

EMPLOYMENT LAWSCENE ALERT: CAN AN EMPLOYER DEDUCT AN EXEMPT EMPLOYEE'S SALARY WHEN THE EMPLOYER CLOSES ITS BUSINESS DUE TO EITHER INCLEMENT WEATHER OR A POWER OUTAGE?

The Fair Labor Standards Act ("FLSA") provides an employer an exemption for minimum wage and overtime payments for any employee employed in a bona fide executive, administrative, or professional capacity. An employee may qualify for exemption if the employee meets all of the pertinent tests relating to duties and receives compensation on a "salary basis" at not less than the minimum amounts as described in the appropriate section of the regulations. The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a "salary basis" for any week if deductions are made to an employee's salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

Oftentimes, the question arises whether an employer can deduct a day's wage from an exempt employee's salary when the employer closes its business due to inclement weather (e.g., a snowstorm) or a power outage. In other words, does an employer need to pay an exempt employee for that day when no work was performed by the employee because of the employer's decision to close its business? It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulations that provide that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of some emergency, whether it is due to severe weather or a simple loss of power, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential

overtime liability.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. This type of absence does not constitute an absence due to sickness or disability. Consequently, an employer that remains open for business during a weather emergency may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.