

**COMPENSATING EMPLOYEES FOR WEATHER-
RELATED ABSENCES:
A PRIMER FOR EMPLOYERS**

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The following is a summary of the laws governing how to compensate employees for weather-related absences. The text and interpretation of these laws may change over time or may not yet be completely resolved. Therefore, you should seek competent counsel before you make business decisions relying upon this summary.

I. Non-Exempt Employees

Most employees are considered non-exempt under the federal Labor Standards Act (FLSA) and are covered by the FLSA's minimum wage and overtime pay provisions. Non-exempt employees generally must be paid only for the time they actually work. Therefore, non-exempt employees who choose not to report to work during inclement weather conditions do not have to be paid under the FLSA for the time they do not work. The FLSA also does not require non-exempt employees be paid where the employer closes the organization due to inclement weather. Furthermore, nothing in the FLSA prevents non-exempt employees from choosing to use (or from employers requiring non-exempt employees use) accrued vacation or paid time off during weather-related absences.

While the FLSA does not require non-exempt employees be compensated for work missed due to inclement weather, employers should be aware that some states have "reporting time pay" laws. "Reporting time pay" laws (also referred to as "show-up pay" or "call-in pay" laws) require employees be paid for a minimum amount of time whenever they report to work as required or requested by the employer, even if no work is available and they are then sent home.

For example, New York's reporting time regulations require most employees who report for work as scheduled or requested by the employer be paid for at least four (4) hours or the hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage. This means that if an employer requests or schedules non-exempt employees to work a full day and then, due to inclement weather, has to close after a short period of time, the employer may still have to pay the employees who reported to work for at least four (4) hours at the basic minimum hourly wage. Note, however, that the New York State Department of Labor has interpreted this regulation as only requiring additional payment where an employee's wages for the workweek are less than the minimum and overtime wage rate for all hours worked, plus any call-in pay owed. In other words, if the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no additional payment for call-in pay is required during that workweek. (Note: Different rules apply to New York employees in specialized industries, such as hospitality and restaurants.)

In New Jersey, an employee who reports for work at the employer's request must be paid for at least one (1) hour at the applicable wage rate. However, this one (1) hour minimum does not apply where the employer has made available to the employee the minimum number of hours agreed upon prior to commencement of work on that day.

Employers who operate outside of New York and New Jersey should become familiar with the reporting time pay laws (if any) of the states in which they operate.

II. Exempt Employees

Exempt employees under the FLSA are generally those who work in bona fide executive, administrative or professional capacities, as well as certain computer employees and outside salesmen. Most exempt employees are paid on a salary basis, meaning their compensation is regularly set regardless of the quality or quantity of the work performed. The rules for compensating exempt employees for weather-related absences differ depending on whether the absence is initiated by the employer or the employee.

a. Employer Remains Open and Employee Chooses Not to Report to Work

Under the FLSA, if an employer remains open during inclement weather and an exempt employee chooses not to report to work, the employer can deduct from that employee's salary for the full-day absence. Note that deductions can only be made for full-day absences. If an exempt employee comes in late or leaves early due to inclement weather, the employer must pay the employee his/her full salary for that day. To that end, an employee who misses one and one-half days due to inclement weather can have one day's salary deducted for the full-day missed, but no time may be deducted for the half-day missed.

Nothing in the FLSA prevents an employer from requiring an exempt employee use vacation or other accrued paid time off when the employee misses full or partial workdays and the employer remains open for business. However, if the exempt employee does not have any accrued paid time off left and comes in late due to inclement weather, the employer must still pay that employee for the full day's work.

b. Employer Closes Operations

Where an employer chooses to close operations and the closure lasts for less than a full workweek, the employer cannot make deductions from an exempt employee's salary for any time missed. An employer, however, does not have to pay employees for any full workweeks where the employer's operations are closed due to inclement weather (although these circumstances are rare).

Even though the employer cannot make salary deductions due to unavailability of work where an exempt employee is "ready, willing and able to work," the employer can require exempt employees use accrued paid time off when the employer closes work due to inclement weather. If the employee does not have any accrued paid time off left or has a negative leave balance, the employer must still pay that employee's salary for the day the employer closes.

III. Other Considerations

In addition to federal and state laws that govern employee compensation for weather-related absences, employers should consider any promises made in employee handbooks, employment contracts, or collective bargaining agreements. While wage and hour laws provide the minimum requirements for compensating employees for weather-related absences, an agreement between the employer and its employees can certainly provide employees with "more" (in other words, wage and hour laws operate as a floor, not a ceiling, for how an employee must be compensated for weather-related absences).

Additionally, employers that require employees use accrued paid time off during weather-related absences should include a statement to that effect in their employee handbooks.