

Winter Is Coming—Wage and Hour Considerations During Weather-Related Emergencies



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Posted in **Wage and Hour**

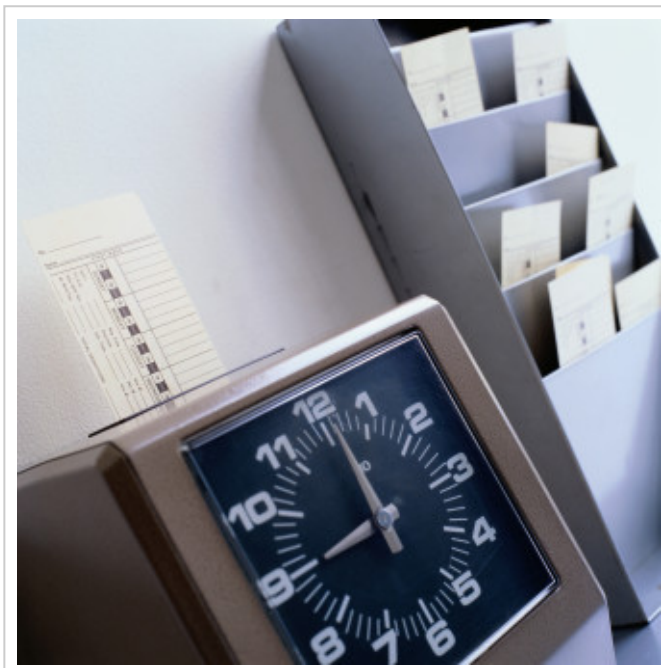
With winter storms around the corner, it's the right time to revisit employer rights and responsibilities during a weather-related emergency or other major disruption. We discuss below some typical scenarios that you are likely to face during weather-related or other emergencies, and the consequences under the wage and hour laws.

“Our office was closed for a few days because of the storm. Do we have to pay our employees for those days?”

Non-exempt (*i.e.*, overtime-eligible) employees generally have to be paid only for hours they actually work. So if a non-exempt employee cannot work because your office is closed—or because the employee cannot make it into the office because of weather-related conditions—the wage and hour laws do not require you to pay the employee for non-working time. On the other hand, a non-exempt employee who performs work remotely (say, from home, from a temporary site, or from a coffee shop) is entitled to pay for the time worked.

An exception exists for salaried non-exempt employees, who may—depending on the terms of their agreement with the employer—expect to receive their full weekly salary regardless of how many hours they actually work that week.

Exempt employees (*i.e.*, employees not entitled to overtime pay) generally receive their full salary for any week in which the office is closed for *less* than a full workweek. Employers who prorate an exempt employee's weekly salary because of office closure risk losing the exemption for the week in question—a consequence that may or may not be material depending on how many hours the employee works that week. If your office is closed for an *entire* workweek, you can inform all employees of the closure and you need not pay them for that week (unless they are working remotely).



Be sure to check any agreements with exempt employees—as well as offer letters, policies, or other statements regarding the nature of their pay—which may also limit your ability to prorate salary during office closures and/or give rise to pay claims.

“Our office was open, but some of our staff could not make it in because of the weather. Do we need to pay them?”

As described above, non-exempt employees generally must be paid only for hours they actually work, but salaried non-exempt employees may have a contractual right to receive their full salary for any week in which they perform any work.

Exempt employees who are absent from work for one or more full days because of inclement weather, including because of transportation difficulties, are considered to be absent for personal reasons (if the office is otherwise open). Absent a contractual right to be paid, they do not have to be paid for the days they fail to report to work, and your failure to pay them for such days will not jeopardize their exempt status. Deductions for partial-day absences under these circumstances, however, will violate the salary basis rules and jeopardize the exemption for that week.

“Because of flooding or another dangerous condition, we had to close our office after a number of employees had already reported for work. Do we have to pay them for the day?”

Exempt employees who report to work but are turned away or sent home by their employer generally must receive their salary for that day. Non-exempt employees who report to work but are turned away or sent home must be paid for all hours actually worked that day. In addition, some states have “reporting pay” or “call in” pay laws that require employers to pay non-exempt employees a minimum number of hours’ pay for any day in which they report to work.

“Our payroll records were destroyed in the storm, or are inaccessible. How do we pay our employees?”

Exempt employees paid on a salary basis should receive their normal salary payment (less any permissible full-day deductions). For hourly non-exempt employees, use a reasonable method to determine the number of hours worked, such as:

- Asking the employees themselves to submit a certified time sheet indicating the number of hours they worked;
- Recreating hours worked through electronic records (g., card/ID swipes or log-ins/log-outs);
- Making assumptions based on an employee’s fixed or regular schedule of hours;
- Asking managers to verify hours worked; or
- Some combination of the above.

“Can we require our employees to use available vacation days or other paid time off during a weather-related office closure or absence?”

Yes. Under federal law and the laws of most states, employers are not required to provide vacation benefits or other paid time off to employees. Such benefits are generally a matter of agreement between employer and employee, or set forth in the employer’s handbook or policy. Under these circumstances, there is no prohibition on an employer giving PTO and requiring that it be taken on specific days. So long as it’s

permitted under the applicable PTO policy or agreement, employers can reduce an employee's accrued PTO bank for either partial or full day absences, without violating the wage and hour laws.

“Can we give our staff additional paid or unpaid time off to assist in recovery or relief efforts?”

Employers can grant their employees additional paid and unpaid time off for any reason, including assisting with storm-related recovery and relief efforts.

Employees who are assisting in relief efforts as part of the National Guard or Armed Forces Reserves may have additional rights under federal and state law.

Because of the snow, it took our employees twice as long to commute to work as opposed to most other days. Do we need to pay them for the additional commute time?”

Time spent in an employee's normal commute from home to work at the beginning of the workday, and from work to home at the end of the workday, is not considered time worked and need not be paid.

“Some of my employees are members of a union. Do these rules apply to them as well?”

Collective bargaining agreements generally cannot waive or reduce the protections available to employees under federal, state, or local wage and hour laws. Collective bargaining agreements can, however—and often do—impose different and additional pay, time off, and other obligations on employers. Employers with unionized employees should consider all applicable agreements when analyzing their rights and responsibilities in the context of a weather-related emergency or other “force majeure” event.

“We want to do more for our employees, to go above and beyond what the law requires. What are some things we can do?”

There are many options available to an employer who wants to do more for its employees, including:

- Granting additional paid or unpaid time off
- Allowing employees to donate accrued paid time off to other employees (i.e., leave-sharing plans)
- Allowing affected employees to work remotely for some period of time
- Making emergency advances of salary or loans
- Setting up disaster-relief programs or payments
- Making certain payments to assist disaster victims that can be excluded from their taxable income
- Setting up food and clothing drives

Final Thoughts

Employers making decisions about scheduling, pay, and time off during weather-related emergencies and disruptions should bear in mind the potential implications on employee morale. Flexibility and support in times of need—or the absence of them—are likely to be remembered long after the storm passes.

As always, check state and local laws—as well as your contracts and policies—before making any final decisions regarding wages, hours, or time off.

Stay warm and informed. Visit Proskauer's wage and hour blog for up-to-date information on the latest issues and developments.

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