

## THE NUTS AND BOLTS OF: DEDUCTING FROM PAY, FMLA ISSUES

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### A. Deducting From Pay

Washington regulates how, how much and when you can deduct items from an employee's paycheck. These laws must be followed carefully because the penalty can be double the amount of the wages mistakenly deducted plus attorneys' fees.

RCW 49.52.050 prohibits a rebate of wages that have already been paid and makes it a misdemeanor to take a rebate of wages. However, RCW 49.52.050 does not apply to a deduction of a prior overpayment of wages. *Cameron v. Neon Sky*, 41 Wash. App. 219 (1985). WAC 296-126-030, however, requires that the company first provide written notice to the employee that the overpayment adjustment will be made and the manner in which the adjustment will be made. The company must take the overpayment within 90 days of the overpayment having been made or forfeit the right to make a deduction from the employee's paycheck for the overpayment. The company does not lose the right to sue the employee for the overpayment. Whether the overpayment is being deducted from a continuing employee's check or from the employee's final check, the deduction can make the gross amount of the check equal to less than minimum wage.

RCW 49.52.050 also does not apply to deductions from wages *to which the employee has agreed in writing and which are for the benefit of the employee and not a benefit to the company*. Such deductions could include advances on wages, repayment of a balance in a company charge account, or repayment of a loan made to the employee by the company. **However, even if the employee agreed in writing to repay the company for certain expensive work related training if the employee left the company within a certain period of time, the company cannot enforce the agreement because the training conferred a benefit on the company--a better trained employee.** If the deduction for the advance, loan or charge account is being taken from a continuing employee's check, the deduction can reduce the gross amount of the paycheck to less than minimum wage. However, if the deduction is being taken from the employee's final paycheck, the deduction cannot reduce the gross amount of the paycheck to less than minimum wage. The company does still have the right to recoup the remainder of the money owed to it through small claims court or, if the amount is too large, District or Superior court.

**The following deductions can only be taken from a final paycheck and cannot make the final paycheck's gross amount less than minimum wage:**

1. Cash shortage—If the cash shortage is from a cash register, cash drawer or portable cash depository, the employer must be able to show that the employee from whom the deduction was taken had sole access to the cash and participated in a cash accounting of the money both at the beginning of the shift and end of the shift. WAC 296-126-025 and WAC 296-126-28. Apparently the State assumes that you will always fire any employee who is cash short and meets the other criteria so there will be a final check.

2. Cash shortage—If not from a cash register, cash drawer or portable cash depository, the employer must be able to show that the employee did it through a dishonest act, not just a mistake or carelessness

3. Bad check/credit card—The employer may make the deduction only if it can show the employee accepted the check or credit card in violation of the employer's procedures which had been made known to the employee by the employer. It is important to have employees sign off on your written procedures for handling cash, taking checks and accepting credit cards.

4. Breakage, loss of equipment or company property, customers walking out without paying—The employer may make the deduction only if it can show the employee acted willfully. For example, a lot attendant who dents a car cannot have the insurance deductible take from his final paycheck unless the employer can show the lot attendant willfully damaged the car, not accidentally damaged the car. If in a fit of rage, the lot attendant runs the car into a wall, it was willful.

5. Failure to return uniforms—The employer may make the deduction only if it has a written agreement with the employee that the employee signed in advance of the time the deduction is to be made. If your company assigns uniforms to some employees, the signed agreement should be in place as part of the new hire packet.

## **B. FMLA ISSUES**

We get frequent calls on FMLA issues. The following are some of the most often asked questions:

1. The worker goes out on a time loss workers' compensation claim. Can the employer put the employee on concurrent FMLA leave? Yes, you can and should run the FMLA leave concurrently with the time loss claim. You already have the proof of a serious health condition lasting more than three days since an employee does not get time loss for work related injuries that require less than three days of absence. True,

you would not have to pay his/her medical insurance during a time loss claim or protect his/her job for 12 weeks, but the worker could come back and then take 12 weeks of FMLA for another illness or a baby.

2. The company puts the worker on FMLA leave but the worker either hasn't worked for the company for at least a year or hasn't worked 1250 hours in the previous year. Once the company discovers its mistake, it asks if it still has to protect the worker's job. The answer is no, not under the FMLA, but the company still needs to determine if the worker has a disability and the leave, with job protection, is a reasonable accommodation.

3. The company forgets to send the FMLA notice to an employee who went on what qualified as an FMLA leave. Can the employer count only the days after the belated notice is sent as FMLA leave or may the employer send the notice and make it retroactive? The Department of Labor's regulations state that the employer may not make the leave retroactive but the courts have said the employer can make the leave retroactive because the intent of Congress was to limit the protections under the FMLA to 12 weeks and no more.

4. The employee claims he/she is out for a serious health condition but refuses to provide the medical certification for the FMLA leave even after having been warned twice in writing that the information is needed. More than fifteen days have passed since you requested the certification. What should the employer do? In this case, the employee is not protected by the FMLA since he/she has failed to perfect the right to the leave. However, we advise that you communicate in writing one more time to the employee and explain that if you do not receive the medical certification within one week of the date of the letter, the leave will not be FMLA leave and his/her employment can be terminated.

5. An employee in your accounting department is out on FMLA leave. The temp who is performing the employee's job discovers that the employee has been embezzling from the company. Can you terminate the employee? Yes. The FMLA provides that the employee is not protected from discipline, including termination, which the company would have implemented had the employee still been on the job and not on FMLA leave.

6. The company must do a reduction in force for economic reasons and eliminate one person in each department. Can you include the employee who is out on FMLA leave in the consideration of which employee in each department should be chosen? Yes, but be careful. Have you developed a written reduction in force plan that will be applied the same to each department? For example, you choose the reduction in force criteria of terminating the employee in each department who has the shortest

tenure. This is a neutral, even handed reason that does not target the employee on FMLA leave. What you cannot do is use the excuse of the reduction in force to terminate the employee on FMLA leave if you would not have terminated him/her if she had still been on the job.

7. You are suspicious of the reason why the employee is on FMLA leave because you have heard rumors that the employee is actually using the time to travel with her over the road trucker boyfriend. Can you follow upon on the rumors? Yes, you can. However, you will need strong positive evidence that the employee is not using the FMLA leave properly. One way to pin down the rumors is to institute surveillance on the employee.

8. The employee who is on FMLA leave has failed to communicate with you during the entire leave. The 12 week period is expiring on Friday. How long does the employee have to return to work and what should the company do? The employee must return within 3 business days of the expiration of the leave. However, we advise contacting the employee in writing (e-mail will suffice) and inform the employee that the leave is expiring and the latest date upon which the employee must return. We advise doing this at least two weeks before the leave actually expires and keeping a copy of the letter or e-mail in the employee's file.

9. An employee wants leave to care for a sick parent but insists that it not be designated as FMLA leave. Does the employee have the right to decide what leaves will or will not be FMLA leaves? No, the employer has the right and the duty to designate any qualifying leave as FMLA leave. In this case, the employee may already know that he/she will need additional qualifying leave later in the year and want to "double dip" by taking one leave as non-FMLA and the other leave as FMLA.

10. One of your employees is taking FMLA leave to have a baby and has told you she "probably" will not return. Can you hire a permanent replacement? No, your employee has not given you *unequivocal* notice that she will not be returning. Place her on FMLA leave, have her position temporarily covered, and see if she does return when the leave expires. If she does not return, unless she had some medical complication that prevented her return, you can recoup the cost of the medical insurance premiums.