

# Insight

IN-DEPTH DISCUSSION

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## Inclement Weather FAQs: Who Gets Pay for a Snow Day?

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As winter progresses, employers may find themselves monitoring the weather and wondering how to handle numerous operational headaches. Should a worksite close? If so: when, and for how long? Who can work from home, and who must be paid for what time? The kids may be hoping for a snow day, but employers know that winter weather creates a host of complications, including dangerous commutes and school closings, as well as delivery and service delays.

In dealing with such disruptions, employers should be prepared to resolve payroll issues that stem from inclement weather. To that end, we review a few common weather-related wage and hour questions. In doing so, we are guided primarily by the federal Fair Labor Standards Act (FLSA), although state laws may come into play as well.<sup>1</sup>

### ***Does the FLSA require employers to pay non-exempt employees if they cannot work due to the weather?***

Under the FLSA, non-exempt workers must be paid only for the time they work. As a result, employers need not compensate non-exempt employees who are not working because of bad weather. Notably, it does not matter whether the absence is based on the employer's decision to close a worksite or the employee's decision to stay (or go) home. If the worksite is open, but the employee decides to stay home or to leave a shift early, the non-exempt employee does not need to be paid for the hours missed.

There may be exceptions during a storm for waiting time, or on-call time. The FLSA considers employees to be "on call" if they must remain on the employer's premises and are unable to use their time for their own

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<sup>1</sup> Of course, specific agreements between employers and employees might also be relevant, along with applicable policies or collective bargaining agreements.

purposes.<sup>2</sup> Thus, for example, if employees are required to remain at a location that has lost power in case power returns, they should be paid for the time spent holding down the fort despite their inactivity.

### ***Do other laws require compensation to non-exempt employees, even if they are not performing work during inclement weather?***

Unlike the FLSA, state laws may require compensation to non-exempt employees in certain circumstances. “Reporting time pay” laws—found in several states as well as the District of Columbia—obligate employers to pay non-exempt employees who report to work as required or as requested by the employer, even if no work is then performed.<sup>3</sup> These laws vary by jurisdiction, but typically they require employers to compensate employees who were scheduled to work a certain number of hours and then are not needed for any or all of the scheduled time.<sup>4</sup> In California, for example, employers must compensate such employees for half of their scheduled hours, up to a maximum of four hours even if they do not work.

Some employers may also be bound by “secure” or “predictable” scheduling laws. A few localities, such as Seattle and San Francisco, have passed legislation requiring that employers provide employees with their schedules two weeks in advance of their shifts.<sup>5</sup> Generally speaking, employers that alter work schedules must compensate employees both for hours added and hours lost. These laws also require employers to pay for hours that their employees are scheduled “on call,” but are not utilized.

Most of these state laws include exceptions, however, that might apply in extreme-weather scenarios. For example, the California reporting time pay is not required if public utilities fail (*i.e.*, electricity, water, gas or sewer) or if the interruption of work is caused by an Act of God or another cause not within the employer’s control, such as an earthquake. The Seattle ordinance also includes an exception for hours lost due to natural disaster or due to a loss of power or other utility service. Suffice it to say, however, that employers with locations covered by these laws should be aware of these requirements and carefully evaluate the applicability of any exceptions.

### ***What about exempt employees? Are they paid if an employer shuts down its operations? Can they be required to use paid time off?***

When an employer shuts down its operations because of adverse weather conditions for less than a full workweek, exempt employees must be paid their full salary.<sup>6</sup> This rule also applies if exempt employees work only part of a day. Thus, if an employer decides to send staff home early due to deteriorating conditions, it may not dock exempt employees’ pay. Indeed, if an employer deducts from the employee’s salary in this situation, it risks losing the exemption applicable to that employee.

Nonetheless—and barring any state law, local ordinance, or overly restrictive company policy to the contrary—exempt employees may be required to use accrued leave or vacation time (in full or partial days)

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<sup>2</sup> See, *eg.*, 29 C.F.R. §§ 785.14, 785.15, 785.17.

<sup>3</sup> Reporting time pay laws have been enacted in California, Connecticut, D.C., Massachusetts, New Hampshire, New Jersey, New York, Oregon (as to minors only), and Rhode Island.

<sup>4</sup> Christopher Kaczmarek, *Reporting Time Pay: A Wage & Hour Winter Wonderland*, Littler Insight (Jan. 6, 2011), <http://www.littler.com/reporting-time-pay-wage-hour-winter-wonderland>.

<sup>5</sup> Doug Smith, *Seattle City Council Approves Secure Scheduling Ordinance*, Littler Insight (Sept. 20, 2016), <http://www.littler.com/publication-press/publication/seattle-city-council-approves-secure-scheduling-ordinance>; Michael Brewer, et al., *San Francisco Ordinance Imposes New Burdens on ‘Formula’ Retail Employers*, Littler Insight (Dec. 9, 2014), <http://www.littler.com/san-francisco-ordinance-imposes-new-burdens-formula-retail-employers>.

<sup>6</sup> 29 C.F.R. § 541.602(a) (explaining that deductions may not be made when work is unavailable at the employer’s instruction); see U.S. Dep’t of Labor, Wage and Hour Div., Opinion Letter FLSA2005-46 (Oct. 28, 2005), [https://www.dol.gov/whd/opinion/FLSA/2005/2005\\_10\\_28\\_46\\_FLSA.htm](https://www.dol.gov/whd/opinion/FLSA/2005/2005_10_28_46_FLSA.htm) (stating that exempt employees must be paid where “the employer closes operations due to a weather-related emergency or other disaster for less than a full workweek”); U.S. Dep’t of Labor, Wage and Hour Div., Opinion Letter FLSA2005-41 (Oct. 24, 2005), [https://www.dol.gov/whd/opinion/FLSA/2005/2005\\_10\\_24\\_41\\_FLSA.htm](https://www.dol.gov/whd/opinion/FLSA/2005/2005_10_24_41_FLSA.htm).

for their absences. While it might not be a popular move, an employer can direct exempt employees to take paid time off for the closure, pursuant to the employer's bona fide leave or vacation policy. If, on the other hand, an employee does not earn or does not have any available leave time, the employee is entitled to his or her full guaranteed salary if the employer decides to close due to weather.<sup>7</sup>

***What if exempt employees choose to stay home, even though the business is open? Must they be paid, or must they use paid time off?***

If an employer is open for business, an exempt employee who elects to stay home due to the weather is considered absent for personal reasons. In lieu of paying salary, an employer with a bona fide leave or vacation policy may require the employee to use his or her accrued paid time off to cover the absence. As long as it is permitted by state law, leave time in this circumstance may be taken in full or partial days.

If an employer has a leave policy, but the absent employee does not have a leave account balance, the employer is not obligated to pay the employee. The employer can place the employee on unpaid leave for the full day(s) that he or she failed to report to work for personal reasons. Employers should bear in mind that salary deductions for less than a full day's absence are not permitted, even though leave balance deductions are allowed for partial-day absences. As a result, if an exempt employee with no leave balance misses half a day, the employer must pay that employee his or her salary for the entire day, with no partial deduction for the absence. Meanwhile, an employee with a leave balance in the same scenario could be required to use half a day of paid time off to cover the absence.

***What if employees work from home?***

Some employees, exempt and non-exempt, may be able to perform some or all of their duties remotely. Employers should consider how to address situations where employees work from home during periods of inclement weather.

As noted earlier, non-exempt employees must be compensated for all time spent working. Accordingly, employers must pay non-exempt employees for performing any work remotely, even if the employee did not have express permission to work from home. Employers, moreover, may need to rely on employee self-reporting of hours worked in such a scenario.

Exempt employees, too, must be paid their regular salary in this circumstance. Even if an exempt employee spends only a few minutes working remotely, he or she must be paid the usual salary for the day and the workweek. In instances where a partial day is worked, the exempt employee can be directed to use appropriate leave time for the balance of the time, as discussed above.

***Do an employer's obligations change if there is a declared state of emergency?***

Generally speaking, no—an employer's obligations do not change if the state government declares a state of emergency. A few states, such as Delaware and Pennsylvania, offer some protections to employees who miss work during a state of emergency. Laws in these states, for example, prohibit employers from terminating or disciplining employees who elect to stay home during certain types of emergencies.<sup>8</sup>

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<sup>7</sup> If state law and the company's policy permits, an employer theoretically could allow an employee to carry a negative vacation balance and then recoup the time later. This approach can become complicated, however, particularly if the employee separates before eliminating the negative leave balance.

<sup>8</sup> See, e.g., Del. Code. Ann. tit. 20, § 3116 (discussing the restriction on the use of motor vehicles during a Level 3 Driving Ban); 43 Pa. Cons. Stat. § 1482 (stating that employers may not discipline employees "for failing to report to work due to a closure of the roads" either in the county where the employer is located or the county where the employee lives, due to a state of emergency declared by the governor).

***How can employers prepare for unpredictable, but inevitable, weather disruptions?***

No matter where an employer operates, it can expect Mother Nature to wreak havoc eventually, in one way or another. With that in mind, employers can take steps to prepare for the next unavoidable disruption.

- Employers should review their existing policies concerning inclement weather to make sure they comply with the FLSA and pertinent state and local laws. Such policies should explain the employer's position on the use of leave time for weather-related absences. They might also stress the importance of safety and explain whether non-exempt employees can work from home.
- Employers should consult with knowledgeable employment law counsel if they have concerns or questions about their pay practices, particularly about applicable state requirements or municipal ordinances.
- Employers without written policies should consider implementing procedures to be followed in the event of natural or other disaster.
- As storm seasons or particular weather patterns approach, employers should remind employees of the established protocols.
- Employers should also be proactive and explicit about communicating procedures for inclement weather or other disruptions. Employers should ensure that employee contact information is current and readily accessible to staff responsible for notifying employees of closures or delayed openings. Employers should consider developing protocols for making and communicating such decisions.
- Employers should also consider training payroll staff on these issues, such as how to handle reporting time pay, and ensure that timekeeping records are clear and accurate.