Coates' Canons Blog: Salaried Employees and the FLSA

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Susan is a salaried employee and does not receive overtime pay no matter how many hours she works in a given workweek. Robert is a salaried employee and is paid overtime whenever he works more than 40 hours in a week. Both are paid in accordance with the requirements of the federal Fair Labor Standards Act (FLSA).

Can that be right? Salaried employees do not have to be paid overtime, do they? The answer to these questions requires an understanding of the difference between "salaried" and "exempt."

What does it mean to be salaried?

The relevant **FLSA regulation** issued by the U.S. Department of Labor defines an employee paid on a "salary basis" as one who is paid a predetermined amount each pay period without any reductions due to the quality or quantity of the employee's work. In other words, the employee must receive full salary for any week in which he or she performs *any* work — regardless of the total number of days or hours worked in that week. And that is all that "salary basis" means.

The definition of salary basis, though, doesn't explain how one employee can be paid on a salary basis and not be entitled to overtime pay, while another employee paid on a salary basis can have a legally enforceable right to overtime pay. As it turns out, the right to overtime does not depend upon salary basis. It depends upon a position's *exempt* status.

What does it mean to be exempt?

A position is *exempt* from the FLSA's overtime rules if it meets three requirements:

1. *the position is paid on a salary basis*; and
2. the position is paid a minimum of $455 per week; and
3. the duties of the position satisfy either the executive duties test, the administrative duties test, or the professional duties test.

The specific requirements of the FLSA's duties tests can be found at **29 CFR Part 541** and will be discussed in later blog post. You can also read more about them **here**.

To be exempt (that is, not entitled to overtime), an employee must be paid on a salary basis. That much is true. But just because an employee is paid on a salary basis does not by itself mean that the position is exempt. Both exempt and nonexempt employees can be paid on a salary basis. An exempt employee can be required to work in excess of his or her scheduled workweek without any additional compensation beyond the fixed weekly salary. Nonexempt employees, however, must always be paid overtime at a rate of time-and-one-half their regular rate of pay for every hour over 40 worked in a given workweek, even if they are paid on a salary basis (you can find the relevant FLSA section **here**). Since salary basis alone does not determine eligibility for overtime, nonexempt employees earn overtime whether they are compensated on a salary basis or an hourly basis.

How do leave policies affect being paid on a salary basis?

Just because an employee is considered salaried today does not mean that they will always be considered salaried for FLSA purposes. What happens when employees paid on a salary basis takes a day or two off because they are ill or take a vacation? Almost all – if not all – local governments provide their employees with some minimal amount of paid sick, vacation or personal leave. Federal appeals courts from around the country have long held that substitution of paid leave for salary does not affect salary basis or exempt status. Salary basis and exempt status are "only affected by monetary deductions for work absences and not by non-monetary deductions from fringe benefits such as personal or sick time." *Schaefer v. Indiana Michigan Power Co.*

, 358 F.3d 394, 400 (6th Cir. 2004). *See also Haywood v. N. Am. Van Lines, Inc.,* 121 F.3d 1066, 1070 (7th Cir.1997).

For nonexempt employees, it hardly matters whether they are considered salaried. When a salaried nonexempt employee has used up all accrued paid leave and takes time off nonetheless, the employer is free to deduct from the employee's paycheck a pro-rata amount of the weekly salary – in effect, to treat the employee like an hourly employee. The primary reason for paying a nonexempt employee on a salary basis is convenience, both for the employer and the employee. The FLSA requires an employer to pay a nonexempt employee only for the time actually worked, so a deduction from wages for absences from work does not violate the law. The employee can be paid on a salary basis again the following week.

But for exempt employees, much depends upon whether they can still be considered to be salaried. When an exempt employee has used up all accrued paid leave and needs time off, things get a little hairier in the private sector – but not in the public sector! In the private sector, the employer who pays an exempt employee less than the agreed upon weekly salary because that employee has worked fewer than the agreed upon number of day or hours in a given workweek violates the FLSA and destroys the position's exemption. The exempt position becomes a nonexempt position not only for that workweek, but potentially for past and future workweeks as well. This is known as the no-docking rule.

But the FLSA provides an exception from this formidable rule for employees of a government agency. **29 C.F.R. § 541.710(a)** says,

"An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption . . . 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 its 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."

In other words, public employers are free to treat salaried exempt employees the same as salaried or hourly nonexempt employees for the purposes of paid leave policies. Unlike private employers, public employers may dock exempt employees who miss work and who have used up all paid leave.

There are no specific requirements that a local government employer must follow in order to avail itself of what is sometimes called the "public accountability exception to the no-docking rule" and no definition of "public accountability." The courts have interpreted the concept broadly, finding government employers to have established pay practices based on principles of public accountability where the government organization must regularly open its books to outside auditors (*Worley v. City of Cincinnati*, 2000 WL 1209989 [Ohio Ct. App. Aug. 2000]), where provisions of state or local law allow payment of government funds only where services have actually been rendered (*Demos v. City of Indianapolis*, 302 F.3d 698, 702-03 (7th Cir. 2002)), or where the practice is merely consistent with such a principle (*Conroy v. City of Chicago*, 644 F. Supp. 2d 1061, 1066-67 (N.D. Ill. 2009)).

The North Carolina Constitution requires all units of state and local government to be accountable for their use of taxpayer funds and prohibits the payment of state or local government funds unless services have actually been rendered. **Article I, Section 32** provides, "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." North Carolina public employers that have enacted pay practices that provide paid sick, vacation or personal days and allow for deductions from pay when no paid leave is available do so in accordance with state law and thus satisfy the principle of public accountability. Public employers may make deductions from the pay of exempt employees who do not report for work and either do not have accrued paid leave or do not satisfy the requirements for the use of their accrued paid leave just as they do from the salaries of salaried nonexempt employees.

Other allowable deductions

There are other allowable deductions from the salaries of exempt and nonexempt employees. Employers may suspend an employee without pay for violating a safety rule of major significance, for violations of rules governing workplace conduct, partial first or last weeks of work or partial weeks or days of work taken in accordance with FMLA leave, and to offset any amounts received by an employee for jury duty, testimony as a witness, or as military pay where the employee is also

receiving payment from their local government employer for that day. These exceptions will be discussed in a future blog post, as will those deductions that cannot be made from the wages of either exempt or nonexempt employees.

Links

- www.law.cornell.edu/cfr/text/29/541.602
- sogpubs.unc.edu/electronicversions/pdfs/pelb31.pdf
- www.law.cornell.edu/uscode/text/29/207
- www.law.cornell.edu/cfr/text/29/541.710
- www.ncga.state.nc.us/legislation/constitution/ncconstitution.html