not the theory. It concluded that the employer had shown a captain's pay was not subject to reduction because of the quality or quantity of work.[17]

***Hartman*: Exemption Upheld**

Finally, the Fourth Circuit Court of Appeals (whose jurisdiction includes North Carolina) issued an opinion on this matter in 1990, in *Hartman v. Arlington County*.[18] In *Hartman*, thirty-four fire shift commanders of the Arlington County Fire Department (Virginia) claimed they were improperly designated as salaried executives by their employer. The fire shift commanders claimed they were not salaried because until 1989 they were subject to a county policy that requires an employee who exhausts his or her leave and works a partial shift to be compensated only for the actual hours worked. Because the employer was concerned about potential

11. 908 F.2d at 486.
12. *Id.*
13. *Id.*
14. 920 F.2d 800 (11th Cir. 1991).
15. *Id.* at 805.
16. *Id.* at 808 (Godbold, J., dissenting).
17. *Id.* at 805.
18. 903 F.2d 290 (4th Cir. 1990).

liability under the FLSA, this policy was changed on January 9, 1989. After that time, salaried county employees were not subject to deductions for absences of less than one workday. The new policy was made retroactive to April 15, 1986.

The district court held that while the employer may or may not have complied with the Act in the past, it clearly was in compliance by 1989.[19] The court noted that under the DOL regulations discussed above, any inadvertent deductions will not result in the loss of the exemption if the employer reimburses the employee and promises to comply in the future. The court further held that the effect of revising the policy was to demonstrate compliance with the regulation and an intent to comply in the future.[20] The court of appeals adopted the reasoning of the lower court and affirmed in a very brief opinion.[21] The effect was to uphold the employer's determination that the fire shift commanders were salaried executives,[22] and to deny backpay liability.

The result of these three opinions is to create a split in the circuits on an important question of federal law, traditionally a basis upon which the U.S. Supreme Court grants review. However, the Court recently denied review in the *Abshire* case, so the prospect of an early resolution of this split seems unlikely. In the meantime what should local governments do?

Recommendations to Local Government Employers

Local governments in North Carolina can take some solace in the fact that the Fourth Circuit opinion is more sympathetic to employers than is the Ninth Circuit ruling. Implicit in the *Hartman* case is a recognition that local governments are still struggling with the implementation of the FLSA, and that where reasonable efforts to comply with the Act have been made, the court is not anxious to deliver harsh punishment. Nonetheless, local governments understandably are apprehensive about their potential backpay liability in light of the *Abshire* ruling.

One approach local governments may take is to adopt a policy which permits absences for salaried executives, administrators, and professionals for less than a day and to make no deductions for such absences in their salaries. The policy would be applied on a prospective basis. A second approach is a variation on the first, as exemplified by Arlington County in the *Hartman* case: to adopt a policy specifying no deductions for absences of less than a day for exempt salaried employees and to apply it retroactively to April 15, 1986.

Of course, if any policy change is made, employees might be alerted to potential backpay entitlements. It is possible, however, that if challenged a court would adopt the *Hartman* analysis and treat the prior policy as inadvertent error which has now been corrected.

What seems clear is that local governments that continue to make deductions for absences of less than a day for employees designated as nonexempt do so at their own peril. A better alternative is to eliminate the practice of deductions in salaries of executives, administrators, and professionals for absences of less than a day. Certainly, the cost of such a policy is far less than the litigation and backpay costs of an FLSA suit.

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19. 720 F. Supp. 1227, 1229 (E.D.Va. 1989).

20. *Id.* at 1230.

21. 903 F.2d at 292.

22. There are other lower court rulings consistent with the *Hartman* case. *See, e.g.*, International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D.Va. 1989) (unauthorized deductions corrected and exemption upheld); Harris v. District of Columbia, 709 F. Supp. 238, 241 (D.D.C. 1989) (exemption upheld where employees covered by policy that allowed deductions for less than a day were shown not to have had any deductions actually made). There are also a number of lower court decisions that reach the same result as in *Abshire*. *See, e.g*, Persons v. City of Gresham, Oregon, 704 F. Supp. 191, 194 (D. Or. 1988) (although no deductions actually shown, fact that employees' pay was subject to deductions for less than a day made them nonexempt); Knecht v. City of Redwood, 683 F. Supp. 1307 (N.D. Cal. 1987) (same).

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