
Coates' Canons Blog: Paying Employees Who Are Absent in Inclement Weather

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It's that time of year. Winter storms may make it impossible for local government employees to make it to work. Sometimes absences are for only a day or two and once the roads are clear and it is safe to drive, employees return to work. At other times, storms cause power outages that may last for a week or longer, forcing employees and their families to relocate temporarily, and closing schools and daycare centers and sometimes even the government workplace itself. Some local government employees may be able to work remotely. For others, remote work will be impossible as they must be physically present at the workplace to engage in their job duties. Under the Fair Labor Standards Act, what happens to wages and salaries when employees cannot work? The rules may briefly be summarized thus:

- Nonexempt employees do not have to be paid.
- Exempt employees do not have to be paid if they do not work for an entire workweek.
- Where the workplace remains open, exempt employees who work for less than a full work week may be required to use accrued paid leave for the time that they are absent. If they do not have accrued paid leave, then a public employer may count this as an absence for personal reasons and deduct the time lost from their salary on a pro-rata basis.
- If conditions require an employer to close its workplace or any part of the workplace for less than a full workweek, it must pay its exempt employees their full weekly salary, although the employer may require employees to apply as much accrued paid leave as an employee has available.

As a quick refresher, remember that nonexempt employees are entitled to overtime pay once they have worked more than 40 hours in a workweek, and exempt employees (who must be paid the same salary without regard to the number of hours they work) are not entitled to overtime pay.

Nonexempt Employees

For nonexempt employees, a simple rule applies in all circumstances: the FLSA requires employers to pay nonexempt employees only for the hours that they have physically worked. If at any given time there is no work for an employee to perform, or if the employer decides to close on what would otherwise be a workday, a nonexempt employee is not entitled to any compensation. Most public employers, however, offer some mix of paid sick and vacation leave to their employees, both nonexempt and exempt. In order to alleviate the hardship that comes from not being paid an expected wage, employers may allow nonexempt employees to draw on their accrued paid leave, including accrued comp time, in order to turn unexpected days off caused by inclement weather into paid time.

This is true both for nonexempt employees paid on an hourly basis and nonexempt employees paid on a salary basis. When nonexempt salaried employees are paid on a salary basis it is as a matter of convenience, in contrast to FLSA-exempt positions, which *must* be paid on a salary basis (see my previous blog post on what it means to be paid on a salaried basis here). As with nonexempt employees paid on an hourly basis, salaried nonexempt employees must record the time that they have worked on a daily basis and must be paid overtime for any hours that they physically work in excess of 40. The same rules apply to all nonexempt employees. The rules for exempt employees are different.

Exempt Employees

The general rule under the FLSA is that employers who make unlawful deductions from the salaries of their exempt employees lose the exemption and convert those employees into nonexempt employees entitled to overtime. That is why employers must be careful during periods of inclement weather to follow the FLSA regulations that provide for exceptions

to this rule. There is no general, weather-related exemption, but certain other rules allow local government employers to minimize the financial impact of the days employees miss due to bad weather on their unit's budget and operations.

Absent from Work for a Full Week or More or Workplace Closed for a Full Week or More

The FLSA requires employers to pay exempt employees their full salary for any week in which they have performed any work. For example, if an exempt employee works on Monday, but performs no other work on any other day of the week, the employer must still pay the employee his or her full weekly salary. But where an exempt employee performs no work whatsoever in a given workweek, the employer need not pay the employee at all. (See here for 29 CFR § 541.602 for the general rule; subsection (b) explains the exceptions). This is true regardless of whether the employee does not work for that full week because of illness, because of traffic or weather conditions or because the employer tells the employee not to come into work. An employer may allow employees to draw upon accrued paid leave during an absence of a full week.

Absent from Work for Less than a Full Workweek While the Workplace is Open

Under normal circumstances, employers require exempt employees who are absent for one or more days — full days or part days — to use accrued paid sick, vacation or personal leave to cover the absence. This is permissible under the FLSA because paid leave is an employer-created benefit not subject to the FLSA. When an employer pays its exempt employees their stated salary and deducts the equivalent amount of leave from their accrued leave bank, the employer satisfies the FLSA without compensating the employee for time during which no work was performed and thus without incurring unbudgeted salary expenses (the cost of the paid leave having already been taken into account in the employer's budget). The U.S. Department of Labor has addressed this issue several times in formal Opinion Letters issued by the Administrator of the Wage and Hour Division, explaining in one that

Employers can . . . make deductions from an exempt employee's leave bank in hourly increments, so long as the employee's salary is not reduced. *If exempt employees receive their full predetermined salary, deductions from a leave bank, whether in full day increments or not, do not affect their exempt status.* (emphasis added)

Sometimes, however, an employee does not have any accrued leave upon which to draw. The general rule requiring exempt employees to be paid their full salary for any week in which they perform any work would suggest that an employer would have to pay exempt employees their full salary if they were absent for a day or two for bad weather and had no accrued leave. In both the public and private sectors, however, deductions from the salary of an exempt employee are allowed where the employee is absent for one or more full days for personal reasons other than sickness. What are personal reasons other than sickness? Just about anything. During inclement weather, personal reasons are most likely to be:

- problems in getting to work, either because the roads are dangerous or impassable or because public transportation is shut down or curtailed,
- sick dependents needing care such as the employee's children or elderly parents,
- child care issues where the regular day care provider is not operating, or
- damage to or loss of the employee's home.

Where an employee is absent for personal reasons for one or more full days and *part of another day*, the rules governing the public and private sectors diverge. In the private sector, an employer may deduct from an employee's salary for absences for personal reasons only in full-day increments. It may not deduct any partial-day absences from the employee's salary. A public sector employer, on the other hand, **may** deduct partial-day absences for personal reasons from an exempt employee's salary when they have no accrued paid leave, just as it may deduct partial-day absences due to illness from an employee's salary when the employee has no accrued sick leave available. The public sector exception is set forth at 29 CFR § 541.710:

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption . . . on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or

because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

- (1) Permission for its use has not been sought or has been sought and denied;
- (2) Accrued leave has been exhausted; or
- (3) The employee chooses to use leave without pay.

Note that in subsection (a)(1) the regulation allows public employers to deduct both full and partial day absences from the pay of exempt employees *where accrued paid leave is available, but the employee has asked for and the employer has denied the employee permission to use it and the employee is absent anyway*. This situation is likely to arise in an emergency where the manager or department head has designated certain employees as “essential personnel” and ordered them to report to work at the same time that other, “nonessential” employees are ordered or given permission to stay home. If an employee who has been deemed essential refuses to report for duty, a public employer may deduct their salary not only in full day increments, as in the private sector, but in partial-day increments as well, even if they have accrued leave available for use (of course, the employer may also fire the employee for insubordination).

Workplace Closed for Less than a Full Work Week

When inclement weather forces an employer to close its workplace for less than a full work week, the employer must pay exempt employees their full weekly salaries. The regulation defining salary basis is explicit on this point:

An employee is not paid on a salary basis if deductions from the employee’s predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

For a DOL Wage and Hour Opinion Letter on this issue, see [here](#).

It is likely that any condition that forces a public employer to close its workplace to all but essential personnel would keep nonessential employees at home anyhow – that is to say, that employees are not going to be “ready, willing and able to work.” An employer might object, perhaps not unreasonably, that it should not have to compensate employees who would not come to work if it stayed open. The presumption behind the regulation, however, is that employees are ready, willing and able to work when the employer is open. When the employer closes down, exempt employees must be compensated.

Employers may, however, apply any accrued paid leave that an exempt employee has to the days during which the employer is shut down:

. . . an employer can substitute or reduce an exempt employee’s accrued leave for the time an employee is absent from work, even if it is less than a full day and *even if the absence is directed by the employer* . . . without affecting the salary basis of payment, provided that the employee still receives in payment an amount equal to the employee’s guaranteed salary.

But where the employee has no accrued paid leave to apply, the employer must pay the employee his or her full salary – a situation that a public employer should try to avoid:

If an employer requires that an exempt employee work less than a full workweek, the employer must pay the employee’s full salary even if: (1) the employer does not have a bona-fide benefits plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits, and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank.

(See also DOL Wage and Hour Opinion Letter 2005-41.)

As we approach the winter storm season, local government employers should review their inclement weather policies to make sure they comply with the FLSA.



Links

- canons.sog.unc.edu/?p=7385
- www.law.cornell.edu/cfr/text/29/541.602
- www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_18_FLSA.pdf
- www.law.cornell.edu/cfr/text/29/541.710
- www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_02_FLSA.pdf
- www.dol.gov/whd/opinion/FLSA/2005/2005_10_24_41_FLSA.pdf