

# PUBLICATION

---

## Is Your Sick Leave Plan a Bona Fide Sick Leave Plan?

**Authors: Russell W. Gray**

**January 8, 2007**

Dealing with employee absences due to sickness can be problematic. They can be even more problematic if your company's sick leave policy results in destroying an employee's status as exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA). That possibility, however, exists.

Executive, administrative and professional employees generally must be paid on a salary basis to be treated as exempt from the overtime and minimum wage provisions of the FLSA. Certain deductions from the required salary may destroy an employee's exempt status. Permissible deductions, however, include a salary deduction "for absences of one or more full days occasioned by sickness or disability... if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability."

In an opinion letter dated September 14, 2006, the U.S. Department of Labor (DOL) considered the question of what constitutes a "bona fide" sick plan. The sick plan that the DOL considered in that letter provided that an employee is entitled to one week of paid vacation and one day of paid sick leave after one year of employment, two weeks of paid vacation and one day of paid sick leave after two years of employment, and three weeks of paid vacation and one day of paid sick leave after ten years of employment. Under that plan, employees could use vacation for sickness and could also take vacation or leave in half-day increments when they became ill.

The DOL explained in the letter that a bona fide sick plan must provide a reasonable number of absences on account of sickness without loss of pay. According to the DOL, however, no bright-line test exists for determining how many days an employer must provide and how short of a waiting period is required for a plan to be bona fide. It noted that it previously had approved leave plans that allowed for at least five days of sick leave per year and that it previously had approved a leave plan that required one year of service prior to eligibility for paid leave benefits.

The DOL then concluded that the employer's sick plan at issue constituted a bona fide plan. It observed that the plan provided for a total of six days of paid leave after one year and that employees could use vacation for sick leave. The amount of the vacation and sick leave increased in years two and three of employment. According to the DOL, such a plan constitutes a bona fide sick leave plan for the purpose of pay on a salary basis for an executive, administrative or professional employee.

Based on this letter, the DOL has reiterated that paid leave plans that provide for at least five days of paid sick leave per year and for which an employee becomes eligible no later than one year after commencing employment will constitute a bona fide sick leave plan. Unfortunately, it is not clear whether an employer's plan that provides less paid sick leave days or includes a longer waiting period may constitute such a plan. Whether less leave may constitute a bona fide plan depends in part on whether the DOL or a court determines that the plan provides a reasonable number of paid absences for illness or disability.

An employer that provides less than five days of paid leave that can be used for illness or disability in one year, or which provides more than a one-year waiting period for eligibility for such benefits, is at risk of not having a bona fide sick leave plan. Such an employer should consider, out of an abundance of caution, not making any

deductions from the salary of a salaried, exempt employee for a whole day absence caused by sickness or disability (irrespective of an employer's sick leave plan, deductions from salary for partial day absences are impermissible unless such absences are for leave under the Family and Medical Leave Act). In the absence of a clear bona fide sick leave plan, such whole-day deductions may jeopardize an employee's exempt status. An employer, of course, is not required to pay an employee's salary for a week in which an employee performs no work.

*Rusty Gray is an attorney in the Chattanooga office.*