State of Wisconsin

DEPARTMENT OF EMPLOYMENT RELATIONS

-OFFICE OF THE SECRETARY, DIVISION OF COLLECTIVE BARGAINING AND

DIVISION OF CLASSIFICATIONAND COMPENSATION BULLETIN -

Date:	July 6, 1995	Subject:	Policies on Disciplinary Suspensions for Employes who are "Exempt" from the Overtime Provisions of the FLSA
Locator No:	OS-66 CC/POL-18 CBB-7 (07.110 & 13.0400)		

RECENT FEDERAL COURT OF APPEALS DECISION AFFECTING WISCONSIN:

On May 15, 1995, the Seventh Circuit Court of Appeals ruled, in a case involving the State of Wisconsin, that state employes who are subject to disciplinary suspensions without pay for periods of less than a full workweek (that is, 5 work days) must be considered to be "non-exempt" employes under the Fair Labor Standards Act (FLSA), and therefore, must be paid premium pay (time and one-half) for overtime hours worked. (The case is Mueller, et al. v. Reich & Thompson, (7th Circ., May 15, 1995, Case Nos. 94-3262 and 94-3263.)

The Court of Appeals ruled that, even though an employe may meet all of the other criteria to be an "exempt" employe under the FLSA as an executive, administrative or professional employe, the employe must also meet all of the requirements under the "salary basis test." One of the elements of the "salary basis test" provides that if an employe is potentially subject to receiving a disciplinary suspension of less than a full work week for work rule violations (other than violations of work rules concerning major safety regulations), then the employe must be treated as "non-exempt" under the overtime provisions of the FLSA. (The "salary basis test" is found at 29 C.F.R§ 541.118, as qualified for public employers by 29 C.F.R. §541.Sd. The U.S. Department of Labor's interpretation that disciplinary suspensions of less than a full work-week can change the status of an "exempt" employe to "non-exempt" is contained in an "opinion letter" issued by the U.S. Department of Labor (DOL) on March 29, 1991.)

NEED TO REDUCE STATE'S LIABILITY:

Although the State has filed a Petition for Rehearing before the Seventh Circuit Court of Appeals, while that request is pending, state agencies need to take some immediate steps to reduce the State's potential liability if the Court of Appeals' decision is ultimately upheld on appeal. (Although the Department of Employment Relations [DER] usually gives agency human resource managers an opportunity to comment on proposed DER Bulletins before they are issued, we felt that time is of the essence in this particular situation, but we will certainly consider any comments or concerns agencies have.)

STEPS TO TAKE NOW:

DER, therefore, is directing all state agencies to revise their agency's discipline policies as follows:

1. Most state agencies currently use some form of a progressive discipline policy which is based on the model of: oral reprimand, written reprimand, 1-day suspension without pay, 3-day suspension without pay, 5-day suspension without pay, sometimes a 30-day suspension without pay, and termination. (Under any progressive discipline policy, the nature of misconduct or work rule violation dictates what level of discipline the employer uses first.)

   If your agency's current discipline policy provides for disciplinary suspensions of "exempt" employes for less than 5 full work days for work rule violations, the agency is directed to amend its policy immediately to reflect a revised progressive discipline model for FLSA "exempt" employes which uses any or all of the following steps: oral reprimand(s), written reprimand(s), 5-day suspension(s) without pay, suspensions without pay of 2 or more full work weeks, and termination.

   (Agencies may also want to consider revising their progressive discipline policies for employes who are "non-exempt" under the FLSA to be the same as the model for exempt employes. That decision is being left to each agency to make for itself.)

2. When the employer determines that an exempt employe's misconduct merits the imposition of progressive discipline, the employer should consider the following points before imposing discipline:

   A. State agencies should no longer give FLSA exempt employes disciplinary suspensions of less than one full work week. (That is, employers should no longer use 1-day, 2-day, 3-day or 4-day suspensions without pay as part of their progressive discipline policy for FLSA exempt employes.)

   B. Depending upon the nature and severity of the employe's misconduct and work rule violations (for example, a first incident of tardiness compared to a first, but serious, incident of insubordination or a third or fourth incident of unexcused absenteeism), the employer must decide what level of discipline (or combination of levels of progressive discipline) is/are most appropriate under the circumstances.

   C. If the employer determines that a **written reprimand** is appropriate, the letter of reprimand should specify that the infraction is the first, second, third, etc., time that this conduct has occurred within a specified time period. Depending upon the nature of the work rule violation, the employer may decide to issue a second or third written reprimand before imposing a 5-day suspension without pay.

   D. If in the past the employer would have imposed a 1-day or 3-day suspension without pay upon the employe for the misconduct, but can no longer do that for exempt employes (because of the recent decision from the

Seventh Circuit Court of Appeals), in the reprimand letter the employer might want to consider indicating to the employe something along the following lines: "Although we believe your conduct would merit a 3-day suspension without pay under our previous discipline policy, this second letter of reprimand is being issued instead of a 3-day suspension in order to maintain the FLSA exempt status of your position. However, you are advised that any future violations of the department's work rules may result in a full work-week suspension without pay, or other discipline, up to and including termination."

E. If the use of written reprimands does not result in the desired positive behavior changes by the employe, the employer should consider imposing a suspension without pay, or even possible termination (depending upon the nature of the misconduct and work rule violations). Any suspensions without pay for FLSA exempt employes must be in consecutive five-day increments and must coincide with the employe's full scheduled work week. (See the examples below.)

Example 1: FACTS: On Wednesday morning, the employer conducts an investigation and determines that Employe A has been racially harassing a co-worker. This is the third incident of this nature in the last 6 months by Employe A. The employer has already given Employe A two written reprimands for the previous violations and now the employer believes that a suspension without pay is justified.

Employe A is regularly scheduled to work Monday through Friday, from 7:30 a.m. to 4:15 p.m., and is FLSA "exempt."

DISCUSSION: Since Employe A is "exempt", the employer can give Employe A a 5-day suspension without pay, but the suspension cannot begin on Wednesday or Thursday. Rather, the employer must schedule the 5-day suspension to start on the following Monday--so that all 5 days of the suspension occur during the employe's regularly scheduled workweek.

Example 2: FACTS: Same facts as above, but Employe A works a "deviated schedule,"-- that is, Employe A works Monday through Thursday for 35 hours the first week of every pay period and Monday through Friday for 45 hours the second week of each pay period. When can the suspension without pay begin?

DISCUSSION: The employer can suspend the employe beginning the next Monday after the work rule violation is found. If the week of the suspension is a "35-hour" week, the employe will lose 40 hours of pay. And if the week of the suspension is a "45-hour" week, the employe will still lose only 40 hours of pay.

3. **Notify all affected employes and the affected unions** of any changes made in your agency discipline policy and indicate that in the future progressive discipline will follow the new procedures established by the agency. (DER will be sending this bulletin to all unions which represent state employes to let them know about this general policy change. However, individual agency policies which differ from this bulletin should be sent by these agen~cy (1) to DER and (2) to all unions affected by the change.)

4. Before taking any disciplinary action against an FLSA exempt employe that would include a suspension without pay, agencies are encouraged to consult with their house counsel or with DER staff who are familiar with the FLSA requirements. At DER you may call either Leean White, Coordinator of Policies and Standards, Division ofClassification and Compensation, phone: (608) 267-0344; Teel Haas, Chief Legal Counsel, phone:v(608) 266-2052; or Mark Wild, Attorney, phone: (608) 266-9564.

5. If your agency is not already using **positive time-reporting for non-exempt employes,** DER strongly encourages you to do so. (DER has recommended this procedure since 1988, but we know that many agencies still do not require positive time-reporting for non-exempt employes.) In light of recent FLSA investigations by the U.S. DOL involving state employes, we cannot emphasize strongly enough how important it is for the employer to have accurate, contemporaneous time reports which show the time actually worked by every non-exempt employe.

If you have any questions about this bulletin, please feel free to contact Leean White, Coordinator of Policies and Standards, Division of Classification and Compensation, at (608) 267-0344.

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