



What is a “bona fide” sick leave plan under the FLSA Salary Basis Regulation?

The term "bona fide" sick leave plan is used in the Fair Labor Standards Act (FLSA) salary basis regulation regarding deductions in pay for an exempt employee's absences due to illness. A sick leave plan is a paid leave benefit provided to employees in the case of absence from work due to illness. It may include paid time off (PTO) banks if the PTO bank permits the benefit to be used for sickness. While there is not a regulatory definition issued by the U.S. Department of Labor (DOL), a DOL opinion letter (http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_14_32_FLSA.htm) provides general guidance as to the requirements for a sick leave plan to be considered bona fide in the context of the salary basis regulation. Sick leave plans may be considered "bona fide" if all of the following criteria are met:

- There are defined sick leave benefits.
- The benefits have been communicated to eligible employees.
- The plan operates as described.
- The plan is administered impartially.
- The plan's design does not reflect an effort to evade the requirements that exempt employees be paid on a salary basis.

There is not a bright-line test articulating how many days and how short a waiting period are required for a plan to be bona fide. However, in its opinion letter, the DOL has indicated that a bona fide sick leave plan must provide pay for a reasonable number of absences on account of sickness. In several opinion letters, plans providing at least five days of paid sick leave have been approved as bona fide by the DOL. A sick leave plan may have a qualifying period to use the sick leave benefit and still be considered bona fide. Opinion letters have indicated leave plans that require the employee to have up to one year of service prior to being eligible to use the payment of sick pay benefits to be bona fide as well. It is important to note the DOL opinion letters are fact-based responses to the particular circumstances of the inquiry, and a slight difference in the

assumed facts of an employer's plan may result in a different outcome. Therefore, consultation with legal counsel may be prudent in determining whether an employer's sick leave plan is compliant with the DOL interpretation of a bona fide sick leave plan.

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