

# WAGE & HOUR COMPLIANCE

Your essential guide to the federal Fair Labor Standards Act and state wage and hour laws



An Essential Building Block of a Human Resources Library



**J. J. Keller**  
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# Wage & Hour Compliance

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# Wage & Hour Compliance

## Introduction

The Fair Labor Standards Act (FLSA) was enacted during the Great Depression in 1938 to protect workers and improve working conditions. Today, more than 130 million American workers are covered by the FLSA, which is enforced by the Wage and Hour Division of the U.S. Department of Labor.

The FLSA has generated nearly 900 pages of regulations. In addition, enforcement agencies have created thousands of additional pages in the form of opinion letters, guidance documents, and fact sheets. Court decisions offer insight on how the laws and regulations should be applied, and a single decision can overturn years of precedent. In addition, many states have adopted more stringent standards, so an employer may be in compliance with federal law, but still be in violation of state law. Wading through all of the material to find answers to even seemingly simple questions can be an arduous task.

This manual has been developed to help employers quickly find the information they need to avoid violations. The overall structure was created based on common violations, such as chapters on Classifying Employees, Hours Worked, Paying Employees, and Time Off and Leave.

This manual can serve as a valuable resource for anyone involved in classifying employees, recording or tracking hours worked, handling payroll, or anyone with compliance obligations. This could include company owners, HR professionals, payroll clerks, supervisors, or line managers.

Each chapter has been structured similarly to provide common navigation. Practical applications have been provided with callouts to illustrate a situation, further clarify a compliance issue, or help clarify compensation calculations.

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# Wage & Hour Compliance

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# Paying Employees

## Deductions From Pay

### Overview

Employers have many reasons to make deductions from wages or salary. Many deductions are required by law, such as taxes. Most other deductions are either for the employee's benefit (such as health insurance) or for the employer's benefit (such as purchasing a uniform or paying for damage). The latter are usually restricted by state laws.

In rare cases, a deduction will not directly benefit either party. For instance, if a payroll error results in an overpayment to an employee, the company might reduce a future paycheck to recover that amount. Although this type of recovery is specifically allowed under the Fair Labor Standards Act (FLSA), a few states restrict these deductions. States may impose time limits for making the recovery, or may outright prohibit the recovery and require that the employee voluntarily agree to repay the error.

Both federal and state laws affect the allowable deductions. Federal law is fairly simple, allowing nearly any deduction for nonexempt employees, as long as the deduction does not reduce the employees' wages to less than the minimum wage for all hours worked on that paycheck.

Note that asking an employee for cash is generally viewed the same as a deduction, even if no funds are taken from an employee's paycheck. The reason is simply that states do not want employers to evade the deduction laws by simply asking for cash.

Nearly all states require signed authorization from the employee for a deduction. The only states which do not require this are Alabama, Arkansas, Florida, Georgia, Mississippi, and Missouri.

In many cases, authorization can be signed at the time of hiring, but some states (like Michigan) require that the authorization be signed during the pay period in which the deduction will be made, while other states (like Wisconsin) stipulate that authorization cannot be given until after the loss occurs. State laws may also prohibit employers from assessing fines or penalties against employees, or may prohibit deductions for medical exams which are required as a condition of employment.

In most states, obtaining signed authorization from the employee will allow the company to make a deduction, as long as that deduction isn't prohibited by another law. For instance, if state law prohibits a deduction for the cost of a medical examination, the employer cannot obtain an authorization for such a deduction. Always check your state laws. Most state labor websites have FAQ pages which address deductions.

Neither state or federal laws specify a particular format for the authorization, but it generally should describe the purpose or reason for the deduction, the conditions or circumstance under which a deduction might be made, and the amount to be taken (if known) or the amount that could be taken. For example, if an employee is issued a laptop computer, the agreement might stipulate a deduction for the value of the computer if the employee fails to return it.



# Paying Employees: Deductions From Pay

## Related Regulations and Guidance

### Regulations

- Part 531 — *Wage Payments under The Fair Labor Standards Act of 1938*
- Part 541, Subpart G — *Salary Requirements*

### Opinion Letters

- FLSA 2009-18: Deductions from paid time-off plan and section 13(a)(1) salary basis
- FLSA 2009-14: Voluntary and mandatory time off policies and section 13(a)(1) salary basis
- FLSA 2009-2: Mandatory use of vacation time and section 13(a)(1) salary basis
- FLSA 2008-10: Replacement of tipped employee's uniform damaged during personal use
- FLSA 2008-4: Shoes as a uniform or "other facilities"
- FLSA 2006-32: Bona fide sick/vacation leave plan and section 13(a)(1)
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- FLSA 2006-7: Deductions from salary for damage or loss of company equipment and section 13(a)(1)
- FLSA 2006-6: Required minimum hours and make-up time under section 13(a)(1)
- FLSA 2005-46: Salary docking for weather-related absences and section 13(a)(1)
- FLSA 2005-41: Leave taken during inclement weather and section 13(a)(1)
- FLSA 2005-5: Timekeeping system and 29 CFR 541.602
- FLSA 2005-7: Paid time off bank and 29 CFR 541.602
- FLSA 2004-19NA: Deduction from pay to recoup over payment
- FLSA 2004-17NA: Deductions from pay for unearned vacation time
- FLSA 2004-4NA: Timekeeping for exempt/nonexempt employees
- FLSA 2004-1NA: Garments as uniforms under FLSA
- FLSA 2003-3NA: Salary basis and deductions for full sick days
- FLSA 2001-7: Deductions from wages for the cost of uniforms
- FLSA052799: Exempt employees and paid time off, holiday pay

### In Depth

While the FLSA allows nearly any deduction for nonexempt employees, there are some restrictions for exempt employees who must be paid on a salary basis. In addition, even nonexempt employees who are paid a salary may be subject to additional restrictions as compared to hourly employees.



# Paying Employees: Deductions From Pay

## Nonexempt (Hourly) Employees

The first issue to address is whether a failure to pay an employee constitutes a deduction from wages. For example, nonexempt employees are not entitled to wages during an absence because they are only paid for hours actually worked. If a nonexempt employee doesn't report to work because of bad weather, you don't have to provide wages for that day because the employee didn't work (regardless of whether the business was open or closed). This is not a deduction from pay because no wages were earned.

As noted previously, deductions are normally either for the employer's benefit (such as tools, uniforms, or damages) or for the employee's benefit (such as retirement plans or health insurance premiums). A deduction for the employer's benefit cannot reduce the employees' wages to less than the minimum wage.

Items which are primarily for the benefit or convenience of the employee may include deductions for things such as health insurance, retirement plan contributions, charitable donations, and purchases of the employer's goods or services via payroll deductions. In addition, meals provided by the employer are regarded as primarily for the benefit and convenience of the employee.

The question of who benefits is important because a deduction for the employee's benefit can usually reduce the employee's wages below minimum wage. For example, an employee who earns minimum wage could still elect to participate in a 401(k) plan, even though the deferrals reduce the paycheck below minimum wage. Similarly, an employee who earns minimum wage could choose to purchase health insurance from the employer, even if the premiums take up most of the wages earned.

On the other hand, expenses for the employer's benefit (such as making the employee purchase a uniform) cannot be taken as a credit toward the minimum wage obligation. The FLSA recognizes that wages in-kind (that is, non-monetary compensation) can be applied toward the minimum wage. Remember that the FLSA was passed in 1938, so it even lists items such as coal and lumber that might be given to employees in lieu of cash. However, providing an employee with a uniform does not benefit the employee, so if the employer requires the employee to bear the cost, it may not reduce the employee's wage below the minimum wage, nor may that cost cut into overtime compensation required.

For example, if an employee is paid the minimum wage of \$7.25 per hour (effective July 24, 2009), the employer may not make any deduction from wages for the cost of the uniform nor require the employee to purchase the uniform out of pocket. However, if the employee were paid \$7.75 per hour and worked 30 hours in a workweek, the employer could deduct \$15.00 ( $\$.50 \times 30$  hours), or the amount above the minimum wage.

Employers may prorate deductions over several paydays, provided the prorated deductions do not reduce the employee's wages below the required minimum wage or overtime compensation in any workweek.

Items other than uniforms are treated much the same. Again, the question is usually who benefits: the company or the employee. Examples of items which are for the benefit or convenience of the employer include tools used in the job, damages to the employer's property, financial losses due to customers not paying bills, and theft of the employer's property by the employee or other individuals. Employees may not be required to pay for any of the cost of such items if, by so doing, their wages would be reduced below the required minimum wage or overtime compensation. This is true even if an economic loss suffered by the employer is due to the employee's negligence.



## Paying Employees: Deductions From Pay

### Dress code or uniform?

Since employers may have to pay for a uniform, but can generally establish any dress code they choose, this raises the question of the difference between a “uniform” and a “dress code.” For example, if you require employees to wear black or tan pants and a blue polo shirt, is this a uniform?

Probably not, because under federal and state wage laws, the term “uniform” has a specific meaning. It generally does not include street clothing such as khaki pants or similar articles that are commonly worn. Typically, the term refers to unusual items that are not suitable for daily wear.

For example, office employees could be expected to wear “business casual” clothing such as dress slacks and dress shirts, but this isn’t a uniform. However, if you require something unusual (like requiring a bartender to wear a tuxedo shirt or Hawaiian shirt as part of the bar’s image), then the clothing may be considered a uniform because it’s unusual and not commonly worn as street clothing.

Many states restrict employers from making employees purchase or maintain a uniform (unless the employee agrees in writing to do so). However, if the employees are simply required to wear black or tan pants of their own choosing, without a company logo or unusual style required, then it probably isn’t a uniform but simply a dress code requirement.

The federal Wage and Hour Division has an opinion letter (FLSA2004-1NA, *Garments as uniforms under FLSA*) which found that khaki pants and a blue polo shirt were ordinary clothing and not “uniforms” under the Fair Labor Standards Act. State agencies generally apply a similar standard, where a “uniform” means clothing of distinctive design or including a company logo.

So even though some laws restrict your ability to make employees purchase or maintain a uniform, a clothing requirement that simply describes common “street clothes” probably isn’t a uniform under such laws. Rather, it is simply a dress code, and employees can be required to provide or pay for their own clothing under a dress code.

In fact, providing an allowance to purchase street clothing can even be taxable income to the employee. According to the Internal Revenue Service (IRS), employers may reimburse employees (or directly pay for) distinctive uniforms or unusual apparel such as high-visibility clothing without increasing the employees’ taxable income. However, giving employees money to purchase clothing that is suitable or readily adaptable for street wear could be taxable income to the employee (even if the article has a company logo, such as a polo shirt with a small logo).



# Paying Employees: Deductions From Pay

## Tipped employees

Tips received by employees are the property of the employee and cannot be considered when evaluating the amount of a deduction. For example, if the employer pays \$5 per hour, but the employee earns around \$15 per hour once tips are included, the employee is still paid a direct rate of less than minimum wage. Therefore, no deduction is permitted.

Any agreement for employees to turn over their tips as part of a deduction which benefits the employer would violate the FLSA, regardless of how much the employee receives in tips. Deductions from tips are prohibited even if the employer does not apply the tip credit and instead pays the full minimum wage (or more).

For example, if an employee is paid \$10 per hour and also collects tips, only the amount of the direct hourly rate that is above minimum wage can be subject to deduction.



## Nonexempt (Salaried) Employees

For nonexempt employees who are paid a salary, the allowable deductions depend on the salary arrangement. For salaried employees, the main difference involves deductions for absences. Although hourly employees are paid only for hours actually worked, some salaried employees must receive the full salary, even during shorter weeks.

If the employee is paid a salary for a fixed number of hours, where the salary is intended to cover a predetermined number of hours, the employee is essentially treated as hourly. If the employee is absent for a full or partial day, you could reduce the wages (just like an hourly employee).

However, if the employee is paid a salary for a fluctuating number of hours, the employee must receive the agreed-upon salary “for whatever hours he is called upon to work in a workweek, whether few or many” (§778.114). Employers can still require these employees to use vacation, sick time, or other PTO for absences, whether a full day or partial day, but cannot reduce the weekly salary for absences.

An opinion letter from the Wage and Hour Division (FLSA2006-15) notes that the allowable salary deductions for exempt employees do NOT apply to salaried nonexempt employees under the “fluctuating workweek” method. Although you can require a salaried nonexempt to use paid time off for absences, you cannot make salary deductions for attendance, even if the employee does not have any vacation or sick leave available. The regulation literally says that the arrangement covers any number of hours, “whether few or many.”

Employers could still discipline the employee for failing to meet expectations, but cannot reduce the weekly salary based on hours worked or attendance, regardless of circumstances.

# Paying Employees: Deductions From Pay

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## Cross Reference

For more information, see the section on **Paying salaries to nonexempt employees** in the **Nonexempt Employees** chapter.

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### Exempt (Salaried) Employees

Exempt employees must be paid on a salary basis. An exempt employee must receive the full salary for any week in which the employee performs any work, without regard to the number of days or hours worked. However, exempt employees need not be paid for any week in which they perform no work.

For exempt employees, the term “deduction” means a deduction from the salary that would have been paid in a particular week. This means that the rules and restrictions for deductions apply only if the exempt employee performs some work during a specified week. Employees who do not work for a full workweek need not be paid. They simply do not earn a salary that week.

However, the term “workweek” means the workweek defined by the employer and not merely any period of seven consecutive days. For example, if an employer defines the workweek as Sunday through Saturday, but an exempt employee is absent from Wednesday through Tuesday, this employee worked two partial workweeks and may be entitled to a full salary for both weeks, unless a specifically allowable deduction applies.

There are seven allowable deductions provided at 29 CFR §541.602(b) of the salary basis rule, and outlined in the following sections. Common questions involve deductions for absences. In some cases, employers can make deductions for full day absences, but rarely for partial days. However, the salary basis provisions do not apply to attorneys, physicians, and teachers. Reducing their pay for partial day absences does not result in the loss of exemption.

Employers may make deductions from the salaries of exempt employees in the following circumstances:

1. When the employee is absent for one or more full days for personal reasons, other than sickness or disability.
2. When the employee is absent for one or more full days due to sickness or disability, if the deduction is made according to a bona fide plan, policy or practice of providing compensation for loss of salary for these types of absences.
3. Within certain limits, for absences caused by jury duty, attendance as a witness, or temporary military leave.
4. For violations of major safety rules.
5. For disciplinary suspensions of one or more full days, subject to certain restrictions.
6. During the first and last weeks of employment.
7. For leave taken under the Family and Medical Leave Act.

## Paying Employees: Deductions From Pay

Each of these exceptions is described in further detail in the following sections. Note that the prohibition against improper salary deductions does not extend to additional compensation such as bonuses or commissions. Deductions for cash shortages, for example, may be made from a salaried exempt employee's commission payments without affecting the exempt status, so long as the commission payments are bona fide and are not intended to facilitate otherwise prohibited deductions from the guaranteed salary.

### Personal absence

Deductions 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. This applies only to full days, and not to partial days. If an exempt employee is absent for one and a half days for personal reasons, you can only deduct for the full day.

Employers may require exempt employees to use vacation or make other deductions from a leave bank for any absence, whether a full day or partial day, and regardless of whether the business remains open or closed. However, if the employee doesn't have vacation available (or the company doesn't have a personal leave policy) the employee is still entitled to full wages if he or she performed work that week. Some employers will allow an advance of vacation in these cases.

Under the FLSA, you aren't required to provide vacation or other paid leave. Since paid leave isn't regulated, you can require that vacation (or other leave) be used on any specific day. In short, the FLSA doesn't regulate the source of an exempt employee's salary, as long as the employee actually receives a full salary.

Deductions for personal absences are allowed even if they reduce the exempt employee's salary to less than the minimum amount normally required. For instance, an exempt employee is paid \$500 per week on a salary basis, and voluntarily takes time off for personal reasons for four days, the employee may receive one-fifth of the salary (or \$100) for that week. This does not result in a violation of the salary basis rule. However, the employee's decision to take time off must be completely voluntary and not "occasioned by the employer or by the operating requirements of the business."

As a comparative example, some employers implement furlough days that would be unpaid, and may want to allow employees to choose which days will be taken. However, such time off is mandated by the employer and is not "voluntarily" taken, so those days could not be considered unpaid personal days.

Similarly, an employer's policy might provide that new hires do not qualify for holiday pay during the first 90 days, but this cannot apply to exempt employees paid on a salary basis because deductions are not permitted for absences occasioned by the employer. Other company closings, including unforeseen shutdowns, also cannot result in a deduction from salary. However, an employer may require exempt employees to use accrued vacation time during a plant shutdown of less than a workweek without violating the salary basis test. Likewise, an employer may require employees to use paid time off when the employee is only needed for partial days because of a reduced workload.





## Paying Employees: Deductions From Pay

Since employers are not required under the FLSA to provide vacation time, there is no prohibition against mandating that vacation time be taken on a specific days. An employer may direct exempt staff to take vacation or debit their leave bank account, whether for a full or partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary.



### Cross Reference

See the chapter on **Time Off and Leave** for more information.

Note that California does not allow employers to mandate the use of vacation during a company closing because the employee would have to be paid a full salary even if vacation was not available. The state therefore considers mandatory vacation use in such cases to result in a loss of vacation benefits without compensation.

In some cases, an exempt employee might not have enough vacation hours to cover the entire absence. For instance, the employee might take a full day off (which could be unpaid) but ask to apply the remaining four vacation hours to that day, resulting in a partial day's pay. This is acceptable because it is not an improper deduction from the salary. Rather, the employee is allowed to use vacation (or is given compensation) for time that could otherwise be unpaid. Effectively, the employer could make the entire day unpaid, and allowing partial vacation use does not harm the employee or result in an improper deduction.

### Absence for sickness or disability

Deductions may be made for absences of one or more full days of sickness or disability (including work-related accidents) if the deduction is made according to a bona fide plan, policy, or practice of providing compensation for loss of salary. Deductions for full day absences also may be made before the employee has qualified under the plan, policy, or practice, and after the employee has exhausted the leave allowance.

As with personal absences, these deductions are allowed even if they reduce the exempt employee's salary to less than the minimum amount normally required for the week.

For example, if you have a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, you can make deductions from pay:

- For the three days of absence before the employee qualifies for benefits under the plan,
- For the 12 weeks in which the employee receives salary replacement benefits under the plan, and



## Paying Employees: Deductions From Pay

- For absences after the employee has exhausted the 12 weeks of salary replacement benefits.

Similarly, you can make deductions for full day absences if salary replacement benefits are provided under a state disability insurance or a workers' compensation law.

While many employers offer sick leave, employees might not be eligible immediately upon hire, and may have a waiting period before obtaining the benefit. Generally, salary deductions are permitted for full day absences during this waiting period because the employee had not yet qualified for the benefits.

There is no bright-line test for how long of a waiting period is acceptable, or how many days of sick leave must be provided annually, for the plan to be bona fide. However, the Wage and Hour Division has previously approved leave plans that allow for at least six days of sick leave per year. With respect to a waiting period, the Wage and Hour Division has previously deemed a leave plan that required one year waiting period to be bona fide.

In some cases, an exempt employee may be on disability insurance but still be working partial weeks. Where the absences are covered by the Family and Medical Leave Act (FMLA), the time taken as FMLA leave can be unpaid (see the section of FMLA leave in the following pages). However, if the employee is not eligible for FMLA but is eligible for insurance benefits, the disability plan might only provide part of the usual salary, such as 60 or 70 percent, and there may be a waiting period before the employee can collect benefits.

When an insurance plan is bona fide, compliance with its terms will be deemed compliance with the salary basis rule even though a waiting period of one or more days is required before the employee becomes eligible, or there is a waiting period for each illness before benefits are paid.

Also, the fact that the employee receives no pay for some period during an illness, or that the employee's disability leave pay is less than the usual salary, will not defeat the salary basis requirement so long as the plan is a bona fide insurance plan. For instance, if the employee works only on Monday and Tuesday, then receives disability pay at 60 percent of the salary for the rest of the week (or those days were unpaid under a waiting period), this should not violate the salary basis requirement.

### Jury duty and military leave

Employers cannot dock pay for jury duty, attendance as a witness, or temporary military leave. However, you can offset any amounts received as jury fees, witness fees, or military pay for a particular week against the salary due for that week. For example, if an employee on jury duty receives \$20 per day for serving, you can deduct that income from the salary for that week.

The restrictions against salary deductions during weeks of jury duty, witness duty, or military service apply only if the employee actually worked during the week involving the absence. If exempt employees do not perform any work for a full workweek, no salary is owed.

For example, an exempt employee might be called to jury duty on Wednesday, and would have to be paid a full salary for that week (minus any jury pay). If the employee is selected and is absent for the next 10 business days, without performing any work, the full workweek absence could be unpaid.





## Paying Employees: Deductions From Pay

Note that some state laws may require continuation of wages or salary during jury duty, either for a specified period (such as the first few days) or for the entire absence. Employers should check state laws before implementing a deduction policy for jury duty.

However, no state requires private employers to continue wages or salary during military service absences (some state government employees may get this benefit, however). For example, if an employee in the National Guard must take two weeks off for annual training, those weeks can be unpaid (or the employee could be allowed to use vacation). Some employers adopt a policy of paying the difference between the employee's regular salary and the military pay, but such policies are entirely at the company's discretion.

### Safety violations

Deductions can be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

This provision is not utilized very often, but deductions under this rule can be made in any amount.

### Disciplinary suspensions

Salary deductions can be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Suspensions must be imposed under a written policy that applies to all employees. The following restrictions apply to unpaid suspensions of less than one workweek. An exempt employee can always be given an unpaid suspension for a full workweek, regardless of the reason. Alternatively, an exempt employee could be given a paid suspension for any amount of time (and receive the full salary) regardless of the reason.

The regulation gives the examples that you may suspend an exempt employee without pay for a few days for violating a written policy prohibiting sexual harassment or workplace violence. Note that these unpaid suspensions are only permitted for conduct violations of a serious nature. The Department of Labor has offered the following clarification:

*The Department does not intend that the term "workplace conduct" be construed expansively. As the term indicates, it refers to conduct, not performance or attendance, issues. Moreover, consistent with the examples included in the regulatory provisions, it refers to serious workplace misconduct like sexual harassment, violence, drug or alcohol violations, or violations of state or federal laws.*

However, the fact that the misconduct occurred off the employer's premises does not preclude an employer from imposing an unpaid disciplinary suspension, as long as the employer has bona fide workplace conduct rules that cover such off-site conduct. For example, if an employee sexually harassed a coworker at a company party, the conduct may still result in an unpaid disciplinary suspension under this provision.

This exception does not allow deductions for fines, settlements, or judgments which could arguably be blamed on an exempt employee. And again, deductions meeting these criteria are only allowed for full day suspensions. If you send an employee home after a partial day (e.g., for the afternoon after a violation occurred in the morning) he or she is still entitled to a full day's wage for that day.

NOTE: These provisions are based on the salary basis rule as adopted in 2004. Several states incorporate previous versions of the salary basis rule. The provisions of the "old" law and the "new" law are substantially identical except that the old law did not provide for disciplinary suspensions of less than one week. Thus, some states may not recognize or allow this provision, and imposing an unpaid suspension of less than one week could violate state

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