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Unpaid Disciplinary Suspensions Require a Careful Reading of Federal and State Law

Working Together

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Counseling and written warnings are common steps employers take to address employee attendance issues (such as habitual tardiness) or performance issues (such as failing to complete assigned work on time). But what if the employer is faced with an employee who engages in **serious workplace misconduct**, such as sexual harassment or violence? As recent news events demonstrate, termination may be warranted; in other cases, the employer may decide that an unpaid suspension is the appropriate disciplinary measure. If the offending employee is not exempt from the minimum wage and overtime provisions of the federal Fair Labor Standards Act (FLSA) and similar state law, the suspension raises few, if any, wage and hour issues since hourly employees need only be paid for the time they work and salaried, non-exempt employees may be docked as long as they receive at least the minimum wage for the week in which the suspension occurs.

The rules governing disciplinary suspensions for exempt employees, however, are more complex.

Exempt Employees Must Be Paid on a Salary Basis

Both the FLSA and Connecticut law provide exemptions from the minimum wage and overtime pay requirements for certain workers, including bona fide executive, administrative, and professional employees. To qualify for one of these exemptions, the employee must meet certain tests regarding job duties *and* be paid on a "salary basis" at not less than $455 per week ($475 per week in Connecticut). Being paid on a "salary basis" means that the employee receives his or her full salary for any week in which the employee performs any work, and that the salary is not subject to reduction because of variations in the quality or quantity of the work performed.

There are a few exceptions to the salary basis rule. For example, under both federal and Connecticut law, the employer is not required to pay the full salary of an exempt employee in the **initial or terminal week of employment** or for weeks in which an exempt employee takes unpaid leave under the **federal or state Family and Medical Leave Act**.

Unpaid Disciplinary Suspensions for Violations of Workplace Conduct Rules

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Unpaid Disciplinary Suspensions Require a Careful Reading of Federal and State Law

Both federal and state law also recognize an exception to the salary basis requirement for **unpaid suspensions** imposed on exempt employees for **serious violations of workplace conduct rules**, such as unlawful harassment or violence. Prior to 2004, both laws provided that deductions from the salary of an exempt employee could only be made if the suspension lasted **a week or more**, but in 2004 the federal regulations were amended to allow deductions in connection with suspensions of **one or more full days** (29 CFR §541.602(b)(5)). Connecticut, however, never adopted a similar revision. (Regs. Conn. State Agencies §31-60-14(b)(4), §31-60-15(b)(4) and §31-60-16(b)(4)).

When federal and state law govern the same subject area, the employer must comply with both laws, and if the two laws are inconsistent, the employer must comply with the law that provides greater protection to the employee. Federal law and Connecticut law both permit deductions when the disciplinary suspension lasts at least a week. But which law provides greater protection for the employee when the suspension is for less than a week? The U.S. Department of Labor seems to suggest that federal law does because it allows the employer to impose a shorter unpaid suspension; as the preamble to the 2004 revisions states, allowing unpaid disciplinary suspensions of less than a week "will avoid harsh treatment of exempt employees— in the form of a full-week suspension— when a shorter suspension would be appropriate." But many people probably would say that Connecticut law really is more protective of the employee; that is, since Connecticut prohibits docking an exempt employee's pay for disciplinary suspensions lasting less than a week, suspensions that last only a few days must be **paid**. (We're not aware of a court or administrative ruling on this precise issue.)

The Bottom Line

Connecticut employers should apply the following rules when imposing disciplinary suspensions on exempt employees for violations of workplace conduct rules:

- A suspension may be **unpaid** if it lasts for **a week or longer**.
- A suspension must be **paid** if it is of **short duration** (i.e., less than a week).

Finally, federal law requires that disciplinary suspensions imposed for non-compliance with a workplace conduct rule be carried out pursuant to **a written policy applicable to all employees (**29 CFR §541.602(b)(5)). The written policy must be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension. Connecticut does not have a similar requirement. Since having a written policy provides greater protection to employees than not having a written policy, Connecticut employers must follow the federal law here and **adopt a written policy**.

Federal laws do not preempt state laws that provide greater protection to the employee, but determining which law provides greater protection is not always easy, and getting it wrong can cost the employer in a big way. A practice of making improper deductions could trigger a loss of the exemption, subjecting the employer

to penalties and entitling the affected employees to file suit to recover back wages, liquidated damages, attorney's fees and court costs. Employers who are unsure about whether a deduction is proper should always consult with legal counsel first.