

# HR QUESTION ? of the month



## **Exempt employee on intermittent leave – pay hourly?**

**Question:** We have an employee who is out on FMLA leave and now has been cleared to come back to work on an intermittent basis. Due to his serious health condition, he will be placed on intermittent FMLA leave. The employee was a salaried manager and now will only be able to work around 20 hours per week. Do we still need to pay him his entire salary or can we break that salary down into an hourly rate?

**Response:** When leave is taken intermittently (or on a reduced schedule basis) under the federal Family and Medical Leave Act (FMLA), the employer can, in fact, prorate an exempt employee's salary commensurate with the time worked. This is one of only a few very limited cases where an exempt employee's compensation can be prorated based on hours worked without destroying the salary basis of pay that is otherwise required for exemption classification. The other two scenarios where this is allowed is during the first and last weeks of employment. See the paragraph titled "Circumstances in Which the Employer May Make Deductions from Pay" at [www.dol.gov/whd/overtime/fs17g\\_salary.htm](http://www.dol.gov/whd/overtime/fs17g_salary.htm)

The FMLA Regulations address this directly at §825.206(a) which provide as follows: "If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee ..., providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. ... This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee...." See [http://www.ecfr.gov/cgi-bin/text-idx?%20c=ecfr;sid=f60cac82476ea25c3294f2114da66cc6;rgn=div5;view=text;node=29%3A3.1.1.3.54;idn=29;cc=ecfr#se29.3.825\\_1206](http://www.ecfr.gov/cgi-bin/text-idx?%20c=ecfr;sid=f60cac82476ea25c3294f2114da66cc6;rgn=div5;view=text;node=29%3A3.1.1.3.54;idn=29;cc=ecfr#se29.3.825_1206) for the full text of the Regulation.

We invite you to also review the Employer Guide to the FMLA which provides more plainly on page 58 that "[t]he employer may make deductions from the employee's salary for any hours taken as intermittent or reduced schedule FMLA leave within a workweek without affecting the exempt status of the employee." See <https://www.dol.gov/whd/fmla/employerguide.pdf>

Want to learn more about how to handle issues like this? [Click Here](#) to listen to our podcast about exempt employees compensation and FMLA.

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