

Hurricane Florence and the FLSA

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09.12.2018

While the best time for employers to review their inclement weather policies is before extreme weather hits, now is a good time - having recently been through the process with Hurricane Florence - to review and update your inclement weather policy, as well as ensure employees are properly compensated for work missed due to the adverse weather.

With Hurricane Florence threatening the Carolinas, this is a good time for employers to review their inclement weather policies and to make sure they properly compensate 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 pay. For employees who are not otherwise exempt from the overtime provisions of the FLSA, the analysis of when they must be paid for missing work is straight forward: absent an employer policy or agreement to the contrary, non-exempt employees do not have to be paid for any time they did not work, regardless of the reason. Neither South Carolina nor North Carolina has a state wage and hour law requiring otherwise.

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

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee 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 the employee 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.

So, if an employer closes because of adverse weather or another emergency, the employer must pay all exempt employees their full salary and may not deduct any pay from these 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 would be when the employer’s facility is closed for an entire workweek. In that case, the 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 plant or office is closed. DOL Opinion Letter FLSA2005-41. However, if the employee has no accrued leave, the employee 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, weather-related closure 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 DOL, such absences are deemed personal in nature and 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 should 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 employer 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 “weather emergency day,” the FLSA provides that isolated or inadvertent deductions will not result in a loss of the exemption as long as 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 which prohibits improper deductions, provides for a complaint mechanism and mandates reimbursement for improper

deductions, and the employer makes a good faith commitment to comply with the FLSA in the future. See 29 C.F.R. § 541.603(d).

For these reasons, it is important for employers with an employee handbook or other written personnel policy to clearly state the company's commitment to properly calculate compensation and to urge employees to immediately report any errors in pay.

Employees are often uncertain whether they will be paid when the employer is closed. 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.

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