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**GOOD NEWS, BAD NEWS:  
THE STATE LABOR COMMISSIONER FURTHER  
"CLARIFIES" THE SALARY BASIS TEST IN CALIFORNIA  
(April 1, 2002)**

**Background**

Many will recall the turmoil created last summer when Miles Locker, the Chief Counsel for the California Labor Commissioner, issued an opinion letter asserting that exempt employees must be paid a "monthly salary," that even full week work furloughs were not permitted under this monthly salary basis test, and that employers were not permitted to require employees to use accrued vacation during a work furlough that is shorter than a month in duration. (See [6/18/01 PP&S E-Update](#).) The Labor Commissioner eventually retracted the Locker letter and removed Mr. Locker from his position as Chief Counsel for the Labor Commissioner.

In October, 2001, the California Industrial Welfare Commission (IWC) rejected the Locker letter's interpretation of the salary basis requirement. The IWC declared that it intended to follow the federal rules regarding the "salary basis" test. This was good news for employers because it resulted in the use of a single standard for the salary basis test.

**The Labor Commissioner's Letter**

Recently, the California Labor Commissioner re-entered the fray. In a [letter dated March 1, 2002](#), Labor Commissioner Arthur Lujan responded to IWC Chairman Bill Dombrowski's request for clarification of the Labor Commissioner's enforcement position with respect to the salary basis issue. Lujan's letter is mostly good news for employers, but also contains some bad news.

The good news is that Lujan states unequivocally that California uses a weekly, not a monthly, salary test. He also confirms that the federal salary basis rules will apply to California employees, namely:

- Unless subject to an exception, an exempt employee must receive the employee's full salary for any week (not month) in which the employee performs any work, without regard to the number of hours or days worked;

- An employer may deduct from an exempt employee's salary when the employee is absent from work for a day or more for personal reasons, or for sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by sickness and disability;
- An employer may pay *extra* compensation to exempt employees (including extra amounts tied to hours worked);
- Exempt employees may be paid for partial weeks in the initial and terminal weeks of employment;
- An employer may adjust the weekly pay of an exempt employee on a reduced schedule or on intermittent family and medical leave; and
- An employer may reduce the weekly pay of an exempt employee who is suspended without pay for a partial week for violation of a major written safety rule.

The bad news in the Labor Commissioner's letter arises from a single sentence in which he observes that unlike federal law, California treats vacation as "wages." Although the Labor Commissioner did not expand on this distinction, it has been reported that the Acting Chief Counsel for the Labor Commissioner has stated that because accrued vacation constitutes wages, deductions may not be made from accrued vacation for partial day absences or full day absences if the reason for the absence is lack of work (as opposed to employee personal reasons).

This prohibition on docking accrued vacation is markedly different from the rule under federal wage and hour law. The Department of Labor and federal courts have stated that since the salary basis rule merely requires that employees be paid the same amount for any workweek in which they perform work and the docking of accrued vacation does not reduce the amount an employee is paid for a particular workweek, the docking of accrued vacation does not affect exempt status.

### **What This Means**

First, employers should remember that this information is merely an indication of the enforcement position of the California Labor Commissioner. It is not a statement of California law. Nonetheless, employers are well advised to assess the potential risks involved in docking accrued vacation of California employees in connection with partial day absences for any reason, or for full day absences occasioned by lack of work (as opposed to a personal day absence).

Specifically, this new interpretation will require employers to reconsider how to structure work furloughs. Previously, employers routinely required salaried employees to use accrued vacation during employer-imposed work furloughs. This practice has now been called into question. Employers seeking to minimize the risk of jeopardizing the exempt status of qualified professional, administrative or executive personnel should not require exempt employees to use accrued vacation for any partial day absence, or for any full day absence that is not due to the employee's personal reasons.

This E-Update was authored by [Fred Plevin](#). If you have any questions about

this E-Update, please contact Mr. Plevin or any PPS&C attorney.

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