



## **WAGE AND HOUR ISSUES In the Event of a Natural Disaster**

Pay policies and the decisions you make as a business impact your workforce and speak to your culture. They can also differ in situations where a natural disaster has occurred and affects the opportunity or ability to work. Because of this there is often a distinction between what is lawful and what you feel is best practice for your business. You should also refer to your policies and customary practices for guidance during the time of a disaster.

### **Must we keep paying employees who are not working?**

Pay obligations differ during inclement weather closures based on employee classifications according to the Fair Labor Standards Act (FLSA).

**Non-Exempt employees:** The FLSA requires employers to pay non-exempt employees only for hours that employees have actually worked. Therefore, an employer is not required to pay non-exempt employees if the employer is unable to provide work to those employees due to a natural disaster, unless you have a policy that dictates this.

Employers may generally require non-exempt employees to use PTO in times of inclement weather or natural disasters. If the employee has no accrued benefits in the leave bank, the employer is under no obligation to pay for hours not worked.

**Exempt employees:** Exempt employees almost always must be paid when they work any portion of a workweek, including situations of inclement weather and natural disaster.

***If an employer sends exempt employees home early because of a natural disaster, an employer is obligated to pay exempt workers for the entire day. If an employer decides to close for an entire day because of inclement weather, an employer is still required to pay exempt employees for the entire day.***

***If an employer closes the worksite due to a natural disaster for less than a full workweek, and the exempt employee has worked any portion of that work week, the employer must pay the employee's full salary.***

***If an employer closes the worksite due to a natural disaster for a full workweek, the employer is not generally required to pay the employee for the week the business is closed. Exempt employees must receive their full salary for any week in which they perform work, but if the business is closed and no work is performed, the employer may withhold pay for that week.***

NOTE: Employees may be eligible for unemployment insurance compensation for work closures due to natural disasters. Consult the "Unemployment" section of the Toolkit for more information.

***If the worksite is open and an exempt employee is unable or unwilling to work for a full day for personal reasons (which include accessibility, transportation, or personal issues dealing with the effects of the natural disaster),*** the lost time can be paid or unpaid at the discretion of the company, and depending on whether the employer has policies that permit the exempt employee to use accrued PTO for personal absences. If the absence is for a partial day, time may be deducted from the employees PTO bank or the employer can optionally require the exempt employee to make up lost time, but partial day deductions from pay are not permitted.

Employers may generally require exempt employees to use PTO unless: (1) the employer does not have a bona fide benefits (aka vacation, PTO) plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank.

When requiring employees, whether non-exempt or exempt, to use their PTO for business closures, employers should have a written policy in place to inform employees of this requirement. Mandatory use of PTO for both exempt and non-exempt employees can be applied to full-day or partial-day absences. Policies should be applied fairly and consistently to avoid any potential discriminatory claims from employees.

You may also have to consider a legal obligation to keep paying employees under the terms of an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract.

**On call time.** An employee who is required to remain on call at the employer's premises or close by is considered to be "on call" and the employer may be required to pay that employee for all of his time. For example, maintenance workers who remain on premises during a storm to deal with emergency repairs must be compensated, even if they perform no work, if they are not free to use their time at their discretion.

**Waiting time.** If an employee is required to wait, that time is compensable. For example, if employees are required to be at work to wait for the power to restart, that is considered time worked.

### **Are there exceptions to overtime rules in the event of a natural disaster?**

There is no "emergency" exception to the Fair Labor Standards Act (FLSA) that relieves you from your obligation to pay legally required wages. Employees subject to the FLSA's overtime provision must be paid overtime at a rate of at least 1.5 times their regular rates of pay for all hours worked over 40 in the designated seven-day workweek. Overtime "work-arounds" such as providing time off in lieu of paying overtime is not permitted regardless of the reasons for the overtime.

Employees covered by a collective bargaining agreement or some other contract or enforceable understanding might be due more than the FLSA requires. Perhaps the terms of that agreement or understanding relax those requirements in emergencies. However, no such "agreement" can override the FLSA's requirements.

**Can an employee volunteer to perform recovery services for us without pay?**

No. The FLSA does not permit employees to “volunteer” to work for their employer. All hours an employee performs work for an employer should be paid.

**What do we do about lost time records for work already performed but not yet paid?**

Under most federal and state laws, employees must be paid on their regularly scheduled payday for time worked. If time records are lost as a result of a disaster, employers must pay employees based on their regular hours or have employees self-report hours worked.

You may need to:

- Recreate the most-accurate accounting you can under the circumstances. Then, have affected employees review, correct, and confirm the recreated time records or,
- Ask each employee make the best-possible estimate of their hours worked. You should obtain the employee’s written acknowledgement of their best recollection and should include the employee’s authorization allowing later corrections in worktime and pay should more accurate hours-worked information become available.

**What happens in the event are electronic timeclocks are not working?**

You may require employees to continue to self-report hours worked by using handwritten timesheets or by other manual means until your customary timekeeping methods are restored. To ensure accuracy, each employee should enter their own time and should record the actual times when their work starts and stops each workday, on a daily basis, preferably including lunch and other breaks. At the end of each week and the end of the pay period, employees should sign and/or acknowledge the time submitted is correct to their best recollection.