

WAGE AND HOUR WINTER WONDERLAND: ARE SNOW DAYS PAID DAYS?

With the recent winter storms that blanketed the Carolinas – and with more likely to come – this is a good time for employers to review their inclement weather policies and to make sure they properly compensate all employees who miss work because of adverse weather.

1. Pay Issues for Non-Exempt Employees

The Fair Labor Standards Act (FLSA) is the federal law that governs all aspects of employee compensation, including minimum wage and overtime, and impacts whether employees must be paid for time missed at work because of inclement weather. For employees who are not otherwise exempt from the overtime provisions of the FLSA, the analysis of whether they must be paid for missing work is straightforward: Absent an employer policy or agreement to the contrary, those employees do not have to be paid for any time they did not work, regardless of the reason. Neither South Carolina nor North Carolina have any state wage and hour laws requiring otherwise.

Nevertheless, some employers may elect to pay non-exempt employees for a half-day or more, even if those employees are only at work for a few hours. Other employers will choose to pay employees for any hours missed because of an office closing due to adverse weather. Moreover, employers may elect to allow employees to use accrued leave during an office closure. However, such payments are not required by law and are discretionary with the employer. In the end, if a non-exempt employee comes in late, leaves early or does not come in at all, absent a company policy or agreement to the contrary, they only need to be paid for the time actually worked.

2. Pay Issues for Exempt Employees

The issue of employee pay becomes more complicated, however, when dealing with exempt employees who miss work because their employer was closed or the weather otherwise prohibited them from coming into the office. Specifically, the challenge arises as a result of the work the employee's salary is designed to cover under the FLSA.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any workers employed in certain executive, administrative or professional capacities who are paid on a salary basis and compensated at a rate of not less than \$455 per week. The FLSA regulations require that an exempt employee receive his or her full salary for any week in which he or she performs any work without regard to the number of days or hours worked. However, where there is an entire workweek in which no work is performed, exempt employees need not be paid for that workweek.

Accordingly, if an employer closes its office because of adverse weather or another emergency, the employer must pay all exempt employees their full salary and must not deduct any pay from the exempt employees. Specifically, if employees are “ready, willing and able to work, deductions may not be made for when work is not available” [29 C.F.R. § 541.602(a)]. The only exception to this pay requirement for an office closure is where the office is closed for an entire workweek. In that case, an employer may deduct the entire workweek from the employee’s pay.

An employer with a bona fide leave plan may require its exempt employees to use personal, sick, vacation or paid time off for the missed days when the office is closed (U.S. Department of Labor Opinion Letter FLSA2005-41). However, if the employee has no accrued leave, he or she must “still receive the employee’s guaranteed salary for any absence(s) occasioned by the employer or the operating requirements of the business.” In other words, snow days become paid days off from work for those exempt employees without available vacation time.

Conversely, if the business is open, but the employee does not report to work because of inclement weather or transportation issues, deductions may be made from the employee’s pay for each full-day absence. According to the Department of Labor, such absences are deemed personal in nature such that a deduction may be made for any full day missed without jeopardizing the exemption (DOL Opinion Letter FLSA2005-46).

However, during periods of inclement weather, it is not unusual for exempt employees to work less than a full day after either coming in late or leaving early. In that situation, the employee must still receive compensation as if a full day had been worked, because salary deductions for less than full-day absences are prohibited under the FLSA (Id.).

Nevertheless, in the case of an exempt employee not reporting to work when the office is open or leaving early or coming in late, if the employee has available accrued leave, the employer may require that it be taken (DOL Opinion Letter FLSA2005-41).

3. Handling Improper Deductions

If an employer discovers that an exempt employee’s salary was improperly docked because of a “snow day,” the FLSA provides that isolated or inadvertent deductions will not result in a loss of the exemption, if prompt reimbursement is made to the employee [See 29 C.F.R. § 541.603(c)]. In addition, the FLSA contains a safe harbor provision where the exemption is not forfeited if the employer has a “clearly communicated” policy in place that prohibits improper deductions, provides for a complaint mechanism, mandates reimbursement for improper deductions and communicates the employer’s good faith commitment to comply with the FLSA in the future [See 29 C.F.R. § 541.603(d)].

Under these circumstances, it is important that employers with an employee handbook or other written personnel policy should make sure that it contains a broad policy reiterating the company’s commitment to properly calculate compensation and that it urges employees to immediately report any errors in pay.

Employees are often uncertain whether they will be paid when the office is closed. During inclement weather, employers are usually occupied trying to boost productivity

and calculating the next payroll after weather-related closures. To alleviate some of the stress and uncertainty for everyone, it is prudent to have an inclement weather policy in place that complies with the provisions of the FLSA and is clearly communicated to everyone. In short, don't get caught out in the cold without an inclement weather policy.

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N|P Employment and Labor Law Group

CHARLESTON

843.577.9440

Cherie Blackburn
Molly Hughes Cherry
Josh Ellis

CHARLOTTE

704.339.0304

Sean Phelan
Grainger Pierce

COLUMBIA

803.771.8900

Mike Brittingham
Jimmy Byars
Jennie Cluverius
David Dubberly
Vickie Eslinger
William Floyd
Joan Hartley
Angus Macaulay
Susi McWilliams
Nikole Mergo
Sue Odom

GREENSBORO

336.373.1600

Peter Pappas
Bill Wilcox

GREENVILLE

864.370.2211

Grant Burns
Jamie Hedgepath
Leon Harmon
Rusty Infinger
Michael Pitts
Tom Stephenson

HILTON HEAD

843.689.6277

Melissa Azallion

MYRTLE BEACH

843.213.5400

Cherie Blackburn
Molly Hughes Cherry

RALEIGH

919.755.1800

David Garrett
Ernie Pearson
David Robinson

NEXSEN | PRUET

