



## FLSA Questions After Hurricane Harvey

Insights

8.28.17

By: The Editor

Affected employers will have a variety of wage-hour questions in the aftermath of Hurricane Harvey. The number and scope of the issues raised might well be practically endless. Here we address in very general ways the federal Fair Labor Standards Act topics that experience suggests will be among the most-pressing.

◇ *What do we do about lost time records for work already performed but not yet paid?*

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 best approach is to have each employee make the best-possible estimate of his or her hours worked. You should obtain the employee's written acknowledgement of his or her best recollection and should include the employee's authorization allowing later corrections in worktime and pay should more accurate hours-worked information become available.

◇ *How do we record employees' worktime without our electronic time clocks?*

Employees may record all hours worked by using handwritten timesheets or by other means. To ensure accuracy, each employee should enter his or her own time and should record the actual times when the employee's work starts and stops each workday.

◇ *As we recover, must we keep paying overtime on top of our other burdens?*

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 employer's designated seven-day workweek(s).

Employees covered by a collective bargaining agreement or some other contract or enforceable understanding might be due more in overtime compensation than the FLSA requires. Perhaps the terms of that agreement or understanding relax those requirements in emergencies. However, no such exception can override the FLSA's requirements.

◇ *Can an employee volunteer to perform recovery services for us without pay?*

The FLSA does not permit employees to "volunteer" work to their private-sector employer under any but the narrowest of circumstances. Employers considering any kind of unpaid "volunteer" services by their employees should carefully evaluate the legality of permitting this. Somewhat-different FLSA "volunteer" principles apply to public-agency employees in certain situations.

◇ *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 in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible difference relates to employees treated as exempt FLSA "white collar" employees whose exempt status requires that they be paid on a "salary basis". Generally speaking, if such an employee performs at least some work in the employee's designated seven-day workweek, the "salary basis" rules require that he or she be paid the entire salary for that particular workweek. There can be exceptions, such as might be the case when the employer is open for business but the employee decides to stay home for the day and performs no work. A U.S. Department of Labor opinion letter addressing these matters can be accessed here.

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, an employer 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 time missed to vacation and leave balances?*

The FLSA generally does not regulate the accumulation and use of vacation and leave. The salary requirements for exempt "white collar" employees can implicate time-off allotments under various circumstances. USDOL has provided some guidance on this topic in an opinion letter that is accessible here.

Again, however, what an employer 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.

## **The Bottom Line**

Circumstances like these demonstrate what a strict and unforgiving law the FLSA can be.

Remember also that other requirements, such as those applying to government contractors or subcontractors, as well as those of states or other jurisdictions, can also be relevant to these questions.