

Law Offices of
SKELLENGER BENDER, PS
A Professional Service Corporation

• Summer 2003

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New Regulations Clarifying when an Employer can make Deductions from a Salaried Engineer's Wages.

Federal and Washington wage and hour laws generally require the payment of overtime wages to any employee who works more than 40 hours in a week. These same laws exempt four categories of employees from the overtime requirements: salaried employees performing executive, professional, administrative and outside sales jobs.

Engineers typically fall within the "professional" exemption (although this may not always be true – check the exemption test) and are not entitled to overtime pay. Engineering firms, however, have unintentionally lost the exemption by making deductions from their salaried employees' pay for partial-day absences. See *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 996 P.2d 582 (2000); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991).

In *Drinkwitz*, salaried engineering employees of a military contractor sued their employer, arguing that they were entitled to receive overtime compensation because their employer's practice of docking pay violated the State "salary basis" test and destroyed their exempt status under Washington's Minimum Wage Act. The employer had a policy of requiring both exempt and nonexempt employees to work a "quota" of 40 to 45 hours per week. If an employee fell short of this quota, the employer would dock their vacation time. If the employee consistently fell short, the employer would discipline the employee by imposing a short unpaid suspension.

The Washington Supreme Court held that the practice of docking exempt employees' pay destroyed the employees' exempt status and that the employer was liable for overtime pay.

The employer argued that even if the deductions were improper, it should be allowed to rely on the "window of correction" as set out under federal Fair Labor Standards Act. This "window of correction" allows employers to correct inadvertent errors without jeopardizing the employee's salaried status. See 29 C.F.R. §541.118(a)(6); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991).

The Court rejected this argument, noting that a window of correction exception had not been adopted by the

State legislature and that federal law interpreting the window of correction regulation was inconsistent and unclear.

In response to the *Drinkwitz* opinion, the Washington State Department of Labor & Industries has announced new "salary basis" regulations, effective February 21, 2003, that clarify under what circumstances an employer may take deductions from a salaried employee's wages without jeopardizing its employee's exempt status. See WAC 296-128-532. These regulations also, for the first time, create a "window of correction" applicable to Washington's Minimum Wage Act.

New regulatory language clarifies (1) that an employee who meets the definition of executive, administrative, or professional and who is paid on a salary basis, is exempt from overtime requirements as set forth in chapter 49.46 RCW and (2) an employer generally cannot subject wages of a salaried employee to a deduction "because of variations in the quantity or quality of the work performed." WAC 296-128-532(2). This general rule, however, is subject to the following exceptions:

- If the employee performs no work in a particular week, regardless of the circumstances, the employer may deduct for the entire week.
- When the employee takes at least a full day off for personal reasons other than sickness or accident, the employer may deduct the employee's wages for this time in full day increments.
- Deductions for absences due to sickness or disability may be made in full day increments if the deduction is made according the employer's bona fide plan, policy or practice of providing paid sick and disability leave (other than industrial accidents or disability). Such deductions are permitted if the employee has exhausted available leave time or the employee has not yet qualified under the plan. Deductions may be imposed even if an employee is receiving compensation under the plan or under worker's compensation laws.
- An employer may set up a bona fide leave bank for salaried employees. A "bona fide leave bank" is a job benefit provided to employees in the case of absence from work due to sickness or personal time off, including vacation. It must appear in a written employment contract or in a written employment

policy. Written leave bank provisions appearing in written employment contracts and policies are not deemed bona fide if they are “used as a subterfuge to circumvent or evade regulations governing deductions from salaried employee’s wages.”

- Partial day absences may be deducted from the salaries of employees who qualify and take leave pursuant to the federal Family and Medical Leave Act.
- In the first and last week of employment, an employee’s salary may be pro rated for actual days worked.
- Deductions are allowed for disciplinary absences imposed for violations of safety rules of major significance. A safety rule of major significance is one relating to the prevention of serious danger to the work site, the public, or fellow employees.

The new regulation also provides the following examples of improper deductions:

- Deductions for lack of work may not be made for durations less than one week.
- An employer may not deduct a salaried employee’s wages for time spent on jury duty, attendance as a witness, or temporary military leave if the employee performs any work during the given week.
- Deductions are not allowed for absences due to sickness or disability if the employer does not have a bona fide plan, policy or practice in place for sick or disability leave.

A “window of correction” is now permitted, but this window only applies when an improper deduction is shown to be “infrequent and inadvertent” and “the employer immediately takes corrective steps to promptly resolve the improper deduction” when the improper deduction is brought to its attention. The window of correction is available only to the extent the deduction is not due to lack of work or is not part of a pattern of the same or substantially similar deductions.

The regulations allow employers to make deductions from compensatory time in any increment. Deductions from a bona fide leave bank may be made in partial or full day increments, but may not be made for less than one hour. Leave bank deductions must be based upon the express or implied request of the employee for time off from work.

In light of these new regulations, we strongly recommend that our design professional clients carefully review their employment policies regarding deductions from salaried employees’ wages.

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