



# Hurricane Irene Leaves Wage/Hour Questions In Her Wake

Insights

10.01.11

(Labor Letter, October 2011)

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.

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 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.

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 [Wage & Hour Laws Blog](#). For more information contact the author at [jthompson@fisherphillips.com](mailto:jthompson@fisherphillips.com) or 404-231-1400.*