

Wage & Hour Insights

Guidance & Solutions for Employers



[Do I Have To Pay An Exempt Employee Who Answers E-Mail Or Phone Calls While On FMLA Leave? \[Wage & Hour FAQ\]](#)

By [Bill Pokorny](#) March 05, 2012

Q. A salaried, exempt employee who recently returned from a week of unpaid FMLA leave claims that he is entitled to be paid his full salary for entire week because he responded to a number of work-related e-mails and telephone calls while he was out. Do we have to pay?



A. Wage and hour law is confusing enough on its own, but it becomes even more so when it intersects with other complicated legal issues, like the Family and Medical Leave Act. On our [FMLA Insights blog](#), my colleague [Jeff Nowak](#) explains how to deal with [this situation from the perspective of counting the employee's time as FMLA leave](#). But that leaves open the question of whether and how much the employee is entitled to be paid.

As we explained in a [recent post regarding unpaid disciplinary suspensions](#), in most cases employees who are classified as exempt executives, administrators, and professionals under the Fair Labor Standards Act must be paid on a "[salary basis](#)," meaning that they must receive a fixed salary each workweek that does not vary regardless of the number of hours worked or the quality or quantity of work performed.

However, the FLSA regulations provide certain exceptions from this general rule. Salary deductions are allowed when an exempt employee misses one or more full workdays for personal reasons other than sickness or disability. Deductions are also permitted for full-workday absences due to sickness or disability if the employer has a "bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability," such as paid sick days or a short-term disability insurance plan.

In the case of FMLA leave, however, the regulations go one step further. Here is the relevant text (29 CFR § 541.602(b)(7)):

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. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

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So, turning to our hypothetical question above:

Much depends upon exactly how much time the employee is spending on e-mail and telephone calls while he is away from work. If all the employee does is spend a couple of minutes over the course of the week responding "OK" to e-mails or taking a quick phone call or two, the time at issue may be *de minimus* and not an issue. If, on the other hand, the employee is spending significant time working while on FMLA leave, the employee might arguably be entitled under the FLSA to a percentage of his regular salary proportionate *to the time actually worked*, but not his full salary for the entire workweek.

That takes care of federal law, but what about state law? As noted in our discussion of disciplinary suspensions, Illinois rejected the 2004 amendments to the FLSA regulations that added the language quoted above. However, [as stated in the preamble to the 2004 FLSA regulations](#), the exception for FMLA leave incorporated into the 2004 FLSA rules merely codified existing federal law. Indeed, the exception is written into the FMLA itself at 29 U.S.C. § 2612(c):

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

Insights for Employers:

1. FMLA leave is the one situation in which an employer can take deductions from an exempt employee's salary in increments of less than one full work day.
2. However, if an exempt employee is actually performing work during FMLA leave and the time involved is more than *de minimus*, the employee might be entitled to a *pro rata* portion of his or her salary for the time spent on work activities.

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