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## Chronically Absent or Late Employees: Do Not Treat All Alike

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Chronic absence and tardiness in the workplace can wreak havoc on a business. Employers often wonder which actions are likeliest to put an end to these behaviors in the workplace without running afoul of the employment laws. The answer is complex because actions may touch on different employment laws.

There are many reasons for chronic absence in the workplace. Generally, an employee who has a medical condition or illness will be protected from discipline by federal and state laws. Only when the employee's absence becomes an undue hardship on the employer can the employer legally terminate the employee. However, to qualify as an undue hardship, the employee's absences must not constitute merely an inconvenience to the employer, but must involve a significant cost or disruption to the employer's business.

If an employee takes too much time off for unprotected reasons, however, the employer may discipline or terminate that employee. An employer may dock an employee for the day's pay, regardless as to whether the employee is exempt or non-exempt under the federal Fair Labor Standards Act ("FLSA"). An employer may also terminate an employee for taking excess unprotected time off. However, in order to do so, the employer should have a clearly communicated attendance policy and method for keeping track of time off. Employers should also ensure that they enforce the policy in a neutral manner, so as not to violate the anti-discrimination laws.

Employer methods for dealing with employee tardiness are dependent on whether the employee is exempt from the wage and hour laws. An employer cannot legally dock the daily pay of an employee who is exempt from the FLSA. Doing so may be interpreted as treating an exempt employee the same as a non-exempt employee, and thus cause the employer to lose the ability to treat the employee as exempt. This could result in an employer owing an employee for overtime pay. Therefore, it is best to discipline a non-exempt employee for chronic lateness via an oral or written warning.

Employers can dock non-exempt employees for lateness. For example, an employer can dock an employee for an hour's work if that employee arrives at work an hour late. An employer can round up the docked time in half hour increments. So, for example, if an employee arrives at work at 9:17 a.m, rather than 9:00 a.m., the employer can dock the employee by a half an hour. Again, the policy on "docking" should be clearly stated in the employer handbook. An employer could also cut a non-exempt employee's hourly wage, as long as the cut does not result in a deduction below the minimum wage. Before an employer docks an employee or cuts an employee's wage, the employer should make sure they do not have knowledge of a medical condition that may be causing the lateness and that the employer is enforcing policies on a consistent basis.

**Takeaway: Disciplining employees for attendance is one area where all employees cannot be treated alike.**

Have an employment law question? Maybe we can help. Contact [Stephanie D. Gironda, Esq.](#) at (732) 855-6027.

### Attorney

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## Practice

- Employment Law