

# HR QUESTION ? of the month



## *Employee Suspensions – When and How?*

**Question:** When and how can suspensions can be used? What, if any, ramifications come with them?

**Response:** There is no federal or state law in the state where the company operates that prohibits employers from suspending employees as a disciplinary action or while an investigation takes place, as may occur if the employer reasonably determines that it can more fully and fairly investigate a situation in the employee's absence or where the alleged misconduct is so severe that it would warrant immediate suspension or discharge if the allegations are substantiated. That said and as discussed below, in some cases an UNPAID suspension as to an exempt employee can jeopardize the salary basis that is otherwise required to maintain the exemption status, but even in this scenario an unpaid suspension does not expressly violate the law. Non-exempt employees, including any as may be subject to a tip credit, can be subject to unpaid suspensions absent a contract that precludes them.

As a general rule relative to disciplinary policies, employers have discretion to establish such policies as they see fit if no employment contract otherwise governs the issue. Disciplinary suspensions, and suspensions pending investigation, are within an employer's right to issue if company policy supports these courses of action based on the facts and where the approach is consistent with how the employer has responded to prior similar scenarios. If an employee is non-exempt, he or she need not be paid for a disciplinary or investigative suspension unless company policy, practice or a contract entitle the employee otherwise. As to suspensions pending investigation, employer policies should support issuance of back pay if the employer's investigation reveals no wrongdoing (or perhaps did not reveal any action on the part of the suspected employee that warranted discharge or an unpaid disciplinary suspension). In this way a suspended employee is made whole for the time lost, and does not suffer what effectively is an unpaid disciplinary suspension, if one is determined not to have been warranted in the first place.

If an employee is exempt, however, then note that an employer generally cannot withhold wages or salary for any exempt employee if he or she performs any work in a workweek. That said, there are some exceptions. The federal Fair Labor Standards Act does permit suspension-related deductions from the salary of such employees when such a penalty is imposed in good faith for infractions of safety rules of major significance, OR for unpaid disciplinary suspensions of one or more FULL days, which also must be imposed in good faith for workplace conduct rule infractions (see [https://www.dol.gov/whd/regs/compliance/overtime/modelPolicy\\_PF.htm](https://www.dol.gov/whd/regs/compliance/overtime/modelPolicy_PF.htm)). This provision refers to

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SERIOUS misconduct, though, not basic performance or attendance issues, and arguably not to partial-week suspensions where the employer is merely investigating (i.e., before an unpaid suspension issues as a form of disciplinary action in and of itself). An employer may thus impose in good faith an unpaid suspension upon an exempt employee for infractions of workplace conduct rules, such as rules prohibiting sexual harassment, workplace violence, drug or alcohol use, or for violations of state or federal laws, but not for anything that would meet not this criteria. No suspension can be imposed if there is not a written policy in place that is applicable to all employees and that provides for it.

See <http://www.dol.gov/elaws/esa/flsa/overtime/cr5.htm#3> and [https://www.dol.gov/whd/regs/compliance/overtime/modelPolicy\\_PF.htm](https://www.dol.gov/whd/regs/compliance/overtime/modelPolicy_PF.htm) for a sample policy that mentions this).

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