JANUARY 5, 2016 | WAGE & HOUR COMPLIANCE

Managing Employee Wages as Inclement Weather Approaches

Happy New Year! As we get deeper and deeper into the winter season, it is inevitable that the government, schools, and businesses will be closed due to inclement weather at some point. When that happens, many employers have questions about how to pay their employees properly under the Fair Labor Standards Act ("FLSA"). Weather-related office closures and reduction in work hours can create confusion for employers because employees may be paid differently depending on whether they are classified as an exempt or non-exempt employee. This article details the possible wage and hour rules that may apply in such situations.

1. **Fair Labor Standards Act Rules and Regulations**

The FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity. 29 U.S.C. § 213(a)(1). An employee may qualify as "exempt" from the FLSA overtime and/or minimum wage standards if all of the pertinent tests relating to primary duty, salary level and salary basis, as discussed in the applicable regulation, are satisfied. These employees are typically considered exempt employees.

An exempt employee is paid on a salary basis within the meaning of the regulations if, under the employee's employment agreement, the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Subject to some exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

In contrast, non-exempt employees are employees who, because of the type of duties performed, the usual level of decision making authority, and the method of compensation, are subject to all FLSA provisions including the payment of overtime. Unlike exempt employees, non-exempt employees are typically required to account for hours and fractional hours worked because they are not paid a salary. Rather, they are paid a certain rate per hour, and the amount they receive in a given week is based on the total number of hours worked.

2. **Exempt Employees**

Generally, an employer may not make deductions from an exempt employee's salary for absences caused by the employer or by the operating requirements of the business. If an exempt employee is ready, willing, and able to work, deductions from the employee's salary cannot be made when no work is available. However, an employer does not have to pay an exempt employee for any workweek in which he or she performs no work during inclement weather closures. Thus, if a business is closed for only two days out of the week due to inclement weather, an exempt employee must receive his or her full salary for that week. Employers are not permitted to make salary deductions from the predetermined salary for the two days that the office was closed even if the exempt employee did not perform any work on those days. However, if the workplace is closed the entire week and the employee did not perform *any* work, the employer technically does not have to pay that employee for that week.

Employers may also have wage and hour issues in scenarios where the office is open but an exempt employee cannot make it to work because he or she lives in a remote area away from the workplace that was struck with inclement weather, or they must stay home because their child's school is closed for the day. In those scenarios, employers may lawfully make deductions from exempt employees' salary for full-day absences as long as it is due to personal reasons rather than disability or sickness. With that being said, employers will often allow an exempt employee to use paid time off or the employee may be able to work remotely from home.

Modern technology has significantly changed the way in which work is performed. Today, many employees are capable of working remotely from the comfort of their home, a coffee shop, or even their car regardless of whether the office is closed. Employers should be mindful that when exempt employees work from home, as permitted by the employer, salary deductions cannot be made for any absences from the office.

Employers may make deductions from an exempt employee's paid time off account for absences occasioned by weather-related business closures if an employee does not perform any work at all that day or only works part of the day. If the employee does not have any paid time off accrued, no deductions can be made from their salary at all as long as the exempt employee performed *some* work during the week. While working remotely is often considered a blessing and useful tool for businesses, it is increasingly difficult to track employee productivity. Therefore, employers should be cautious when considering whether to deduct paid time off from an employee's leave bank unless it is very clear that the employee did not work at all on the day or days when the office was closed.

3. **Non-Exempt Employees**

Non-exempt employees are compensated quite differently and, as such, the wage and hour rules for inclement weather situations are different as well. From an employer policy perspective, the rules for non-exempt employees related to inclement weather are easier to manage than the rules for exempt employees. Employers are not required to pay a non-exempt employee wages for any day that the non-exempt employee does not work. Therefore, if the office is closed due to inclement weather and the non-exempt employee does not perform any work during the closure, the employer has no obligation to pay its non-exempt employee for time not worked. However, as with an exempt employee, a non-exempt employee who is able to work from home must be compensated for any time worked. The monitoring problems discussed above are even more of a concern for non-exempt employees. Whereas an exempt employee is paid his or her weekly salary even if the employee only worked a couple of hours during an entire week, a non-exempt employee is only paid for the total number of hours he or she worked during the week. Meticulous tracking of non-exempt employee hours when the business is closed could be tedious and more of a burden for employers.

Therefore, many employers only permit exempt employees to work from home and it is more or less expected. Non-exempt employees are often strictly prohibited from working outside of the office if the business is closed due to inclement weather. Many employers provide a specific operations policy in their employee handbooks that explains work expectations when the office is closed for any reason. An inclement weather policy detailing office closure procedures and work expectations will help employers in the long run because it maintains some consistency in managing work output, and it limits confusion when making payroll decisions.