



## NEW LEGISLATION GIVES EMPLOYERS LATITUDE IN ADJUSTING EMPLOYEE PAY AND BENEFITS

*By Kara L. Arguello*

### **Temporary Reduction in Workweek and Salary for Exempt Employees**

*August 19, 2009:* Reversing its 2002 opinion on the subject, the DLSE issued an opinion letter stating that employers may temporarily reduce the salaries of their exempt employees along with a matching reduction in work schedules during periods where the employer operates shortened workweeks due to economic conditions, without the presumption that such a change destroys the exempt status of those employees.

In the new opinion letter, the DLSE stated that federal regulations and relevant federal court decisions have determined that reducing salaries of exempt employees during periods the employer used shorter workweeks due to economic conditions does not necessarily violate the salary basis test for exemption. Nor does the Labor Code or the Industrial Welfare Commission's wage order provisions prohibit employers from simultaneously reducing work schedules and salaries of exempt employees.

As a result, California employers may, for example, temporarily reduce employee salaries by 20 percent and implement a temporary 4-day workweek, without calling into question the exempt status of the employees. However, the reductions must be due to economic conditions, be temporary in nature, employers must not use the salary and correlating scheduled reduction to circumvent the requirement that the employees be paid their full salary in any week in which they perform work, and the reductions must be applied prospectively, not retroactively.

The full text of the opinion letter can be found at [www.dir.ca.gov/dlse/opinions/2009-08-19.pdf](http://www.dir.ca.gov/dlse/opinions/2009-08-19.pdf).

### **Approval of Alternative Workweek Schedule**

*March 23, 2009:* This Labor Commissioner opinion letter authorizes employers to adopt alternative workweek schedules for summer months, provided that they comply with all regulations otherwise applicable to the adoption of such schedules (i.e., election procedures, notice requirements, etc.). In the facts presented to the Labor Commissioner, it was permissible for a manufacturing employer to adopt a summer schedule of four 9-hour days and one 4-hour day, without incurring overtime for non-exempt employees working this schedule, and to maintain a normal schedule of five 8-hour days for the rest of the year.

This opinion letter clarified the issue of whether alternative work week schedules during only a particular time of year would satisfy the requirement that the schedules be "regularly recurring," or whether employers would have to maintain such schedules for the entire year.

The DLSE also noted that to if the alternative workweek schedule remains the same each year after it has been properly adopted by the employer under Labor Code §511, the employer does not need to conduct further elections in following years.

The full text of the opinion letter may be found at [http://www.dir.ca.gov/dlse/DLSE\\_OpinionLetters.htm](http://www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm).

## **Deductions from Accrued or Banked Vacation and Sick Leave**

*November 23, 2009:* Elaborating on the California court's dicta in the 2005 *Conley v. PG&E* case, this DLSE Opinion Letter addresses the issue of when an employer may deduct from an exempt employees vacation and/or sick leave for partial or full day absences due to either illness or personal reasons without destroying his/her exempt status. The DLSE states that in reviewing any deductions from leave balances, it first determines whether the company had a bona fide plan, practice or policy and if such deduction is made in accordance with the plan, practice or policy.

Assuming that an employer's policy expressly permits the application of accrued vacation and sick time for absences from work, the DLSE has detailed the rules and regulations regarding what can be used and when. First, the employer is always obligated to compensate an exempt employee with his/her salary for any day during which the employee performs work. Although an employer may not deduct from an employees salary for a partial day absence, the employer may deduct from the employees leave balances for a partial day absence. An employer may deduct from an employee's leave balances or from an employee's pay when the employee is absent for one or more full days and such deductions will not have an adverse effect on the employee's status as exempt.

Where an employee is absent from work for a full day and he/she has a sufficient leave balance, the employer may, in accordance with its plan, practice or policy, deduct the time from the applicable accrued leave. Similarly, where an employee is absent from work for a full day for personal reasons (not due to illness or disability) and he/she does not have a sufficient leave balance, the employer may deduct from the exempt employee's salary.

Where an employee is absent from work for a portion of a day for personal reasons, the employer may deduct (in accordance with the employer's policy, plan or practice) from the employee's vacation leave balance, to the extent that there is a balance; however, once the vacation leave balance is exhausted, the employer may not deduct pay for the hours during which the employee was absent. Where an employee is absent from work for a portion of the day due to illness, the employer may deduct (in accordance with the employer's policy, plan or practice) from the employee's sick leave balance (and once sick leave has been exhausted from the employee's vacation leave balance), but may not deduct from the employee's salary. The important thing to remember is that an employer must ensure that the exempt employee, who works a partial day, is compensated for a full day of work. Such compensation can be made through a combination of deductions from leave balance(s) and paid leave.

The full text of the opinion letter may be found at [www.dir.ca.gov/dlse/DLSE\\_OpinionLetters.htm](http://www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm).

*For more information, please contact Kara L. Arguello at [kara.arguello@berliner.com](mailto:kara.arguello@berliner.com).*

---

**Kara L. Arguello**, an attorney at Berliner Cohen, represents individuals and businesses in employment and general litigation, including wrongful termination, unfair competition, misappropriation of trade secrets, and discrimination. Ms. Arguello has experience litigating and representing employers before the Labor Commissioner on issues including unpaid overtime and vacation. She advises and counsels on employee classification, leaves of absence, wage and hour law, and reduction in force.

© 2010 California Hospitality Alert