

Quick Quiz Answer: FLSA "Salary Basis" Of Pay

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The answer to our January 31 Quick Quiz is "No": Furniture World's policy does *not* destroy the "salary basis" required for Robin's exempt status under the federal Fair Labor Standards Act. This will be true even if management disciplines or discharges Robin for refusing to make-up the time she missed.

When the so-called "white collar" exemption regulations were revised in 2004, the U.S. Labor Department re-affirmed that employers do not undercut the "salary basis" by requiring exempt employees to record their worktime or to work a specified schedule. See 69 Fed.Reg. 22122, 22178 (April 23, 2004). This continued an interpretation that existed under the prior version of the rules. See, e.g., *Guerrero v. J.W. Hutton, Inc.*, 458 F.3d 830 (8th Cir. 2006)(employers not prohibited from requiring exempt employees to work a specific number of hours per week and to track their time to ensure they have worked those hours); *Opinion Letter of Wage and Hour Administrator No. FLSA2003-5* (July 9, 2003)(tracking, recording, accounting for exempt employees' actual hours worked does not violate the "salary basis").

Since that time, *Opinion Letter of Deputy Wage and Hour Administrator No. FLSA 2006-6* (March 10, 2006) has addressed circumstances even closer to those in our hypothetical. An employer wanted to require some exempt employees to work at least 45 hours a week and others to work not less than 50 hours a week. Management reserved the right to require exempt employees to make-up time missed due to personal absences of less than one day. An employee who failed to meet these two requirements might be disciplined or discharged.

According to the Labor Department, the number of hours worked by an

exempt employee "is a matter to be determined between the employer and the employee." Moreover, it said, an employer "may require an exempt employee to make up work time lost due to personal absences of less than a day without loss of the exemption" The Deputy Administrator stated that the employer was "free to implement the two rules without loss of the exemption."

Despite this flexibility, keep in mind that these exemption rules *do* limit the situations in which one may dock an exempt employee's salary for failing to meet an hours-worked requirement. Robin's weekly salary could *not* have been reduced to offset the 3½-hour shortfall.

Also, states and other jurisdictions might take a different position on these kinds of policies under their own laws. Employers should be sure that any such rules they want to adopt are permitted under all applicable requirements.