

ALERT

SPECIAL ALERT HURRICANE SANDY STORM EDITION

May Employees Be ‘Docked’ For Time Lost Due To Hurricane Sandy?

By Bennett Pine

Many employers, already facing financial hardship due to the economic down-turn, wonder whether they must shoulder the additional financial burden of continuing to pay employees during Hurricane Sandy or whether they may “dock” employees for time lost during the storm. The answer generally turns on (i) the type of employee and (ii) the reason for the lost time.

Exempt Salaried Employees

As a general proposition, employees who are paid a fixed salary and who are considered “exempt” from federal and state overtime and minimum wage requirements as “professional,” “executive,” “administrative,” or “computer professionals” must be paid their full fixed, unreduced “salary” without regard to variations in the “quantity” or “quality” of their work, in any week in which they:

- Perform work — regardless of how many hours or days they work (or how “well” they perform), and
- Are ready, willing and able to work, but aren’t able to do so because no work is available.

However, employers may permissibly *dock* exempt employees’ pay for:

- Absences greater than a day for *personal reasons*.
- Absences greater than a day pursuant to a bona fide sick leave plan.
- Violating safety rules of major significance.
- In initial and terminal weeks of employment where the employee does not work the full workweek.
- Disciplinary suspensions as long as certain requirements are met.

In other words, if the salaried, exempt employee misses work because the business is closed at the business owner’s discretion (or due to an evacuation or other governmental-declared state of emergency), rather

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than the employee's own choice or personal circumstances, the exempt employee still is entitled to receive his/her full salary in any workweek in which they perform any work. However, when the business is open, employee absences due to commutation, child-care and related family issues are considered "personal reasons" by the United States Department of Labor and may be docked on a full day basis. Further closures for a *full workweek* need not be compensated if no work is performed. In any event, exempt employees should not be docked for partial day absences or lateness.

Non-Exempt and Hourly Employees

In contrast to the above, as regards hourly and non-exempt salaried employees, there is generally no obligation under either state or federal laws to pay employees for time not worked. Employers should be aware, however, that certain states, including New York and New Jersey, have laws that require non-exempt employees to receive a minimum amount of "show up" or "reporting" pay if they report to work either by permission or request of the employer, only to be advised that work is not available and/or are sent home.

In addition, while employers generally can require all employees to use "banked" vacation/sick/personal time, if the exempt employee has no banked time remaining, s/he probably needs to be paid for the closure decision.

In instances where union contracts or individual employment agreements apply, those clauses will likely govern and must be examined.

Finally, legal consideration aside, employers should be sensitive to the public relations, employee relations and morale issues arising from docking employees for time lost through no fault of their own. ▲

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