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Benefits**Employment Question of the Day: April 28, 2020****Legal Update**

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Question

Please explain the intersection of Families First Coronavirus Response Act (FFCRA) and the Fair Labor Standards Act (FLSA), which sets the federal wage and hour rules for employers. Specifically, does reducing an eligible exempt employee's salary to two-thirds their daily rate of pay, capped at \$200, as allowed under FFCRA, put the employee's exempt status at risk under the FLSA?

Answer

As a practical matter, if an exempt employee is performing all the work of the job and is doing so on a flexible schedule (e.g., to share duties as to children home from school), the easiest practice administratively would be just to pay the full salary. That said, below is the technical analysis for this situation if you want to utilize the paid leave provisions under the FFCRA.

Under the FLSA, to classify an employee under the executive, administrative and professional exemptions, an employer must satisfy both a duties test and a salary basis test. The "salary basis" doctrine requires that the employee is paid a predetermined amount of compensation each pay period, regardless of the quantity or quality of the work. For example, an employer cannot deduct an exempt employee's pay because of operational issues if the employee is ready, willing and able to work.

The FLSA allows some limited deductions from exempt employees' salaries, however, including when an exempt employee is absent from work for a full day for personal reasons other than sickness. The FLSA also allows employers to deduct pay when an exempt employee is absent for one or more full days due to sickness or disability *before* the employee has earned paid time under a bona fide plan, policy or practice of providing compensation for salary lost due to illness or *after* the employee already has used all such earned paid time. When the employee has such earned paid time available, an employer is allowed to "substitute" the employee's earned paid time off for lost salary for absences due to illness or disability.

Under the FFCRA, if an employee takes a full day of EPSLA leave to care for a child or a family member, the employer must pay the employee two-thirds of his or her regular daily rate of pay, capped at \$200. Assuming that the employee is gone for a full day, a deduction for this leave falls under the FLSA exception allowing deductions for full-day leaves for personal matters. In other words, the employee's exempt status will not be at risk, even if that leave is paid under the FFCRA.

If, however, the employee takes intermittent leave, the answer is more complicated. As an initial matter, intermittent leave is available under the FFCRA only when an employer and employee agree to such leave. Neither party can force intermittent leave on the other.

If the employee is taking the intermittent leave to care for a child whose school is closed or whose daycare is unavailable because of COVID-19 issues, the employee's leave will be covered by both the EPSLA (for two weeks) and the EFMLEA (for 12 weeks). Because the EFMLEA is an amendment to the FMLA, the FLSA rule regarding deductions from exempt employees' compensation for FMLA leave applies. Specifically, a pay deduction for the intermittent FMLA leave does not affect the exempt status of an employee. 29 C.F.R. § 825.206.

But what if an exempt employee is able to telework and wants to take intermittent leave for one of the other reasons that qualifies for the EPSLA leave under which the pay is only two-thirds of the daily rate, capped at \$200? The first issue in that case is whether the leave might qualify for classic FMLA leave for a serious health condition. If it does, the rule of § 825.206 applies, and the deduction does not affect exempt status.

If, however, the leave does not qualify for FMLA leave, deducting for the intermittent leave could put the employee's exempt status at risk. In that case, if you are considering intermittent leave under the EPSLA, we recommend talking to the employee about using the employee's PTO bank to true up the pay to 100 percent of the employee's daily wages so that you do not run afoul of the salary basis requirement. Remember, this intermittent leave is a matter of agreement between the parties. That gives you an opportunity to work through the pay structure for that intermittent leave.

Conclusion

As you can see, the answer to your question is complicated. We therefore end where we began: If the employee is performing all the work of the job but needs to take some time off for reasons that may qualify for FFCRA leave, the easiest practice administratively may be just to pay the full salary.

If the reason for the intermittent absence from work is covered by the FMLA, a deduction against the exempt employee's weekly salary will not jeopardize the employee's exempt status. For all other intermittent FFCRA absences, as part of approving the intermittent absence, the employer should work with the employee to ensure that the employee's exempt status is protected.

Please feel free to contact an employment attorney at Fredrikson & Byron for assistance with these leave matters. We are happy to help you protect the exempt status of your salaried employees.

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