

Hurricane Irene Likely To Spur Wage Questions

By John E. Thompson

August 29, 2011

Affected employers will no doubt have a variety of wage-hour questions in the aftermath of Hurricane Irene. The number and scope of the issues raised might well be practically endless. In this post, we address in very general ways the federal Fair Labor Standards Act topics that experience suggests will be among the most-pressing.

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

If the only records of hours worked are lost or unusable, then there is no perfect solution. Re-create the most accurate accounting you can under the circumstances. Perhaps the preferred approach is to ask each employee to make the best-possible estimate of his or her hours worked. You should obtain the employee's written acknowledgement of his or her best recollection and should include the employee's authorization allowing later corrections in worktime and pay should more accurate hours-worked information become available.

◇ **How do we track employees' worktime without our electronic/computerized time clocks?**

Employees may record all hours worked by using handwritten timesheets. To ensure accuracy, each employee should enter his or her own time and should record the actual times when the employee's work starts and stops each workday.

◇ **As we recover, must we keep paying overtime on top of our other burdens?**

At this time, there is no FLSA "emergency" exception that relieves the obligation to pay FLSA-required wages. Employees subject to the FLSA's overtime provision must receive overtime premium 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](#).

If employees are covered by a collective bargaining agreement, it might contain additional overtime provisions requiring more than the FLSA does. Perhaps the terms of the agreement relax those requirements in emergencies. However, a collective bargaining agreement cannot override the FLSA's requirements.

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

The FLSA does not permit employees to "volunteer" unpaid time to the employer under any but the narrowest of circumstances. For example, if a manufacturing facility sets up a hotline or makes other arrangements to provide a clearinghouse for information about the status of the workplace and employee reporting times, non-exempt employees volunteering to perform such services are engaged in compensable hours worked for FLSA purposes. Employers considering any kind of unpaid "volunteer" services by their employees should evaluate the legality of doing this carefully and in advance.

◇ Must we keep paying employees who are not working?

Under the FLSA, for the most part the answer is "no". FLSA minimum-wage and overtime requirements attach to hours worked, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible FLSA-related exception is for employees treated as FLSA-exempt whose exempt status requires that they be paid on a "salary basis". Generally speaking, if such an employee performs at least some work in the designated seven-day workweek, the "salary basis" rules require that he or she be paid entire salary for that particular workweek. There can be exceptions here, too, such as might sometimes be the case where the employer is open for business but the employee decides to stay home for the day.

Also, non-exempt employees paid on a "fluctuating-workweek" basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work. There are a few exceptions, but these are even more-limited than the ones for exempt "salary basis" employees.

Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining contract, or some policy or practice that is enforceable as a contract or under a state wage law.

◇ What can we do about charging missed time to vacation and leave balances?

The FLSA generally does not regulate the accumulation and use of vacation and leave. The "salary basis" requirements for certain FLSA-exempt employees can implicate time-off allotments under various circumstances, some guidance on which the U.S. Labor Department has provided in opinion letters accessible [here](#) and [here](#).

Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining contract, or some policy or practice that is enforceable as a contract or under a state wage law.

◇ **When is travel time "hours worked" for purposes of computing FLSA wages due?**

FLSA travel-time "rules" are not seamless, up-to-date, or necessarily logical or consistent with common sense. The best-known ones are that:

- Normal commuting between home and work typically is not considered to be hours worked, and
- Travel between one assignment and another during a workday typically *is* hours worked.

However, even these principles are subject to exceptions and elaboration. The best starting point is to consider each scenario an employer faces under the U.S. Labor Department's basic interpretations on travel time. They are compiled at 29 C.F.R. §§ 785.33-785.41 and may be accessed [here](#).

Remember that other requirements, such as those applying to government contractors or subcontractors and those of states or other jurisdictions, can also be relevant to these questions.