

A photograph of four business professionals (three men and one woman) standing in an office hallway. They are all smiling and have their arms crossed. The man on the far left is wearing glasses and a light blue shirt. The man in the center is wearing a white shirt and a light-colored tie. The woman on the right is wearing a light pink shirt. The man on the far right is wearing glasses, a white shirt, and a red and blue striped tie. The background is a bright, modern office interior with large windows.

Do I Have to Pay My Exempt Employee?

By Karen L. Gabler, Esq.

The law requires that exempt employees be paid a salary which is intended to cover all work performed during the workweek. This is because exempt employees are paid for the value of the work performed, rather than the hours spent performing that work. With this general rule in mind, California employers are often unsure of whether and when they can dock the salary of an exempt employee for partial workweeks or partial days of work.

An exempt employee who works any portion of the workweek must be paid for the entire week, with limited exceptions. Partial weeks of pay are permitted in the employee's first and last weeks of employment, because the employee is not actually employed prior to his start date or after his termination date.

Partial weeks of pay are also permissible under certain leaves of absence. Employers may dock an exempt employee's pay for time missed due to leave under the Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). The same applies to leave for worker's compensation purposes. Less clear is whether the employer may dock hours of absence for pregnancy disability leave; we recommend that employers dock pay only for full day absences during pregnancy disability leave, unless FMLA is running at the same time.

An employer may never dock an exempt employee's pay when the employee misses a partial day of work. If the employee has worked any portion of the day, he is entitled to be paid for that day. However, the employer can dock the employee's paid time off banks (whether PTO, vacation or sick time, as appropriate) to a partial day missed for personal reasons, in any increment, as long as the employee has accrued time available. For example, if an employee works for four hours and then takes the other four hours off, the employer can pay for four hours and apply four hours of paid time off to the absence. If the employee has no paid time off, however the employee must be paid for the full workday, because he performed a partial day of work.

Similarly, when the employee misses a full day of work for personal reasons, the employer may apply the employee's paid time off to the absence. When the employee has exhausted all available paid time off, the employer can dock a full day of pay for an exempt

employee who has missed a full day of work for personal reasons. This “full day” requirement is critical: it is imperative that the employee perform no work during that day. If the employee checks email, voicemail, makes phone calls, or performs any other work duty during that workday, the employer is then obligated to pay for that workday, because the employer may never dock an exempt employee’s pay for a partial day of work.

The “personal reasons” standard is equally important: if the employee was required to miss work and his absence was not his personal choice, the employer may not dock his pay or paid time off bank. For this reason, exempt employees must be paid for jury and witness duty: they did not choose to take this time off from work and instead were mandated to serve. Thus, this is not considered “personal” time off. Employers who limit jury duty pay for non-exempt employees should add a provision to their policies clarifying that exempt employees will not suffer any reduction in pay while serving on jury or witness duty.

When a business shuts down for less than a full week, exempt employees must receive pay for the full workweek. To avoid having to pay exempt employees, employers must ensure that the shutdown spans a full workweek, and their exempt employees perform no work at all during that workweek. The employer can permit the employee to apply any available paid time off to the full-week shutdown, but if the employer wants to force the employee to use paid time off, the employee must be given at least ninety days’ advance notice. Employers who wish to take advantage of this option may require employees to reserve a full week of paid time off to cover this anticipated shutdown period.

Employers who hope to avoid a day or week of pay for an exempt employee are often frustrated to discover that the exempt employee has chosen to work when he was expected to be off duty. With today’s technology, it is common for exempt employees to read and answer their email, check voicemail, answer calls, or review their work to prepare for the upcoming workday. Employers must establish clear policies preventing exempt employees from working when they are expected to be off. Consider implementing disciplinary action for an exempt employee who has been instructed not to work and chooses to do so anyway. In extreme cases, some employers may wish to shut off access to voicemail and email for exempt employees who are expected to be off.

Exempt employee salary deductions can be confusing and mistakes are common. Consult with employment law counsel to establish clear policies and review payroll practices to avoid wage and hour liability.

Karen Gabler is an employment attorney with over 25 years of experience representing employers and management in all aspects of employment law. She provides her clients with proactive employment strategies to ensure legal compliance and enhance workplace productivity. When employment disputes arise, she defends her clients in all federal, state and administrative forums. For further information, see www.lightgablerlaw.com.