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### Time Is Of The Essence

The chart below demonstrates the importance of a proactive return-to-work program for both on-the-job and off-the-job injuries/illnesses. At 12 weeks away, employees have only a 50% chance of ever returning to work.

Time away in weeks due to injury or illness	% ever RTW
4 weeks	95%
8 weeks	80%
12 weeks	50%
16 weeks	40%
20 weeks	30%
24 weeks	20%
28 weeks	15%
32 weeks	14%
36 weeks	11%
40 weeks	9%
44 weeks	5%
48 weeks	2%

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### REGULATION HIGHLIGHT

## Inclement Weather and the FLSA

Due to inclement weather or other disasters, an employer may need to close their office for the safety of employees. Travel during these times may be hazardous. The national weather service says that everyone is potentially at risk during winter storms. The actual threat depends on the situation.

Closing an office may bring up questions regarding payment of wages to exempt employees. The Department of Labor has answered some common questions in an Opinion Letter.

1. *During office closures due to inclement weather or other disasters, may a private employer direct exempt staff to take vacation (or leave bank deductions) or leave without pay without jeopardizing the employees' exempt status?*

The FLSA does not require employer provided vacation time. Where an employer has proposed a bona fide benefits plan, it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if the employee still receives in payment an amount equal to the employee's guaranteed salary.

### RISK REVIEW

## Why Employers Should Be Concerned About Impaired Driving

Employers have a vested interest in preventing the devastating consequences of impaired driving for a range of reasons in addition to improving the quality of life in the community in which they operate. Each time an employee is involved in an impaired driving crash, businesses pay in the form of increased absenteeism and use of health care benefits. According to the National Highway Traffic Safety Administration, the annual employer cost of motor vehicle crashes in which at least one driver was alcohol impaired is more than \$9 billion, including wage-risk premiums.

Furthermore, if the employee caused the crash or is arrested for impaired driving even if a crash did not occur, administrative and legal procedures

However, an employee will not be considered to be paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.

Thus, if the employer closes the office due to weather or other disasters for less than a full work-week, the employer must pay the employee's full salary even if: (1) the employer does not have a bona fide benefits plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank.

Since employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s). Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account in the situation presented above, whether for a full or

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## Inclement Weather and the FLSA (con't)

partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account or has a negative balance in the leave bank account still must receive the employee's guaranteed salary for any absence(s) occasioned by the employer or the operating requirements of the business.

*2. If the private employer's offices remain open during inclement weather or other types of disaster, can exempt staff be directed to take vacation (or leave deductions) or leave without pay if they fail to report to work without jeopardizing the employees' exempt status?*

Leave bank or salary deductions may be made when the employee is absent from work for a day or more for personal reasons other than sickness or accident. Thus, if an employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made from the employee's salary for such absences. An absence due to inclement weather does not constitute an absence due to sickness or accident.

Therefore, an employee who is absent due to inclement weather, such as because of transportation difficulties, is absent for personal reasons. In the situation described above, a private employer may require an exempt employee who fails to report to work to take vacation or make leave bank deductions without jeopardizing the employee's exempt status. When the office is open, an exempt employee who has no accrued benefits in the leave bank account does not have to be paid for the full day(s) s/he fails to report to work due to such circumstances as a heavy snow day.

*3. If the private employer's employees are probationary or have used all of their accrued vacation (or leave bank) time, can the employer choose not to pay them for time not worked without jeopardizing the employee's exempt status such as in a circumstance where an employee stays home half a day due to inclement weather?*

Deductions from salary for less than a full day's absence are not permitted under the regulations. Therefore, where the employee's absence is for less than a full day, payment of an amount equal to the employee's guaranteed salary must be made even if the employee has no accrued vacation or other leave benefits. A deduction from an employee's leave bank or salary may be made for absences of one or more full days for personal reasons, other than sickness or accident.

An employer will lose the exemption if it has an actual practice of making improper deductions that demonstrates it did not intend to pay employees on a salary basis. On the other hand, isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions. Moreover, if an employer has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

① More information on FLSA compliance assistance available at

## Why Employers Should Be Concerned About Impaired Driving (con't)

their establishment and subsequently causes a crash.

Employers who have employees who drive as part of their job such as couriers, delivery persons and sales representatives may also be subject to legal action if an employee who is driving while impaired causes a crash while conducting business. Furthermore, these employers have to take into consideration the costs of insuring and maintaining company vehicles, as well as the time managers spend taking care of these procedures. When it comes to employer-sponsored impaired driving prevention, the return on investment is considerable when compared to the financial burden caused by just one crash, especially for small businesses.

The good news is that employers have enormous power to protect their businesses from the negative impact of impaired driving by educating employees about its harmful effects and supporting efforts to prevent it in their communities. By doing so, employers do more than just safeguard their business assets, they contribute to the nationwide campaign to eliminate a devastating and preventable crime and play a part in making their communities safer for their friends and families and those of their employees.

## Disability Discrimination Claim Settlement

The EEOC and JPMorgan Chase & Co. (Chase) recently announced the \$2.2 million settlement of a claim brought under the Americans with Disabilities Act (ADA) against Bank One Corporation.

The EEOC issued an administrative determination on March 11, 2004, finding that there was reasonable cause to believe that Bank One violated the ADA by failing to properly accommodate a group of employees who were medically released to return to work after leaves of absence exceeding six months. Bank One automatically protected employees' jobs when employees went on a leave of absence for less than six months. However, for employees who went on longer leaves of absence, the EEOC found that Bank One violated the ADA by terminating some employees without first attempting to determine on an individual basis whether they required additional job protection or other accommodations because of a disability.

As a result of the settlement, the merged company will distribute \$2.2 million among 222 individuals who went on a long-term disability (LTD) leave of absence from Bank One and whose employment was ultimately terminated. Chase will also reinforce its policies to individually assess whether a disabled employee on a disability leave of absence should receive additional job protection or other accommodations. Chase will provide training on the ADA and its revised policy to all managers, human resources professionals, and employees of its Disability Management Services department.

During its investigation, the EEOC found that Bank One's policy permitted employees who returned from short-term disability within six months to return to their jobs. Employees who required more than six months of disability leave, however, were not guaranteed to return to their previous position. If their position had been filled, employees who were released to return to work after more than six months of disability leave had thirty days to find other positions within Bank One or were terminated. The ADA requires that employers individually assess whether or not additional leave will assist employees with disabilities in returning to work without placing an undue hardship on the company.