

SOME THINGS NEVER CHANGE: 4 RISKS EMPLOYERS SHOULD KEEP IN MIND TO AVOID A FROZEN WINTER

Insights
Oct 4, 2022

There are many things to love about winter: holiday music, shiny decorations, excuses to shop more than you should, and your favorite coffee shop serving drinks in those delightful red cups. While winter can be a time to recharge for many, it can be one of the most brutal seasons for employers and their businesses. This Insight will focus on four risks that this season may bring: how to properly compensate your workers during weather-related absences, the dangers of this year's flu season (with just a hint of COVID-19 discussion), how to limit risks associated with cold-weather exposure, and how to limit the chances of your company holiday party turning into a lawsuit.

Do You Want to Build a Snowman? Paying Employees During Winter Storms

First and foremost, you should plan ahead and develop policies addressing inclement weather, including how employees can find out if the business is open, how their schedule may be changed, what they should do if they are unable to make it to work or continue working due to the weather, and any reporting time rules for compensation that may apply under state law. If you already have such policies on the books, now is the time to review them to make sure they are up-to-date, compliant with applicable wage and hour laws, and reflect the current company philosophy on these issues.

The Legal Standards Involved

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In addition to dealing with scheduling and commuting or travel time issues, you must also ensure that employees are paid properly. Your company must comply with the federal Fair Labor Standards Act (FLSA) and any associated state or local wage and hour laws.

Employees are treated differently under the FLSA depending on whether they are classified as non-exempt or exempt. Non-exempt employees are those who are entitled to overtime pay. Exempt employees are those who are paid on a salaried basis and also meet specific legal requirements so as to be exempt from the overtime pay requirements. In addition, conditional exemptions from overtime may be available for eligible outside or inside salespersons provided all requirements are satisfied under local, state, and federal laws.

Pay Non-Exempt Employees for Time Spent Working

Compliance with the FLSA for non-exempt employees is fairly straightforward: you only have to pay non-exempt employees for hours they work. Absent some contractual obligation (such as an individual employment agreement or a union contract) or obligations arising under public policy (e.g., reporting time regulations), you do not have to pay non-exempt employees if they miss work, in whole or in part, due to snow or other inclement weather. Also, non-exempt employees may be required to use vacation time for an absence due to inclement weather (even for a half-day).

Of course, before implementing such a policy, you should consider how disgruntled your employees might be if they are forced to use vacation time when missing work. Your employees are more likely to favor a policy that allows them to choose whether to use a vacation day to cover their winter-related absence, or to simply not be paid if they are saving vacation for special plans.

Exempt Employees Must Often Be Paid When Operations Are Suspended

Exempt employees are different. You must pay them their full salary for any week in which they perform work. So, for example, if your company is shut down for three out of five days during the workweek, you must still pay the exempt employees their normal weekly salary. To do otherwise signifies that an employee is not exempt and might lead to costly litigation.

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The FLSA does not require you to provide paid vacation or time off for any employees, exempt or non-exempt. But if you have a vacation or PTO policy that covers exempt employees, unless otherwise prohibited by local or state law, you may substitute or reduce the accrued leave for the time an employee is absent from work. Even if the substitution is for less than a full day, it will not affect the classification of the employee as exempt. Either way, if the exempt employees work for a small portion of the workweek, they must be paid for the entire week, even if your operations are closed for a portion of the week.

What If Exempt Employees Are Snowbound?

The above discussion assumes that your company is shut down due to inclement weather. What should you do when you stay open but the employee is unable to come to work? The U.S. Department of Labor says that if you are open for business and an exempt employee chooses not to (or is unable to) report to work, you may count this as time off for personal reasons.

Under the FLSA, you can take deductions from an exempt employee's salary or leave time for absences due to personal reasons other than sick leave. The sole caveat is that you may deduct from an exempt employee taking personal leave in full-day increments only, not for half-days missed. Thus, a salaried exempt employee who misses a full day of work due to personal reasons generally may receive a deduction of the day's salary, although some restrictions may apply (for example, if an employee works remotely by checking emails or performing work at home). Thus, if your exempt employee shows up for work at noon and works until 6 pm, you will not be able to deduct from their pay (although you may be able to reduce the vacation leave bank).

We Were So Close! Keeping Employees Healthy with Seasonal Shots to Avoid Outbreaks

Although flu activity typically peaks in January, it is not uncommon for your workforce to start displaying signs of the sickness well before the holidays. The time to prepare for an outbreak is now. You can start by educating yourself about preventive steps you can take and planning for what you will do if an outbreak hits your workplace this winter.

Under the FLSA, if you have a bona fide sick leave policy (and some states or localities may require it), you can take

deductions from an exempt employee's salary if the sick leave bank is empty, but only in full-day increments only, not for half-days missed. If there is no bona fide sick pay policy, no deductions for illness may occur in any week during which a salaried exempt employee has worked.

Use Common Sense

Several commonsense actions can be utilized to help keep a flu epidemic from breaking out at your company. Some of these measures are very easily implemented and cost-effective. For example, you should urge your workers to thoroughly wash their hands and to use proper cough and sneeze etiquette. Keep a supply of antibacterial or waterless soap readily available. You should provide cleaning supplies for telephones, keyboards, and desks to help limit the spread of germs.

In the coming weeks, you should introduce these measures and train your workforce to take advantage of them. And of course, encourage those workers under the weather to stay at home in order to reduce the contagion.

Take a More Proactive Approach

Depending on your business operations and the potential effect of a widespread flu outbreak among your workers, you may want to take a more aggressive approach to help limit flu cases. For example, you may want to consider suspending or changing some of your workplace policies in order to encourage workers to avoid spreading the flu. You may want to temporarily alter your paid-time-off or attendance policy to lessen the chance that sick employees will rush back to work.

Or perhaps you could permit workers to telecommute or otherwise work from home during an outbreak so that an entire department doesn't get wiped out for days or even weeks. At the first sign of symptoms, consider sending sick workers home or providing them with protective gear, such as face masks, to help prevent the spread of germs. With the implementation of new work-from-home policies and updated remote work capabilities, this option should now be easier to implement than in recent years. Work-from-home flexibility is a tool that should be used to your advantage this time of year.

Another smart idea is educating employees about the benefits of the flu vaccine. The CDC and medical professionals urge the general public to get the flu vaccine to lessen the effects of an outbreak. You should consider suggesting and even encouraging your employees to get a flu shot this season, preferably before Thanksgiving. You can even consider bringing in a qualified medical professional to administer shots at your workplace.

The Pushback to Mandatory Vaccination

Requiring employees to get mandatory flu vaccinations is a controversial issue and one that has been exacerbated by the COVID pandemic. Many workers may refuse to comply, although in some industries such as healthcare, mandatory flu shots are common.

The Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC) have largely deferred to the CDC policies to determine the proper way to view and handle mandatory flu shots in the workplace. A risk assessment is the first step in making such a determination, and the nature of the workplace and the responsibilities of the employees will be major factors to be considered. In fact, OSHA requires you to assess each task performed by employees to determine what personal protective equipment, including hats, gloves, and other clothing, is required to perform a job safely.

Certainly, some jobs and some businesses will face far more serious problems with the flu than others, and you must be prepared to take into consideration many elements when an employee objects to the vaccination. For example, is the worker objecting to the vaccine on religious grounds? Would the vaccine aggravate another health condition or set off an allergic reaction? Does the employee simply fear needles?

According to the EEOC, an employer must interact with any employee who objects to vaccines, whether based on religious or health reasons. You need to consider possible issues under the Americans with Disabilities Act (ADA) and whether reasonable accommodations are necessary.

You should consider creating forms for employees to fill out if they want to request exemptions from any required inoculations based on religious, disability, or medically related reasons. Make sure you have a team available to

review and resolve any such requests in a professional and expeditious manner.

Keep COVID-19 in Mind

Although most employers are happy to leave COVID-19, quarantining, and vaccinations in the past, you should remain vigilant in tracking the remnants of the pandemic. As we have seen in past winter seasons, COVID-19 can develop new and sometimes more aggressive variants and COVID is still lingering around. We would not be surprised if the number of positive COVID-19 cases sees an uptick as we head into the winter months. The U.S. Department of Health and Human Services (HHS) recently announced the purchase of 66 million doses of COVID-19 booster in preparation for potential variants arriving in the fall and winter.

As with the flu vaccine, employers should educate employees on their options and make informed risk-assessments on vaccine mandates. Employers should track outbreaks, keep abreast of region-specific positivity rates, and provide flexibility for employees who wish to get vaccinated or wear PPE in the workplace as a precaution.

Collective Bargaining Concerns

If your employees are represented by a union, remember that you may have a duty to bargain about flu-prevention policies and vaccine mandates. Before you make any policy changes or implement any mandatory actions, make sure that you can do so under the collective bargaining agreement.

The Next Right Thing: Handling Weather Exposure Issues

With winter bearing down upon us, it is a good time to familiarize yourself with the dangers of weather-related health threats and gain some important tips to help protect your workers from the cold weather. While the cold-weather months are obviously dangerous to employees spending long hours outside such as construction workers, other workers may be exposed as well. Remember, your employees may be conscripted to help out with shoveling out or other weather-related cleanup activities they do not normally handle.

What Does the Law Say?

Although there are no regulations specifically addressing work in cold temperatures, OSHA's general duty clause requires you to provide a safe and healthy workplace for your employees. Besides protecting your workers from expected threats like winter-weather exposure, you also have an obligation to rid your workplace of winter-related hazards like icy walkways and parking lots to avoid a citation under the general duty clause.

The Science of Cold Weather

First, some science to help understand the dangers your workers will face. An individual gains body heat from food and activity, and loses it through convection, conduction, radiation, and sweating to maintain a constant body temperature. If the body temperature drops slightly below its normal temperature of 98.6°F, the blood vessels will constrict. This decreases blood flow to reduce heat loss from the surface of the skin. The body shivers to generate heat by increasing the body's metabolic rate.

The environmental conditions that cause cold-related stress are low temperatures, high/cool winds, dampness, and contact with cold water. Wind chill, a combination of air temperature and speed, is a critical factor to evaluate when working outside. For example, when the actual temperature is 40°F but the wind is at 35 mph, it feels like 11°F to exposed skin. A dangerous situation of rapid heat loss may occur for someone exposed to high winds and cold temperatures even if it is not technically "freezing" outside.

The Dangers of Cold Weather

Prolonged exposure to freezing or cold temperatures can result in serious health problems like trench foot, frostbite, hypothermia, and, in extreme cases, death.

- Trench foot is caused by long, continuous exposure to a wet, cold environment, including actual immersion in water. Work involving small bodies of water or working in trenches with water pose particular threats. Symptoms include a tingling or itching sensation, burning, pain, and swelling, sometimes forming blisters in more extreme cases.
- Frostbite occurs when the skin tissue actually freezes, causing ice crystals to form between cells and draw water from them. This typically occurs at temperatures below

30°F, but wind chill can cause frostbite at above-freezing temperatures. Initially, frostbite symptoms include uncomfortable sensations of coldness. A tingling, stinging, or aching feeling of the exposed area is then followed by numbness.

- Hypothermia occurs when body temperatures fall to a level where normal muscular and cerebral functions are impaired. While hypothermia is generally associated with freezing temperatures, it may occur in any climate where a person's body temperature falls below normal. The first symptoms, which begin when the individual's temperature drops more than one degree, include shivering, an inability to perform complex motor functions, lethargy, and mild confusion.

How to Protect Employees

Obviously, employers should watch for the symptoms described above, including uncontrolled shivering, slurred speech, clumsy movements, fatigue, and confused behavior. If you observe any danger signs, you should call for emergency help.

There are many methods to protect your employees from the cold, including protective clothing (e.g., gloves and hats), engineering controls, and common safe work practices. OSHA distributes a free "Cold Stress Card" with tips on handling cold weather. Some tips include:

- train workers about cold-induced illnesses and injuries;
- encourage workers to wear proper clothing for cold, wet, and windy conditions including layers so they can adjust to changing conditions;
- be sure that workers take frequent short breaks in warm dry shelters to allow the body to warm up;
- try to schedule work for the warmest part of the day;
- avoid exhaustion or fatigue (because energy is needed to keep muscles warm);
- use the buddy system – work in pairs so that one worker can recognize danger signs;
- drink warm, sweet beverages (sugar water, sports-type drinks) and avoid drinks with caffeine (coffee, tea, sodas,

or hot chocolate) or alcohol; and

- eat warm, high-calorie foods such as hot pasta dishes.

Free copies of OSHA's Cold Stress Card may be obtained through [OSHA's website](#). The card is available in both English and Spanish.

Remember that workers may face increased risk because of factors including age, medications, if they are in poor physical condition, or suffer from illnesses such as diabetes, hypertension, or cardiovascular disease. Other more obvious risk factors include wearing inadequate or wet clothing or having a cold.

Don't "Let it Go" or YOLO at the Holiday Party! Hosting a Safe and Responsible Office Party

If your employees aren't planning your company holiday party right now, they soon will be. It's time for you to get involved to make sure things don't go off the rails.

There is always a human resources risk involved in holding any company-sponsored function. Serving alcohol only compounds the problems. According to one study, 36% of employers reported behavioral problems at their most recent company party. These problems involved everything from excessive drinking to off-color jokes to sexual advances to fist fights.

Since most employers still want to hold holiday parties despite the risks, you can reduce your legal liability by observing as many of the following recommendations as possible:

- If you've had troubles in the past or want to organize the most conservative holiday party possible, have a catered lunch at your offices without alcohol present.
- But if, like most, you serve alcohol, you should invite spouses and significant others so that there will be someone there to help keep an eye on your employees and, if necessary, get them home safely.
- Always serve food and always have plenty of non-alcoholic beverages available.
- If your party is a dinner, consider serving only wine or beer (plus non-alcoholic alternatives) with the meal, not

hard liquor.

- If you do serve alcohol, don't have an "open bar" where employees can drink as much as they want. Instead have a cash bar or use a ticket system to limit the number of drinks. Close the bar at least an hour before you plan to end the party. Switch to coffee and soft drinks from there on.
- Let your managers know that they will be considered to be "on duty" at the party. They should be instructed to keep an eye on their subordinates to ensure they do not drink too much. Instruct managers that they are not to attend any "post-party" parties.
- Consumption of alcohol lowers inhibitions and impairs judgment. This can result in employees saying and doing things that they would not ordinarily do. Remind employees that, while you encourage everyone to have a good time, your company's normal workplace standards of conduct will be in force at the party, and misconduct at or after the party can result in disciplinary action.
- Hire professional bartenders (don't use supervisors!) and instruct them to report anyone who they think has had too much. Ensure that bartenders require positive identification from guests who do not appear to be substantially over 21.
- Arrange for no-cost taxi or other driving service for any employee who feels that he or she should not drive home. At management's discretion, be prepared to provide hotel rooms for intoxicated employees.
- Finally: never, ever, hang mistletoe! You can be sure that mistletoe + alcohol = lawsuit.

Conclusion

If you have questions regarding any of these issues, contact your Fisher Phillips attorney or the authors of this Insight. We will continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information.