

Gavin Newsom  
MayorPhilip A. Ginsburg  
Human Resources DirectorMEMORANDUM  
DHR #14-2005

To: Department Heads  
Personnel Officers

From: Philip A. Ginsburg  
Director 

Date: July 25, 2005

Subject: New Department of Labor (DOL) Fair Labor Standards Act (FLSA) Regulations Regarding Suspensions

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The U.S. Department of Labor has promulgated FLSA regulations clarifying issues related to exempt employees and the Act's "salary basis" test. These regulations took effect on August 23, 2004. Under the DOL's prior regulations, suspensions of exempt employees in increments of one or more *weeks* would not violate the salary basis test. Under the new regulations, an employer is free to suspend exempt employees in *one-day* increments for violations of certain "workplace conduct" rules under some circumstances.

First, the work rule must be imposed pursuant to a written policy; the policy must be applicable to all employees. 29 CFR § 541.602(b)5.<sup>1</sup> Not all workplace rules may support one-day suspensions. The workplace rules cannot apply to performance and attendance issues. They must refer to "serious harassment, violence, drug or alcohol violations, or violations of state or federal law." According to the DOL, this exception to the one-week rule should be construed narrowly so not as to undermine the essential guarantees of the salary basis test." 29 CFR Part 541, Preamble, Fed. Register, Vol. 69, No. 79, April 23, 2004 at 22177.

Second, the written policy must be applicable to all employees, and must put employees on notice that violations thereof may lead to an unpaid disciplinary suspension. The Preamble to the new regulations makes clear that the workplace policy in question "need not include an exhaustive list of specific violations that could result in a suspension." Thus, it appears that the work rule violation must at least stem from a written policy,

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<sup>1</sup> The pertinent portion of the new regulation reads as follows:

Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed *pursuant to a written policy applicable to all employees*. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

29 CFR 541.602(b)(5) (emphasis added).

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even if the policy does not specifically address the exact misconduct at hand. 29 CFR Part 541, Preamble, Fed. Register, Vol. 69, No. 79, April 23, 2004 at 22177-78.<sup>2</sup>

It is recommended that departments reduce as many workplace rules to writing as possible. In addition, all policies should be reviewed to make sure that they apply to all employees and put employees on notice that violations of the policies may lead to unpaid disciplinary suspensions.<sup>3</sup>

### CONCLUSION

While the Department of Labor has promulgated new regulations allowing employers much more freedom to suspend exempt employees in periods of less than a week, departments should only rely on these regulations for violations of workplace conduct rules: (a) contained in or generally addressed in a written policy distributed to all or substantially all employees; (b) involving serious workplace policies such as sexual or racial harassment, workplace violence, substance abuse or violations of state or federal law; (c) that place employees on notice that violations of the policy may lead to unpaid disciplinary suspensions; and (d) that are applicable to all employees.

I would like to thank Martin Gran of the City Attorney's Office for his diligence and work on this matter.

Please feel free to contact your DHR Client Services Representative or Deputy City Attorney, Martin Gran at 554-4291 if you have any follow-up questions.

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<sup>2</sup> The DOL Preamble states in part:

The Department has decided to retain the requirement that the policy be in writing, on the assumption that most employers would put (or already have) significant conduct rules in writing, and to deter misuse of this exception. This provision is a new exception to the salary basis test, and the Department does not believe restricting this new exception to written disciplinary policies will lead to changes in current employer practices regarding such policies. *However, the written policy need not include an exhaustive list of specific violations that could result in a suspension, or a definitive declaration of when a suspension will be imposed. The written policy should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension.* We have clarified the regulatory language to provide that the written policy must be "applicable to all employees," which should not preclude an employer from making case-by-case disciplinary determinations. Thus, for example, the "written policy" requirement for this exception would be satisfied by a sexual harassment policy distributed generally to employees, that warns employees that violations of the policy will result in suspension or termination.

29 CFR Part 541, Preamble, Fed. Register, Vol. 69, No. 79, April 23, 2004 at 22177-78 (emphasis added).

<sup>3</sup> The new regulation also allow employers to limit the damage of making improper deductions (i.e., making deductions that threaten an employee's exempt status) by: (a) clearly communicating a policy that prohibits improper deductions, (b) creating a complaint mechanism for employee who feel that deductions were improper, and (c) making a good faith commitment to comply in the future. 29 CFR 603(d).