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**Employment Law Considerations When Disaster Strikes: Some FAQ's**

**Question:** If a state of emergency is declared, is an employer legally mandated to pay its non-exempt employees who were unable to work due to a natural disaster?

**Answer:** No. Unionized employers, however, must comply with any specific requirements in their collective bargaining agreements. Some agreements have provisions that address payments during natural disasters, states of emergency, unusual weather conditions, or involuntary shutdowns.

**Question:** If an employer keeps its business open during all or part of the disaster, can it lawfully deduct for a full day absence from the salary of exempt employees?

**Answer:** Yes. Under the FLSA, an exempt employee must be paid his or her entire weekly salary if he or she works during *any portion* of the workweek, even if the employer is forced to shut down operations for part of the week due to a disaster.

An employer lawfully may deduct a full day's absence from the salary of any exempt employee for each day he or she does not work, but:

- If an employee is injured or becomes ill due to the disaster, he or she may utilize paid sick time for the absence.
- If an employer provides for paid personal leave, it may require an exempt employee to use such time to account for the days missed.
- If an employee has accrued vacation or paid time off, the employer may reduce the amount of paid time off available to the employee, *provided* the employee receives payment equal to his or her regular salary.
- If an employee has exhausted his or her paid vacation time or PTO, and the employer shuts down operations for *less than a week*, the employer must pay the employee's full salary for that week.
- If an employer remains open for business, but the employee can't get to work because of weather, illness, injury or accident, the employer may lawfully deduct a full-day's pay from that employee's salary if the employee does no work from home.

**Question:** If an employer remains closed for full week periods on account of a disaster, its aftermath or the clean-up, is it required to pay exempt employees?

**Answer:** No. Employers need not pay exempt employees for full weeks in which no work is performed, whether due to an emergency, shutdown, or any other reason.

**Question:** If an employer decides to stay closed for a period on account of a disaster, its aftermath or the clean-up, is the employer required to pay its non-exempt employees?

**Answer:** For non-exempt employees, an employer only has to pay for actual time worked, subject to state law exceptions, such as "reporting time" pay laws, or any collective bargaining agreements that require otherwise. In practice, an employer may voluntarily pay employees for time not worked in such circumstances, or may allow employees to use paid leave time to make up the difference in their pay.

**Question:** What if an employer did not realize that the disaster would be as severe as it was and had called in some of its exempt and non-exempt employees and then sent them home shortly thereafter – are they entitled to be paid?

**Answer:** If an exempt employee reports for work and is later sent home due to weather conditions, he or she must still be paid for the entire day.

Non-exempt employees are required to be paid for all work that they perform. New York, New Jersey, Massachusetts and perhaps other states, require payment of so-called "call-in" or "reporting time" pay for those employees who come to work but are sent home early because of the weather. Under this provision, if an employer requests or gives permission to a non-exempt employee to work, it is required to either pay a minimum of four hours, or the number of hours of an employee's regularly scheduled shift, whichever is less, at the basic minimum hour rate (minimum wage).

**Question:** Must an employer pay employees for work they perform remotely or at home?

**Answer:** Exempt employees must receive the full day's salary for *any* work, whether that work is performed remotely or in the workplace. Non-exempt employees must also be paid for all "hours worked," regardless of where the work is performed.

**Question:** Must employers pay employees for additional time spent commuting to and from work due to the weather, transit and/or road conditions?

**Answer:** As long as employees did not perform work while commuting to work, such as answer calls, an employer does not have to pay for additional time spent commuting to and from work.

**Question:** If an employee (or his or her family member) sustains an injury during the disaster (or its aftermath), is an employer required to provide the employee with a leave of absence? What if an employee sustained no injuries during the natural disaster, must an employer nonetheless provide the employee with a leave of absence?

**Answer:** An employee who sustains an injury during a disaster (or whose family member sustained an injury) may qualify for FMLA leave to care for him - or herself or the family member. An employee may also be entitled to sick leave or other paid leave under company policies or collective bargaining agreements.

**Question:** Must an employer provide the employee with a leave of absence if the employee (or a family member) sustained no injuries during the disaster?

**Answer:** No.

**Question:** If an employee is injured as a result of the natural disaster, must an employer accommodate the employee's injury?

**Answer:** Employees who are physically or emotionally (e.g., post-traumatic stress disorder) injured as the result of a disaster may be entitled to reasonable accommodation under the ADA and/or corresponding state and local laws.

**Question:** What pay is required for employees required to be on duty, on premises, or "on-call" for extended periods of time?

**Answer:** According to DOL FLSA regulations, an employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in other personal activities when not busy.

An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked *bona fide* regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep.

No reduction is permitted unless at least 5 hours of sleep is taken.

Nonexempt employees must be paid for on-call time if they are waiting to be engaged and are not free to use time for their own purposes (*e.g.*, an employee required to report to the employer's premises within ten minutes or check his or her E-mail every five minutes). The test is whether the time is predominantly for the benefit of the employee or the employer.

**Question:** Is an employer required to pay employees who volunteer to assist with cleanup, or to man "hotlines" or call-in centers?

**Answer:** Generally, yes. If an exempt employee volunteers to help with an employer's cleanup efforts for a limited period of time, the employer will not be legally obligated to pay the employee more than his or her regular weekly salary.

If a non-exempt employee volunteers to help a for-profit employer recover from storm damage, the employee must generally be paid for his or her time, even if he or she has agreed to work for free.

**Question:** Do exempt employees who perform disaster emergency clean-up duties (such as manning pumps, stripping drywall or filling sandbags) lose their FLSA-exempt status?

**Answer:** It is possible, at least for that pay period. The exemption would be reinstated when the employees return to their regular exempt duties.

#### NOTE

I have not touched upon disaster-related, but important Workers Compensation, unemployment insurance or OSHA issues.