



CLIENT ALERT & WEBINAR INVITATION: EMPLOYEE MANDATORY TIME OFF PROGRAMS

Faced with continuing economic challenges, many employers are implementing an array of cost-cutting measures. Among those, employers are considering mandatory time off programs for employees.

One question we are receiving frequently is whether employees may be required to take off on Fridays, or every other Friday. The most important legal problem with this type of time-off program relates to exempt employees. California and federal laws generally require that exempt employees be paid their full week's salary for any week in which they perform any work. Therefore, employers may not cause exempt employees to miss one day of work in a workweek and dock their salaries accordingly.

Some federal opinion letters and court rulings in certain jurisdictions *outside of California* indicate that an employer may require exempt employees to take time off in partial-week increments by requiring the employees to use vacation or PTO for the day off (i.e., resulting in the employee receiving the full weekly salary for the week). However, the California Labor Commissioner has emphasized in its Enforcement Manual that "deductions for vacation are treated differently under state and federal law[.]" and the California law differences create serious problems for mandatory "Friday off" programs. First, the California Labor Commissioner has opined that employers generally must provide the greater of 90 days or one full fiscal quarter advance notice before requiring an employee to use accrued vacation or PTO on a specified date or dates. In other words, the employer generally may not require vacation/PTO use for the Friday in question, and thus may not use such vacation/PTO to meet the obligation of paying the full week's salary, for the greater of 90 days/one full fiscal quarter after notice is given. Because most employers contemplating these programs need to start saving money now, and economic conditions for any company could change substantially in 3 months, this requirement independently makes it infeasible for most companies to implement mandatory "Friday off" programs.

Second, the California Labor Commissioner previously published two opinion letters which expressly stated that (wholly apart from the issue of advance notice) employers could not use employees' accrued vacation or PTO to meet the weekly salary obligation when partial-week absences were required by the employer (i.e., as opposed to days taken off for personal reasons). It is possible that the Labor Commissioner's stance on this issue has changed, because it has removed those opinion letters from its web site. Unfortunately, however, the answer is unclear: the opinion letters could have been withdrawn based on other issues they addressed, and the Labor Commissioner's discussion of the above issues in its Enforcement Manual is ambiguous. Also, while in *Conley v. PG&E* (Cal. Ct. App. 2005) the California Court of Appeal endorsed the federal approach of allowing employers to deduct

from an employee's accrued vacation/PTO for partial-day *personal* absences, the case did not address *mandatory* time off. Consequently, the only clearly safe approach in California is to require exempt employees to take mandatory time off in increments that coincide with a full payroll workweek, and to provide the employees the options of either using accrued vacation/PTO or taking the time off unpaid.

Using what appears to be an increasingly popular approach, employers sometimes require exempt employees to take mandatory time off for an entire workweek, but allow them to request permission to take time off in smaller increments for personal reasons. For example, the employer's program could be to require exempt employees to take off one full workweek during a 10-week period, but allow the employees to request permission to take off a total of 5 business days (in smaller increments than a full workweek) for personal reasons over the 10-week period. Although there are no rulings directly on point in the context of mandatory time off programs, we believe that employers may legally provide this option to employees because the law clearly allows deductions of vacation/PTO time (and even deductions from salary) when employees take off full days for personal reasons. It is very important, however, that managers not encourage or require exempt employees to take time off in partial-week increments.

Some have asked whether an employer may simply make fixed reduction in an exempt employee's regular salary, in accordance with a schedule reduction. While a federal opinion letter states that employers may do so under federal law (as long as the salary does not fall below the minimum federal level), the California Labor Commissioner has published an opinion letter saying that the federal opinion letter conflicts with California law requirements.

As to non-exempt employees, the rules are different. Non-exempt employees may be required to take off time in partial-week increments and have their pay docked accordingly. However, the California Labor Commissioner's statement that the greater of 90 days or one full fiscal quarter advance notice be provided before mandatory vacation use would apply to non-exempt and exempt employees.

Finally, employers contemplating mandatory time off of more than one week need to be aware of California Labor Commissioner opinion letters that address the maximum length of mandatory time off (these rules are also applicable to both exempt and non-exempt employees). The opinion letters state that, if the mandatory time off exceeds a maximum period of time, the mandatory time off may be construed as a "termination" of employment requiring payment of all earned wages to the employees on the last day of work before the mandatory time off (including all regular wages, accrued vacation, and all other earned wages). And, the risk of noncompliance would include waiting time penalties of up to 30 days additional pay per affected employee. Making matters worse, the Labor Commissioner has issued conflicting opinion letters as to the maximum duration of mandatory time off. Some opinion letters state that the maximum length is 10 days, and others state that the employees must be scheduled to return to work on a date within the same pay period. Further, the Labor Commissioner has responded inconsistently to inquiries regarding whether the 10-day rule refers to calendar days or working days. If an employer is planning a mandatory time off program in which one or more employees will not return to work within 10 calendar days or the same pay period, legal counsel should be consulted to assess risk and to explore possible solutions.

Due to the complex legal issues surrounding mandatory time off programs, we strongly recommend that employers communicate such programs to employees in carefully written announcements that are reviewed by legal counsel.

COMPLIMENTARY WEBINAR:

In light of the number of questions we are receiving on this subject, we are offering a *complimentary webinar on Tuesday, April 7, 2009, from noon to 1:00 p.m. You may register for the webinar through this link: <https://www2.gotomeeting.com/register/293039084>. You may also forward this e-mail and link to others who may be interested.*



4633 Old Ironsides Drive, Suite 310 | Santa Clara, CA 95054

“Big firm sophistication. Small firm personal service and efficiency.”

Raymond H. Hixson

rhixson@hixsonnagatani.com

408-486-9977

Brian K. Nagatani

bnagatani@hixsonnagatani.com

408-486-9988

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