

Managing Through the Storm

To Pay or Not to Pay?

One of the most important questions asked by employers is, “If my business is shut down in the aftermath of a storm, do I still have to pay my employees?” The answer depends on the status of the employee as exempt or nonexempt under the Fair Labor Standards Act (FLSA), which in turn depends largely on the work he or she performs.

The general answer is that employees that are exempt under the FLSA must be paid an entire week’s salary if they perform any work during the workweek. Conversely, nonexempt employees must be paid only for the hours actually worked. Because this is a generalization and because there are many exceptions and wrinkles that could apply to any particular situation, make sure to contact your legal professional for help.

Nonexempt (usually hourly) employees

An hourly employee must only be paid for work he or she actually performs. Therefore, if your business is shut down as a result of a storm or other natural disaster, you generally do not have to pay nonexempt employees for any hours not worked (with a few exceptions). However, if your employee handbook contains any language or policies to the contrary, then you may be obligated to follow those policies. Likewise, be sure to review your policies and handbooks to ensure they do not contain anything that could give rise to a contract or quasi-contractual claim. Finally, make sure that you do not have an actual employment contract with the employee that could govern the terms of his or her wage payments.

Exempt (usually salaried) Employees

The general rule for salaried/exempt employees is that they are required to be paid if they perform work at some point during the workweek. So, unless your business is shut down for more than an entire workweek, your exempt employees are generally entitled to be paid for the entire week in which they worked.

- One approach employers have considered is to require salaried employees to apply vacation or leave balances for the days not worked. However, the DOL has disapproved of this practice, so employers will do so at their own risk.
- Another approach could be to lower your exempt employees' salaries on a go-forward basis if you reasonably anticipate those employees will be working reduced weeks for an extended period of time. This, of course, could create morale issues, so this option should only be implemented after careful consideration. Additionally, if you have a contract with a salaried employee where the salary term is definite, you will not be able to adjust the salary downward without the employee's consent.
- Employers frequently grapple with the issue of employee compensation after the storm. In a survey conducted after Hurricane Katrina, the Society for Human Resource Management ("SHRM") found that 75% of affected employers provided special pay or other additional assistance to their employees who needed it and 46% said they would keep out-of-work employees on their payroll indefinitely. In a nutshell, if and when the time comes that you are faced with making these decisions, there are other factors that to consider than beyond the bare-minimum legal requirements.

FLSA FAQ

Q: How will I pay my employees if my business is shut down?

A: Consider early direct deposit or withdraw enough cash to pay employees for their services if the banks and ATMs are closed.

Q: Can I require my non-exempt employees to apply their accrued paid vacation or leave time during the time that they are not able to work?

A: If you have a statement in your policies or handbook alerting the employee to this requirement then you may be able to require the use of accrued paid leave during non-working time as a result of a storm or other crisis (but also check your state law requirements or limitations).

Q: Do I still have pay to overtime under the FLSA if employees are working over 40 hours each work to help me clean up or recover from the storm?

A: Yes. The time-and-a-half requirement of the Fair Labor Standards Act continues to apply post-storm along with any specific state and/or local wage and hour laws.

Q: Do I have to pay employees who "volunteer" to come in and help clean-up the office?

A: Yes. For purposes of the FLSA any work performed by a nonexempt employee to benefit the employer must be compensated.

Q: Are employees eligible for unemployment compensation if my business is shut down?

A: Usually yes, but unemployment compensation laws vary by each state – check your state laws to determine the eligibility requirements.

Q: If I provide financial assistance to my employees getting unemployment will that jeopardize their unemployment compensation payments?

A: Generally no, provided that the payments are not conditioned upon any services being provided by the employee. Because unemployment compensation laws vary by state check each your state's laws.

Q: Can I terminate an employee who fails to come to work before or after the storm?

A: Terminating an employee who refuses to come to work to prepare for a storm or fails to return to work after a storm may be problematic. For example, the OSHA General Duty Clause requires all employers to provide a safe working environment for employees. If requiring employees to work puts them in harm's way (if your workplace is not yet safe/secure) you may face OSHA issues. While in most states employment is "at will" (meaning employers may fire an employee for any reason so long as it is not an unlawful reason) you should check with legal counsel before terminating an employee to ensure laws such as FMLA, ADA, and OSHA are not implicated.

Q: Are employees who are injured in a storm eligible for leave under the Family and Medical Leave Act?

A: Qualified employees affected by a natural disaster may be entitled to leave under the FMLA for a serious health condition caused by the disaster if they meet the criteria for an employee's own serious health condition under the FMLA. Additionally, employees affected by a natural disaster who must care for a qualified family member (such as a child, spouse, or parent) with a serious health condition may also be entitled to leave under the FMLA. Remember, employers subject to the FMLA must comply with the Act regardless of other circumstances such as a storm or other natural disaster.

Q: What obligations, if any, do I have for my employees who are deployed with the National Guard, Coast Guard, or other arm of the military in response to a storm or other crisis/natural disaster?

A: USERRA prohibits discharging, denying initial employment, denying promotion, or denying any benefit of employment because of a person's membership, performance of service, or obligation to perform service in uniformed service. Employees do not have any time limit within which they must provide notice. Likewise, notice may be provided by the employee or an officer of the military branch.

Q: Do I have to accommodate an employee who may have been injured during the storm and wants to return to work?

A: The Americans with Disabilities Act requires employers to provide a reasonable accommodation to an employee to perform the essential functions of the job. The employer does not have to create a new job for the employee or displace an employee in another position. However, the obligation to identify a reasonable accommodation to perform the essential functions of the job remains regardless of the storm or other natural disaster.

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