

How Do Vacation and Sick Leave Buy-Back Programs Affect the Calculation of the Regular Rate for Overtime Purposes?

Employers who provide sick leave and vacation leave time may also have a policy or practice of allowing employees to “sell back” accrued, unused time. Under these “buy-back” programs, the employer will, for a select time period, pay employees for their unused time, in addition to any actual work performed by the employee in that workweek. This then raises the question: do these payments for sick and vacation time have to be counted as part of the employee’s “regular rate” for purposes of computing overtime due during the workweeks in which that time is paid out to the employee?

The U.S. Department of Labor takes the position that under the Fair Labor Standards Act, paid out vacation time does not become part of the regular rate, but paid out sick time does. Under 29 C.F.R. 778.219(a), if an employee “is entitled to a certain sum as holiday or vacation pay, whether he works or not, and receives pay at his customary rate (or higher) in addition for each hour that he works on the holiday or vacation day, the certain sum allocable to holiday or vacation pay is still to be excluded from the regular rate.” Despite this regulation applying to vacation and holiday time buy-back pay, the USDOL takes an opposite view regarding sick leave buy-backs. In 2009, the USDOL released an opinion letter explaining that it viewed sick time buy-back pay as a non-discretionary bonus because of its link to attendance. According to the USDOL, sick leave buy-backs encourage employees “not to use or abuse sick leave, resulting in reduced absenteeism.” Therefore, like attendance bonuses, sick leave buy-back pay must be treated as a non-discretionary bonus and must be included in the regular rate.

Three federal appellate courts have ruled on this issue: the Sixth, Eighth, and Tenth Circuit Courts of Appeals. While the Courts have agreed with the USDOL regarding the exclusion of holiday and vacation leave buy-back pay from the regular rate calculation, they have split on the same issue when it comes to sick leave. The Sixth Circuit, in *Featsent v. City of Youngstown*, found that the payments for unused sick time could be excluded from the regular rate, solely because these are payments for periods of time during which no work is performed. The Eighth and Tenth Circuits, on the other hand, have agreed with the USDOL and held that sick leave buy-back pay must be calculated into the regular rate. The Tenth Circuit, in *Chavez v. City of Albuquerque*, found:

The key difference [between sick leave and vacation/holiday leave] lies in the way in which each type of day off operates. A sick day is usually unscheduled or unexpected, and is a burden because the employer must find last minute coverage for the sick employee. In contrast, vacation days are usually scheduled in advance, so their use does not burden the employer in the way that unscheduled absences do. An employee has a duty not to abuse sick days, whereas there is no corresponding duty not to use vacation days. Buying back sick days rewards an employee for consistent and scheduled attendance . . . thus sick leave buy-backs are compensation for additional service or value received by the employer, and are analogous to attendance bonuses.

When sick leave and vacation leave are combined into one “bank” from which days can be bought back, at least one federal court has held that this time is discretionary, and does not need to be counted towards the regular rate. This decision, however, is by no means universally applicable, and it remains an open question as to how other courts would treat this issue.

The Second Circuit Court of Appeals, which governs employers in New York, has not ruled on this topic. Given the USDOL's opinion and the more recent Eighth and Tenth Circuit decisions, it is probable that the Second Circuit would find that payments pursuant to a sick leave buy-back programs count toward an employee's regular rate for purposes of computing overtime compensation due.

Given this conflicting precedent and the USDOL's position, employers should be aware of the way in which they calculate the regular rate during weeks in which they pay employees as part of a sick leave buy-back program. Employers who fail to account for sick leave buy-back pay in their calculations of the regular rate run the risk of being held liable for additional overtime compensation due.

If you have any questions about this Information Memo, please contact [Theresa E. Rusnak](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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