

## To Pay or Not to Pay: Is an Employer Liable for Wages When Employees Stay Home due to a State of Emergency

The cleanup has begun, and with it comes questions about whether employers must pay the wages of employees who stayed home during the hurricane. Absent special dispensation from the governing bodies or a contractual guarantee, the answer is governed by the Fair Labor Standards Act and New York State law.

For nonexempt hourly employees, private employers need only pay employees for the hours that they worked. This is because hourly employees are only paid for the hours that they worked, regardless of why they did not work. However, if the employee was required to come in to work, but was sent home because of the hurricane, then NYS law requires that the employee be paid for “call-in” time, which is usually four hours at minimum wage or the employee’s regular shift, whichever is less. Where non-exempt employees are paid a fixed salary for fluctuating workweeks, an employer must pay these employees their full weekly salary for any week in which any work was performed.

How to treat exempt employees is more difficult. The federal Fair Labor Standards Act exempts some employees from minimum wage and overtime payments, such as salaried administrative, executive or professional employees who reach a threshold income level each week.

If the employer was open for business, then an exempt employee’s absence due to a state of emergency is deemed to be an absence for personal reasons. This means that the employer can dock the employee’s wages for a full day’s absence, or may require the employee to use accrued vacation or other leave to cover the absence. The employer may not dock the employee for less than a full day’s absence. It is also permissible to require exempt employees to make up lost time.

If, on the other hand, the office was closed as a result of the hurricane, then an employer may not dock an exempt employee’s pay, but may require the employee to use vacation or other accrued leave.

Of course, an employer can always choose to voluntarily pay the employee for the missed time, even where the law does not require payment. We stand ready to help you resolve these and other pressing employment issues.