Alert

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COZEN O'CONNOR

Third Circuit Rules PTO Not Salary in Win For Employers

In a win for employers, on March 15, 2023, the U.S. Court of Appeals for the Third Circuit held that paid time off (PTO) does not constitute salary for purposes of the Fair Labor Standards Act (FLSA). The decision in *Higgins et al. v. Bayada Home Health Care Inc.* involved an issue of first impression for the federal appellate court and provides employers with some assurance that, at least under federal law, PTO deductions for salaried, exempt employees generally will not require that such employees be reclassified and entitled to overtime.

Stephanie Higgins was a registered nurse for Bayada, which provides medical and related support services for patients in their homes. Higgins was a full-time, salaried employee classified as exempt from the FLSA overtime rules, meaning she did not earn overtime for hours worked in excess of 40 hours per workweek. In addition to job-duty requirements, the FLSA requires exempt employees be paid on a salary basis, meaning the "employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Currently, the minimum predetermined amount that an employee must receive is $684 per week.

Higgins claimed that Bayada's PTO policy ran afoul of the "salary basis" test, and that, as a result, she had been misclassified and should be entitled to earn overtime pay. As a result, she had been misclassified and should be entitled to earn overtime pay. Bayada requires employees to accumulate a specified number of productivity points per week (equivalent to about 1.33 hours worked per point) – and, critically, if employees fail to meet their productivity minimum, Bayada withdraws from their available PTO the difference between the expected and actual productivity amounts. In other words, Bayada can deduct PTO time for employees who work fewer hours. The only circumstance in which Bayada would reduce an employee's salary is if the employee voluntarily takes a day off without sufficient PTO.

The Third Circuit held that Bayada's PTO deductions did not violate the FLSA because the PTO time was a fringe benefit and did not constitute salary. The court reasoned that salary constitutes the predetermined amount paid each workweek and that "[a]n employer does not violate those conditions by deducting from an employee's PTO because, when an employer docks an employee's PTO, but not her base pay, the predetermined amount that the employee receives at the end of a pay period does not change." In so reasoning, the court looked both to statutory and regulatory provisions as well as widely-accepted definitions that distinguish the concept of salary from that of fringe benefits.

Although *Higgins* provides some clarity for employers under federal wage and hour law, it warrants two notes of caution. First, the Third Circuit expressly declined to consider whether PTO deductions violate Pennsylvania law because Higgins waived her state-law claim. This is significant because Higgins asserted that Pennsylvania law affords greater protection to employees than the FLSA. Second, *Higgins* emphasizes that PTO time does not count toward the minimum salary (*i.e.*, $684 or more) that exempt employees must receive each workweek in which they perform work. Employers should continue to proceed with caution when making any deduction from an employee's pay or fringe benefits.

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