

# DEPARTMENT OF EMPLOYMENT RELATIONS

- CLASSIFICATION & COMPENSATION BULLETIN

- COLLECTIVE BARGAINING BULLETIN -

**Date:** February 5, 1996

**Locator No:** CC/POL-27  
CBB-15 (16.1026)  
and 16.1500)

**Subject:** Fair Labor Standards Act Allowances for Partial Day Absences as Leave Without Pay (29CFR § 541.5d)

This bulletin is intended to: (1) provide state agencies with guidance on application of the State of Wisconsin's policy related to leave without pay of less than one full day for public employees who are exempt from the overtime provisions of the federal Fair Labor Standards Act (FLSA); and (2) rescind Bulletin CC-90, CB-10 dated August 15, 1986 which prohibited all salary reductions for absences of less than one full day by employees functioning in an executive, administrative or professional exempt capacity.

Please note that the Department of Employment Relations is not responsible for administering the FLSA provisions for faculty and academic staff of the University of Wisconsin System or unclassified employees in the judicial and legislative branches other than executive salary group employees. As a result, this bulletin does not apply to those employees although they may be eligible for the same consideration under the FLSA as it relates to leave without pay absences of less than one full day for exempt employees.

## **BACKGROUND**

The FLSA is the most generally applied Federal law concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage per hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

The law applies to all State of Wisconsin employees who are not specifically excluded (i.e., exempt) from the minimum wage and/or overtime pay provisions of the FLSA. Title 29, Code of Federal Regulations, Part 541, defines the "exemptions" allowable under the FLSA as "Executive, Administrative, Professional and Outside Sales." Employees must meet both the "payment on a salary basis test" and "duties and discretion test" within Part 541 in order to qualify for "exempt" status. (Refer to Wisconsin Personnel Manual Chapter 516 (April, 1987) for more specific information on exempt and nonexempt status definitions.)

Exceptions to payment on a salary basis have been allowed in the past, per Wisconsin Personnel Manual Chapter 516.020, for: (1) disciplinary suspensions; or (2) in the case of illness where the employee cannot work any kind of regular schedule. (Refer to OS-66, CC/POL-18, CBB-7 dated July 6, 1995 for current information on disciplinary suspensions for "exempt" employees.)

Title 29 C.F.R. Part 541 was revised in 1992 to include "Special provisions applicable to employees of public agencies" in Part 541.5d. Prior to publication of the revised regulation, public employees who were allowed to use leave without pay in less than full day increments were in jeopardy of losing their "exempt" status because the reduction in pay resulted in the employee no longer meeting the "salary basis" test, as required

under the FLSA in order to maintain the "exempt" status. Part 541.18 defines payment "on a salary basis" to mean the employee regularly receives a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed.

On April 5, 1993, a letter was sent to agency personnel and payroll managers notifying them of the Part 541.5d regulations and directing them to not make deductions of less than one full day from an "exempt" employee's salary. The direction was based on advice received, at that time, from the U.S. Department of Labor and the Wisconsin Department of Justice.

This bulletin provides new information on leave without pay of less than one full day for "exempt" public employees and allows partial day deductions without affecting the exempt status.

#### LEAVE WITHOUT PAY OF LESS THAN A FULL DAY FOR "EXEMPT" PUBLIC EMPLOYEES

(Part 541.5d Provisions):

While the special provisions of Part 541.5d were developed in 1992, the question of whether or not this regulation was valid was an issue before the Seventh Circuit Court of Appeals in the Mueller, et al. v. Reich & Thompson case. It was not until the "Mueller case" decision was rendered by the Seventh Circuit Court of Appeals in May 1995 that the validity of Part 541.5d was affirmed. The "special provisions" found in Part 541.5d apply to public employees who are paid according to a pay system established by statute, under which the employee accrues personal leave and sick leave and which requires the employee's pay to be reduced or the employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day, pursuant to principles of public accountability.

Based on the Seventh Circuit Court of Appeals' decision in Mueller, supra, State agencies are now advised that deductions of less than one full day may be made from an "exempt" employee's salary under the following circumstances if accrued leave is not used by an employee because: **(1) permission for its use has not been sought or has been sought and denied; (2) accrued leave has been exhausted; or (3) the employee chooses to use leave without pay.** The text of Part 541.5d is reproduced below for informational purposes. (Note: Leave without pay for disciplinary purposes for exempt employees may only be approved in full workweek increments as detailed in OS-66, CC/POL-18, CBB-7 dated July 6, 1995.)

#### **§ 541.5d Special provisions applicable to employees of public agencies.**

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because-- (Emphasis added.)

(1) permission for its use has not been sought or has been sought and denied; (2) accrued leave has been exhausted; or (3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

DOCUMENTATION AND REPORTING REQUIREMENTS

Effective immediately, the Administrator, Division of Classification and Compensation, will no longer require state agencies to request an exception to payment on a salary basis as noted under Wisconsin Personnel Manual Chapter 516.020 when leave without pay absences of less than one full day are requested by exempt state employees and the circumstances fall within those described under Part 541.5d above. **State agencies must maintain documentation related to the approval of leave without** pay requests for exempt employees under Part 541.5d for a period of three years as part of the record keeping requirements of the FLSA, for random audit by the Division of Classification and Compensation, or in the event an investigation by the U.S. Department of Labor occurs. It is recommended that the supporting documentation be attached to the employee's formal request for leave without pay.

The Division of Classification and Compensation is reviewing Wisconsin Personnel Manual Chapter 516 "Administration of the FLSA Overtime Provisions for State Classified Employees and Certain Unclassified Employees" to determine whether revision of this chapter is necessary to incorporate a number of regulatory changes and/or court decisions which have been communicated to state agencies through letters and bulletins.

Questions regarding the information contained in Wisconsin Personnel Manual Chapter 516 and/or this policy bulletin should be addressed to Leean White at (608)267-0344. Questions regarding provisions contained within collective bargaining agreements should be addressed to Glen Blahnik at (608)267-9604.

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