

from the Fair Labor Standards Act's (FLSA) requirements for payment of minimum wage and overtime compensation for hours worked over 40 per week (the exemption for "executive, administrative, and professional" employees under FLSA § 13(a)(1)), compliance by an employer with FMLA's requirement to provide unpaid leave shall not affect the exempt status of the employee under the FLSA exemption and its regulations (29 CFR Part 541). Thus, employers can "dock" the pay of otherwise-exempt, salaried employees for FMLA leave taken for partial day absences. If an FLSA-exempt employee needs to work a reduced leave schedule under FMLA, the employer may deduct from the employee's salary partial-day absences for any hours taken as intermittent or reduced schedule FMLA leave within the workweek without causing loss of the employee's exempt status under 29 CFR Part 541. By operation of the statute (FMLA), this exception to the FLSA "salary basis" rule extends only to leave which qualifies as FMLA leave (*i.e.*, FMLA-eligible employees, working for FMLA-covered employers, who take FMLA leave only for reasons which qualify as FMLA leave).

Twenty comments were received on this provision. Many commenters complained that the tension between FMLA's requirement to grant unpaid leave and FLSA's "salary basis" rule prohibiting partial-day deductions from pay for FLSA-exempt employees discourages employers from maintaining more generous family leave policies that were in effect prior to FMLA, or from extending FMLA leave rights to non-covered or non-eligible employees, because of the risk of jeopardizing the exempt status of entire classes of employees. The Personnel Department of Whatcom County, Washington, noted the inequitable result under the rule that causes non-exempt employees to obtain a "better package" under FMLA than exempt employees do. In contrast, the Service Employees International Union stated it would have been inappropriate for DOL to expand FMLA's exception to the FLSA "salary basis" test beyond the use of FMLA-qualified leave. The United Food and Commercial Workers International Union opposed allowing even FMLA-required deductions from an employee's salary without affecting the employee's qualifications for exemption under the FLSA because it permits the employer to reduce an employee's wages for hourly leave without having to grant overtime pay for hours over 40 per week. Van Hoy,

Reutlinger & Taylor recommended that the final rule also address how employers treat salaried but *non-exempt* employees who are paid on the "fluctuating workweek" method for payment of half-time overtime compensation when FMLA leave results in fewer than 40 hours being worked in the workweek.

An employee subject to FLSA's overtime requirements who is paid on a salary basis and whose workhours fluctuate each week may be paid overtime compensation under the "fluctuating workweek" method of payment described in 29 CFR 778.114. Where the employee and employer mutually agree that the salary amount will compensate the employee for all straight-time earnings for whatever hours are worked in the week, whether few or many, payment of extra compensation, in addition to the salary, for all overtime hours worked at one-half the "regular rate" will meet FLSA's overtime compensation requirements. Because the salary covers "straight-time" compensation for however many hours are worked in the workweek, the employee's "regular rate" varies each week (determined by dividing the salary by the number of hours worked each week). Payment for the overtime hours at one-half the rate computed each week, in addition to the salary, results in payment of time-and-one-half the regular rate for all overtime hours worked each week. The "fluctuating workweek" method of payment for overtime hours may not be used unless the salary amount is enough to yield average hourly straight-time earnings in excess of the statutory minimum wage for each hour worked in the weeks when the employee works the greatest number of hours. Typically, it is mutually agreed by the parties under these types of salary arrangements that the salary will be paid as straight-time compensation for however many or few hours are worked, long weeks as well as short weeks, under the circumstances of the employment arrangement as a whole.

Therefore, because payment of the agreed-upon salary is required in each short workweek as a prerequisite for payment of overtime compensation on a "fluctuating workweek" basis, employers may not dock the salary of an employee paid on this basis who takes FMLA leave intermittently or on a reduced leave schedule without abandoning the "fluctuating workweek" overtime formula. An employer may either continue paying such an employee the agreed-upon salary in any week in which any work is performed during the employee's FMLA leave

period, or may choose to convert the employee to an hourly basis of payment, with payment of proper time-and-one-half the hourly rate for any overtime hours worked during the period of the condition for which FMLA leave is needed intermittently or on a reduced leave schedule basis, and later restore the salary basis of payment after the employee's need for intermittent or reduced schedule FMLA leave has concluded. If an employer chooses to follow this exception from the fluctuating workweek method of overtime payment, it must do so uniformly for all employees paid on a fluctuating workweek basis who take FMLA leave intermittently or on a reduced leave schedule, and may not do so for employees taking leave under circumstances not covered by FMLA. The final rule has been clarified to reflect this policy.

While the Department recognizes the view, as some commenters noted, that a tension exists between partial-day docking under the FLSA "salary basis" rule and the intent of FMLA to encourage more generous family and medical leave policies, we are constrained by the literal language of the statutory terms to adhere to the policy set forth in the Interim Final Rule. By operation of FMLA, the statutory exception to the FLSA 541 exemption's "salary basis" rule extends only to leave qualifying as FMLA leave that is taken by FMLA-eligible employees employed by FMLA-covered employers. No further revisions are made in this section.

Paid or Unpaid Leave (§ 825.207)

FMLA requires *unpaid* leave, generally. If an employer provides *paid* leave of fewer than the 12 workweeks required by FMLA, the additional weeks necessary to attain 12 workweeks of leave in the 12-month period may be unpaid. FMLA also provides for substituting appropriate paid leave for the unpaid leave required by the Act. An employee may elect, or an employer may require the employee, to substitute any of the employee's accrued paid *vacation* leave, *personal* leave, or *family* leave if it is: (1) for the birth of a child, and to care for such child; (2) for placement of a child with the employee for adoption or foster care, and to care for such child; or, (3) to care for the employee's spouse, child, or parent, if the spouse, child or parent has a serious health condition. The legislative history explains that "family leave" as used here in FMLA refers to paid leave provided by the employer " * * * covering the *particular* circumstances for which the employee