FENWICK & WEST LLP

Weekly Employment Brief

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Miles Locker, Chief Legal Counsel for the California Division of Labor Standards Enforcement delivered a speech on June 13 in San Francisco to those in the legal community specializing in wage and hour law. Most of the time was questions and answers about his May 30, 2001 opinion letter regarding whether employers may deduct pay from the salary of exempt employees or force them to use accrued vacation during a temporary plant shutdown. Here are the important lessons. (These are the opinions of Mr. Locker and not necessarily those of Fenwick & West.)

Q. Is it unlawful to deduct from an exempt employee's salary as part of a plant shutdown?

A. No, it is not unlawful to deduct from salary but there is a legal consequence - the employee will become nonexempt from overtime laws. There would be no actual consequence if the employer makes certain that the now nonexempt employee works no overtime that month.

Q. For how long is the exemption lost?

A. If a deduction is made from an exempt employee's salary in a month, the exemption is lost only for the month in which the salary basis test is not met. If deductions occurred in more than one month, then the employee would be nonexempt during the entire period that the deductions were taken.

Q. What would be the consequence of a deduction in one month, followed by a month with no deduction, and then a second deduction occurring in the third month?

A. The employee would be nonexempt for the entire three-month period. The employer may not "flip-flop" the employee's classification from nonexempt to exempt from one month to the next.

Q. What if the deduction occurred in year one and was followed by a second deduction a full year later in year 2.

A. This would have to be determined on a case-by-case basis, but likely the employee would be nonexempt only in the months that deductions occurred and not for the entire one-year period.

Q. Is it permissible in advance of the beginning of the month to announce a plant shutdown during the next month and reclassify all exempt employees as nonexempt for the month of the shutdown, pay employees only for the time actually worked (including any overtime pay) the month of the shutdown, and then in advance of the succeeding month to announce and reclassify the employees as exempt again?

A. Yes, this would be permissible so long as any overtime was paid during the month the employee was nonexempt.

Q. Is it permissible to continue a practice or policy of shutting down the plant the last two weeks of each year and require all employees to take vacation at that time without affecting the exempt employees' status?

A. Yes, this would continue to be permissible.

Q. Would it be permissible to announce that beginning this year in December the employer will implement a new practice or policy of shutting down the plant the last two weeks of each year and require all employees to take vacation at that time?

A. No, exempt employees must receive at least 9 months' advance notice of such a plant shutdown and required use of vacation in order to avoid reclassification of exempt salaried employees to nonexempt status. According to Locker, this is analogous to the DLSE position in prior opinion letters that in order to implement a new cap on vacation accrual, employees must be afforded at least 9 months' advance notice to take vacation, and bring down their vacation accrual, in order to avoid the effect of a new cap on accrual.

Q. Would it be permissible to announce today that starting in summer 2002 the employer will implement a plant shutdown of two weeks each year in the last two weeks of June and require all employees to take vacation at that time?

A. Yes, this would be permissible as employees are afforded at least 9 months notice of the shutdown and required vacation.

Q. Would it be permissible to announce today that starting in summer 2002, all employees must take at least two weeks of vacation during the summer months between Memorial Day and Labor Day.

A. Yes, this would be permissible.

Q. Is the federal "window of correction" defense available for deductions that occurred prior to the issuance of the May 30, 2001 opinion letter if an employer pays the employees any previously deducted salary?

A. This will be the subject of the next opinion letter. Likely no, the defense is not available to avoid an overtime pay obligation. The defense may be available, however, for a claim of forced use of vacation.

Q. PTO is treated as a vacation-equivalent by the DLSE. How will deductions for illness be treated where the employee has exhausted PTO?

A. The PTO will be treated as sick pay instead of vacation pay. See the May 30 opinion letter regarding deductions for illness under a bona fide sick pay plan.

Q. The FMLA regulations allow partial day deductions for employees on intermittent FMLA leave of absence. What is the DLSE position?

A. This is the subject of another opinion letter. Likely, the DLSE will agree with the FMLA regulation.