

## Hurricane Season is Here

*How do I handle absences, pay issues, and other items?*

The personal toll on individuals, families, and communities from Hurricane Irene has been tremendous and the outcome is still being discovered by many. While the issue of business closure pales compared to loss and disruption of life, it is a concern of employers around the country as they review their own situations and disaster planning. While most of us have been lucky enough not to deal with such serious destruction, all businesses face the potential of emergency closing, although on a much smaller scale.

A significant issue for employers and employees is: if we have to close for a day, week, or longer because of bad weather, power outages, or other emergencies, how do we handle paying employees?

### **Must Employees Be Paid If You Have To Close Because Of Bad Weather?**

Maybe. Would you have expected any other answer but “maybe” given the complexity of HR law? Whether employees must be paid in such circumstances depends on a number of things including: exempt/nonexempt status, the length of the closure (i.e., for a week, a day or a part day), and state law.

### **What’s exempt status got to do with it?**

Remember that under the federal Fair Labor Standards Act (FLSA), to be exempt, an employee, generally, must be paid on a salary basis, among other requirements. To meet the “salary basis” test an employee must be paid a predetermined amount that can’t be reduced because of the quantity or quality of work performed, including partial day absences or lateness.

The FLSA regulations make clear that salary deductions because of “employer or...operating requirements” would violate the salary basis test. Therefore if an exempt employee is “ready, willing, and able to work, pay deductions may not be made for time when work isn’t available.”

### **So if we close early because of bad weather or a power outage must we pay employees?**

*Exempt Employees:* Yes. To do otherwise would violate the salary basis test.

*Nonexempt Employees:* Probably not unless yours is one of the states that requires that employees be paid a minimum amount of pay for reporting to work.

### **What if we close for a whole day or even 2 days in a week, must they be paid?**

*Exempt Employees:* Yes, same answer as above. They must be paid.

*Nonexempt Employees:* No payment is required.

### **What if the closure lasts a week or more?**

*Exempt Employees:* No. The FLSA regulations provide that, generally, an employee need not be paid for any workweek in which she performs no work.

*Nonexempt Employees:* No payment is required.

### **Can we require that employees use vacation time if the business is forced to close because of emergency or bad weather?**

*Exempt Employees:* The federal Fair Labor Standards Act does not address vacation pay. In general, as long as exempt employees receive amounts equal to their regular salaries the FLSA isn’t violated by substituting vacation pay. However, such an approach may create unintended problems, including serious morale issues, as some employees may have exhausted their vacation, thereby requiring that they be paid their regular checks, while others could be forced to use their vacation. Additionally there may be state law requirements. Be cautious on this one.

*Nonexempt Employees:* Requiring a nonexempt employee to use his vacation days would be governed by company policy. This also has the potential to create morale problems as some employees may have exhausted their accrued vacation.

### What if an employee is unable to leave work on time because of bad weather or other circumstances?

**Exempt Employees:** There is no issue regarding exempt employees who must be paid their predetermined regular salaries no matter how many hours they work.

**Nonexempt Employees:** If nonexempt employees work beyond their regular hours (or are allowed to do so) because they are “stuck” at work, they would need to be compensated. There may also be overtime implications.

### What about state law?

Some states have “reporting pay” laws that require employees to be paid a minimum number of hours for reporting to work, even if they are sent home early. Some states also have exceptions to their reporting pay requirements and don’t require such payments if the business closure results from threats to employees or property, recommendations by local authorities, public utility failure, or Act of God. Check your state law to determine if you’re subject to these types of requirements.

### What should your company do?

While your business may never be destroyed or seriously damaged because of bad weather, it’s likely at some point that snow, ice, rain, power outages, or other cause may require you to close. Most states do not impose reporting pay requirements; however, you’ll still need to determine how you’ll handle the situation. Some companies voluntarily implement policies that provide nonexempt employees with a couple of hours of pay for reporting to work. Others allow employees to use vacation time if desired. Some simply pay their nonexempt employees only for their “hours worked.” It’s wise to plan ahead and decide what your approach should be.

### What else should you think about?

In instances of more serious disasters you may want to consider:

- **Temporarily Altering Your Time Off Policies.** Funeral, sick, vacation, unpaid time off, and other policies should be reviewed and perhaps expanded. Just make sure that you still apply them consistently.
- **FMLA Issues.** Look closely at Family and Medical Leave (FMLA) requirements as well as your personal leave policies. People may not be sick or injured but just need time to deal with personal issues.
- **ADA Issues.** Remember that the Americans with Disabilities Act (ADA) may require you to provide reasonable accommodations to employees who have been both physically and emotionally injured.
- **COBRA.** You may have considerable COBRA and other benefit continuation issues if you are forced to close for a lengthy time or have to layoff employees.
- **Telecommuting.** It may be wise to have considered your telecommuting options before disaster strikes, including developing policies and procedures.
- **Layoffs And Reductions In Force.** If you are forced to close all or part of your operation do you have effective policies in place to address the issue? Are you familiar with the WARN Act (Worker Adjustment and Retraining Notification Act)? Any applicable state laws?
- **Disaster Recovery And An Emergency Preparedness Plan.** Do you have one in place?

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