



Salary Basis Test

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Table of Contents

Salary Basis Test	3
Employees of Public Agencies.....	4
Safe Harbor and Window of Correction	5

Salary Basis Test

Reference Number: MTAS-921

An employee is considered to be paid on a “salary basis” if the employee regularly receives each pay period, on a weekly or less frequent basis, a pre-determined 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 work performed. 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 unless subject to the exemptions provided by the law. (29 C.F.R. § 541.602)

The prohibition against deductions from pay is subject to the following exceptions:

1. Deductions from pay 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. 29 C.F.R. § 541.602(b)(1). Thus, if an employee is absent for one or more full days to handle personal affairs, the employee’s salaried status will not be affected if deductions are made from the salary for the full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full day absence.
2. Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) 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. 29 C.F.R. § 541.602(b)(2). The employer is not required to pay any portion of the employee’s salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee qualifies under the plan, and after the employee has exhausted the leave allowance provided by the benefit. For example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may 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 for absences after the employee has exhausted the 12 weeks of salary replacement benefits.
3. Deductions may not be made for absences of an exempt employee because the employee serves on jury duty; for attendance as a witness; or temporary military leave, the employer can offset any amount received by an employee as jury fee, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption. 29 C.F.R. § 541.602(b)(3).
4. Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance (those related 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). 29 C.F.R. § 541.602(b)(4).
5. Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions on one or more full days imposed in good faith for infractions of workplace conduct rules. 29 C.F.R. § 541.602(b)(5). Such suspensions may be imposed pursuant to a written policy, applicable to all employees.

“An employer is not required to pay the full salary in the initial or terminal week of employment.” 29 C.F.R. § 541.602(b)(6). An employer may pay a proportionate part of an employee’s full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee’s full salary for the time actually worked will meet the requirement.

“An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.” 29 C.F.R. § 541.602(b)(7). Rather, when an exempt employee takes unpaid leave under the act, an employer may pay a proportionate part of the full salary for time actually worked. DOL’s regulations under the FMLA provide that deductions may be made from the salaries of exempt executive, administrative and professional employees “for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.” 29 C.F.R. § 825.206(a). Thus, the deduction can be hour for hour.

FMLA regulations state that this special exemption to payment on a salary basis “applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as one of the four type of FMLA leave.” 29 C.F.R. § 825.206(c). Deductions may not be made from the salary of an exempt employee (1) who works for an employer with fewer than 50 employees; (2) who works at a site with fewer than 50 employees within a 75-mile radius; or (3) where the employee has not worked the required 1,250 hours necessary to qualify for FMLA leave.

When calculating the amount of allowed deduction from pay, the employer may use the hourly or daily equivalent of the employee’s full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules may be made in any amount. (29 C.F.R. § 541.602(c))

The regulations allow an employer to provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirements if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least the minimum weekly required amount paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus, straight-time hourly amount, time and one-half or any other basis), and may include paid time off. (29 C.F.R. § 541.604)

Employees of Public Agencies

Reference Number: MTAS-2120

The regulations (29 C.F.R. § 541.710) also provide that an employee of a public agency who otherwise meets the salary basis requirements of 29 C.F.R. § 541.602 shall not be disqualified from exemption under 29 C.F.R. §§ 541.100, 541.200, 541.300, or 541.400 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:

- Permission for its use has not been sought or has been sought and denied;
- Accrued leave has been exhausted; or
- The employee chooses to use leave without pay.

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 reduced accordingly. As 29 C.F.R. § 541.710 states, “The special pay deduction rule for public sector employers is based on ‘principles of public accountability.’”

DOL explains that:

Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or “phantom” employees. 57 Fed. Reg. 37,676 (Aug. 19, 1992).

As a result of this rule, public sector employers may make certain types of deductions from the salary of otherwise exempt employees that a private sector employer would not be permitted. These include deductions for partial day absences when leave was not used or has been exhausted. The regulation also allows exempt employees to be furloughed for budget reasons without affecting their exempt status, except for the workweek in which the furlough occurs. 57 Fed. Reg. 37,674-75 (Aug. 19, 1992). The ex-

ceptions, however, apply only if the pay systems are established by statute, ordinance, regulation, policy or practice.

"If an employer discovers it has made deductions from the pay of an otherwise exempt employee that could potentially destroy the salary basis method or payment and, therefore, the exempt status of their employee, the employer that makes improper deductions from the salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay the employee on a salary basis." 29 C.F.R. § 541.603(a). The employer's intent is the "central inquiry" in determining whether the exemption should be forfeited. 69 Fed. Reg. 22,179.

Safe Harbor and Window of Correction

Reference Number: MTAS-2121

The salary basis regulations include a "window of correction" and a "safe harbor," both of which permit employers to retain the exempt status of their employees in certain situations involving improper pay docking. "Improper deductions from employee salaries that are either isolated or inadvertent will not result in the loss of the exemption if the employer reimburses the employee for such improper deduction." 29 C.F.R. § 541.603(c). This is called the "Window of Correction."

"If an employer has a clearly communicated policy that prohibits improper deductions and a complaint mechanism, reimburses employees for the improper deduction and makes a good faith commitment to comply with the FLSA's salary basis test in the future, the employer will not lose the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. DOL refers to this new rule as a "safe harbor" provision." 29 C.F.R. § 541.603(d).

The safe harbor provision applies regardless of the reasons for the improper pay deduction. The safe harbor is available for both improper deductions made because there is no work available and improper deductions made for reasons other than lack of work. DOL has provided a sample policy to help employers comply with the new salary basis test regulations. The written salary basis policy [1] may be included in the employer's employee handbook or given directly to exempt employees, but there is no indication in the rules that employees must sign that they have received such a policy.

Links:

[1] https://www.dol.gov/whd/regs/compliance/overtime/modelPolicy_PF.htm

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