

Human Resources

Employment Law Q&A

By Jeremy Naftel

Question: Can I deduct from an exempt employee's accrued vacation if he or she misses a partial day of work?

Answer:

California employers may now deduct partial-day absences from an exempt employee's accrued vacation without fear of rendering the employee non-exempt. Although partial-day deductions have been permitted under federal law for a number of years, California law had been in limbo since a 2002 opinion letter from the Division of Labor Standards Enforcement (DLSE) suggested that such deductions may jeopardize exemptions under the "salary basis" test and expose employers to significant risks of having to pay overtime to exempt workers. *Conley v. Pacific Gas & Electric*, decided in July 2005, confirms that employers can now make partial-day deductions from vacation or PTO banks and also suggests employers may have more control over when employees can use vacation time than previously thought.

In *Conley*, a group of exempt PG & E employees filed a class action, disputing

PG & E's classification of *all* exempt PG & E employees. Arguing that PG & E's express and documented policy of deducting partial-day absences from the banked vacation of exempt employees rendered them non-exempt as a matter of law, the employees claimed years of unpaid overtime. The trial court disagreed and refused to certify the class. The Court of Appeal affirmed and found for the employer.

Although the Court agreed that a reduction in actual compensation for partial-day absences would defeat exempt classification, they found no such reduction in *Conley*. The Court of Appeal distinguished the *Conley* situation in stating that by deducting from banked vacation, the employer was not reducing compensation, only requiring that employees use accrued vacation when they were actually on vacation.

For employers ready to implement policies related to this new ruling, a bit of

advice: The ruling applies only to accrued vacation or PTO; employers still may not deduct from an exempt employee's *pay* for partial-day absences. If the employee has exhausted his or her accrued vacation leave, the employer may be required to give an exempt employee additional time off for partial-day absences.

The *Conley* court defined "partial-day" as "four hours or more in a single day." Making deductions in smaller increments have yet to be tested in the courts.

Finally, employers should probably wait until September 2005 to make sure that the *Conley* decision is not further appealed to the California Supreme Court before finalizing and implementing any new policies related to partial day deductions. ■

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Legal Issues

Energy Surcharges: A Risk-Benefit Snapshot

By Mitch Miller, J.D., M.B.A and Kindon Olsen

Surcharges enable a hotelier to cover increased energy costs (or other operating expenses) that are usually unforeseen when the hotel accepts the reservation, permitting the property to maintain a consistent rate while adjusting to uncertainties that may affect profitability.

In the wake of Hurricane Katrina, winter heating costs are expected to jump. Some hoteliers may seek to recoup the added expense with surcharges. In 2001, many hoteliers' implemented energy surcharges, prompting lawsuits that shed some light about the best way to implement energy surcharges, if any.

Customers consider surcharges deceptive, a "bait and switch" tactic, even when notified at "check-in". If surcharges are not disclosed at the time reservation is made, or at check-in for walk-in guests, the risk of lawsuits increases.

If hoteliers wish to impose energy surcharges, while minimizing legal risk, they should, at a minimum, invoke the following practices:

- Use a statement comparable to: "The room rate does not include applicable taxes, or surcharges for energy [or specified other costs if applicable] to cover unforeseen extraordinary costs incurred by the hotel for a guest while staying at the property. The hotel reserves the right to change or add surcharges at any time prior to guest check-in. Guests may cancel their reservation when checking into the hotel if they do not agree to pay the applicable taxes or surcharges. Presently, due to unforeseen increases in energy costs, an energy surcharge of \$3.00 per night will be added to your room charge."
- Online bookings should require the customer to consent by checking "I Agree" before finalizing the reservation.

- Telephone reservationists should read the statement to guests and obtain an oral affirmation to its terms before finalizing the reservation.
- Confirmations sent to guests should include the statement.
- Walk-in guests should be provided the statement at check-in and asked to confirm their consent by initialing the registration form. This should be part of the regular check-in practice where a guest confirms the room rate to be charged.
- The check-out portfolio should enumerate all charges, including surcharges.

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