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The Salary Basis Requirement

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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The Salary Basis Requirement

Reference Number: CTAS-138

The “salary basis” test is a threshold requirement for the executive, administrative, and professional exemptions.^[1] To meet this requirement, an employee must receive each pay period on a weekly or less frequent basis a pre-determined amount that is not subject to reduction for the quality or quantity of work performed. The regulations were revised effective January 1, 2020. Under current regulations, the amount of the guaranteed salary cannot be less than \$684 per week (which translates into \$35,568 per year). The employee must receive the full salary for any week in which any work is performed, without regard to the number of days or hours worked, but exempt employees are not required to be paid for any week in which no work was performed.^[2]

The \$684 minimum weekly salary may be translated into an equivalent amount for periods longer than one week (for example, the \$684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than \$1,368, semimonthly on a salary basis of not less than \$1,482, or monthly on a salary basis of not less than \$2,964). However, the shortest period of payment that will meet this compensation requirement is one week.^[3]

Also, the \$684 minimum weekly salary is not dependent on the number of hours worked in the workweek. Part-time employees are subject to the \$684 minimum weekly salary in the same way full-time employees are. It cannot be pro-rated to account for the reduced number of hours worked by part-time employees. See Wage-Hour Opinion Letter FLSA2008-1NA (2008 WL 1847289), Feb. 14, 2008.

The regulations contain exceptions that allow deductions from an exempt employee’s pay for the following limited reasons: (1) deductions for absences of one or more full days for personal reasons other than sickness or disability (for example, if an employee is absent for one and one-half days for personal reasons, an employer could only deduct one day; however, the regulations contain a special provision that allows public employers to make deductions for absences of less than one day); (2) deductions for absences of one or more full days for sickness or disability if the employer has a paid sick/disability leave plan in place and the employee has used up his or her paid sick or disability leave (a special provision allows public employers to make deductions for absences of less than one day); (3) deductions to offset any amounts the employee may receive as jury fees, witness fees, or military pay while an employee is on leave for one of these reasons (the employer cannot make deductions for the actual absences for jury duty, witness duty, or temporary military leave; only the pay may be offset); (4) deductions made in good faith for violations of safety rules of major significance (such as rules prohibiting smoking in explosive plants, oil refineries or coal mines); (5) employers may make deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules that are part of written policies applicable to all employees (for example, suspension for violating a written policy prohibiting sexual harassment or workplace violence); (6) the employer is not required to pay full compensation for the first or last week of employment but instead may pay a proportionate part of the employee’s salary for the time actually worked during those weeks; and (7) an employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA), but instead may pay a proportionate share of the salary for the time actually worked. When calculating the amount of the deductions, 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. A deduction for major safety violations may be made in any amount.^[4]

Because the strict salary basis test presented problems for employers in the public sector with regard to deductions for less than one day’s absence due to the generally accepted principle that public sector employees should not be paid for time not worked or covered by leave, the DOL issued regulations addressing this issue. The regulations^[5] state:

a. An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under § 541.100, 541.200, 541.300, or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee’s pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

1. permission for use has not been sought or has been sought and denied;

2. accrued leave has been exhausted; or
 3. the employee chooses to use leave without pay.
- b. Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Under these regulations, a public employee who otherwise meets the requirements for an executive, administrative, or professional exemption does not lose the exemption if the employee is paid according to a pay system under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave, the pay system requires the employee's pay to be reduced for absences for personal reasons or because of illness or injury of *less than one work day*.^[6] These regulations also allow a public employer to place an exempt employee on furlough for budget-required reasons without disqualifying the employee from being paid on a salary basis, except in the workweek in which the furlough occurred and the employee's pay was reduced.

With regard to disciplinary deductions, DOL recognizes the increasing liability of employers for their employees' conduct, particularly with respect to sexual harassment, workplace violence, drug and alcohol violations, and violations of state or federal laws, and the corresponding need for employers to be able to impose disciplinary suspensions of less than one week without pay for violations of workplace conduct rules. The regulations allow these deductions as long as there is a written policy in place that applies to all employees. The employer can suspend an exempt employee for one or more full days for disciplinary reasons under the written policy without losing the exemption.^[7]

Current regulations provide that employers will not lose the exemption if an employee's pay is merely "subject to" impermissible deductions; instead, the employer must have an "actual practice" of making improper deductions. There is a "safe harbor" rule that protects employers from violations of the salary basis test through impermissible pay deductions if the employer demonstrates a good faith effort to comply with the FLSA by:

1. Having a clearly communicated policy that prohibits improper pay deductions;
2. Having a complaint mechanism in place that allows employees to bring the mistake to the employer's attention;
3. Reimbursing the employee for improper deduction(s); and
4. Making a good faith commitment to comply in the future.^[8]

Under old rules, it was possible to violate the salary basis test by seemingly inconsequential actions as having exempt employees punch a time clock, or by paying exempt employees overtime and compensatory time. The current regulations eliminate these problems by providing that an exempt employee can receive additional compensation above the guaranteed minimum salary, and it can be based on additional hours worked beyond the normal workweek. The additional compensation may be paid on any basis, including flat sum, bonuses, straight-time hourly amounts, time-and-one-half or any other hourly basis, and it may include compensatory time. 29 C.F.R. § 541.604.

The following groups of employees are *not subject to the salary basis test*: teachers, doctors, lawyers, and those software professionals who are paid on an hourly basis at least \$27.63 per hour. These occupations have special rules exempting them from the salary basis test.^[9] Also, for academic administrative employees the salary basis requirement can be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed.^[10]

[1] The salary basis requirement does not apply to lawyers and licensed or certified doctors and teachers. For certain computer-related occupations under the professional exemption, they need not be paid a salary if they are paid on an hourly basis at a rate not less than \$27.63 an hour. See FLSA Fact Sheet No. 17A, Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (U.S. Department of Labor, Wage and Hour Division). Also, for academic administrative employees the salary basis requirement can be met if the employee is compensated on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed. 29 C.F.R. §§ 541.204(a)(1), 541.600.

[2] 29 C.F.R. §§ 541.600, 541.602.

[3] 29 C.F.R. § 541.600(b).

[4] 29 C.F.R. § 541.602.

[5] 29 C.F.R. § 541.710.

[6] These special provisions apply only when the absence is occasioned by the employee for illness or personal reasons. Deductions cannot be made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions cannot be made for time when work is not available. 29 C.F.R. § 541.602.

[7] 29 C.F.R. § 541.602(b)(5). In the preamble to the 2004 amendments the DOL stated that the rules regarding deductions for violations workplace conduct rules are to be narrowly construed to apply only to serious conduct issues and not to employee performance or attendance. Accordingly, disciplinary deductions for chronic tardiness or absenteeism would not be allowed.

[8] 29 C.F.R. § 541.603.

[9] 29 C.F.R. §§ 541.303, 541.304, 541.600.

[10] 29 C.F.R. §§ 541.204(a)(1), 541.600.

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