

Is There Such a Thing as "Snow Pay" for "Snow Days?"

In the midst of one of the wildest winters on record, we thought it would be helpful to remind employers about the rules for docking employee pay due to weather-related absences. These basic rules apply to all employers. However, public employers and employers operating under collective bargaining agreements may face additional restrictions and should check their policies/contracts before making any deductions.

What happens when our company closes because of inclement weather?

Let's start with exempt employees. The Fair Labor Standards Act (FLSA) prohibits employers from docking the pay of any exempt employee based on the quantity or quality of his work or when he is ready, willing, and able to work but no work is available. Applying this principle, the United States Department of Labor (DOL) has taken the position that **employers who decide to close because of weather conditions must pay exempt employees their regular salaries for any shutdown that lasts less than one full week.**

However, nothing prohibits such employers from requiring all employees, including exempt ones, to use accrued vacation time or other paid time off (PTO) to cover the missed work. The FLSA does not require employers to provide vacation or other paid leave time at all, so there is nothing wrong with allowing employees to accrue vacation or other PTO but then requiring them to use it on certain days, such as due to inclement weather closings. A private employer may therefore deduct the period of absence due to bad weather from an employee's remaining vacation or other paid leave time, regardless of whether the absence is for a full or a partial day, so long as it pays exempt employees the total amount of their regular salaries for that time. (Note that if an exempt employee has no paid time off accrued, she still must be paid her full regular salary when the company is closed because of bad weather for less than a week. The DOL has made it clear that exempt employees must be paid their full salaries in these circumstances, even if their employer does not offer vacation or PTO benefits at all or even if such benefits are provided but the particular exempt employee has no accrued paid leave available at the time bad weather strikes.)

Handling non-exempt (hourly) employees' "snow day pay" is discussed in the final section below.

What if our business is open, but our exempt employees don't show up?

This is a different story. When your office or facility is open for business and an exempt employee does not report to work because of bad weather conditions, he is not considered "ready, willing and able" to work — even if his "unreadiness" is due to conditions beyond his control. Rather, the DOL has stated that "an absence due to adverse weather conditions, such as when transportation difficulties experienced during a snow emergency cause an employee not to report to work for the day even though the employer is open for business, [is] an absence for personal reasons. Such an absence does not constitute an absence due to sickness or disability." Thus, the basic FLSA rule that exempt employees generally should not have their pay reduced for partial-day absences but may be docked for full-day absences for personal reasons applies in this situation. **So, if an exempt employee fails to report to work because of inclement weather for an entire**

business day when your business is open, he may be docked that day's pay.

You cannot dock for weather-related partial-day absences involving exempt employees. The DOL has said, "Deductions from salary for less than a full-day's absence are not permitted for such reasons under the regulations. If an exempt employee is absent for one-and-a-half days due to adverse weather conditions, the employer may deduct only for the one full-day absence and the employee must receive a full-day's pay for the partial day worked."

So, when an exempt employee arrives late due to weather-related commuting problems (including the need to make alternate child-care arrangements because of a school closing) or decides to leave early because of weather-related concerns, she must be paid her full regular day's pay, regardless of whether management agrees that the situation was serious enough to warrant the late arrival or early departure.

Also remember that working from home "counts," so if an exempt employee spends all or part of a "snow day" working from home, she must be paid for the full day.

Again, however, everything stated above applies to *docking* salary. As noted in the first section above, you may elect to use time from an exempt employee's paid leave bank when she is absent for weather-related reasons, and such use may be made in full or partial-day increments.

It is also fine to elect to pay your exempt employees their regular salaries for all time missed due to inclement weather. You can always do *more* than the law requires, it's only when you start taking money away that you need to check the rule book.

What if we have already made an improper deduction?

Improper deductions from exempt employees' pay can cause them to be reclassified as non-exempt, which makes them eligible for overtime pay, including back pay for two or more years. The good news is that the DOL has held that "isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions."

The DOL has gone on to say that "if an employer has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption, unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints."

So, consider this alert a friendly reminder to review your personnel policies to make sure they include this "safe harbor" language to protect against "accidental" employee reclassification based on honest oversights in applying the FLSA provisions outlined above.

What about non-exempt, hourly employees?

It is up to your organization to decide whether or not to pay non-exempt employees for "snow days," because the FLSA does not require you to pay such employees for hours they "would have worked" if severe weather conditions had not caused your business to be closed or created other problems that led to their absence from work.

As with exempt employees, you may allow or require non-exempt employees to use vacation or PTO to cover snow day absences, but this is not required.

Bottom line

Bad weather creates uncertainty and stress for both employers and employees. You can reduce some of this stress by having clearly written and communicated guidelines as to how your organization will handle weather-related absences, particularly with regard to how or if employees will be paid when bad weather affects their ability to come to work.

If you have any questions about this or any other labor and employment law topic, please feel free to contact [Kara Shea](#) or any other member of our [Labor & Employment Law Department](#).

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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