Labor Letter

October 2011

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Hurricane Irene Leaves Wage/Hour Questions In Her Wake

By John Thompson (Atlanta)

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

Lost Time Records

Records of work already performed but not yet paid can be destroyed by these events. If the only records of hours worked are lost or unusable, then there is no perfect solution. Recreate 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 employees' written acknowledgement of their best recollection. Include each employee's authorization allowing later corrections in worktime and pay should more accurate hours-worked information become available.

If the disaster has rendered your electronic or computerized time clocks inoperable, remember that employees may record all hours worked by using handwritten timesheets. To ensure accuracy, have each employee enter his or her own time and record the actual times when the employee's work starts and stops each workday (i.e. not "in at 8:00 out at 4:00" every single day).

Must We Keep Paying Overtime?

When faced with the overwhelming burden of getting your company back on its feet after a disaster, it might seem reasonable to obtain a waiver from overtime requirements. Reasonable, but impossible. 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. State law may increase this obligation.

Employees who are covered by a collective-bargaining agreement, might also be entitled to additional overtime provisions requiring more than the FLSA does, however, sometimes the terms of the agreement relax those requirements in emergencies. A collective bargaining agreement cannot override the FLSA's minimum requirements, however.

Can My Employees Volunteer To Do Their Jobs?

No. The law 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.

If you are considering any kind of unpaid "volunteer" services by your employees an attorney 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 exception is for employees treated as exempt whose exempt status requires that they be paid on a "salary basis." Generally speaking, if exempt employees perform at least some work in the designated seven-day workweek, the "salary basis" rules require that they be paid the 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, you might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective-bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Can We Charge Missed Time To Vacation?

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, and the U.S. Labor Department has provided some guidance in opinion letters.

But again, what you may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a

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Managing Workers' Compensation Costs

By James R. Holland, II (Kansas City)

When the workers' compensation system was first instituted, it was devised as a cost-saving mechanism. Job safety was deteriorating, leading to an increase in accidents and injuries. Employers increasingly found themselves in court defending civil suits for work-related injuries. The workers' compensation system was seen as a way out of the problem. Today, the system is a monster, with employers spending tens of billions of dollars each year to insure their work-injury risk.

Dozens of states have turned to legal reform in an effort to control spiraling costs. Caps on recovery awards and contingency fee limits have been passed in many states, but with limited success. Other states have passed laws that provide incentives to employers who implement drug-free workplace programs.

Workers' compensation costs have an enormous impact on most employers' bottom lines, especially on those in high-risk occupations, such as construction. But by focusing on long-term objectives these expenses can be managed.

Here is a checklist that can help keep your costs down:

Establish A Comprehensive Cost Reduction Program

Any cost reduction program should be tailored to suit individual needs, but there are some common elements to the most effective programs:

- a legal, but thorough pre-employment screening program;
- administration of agility tests to job applicants;
- conducting legal post-offer medical exams and inquiries;
- a focus on safety at orientation;
- utilization of accurate, updated job descriptions;
- strict enforcement of a substance abuse policy; and
- consistent adherence to a temporary light duty policy.

Train Managers And Supervisors On Cost Containment

Instruct supervisors on proper techniques for compiling information and background evidence from the employee and other witnesses to the accident. Train them on proper safety procedures and first-aid, accident reporting, and physician referral procedures. Instruct supervisors to show personal concern for their employees while on leave.

Train Employees To Be Safety-Conscious

Implement a comprehensive safety program that provides for regular meetings, dissemination of written materials, and hazard communication.

Know Your Insurance Policy Inside And Out

Understand the correlation between current experience and future premiums. Identify the parties responsible for attorneys' fees and determine whether those fees are reflected in your experience ratings. Determine who pays for surveillance and medical exams, and whether you have input in selecting the attorney.

Evaluate Your Organization's Claim History

Study your workers' compensation claims history over a minimum five-year period and look for patterns in injury type and frequency. Determine the most common types of injuries and look for a repeat use of the same doctors, chiropractors, and lawyers.

Periodically Audit Claims Reserves

Hire a qualified person to evaluate whether reserve computations are reasonable or excessive for the types of injuries incurred at your facility. This person should report directly to you, not the insurance company.

Handle Every Claim Individually And Aggressively

Consider possible courses of action for each file as you review it, including such options as surveillance, medical exams, termination of benefits, and light duty.

Establish A Good Working Relationship With Company Physicians

Look for an honest and conservative doctor who, in addition to providing excellent medical care, understands your point of view. Cultivate a trusting relationship with that physician over time.

Coordinate Workers' Compensation Claims With Pending Litigation

When litigation is pending with the employee, a qualified person (usually labor and employment counsel) should compare the facts contained in the workers' compensation file to the other litigation. Make an effort to obtain a full release of all claims whenever a settlement of a workers' compensation claim is reached.

Bring Employees Back To Work As Soon As Possible

Consider implementing temporary light duty policies or "work hardening" programs designed to return employees to work as soon as possible. Designate a coordinator to work with injured employees while on leave and to encourage them to return to duty as soon as possible.

Analyze The Advantages Of Self-Insurance

Under "self-funding" plans, the employer is directly liable for workers compensation benefits. In states that permit it, self-funding may provide significant cost-saving advantages, particularly when insurance premiums exceed the amounts paid to employees by the carrier.

Compare Your Costs To Those Of Other Companies

Contact other contractors to compare your cost figures with those of "benchmark" companies with excellent claims records. Find out what they do differently and try to determine what makes the difference.

Conclusion

Controlling workers' compensation costs has become an essential part of every employer's business. While there is no way to eliminate these costs, every employer can and should take steps now that will help it control and manage these costs in the future.

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"EXCUSE ME, BUT YOU JUST IMPOSED AN UNGRAMMATICAL SENTENCE."

That Little Smart Phone Might Cause a Big Wage and Hour Headache

By David Monks (San Diego)

A smart phone is now as much a piece of your office life as a desk, laptop or employee handbook. Anyone can use their BlackBerry or iPhone to stay current on news and events, update social media status and check their email from any location with a signal.

For more and more people, that email checking usually includes a work email box. The potential dilemma: there are legal issues to consider when an employee uses technology to stay connected outside of work hours, even if the smart phone is not issued by the employer.

Recently, a police officer sued the City of Chicago on behalf of himself and others, seeking pay for time spent dealing with work-related phone calls, voice mails, emails, text messages and work orders via BlackBerry devices and similar "personal digital assistants." The officer contends that these activities entitle the group to an award of overtime compensation under the federal Fair Labor Standards Act (FLSA).

Today's Problems Meet Yesterday's Law

The idea of checking on work activities outside of work hours is neither a new phenomenon nor surprising. But the extreme proliferation of electronic communication devices into every part of our lives creates a new wrinkle and key issues that employers must address when it comes to smart phone use outside the workplace. The law (created 70 years ago) doesn't always relate to current real-life situations.

This issue won't be going away any time soon. Although there have been countless wage-and-hour claims on a variety of topics, there is no widely accepted legal definition about compensating for time spent on work projects after hours strictly using electronic communication. The fact is, even without a statute in place, employers need to begin looking at policies regulating and defining electronic communication use outside of work hours and what work constitutes "overtime."

Our Advice

One initial solution is to put in place procedures and systems that allow (and even require) non-exempt employees to keep accurate records of the time spent working using a mobile device. You may wish to create a special time sheet for this or a new online tracking code if your company uses a software-based or web-driven time management tool. Train employees to make a habit of submitting this record so that the activities can be counted along with their other work in order to compute wages.

Recently, the Department of Labor has gotten into the act and created an iPhone app that allows employees to keep their own time records. This is a powerful example of the ways technology can open the door for employees to be deceitful and manipulative in tracking time. It also seems clear that the DOL is doing this to help bolster wage-hour cases against employers.

Apps like this can be truly dangerous. There is a huge risk for mistakes and most employees have no expertise in what is considered to be work time under the FLSA (or applicable state law). This can lead to employees misreporting time that otherwise would not count as compensable hours worked.

Technology will continue to invade all parts of employee lives and further blur the line between work and personal time. Employers need to stay up to date on current information about potential impact of timesheet app entries in wage disputes.

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collective-bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Is Travel Time "Hours Worked"?

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.

But even these principles are subject to exceptions and elaboration. The best starting point is to consider each scenario you face under the U.S. Labor Department's basic interpretations on travel time. They may be accessed at http://ecfr.gpoaccess.gov.

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.

This article first appeared in our blog http://wage-hour.net. For more information contact the author at jthompson@laborlawyers.com or 404.231.1400.

Employers *Can* Discriminate!

By Grace Y. Horoupian and Matthew C. Sgnilek (Irvine)

For some employees who can't figure out why they are not getting that promotion, the answer could be as simple as looking in the mirror. Grooming and personal appearance are playing an ever-increasing role in workplace raise and promotion decisions. A recent CareerBuilder.com survey listed the following as the top reasons that would make an employer less likely to offer an employee a promotion:

1. Piercings
2. Bad Breath
3. Visible Tattoo
4. Wrinkled Clothes
5. Messy Hair
6. Casual Dress
7. Too much perfume or cologne
8. Too much makeup
9. Messy office or cubicle
10. Chewed fingernails
11. Too suntanned

Is not giving an employee a promotion because of their bad breath or fingernails illegal? Some employees might think so, but generally speaking, the answer is "no." You are legally free to deny that new corner office to employees because they have bad breath or dress as though they just came from the beach. This is one of those areas where employers actually **can** discriminate, because discrimination based on such characteristics does not violate Title VII – unless issues of race, religion, sex or national origin are intertwined.

Employers do have the option of regulating workplace grooming and appearance. But from our experience many are sometimes reluctant to exercise this right because everyone "knows" that discrimination is unlawful. The truth is you have a lot of control over the dress and appearance of your employees. The key is to carefully draft and consistently enforce a reasonable dress code.

Doing It Right

There is no legal requirement for a dress or appearance policy. Yet, having such a policy in place before a tattoo, nose ring, haircut, or head covering becomes an issue allows you to defend claims of discrimination. More importantly, a well-written policy can help protect a company's public image, promote a productive work environment, comply with health and safety standards, and even prevent claims of unlawful harassment. Having such policies in place also helps better ensure that highly qualified employees are not overlooked, albeit legally, for a promotion because they are permitted to come to work with messy hair or wrinkled clothes.

A dress and appearance policy based on business needs that is applied uniformly will generally not run afoul of employees' seemingly endless civil rights. Any appearance policy should be based on justifiable business reasons that do not have a disproportionate effect on particular segments of the workforce, particularly those in a protected category. Of course, as with all employment policies, you must ensure that such policies are applied consistently and fairly without regard to an applicant's or employee's race, sex, national origin, religion, color, disability, age, or any other protected status.

Employees are becoming wise to these issues and seeking to challenge grooming- and dress-based decisions by tying them to protected categories such as religion and disability, with some degree of success. As an example, some courts have held that obesity can be considered a disability which calls into question the viability of making employment decisions because of an employee's weight. In fact, Michigan even prohibits discrimination in employment based upon weight by state statute. Other courts have found that no-beard policies discriminate against men who wear beards for religious reasons. It's important to be wise to these risks and be certain to draft their appearance and grooming policies so that they do not encroach upon a protected category.

When faced with grooming- and dress-based cases, courts and arbitrators will balance an employee's desire for self expression with an employer's right to enforce a reasonable dress code necessary to protect the company's image. If done correctly, in most cases the employer's reasonable dress code will prevail. Case in point, in an arbitration decided several years ago, a woman of Mayan descent was required to cover up a nose ring she wore to work in her position as a hospital receptionist.

The employee viewed the nose ring as part of her Mayan cultural heritage whereas the hospital viewed it as a violation of its dress guidelines prohibiting extremes in jewelry. The arbitrator agreed with the employer. He viewed the employer's requirement that the nose ring be covered as reasonable because as a receptionist the employee was the first person to make an impression upon hospital visitors.

The case highlights that courts and arbitrators continue to support an employer's right to enforce a reasonable dress code as long as it is does not encroach upon a protected activity and can be tied to reasonable business needs.

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