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California employers grapple with wage and hour issues arising from the closure of businesses and the displacement of employees due to the Southern California wildfires.

California Edition

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California Employers Impacted By Wildfires Now Deal With How To Pay Employees

By Stacey E. James

The wildfires in Southern California have taken a significant toll and continue to affect both employers and employees. As many employees remain absent due to evacuations and to care for their displaced loved ones and many employers are forced to remain closed as a result of evacuation orders, employers question their obligation, if any, to pay employees when no work is being performed. The answer depends on the circumstances involved and whether the employee is classified as exempt or non-exempt under California's wage and hour laws.

White Collar Exempt Employees (Executive, Administrative, Professional Exemptions)

The general rules requiring that white collar exempt employees be paid on a salary basis continue to apply. These employees must generally be paid their predetermined salary regardless of the number of hours worked. Deductions from an exempt employee's salary for absences occasioned by the employer or by the operating requirements of the business will jeopardize the employee's exempt status. However, where the employee chooses to absent him/herself from work due to personal reasons for an entire day, and the employee performs no work during that workday, the employee's salary may be docked for the full day's absence. For instance, if the employer's business is open but the employee is unable to come to work due to being personally impacted by the fires, the employee's salary may be docked for the full day's absence. Additionally, if the company is closed for an entire workweek, and an exempt employee performs no work during that workweek,

the employee need not be paid for the work-week.

California's Labor Commissioner takes the position that exempt employees cannot be required to use accrued vacation time to cover an absence unless reasonable advance notice is provided that such use of accrued time will be required. For this reason, it is generally a good idea not to require exempt employees to use accrued paid benefits to cover such absences. However, from a practical standpoint, most employees will elect to use accrued paid time off when given the option.

Non-Exempt Employees

Generally, there is no obligation to pay non-exempt employees if they do not work. For instance, if the employer decides to close the facility and has informed employees in advance that they should not report for work, there is no requirement to pay non-exempt employees for unworked time.

Reporting Time Pay

If an employer decides to close the facility and has not notified employees in advance that the facility will be closed (or made a good attempt to inform them), California's reporting time pay requirements could apply. All California wage orders have a provision requiring a non-exempt employee to be paid if he/she reports for work and is not put to work or is provided less than half his/her usual or scheduled day's work. In such a circumstance, the employee must be paid for the greater of (1) half his/her usual or scheduled day's work (up to four hours); or (2) two hours at his/her regular rate of pay. However, this requirement does not apply in

a few different circumstances, including: (1) the employer is unable to operate because of threats to employees or to property, or because of the recommendation of civil authorities; (2) a failure of the sewer system or of public utilities to supply electricity, water, or gas; or (3) the interruption of work is caused by an act of God or other cause outside of the employer's control. In other words, if non-exempt employees show up to work and are sent home because of one of these three exceptional circumstances, the reporting time pay requirements do not apply and non-exempt employees do not have to be paid, other than for the hours they actually worked. However, if the Company closes its facility of its own accord and not because of one of these three exceptional circumstances, and employees are not informed in advance, then employees who show up to work must be paid according to the reporting time pay requirements.

Call-Back Pay

Additionally, California's wage orders include a call-back provision that could apply in certain situations. If an employee reports to work a second time in a scheduled workday and is furnished less than two hours of work, he/she must be paid for two hours at his/her regular rate. This provision also does not apply if any of the three exceptional circumstances noted above apply.

Controlled Time

California's wage orders also require employers to pay non-exempt employees for all time during which an employee is under the employer's control. For instance, if employees are required to wait on the employer's premises during a blackout or similar situation, these employees must be paid for the waiting time, even if no work is being performed. Similarly, employees who are required to work at remote locations (such as at home) or who are required to be on call for immediate return and are thus under the control of the employer, must be paid for the time as if it were regular work time.

Hours Worked for Calculating Overtime

Reporting time pay or call-back pay paid to non-exempt employees for unworked time need not be counted as hours worked for determining overtime hours. In other words, unworked reporting time pay or unworked

call-back pay does not count as hours worked and need not be taken into consideration for determining if the employee has worked the requisite number of hours to become entitled to daily or weekly overtime.

Timekeeping Procedures

Employers should also ensure that non-exempt employees are still accurately recording their working time, even if employees are working off site. For instance, employees who are unable to use a timeclock because they are working remotely should still record all starting and stopping times, including meal periods.

Given the nuances of California wage and hour law and the factually specific analysis that may be involved, employers should contact experienced employment counsel if they have any questions when evaluating the application of these rules to their particular California employees and operations.

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