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Considerations for New York Employers in the Wake of Hurricane Sandy

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The aftermath of Hurricane Sandy, and the one-year anniversary of Hurricane Irene, present unfortunate reminders to employers of the need to prepare effectively for the various employment-related issues posed by natural disasters. What follows are some frequently asked questions and answers (FAQ) to help guide New York employers through some of the critical issues they may face in times of crisis.

Note: In following these FAQ, employers should be mindful of any collective bargaining agreements or, in the non-union setting, personnel policies they may have promulgated that require pay at a higher rate, or for more hours, than are required by the regulations discussed below.

Question: When a state of emergency is declared, is an employer legally mandated to pay its non-exempt employees¹ who were unable to get to work due to a natural disaster?

Answer: No. In New York, there is no state law that requires employers to pay non-exempt employees for time not actually worked. This applies regardless of whether there is a declared state of emergency. However, unionized employers 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, can deductions lawfully be made for a full day absence from the salary of exempt employees?

Answer: Yes. An employer may lawfully deduct a full day's absence from the salary of any exempt employee for each day he or she chooses not to show up to work. But, if the exempt employee works part of the day, even from home, an employer cannot make any deduction. However, depending on a company's policy, it may require an exempt employee who voluntarily misses work to utilize his or her paid vacation or other leave to account for the absence. Also, if an employee is injured or becomes ill due to the storm, he or she may utilize paid sick time for such absences.

¹ For purposes of these FAQ, "non-exempt employees" are those employees who are subject to the minimum wage and overtime requirements established by the federal Fair Labor Standards Act (FLSA) and New York law. These employees must receive overtime pay for each hour worked above 40 hours a week. "Exempt employees" are those employees exempt from overtime rules, including those classified as executives, administrators, and professionals under the law.

Similarly, if an employer provides for paid personal leave, it may require an exempt employee to use such time to account for the days voluntarily missed. See below for questions regarding employees who work remotely or work from home.

Question: If an employer decides to stay closed, can it make deductions from an exempt employee's salary? What about from a non-exempt employee's salary?

Answer: If an employer decides to stay closed, it cannot make any deductions from its exempt employees' salaries, even if an employee would not have been able to make it to work. But, depending on company policy, an employer may require its exempt employees to utilize paid leave to account for the absences.

For non-exempt employees, an employer only has to pay for actual time worked, subject to New York's exceptions, such as "reporting time" pay laws, or any contractual agreements, such as collective bargaining agreements, that say otherwise. 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 storm 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 attends work and is later sent home due to weather conditions, he or she must still be paid for the entire day.

For non-exempt employees other than those in the hospitality industry, New York requires the payment of what is 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).

Employees in the hospitality industry: If a non-exempt employee, by request or permission of an employer, reports for duty on any day, he or she must be paid at the applicable wage rate (explained below):

- For at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;
- For at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and
- For at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less.

How to calculate the applicable wage rate: Payment at the regular or overtime rate of pay for the hours actually worked, minus any customary and usual tip credit, plus payment of the balance of the period at the basic minimum hourly rate (minimum wage), with no tip credit subtracted.

Question: What if an employer, due to weather conditions, requests a non-exempt employee to work a spread of more than 10 hours, or requires an employee to work split shifts, or both?

Answer: Outside of the hospitality industry, if a non-exempt employee works a spread of hours that exceeds 10 hours, or if there is a split shift, or both, an employer will have to pay the employee at least one additional hour's pay at the basic minimum hourly rate (minimum wage), unless the employee has sufficient earnings in the day (*i.e.*, is paid at a high enough rate) to cover the extra hour of pay at the minimum rate.

Employees in the hospitality industry: In restaurants and all-year hotels, if an employee works a spread of more than 10 hours, he or she must receive one additional hour of pay at the basic minimum hourly rate (minimum wage), *regardless* of his or her rate of pay and any other earnings during the day. This additional hour may not be offset by any credits for meals or lodging provided to the employee.

Question: Must employers pay employees for work performed remotely or at home?

Answer: Exempt employees must receive the full day's salary for any work, whether that work is done remotely or in the workplace. Non-exempt employees must also be paid for all "hours worked," regardless of where the work is performed. Thus, employers should also make sure that any such work, particularly by non-exempt employees, was authorized and/or in compliance with company policy. If not, employers should put a stop to it immediately, because the hours must be paid. Similarly, employers should make sure the time reported is the amount of time actually worked. It is recommended that employers require employees to carefully track any time worked at home.

Question: Must employers pay employees for additional time spent commuting to and from work due to the weather and 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) sustained an injury during Hurricane Sandy, 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 sustained an injury during Hurricane Sandy (or whose family member sustained an injury) may qualify for leave under the federal Family and Medical Leave Act (FMLA) 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.

Even if an employer's policies (or practices) do not allow non-medical leaves of absence, the circumstances of a natural disaster will probably present extraordinary circumstances that may allow an employer to grant the time off to employees directly or indirectly affected by the disaster. While strict adherence to leave policies is the conservative and prudent management approach for employers in normal operating circumstances, when a disaster strikes employers should be flexible and considerate by expanding or at least temporarily relaxing otherwise restrictive existing leave policies. Even if a change or relaxation in policies may result in some operational inefficiencies or reduced revenues to an employer, companies should consider the value and propriety of the company's contributions as corporate citizens in assisting others during a time of great need – and employers should also consider the possible repercussions to the company's image in the community and as an employer if it does exercise informed judgment on these issues. Of course, in making exceptions, employers must remain mindful of state and federal anti-discrimination laws, and ensure that such exceptions are based on legitimate, non-discriminatory reasons.

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 natural disaster may be entitled to reasonable accommodation under the federal Americans with Disability Act (ADA) or corresponding state and local laws.

Question: What should an employer do if it is unable to process its employees' wage payments as a result of the natural disaster?

Answer: One anticipated effect of a natural disaster is the delayed processing of employees' wage payments, such as by those companies directly affected by Hurricane Sandy. New York law requires manual workers to be paid weekly, not later than seven days after the end of the week in which wages are earned. Commission salespeople must not be paid less frequently than once a month. All other employees must be paid not less than semi-monthly. An employer must notify employees of any change in paydays at least seven calendar days prior to such change.

Although some laxity may be afforded to those who experience significant difficulty meeting these types of obligations as a result of unforeseen disaster, the New York State Department of Labor has not indicated that there is any relief or waiver of the normal wage payment laws. If your company has a situation where you cannot meet payroll obligations, we suggest that you notify employees as stated in the following paragraph, keep records of the reasons for the delay, and then make arrangements to pay your employees as promptly as possible.

We suggest that employers promptly notify their employees in writing of any wage payment processing problems and advise them of when they can expect payment, particularly where employees are on direct deposit and might otherwise write checks against anticipated deposits.

We hope our clients and friends have weathered the storm and are rebuilding. We want to remind you that we are here to help with any of your questions.

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