

# Employment Practices Liability

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## Employers Should be Prepared to Deal with the Impact of Hurricanes

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**Executive Summary:** Hurricane Matthew serves as a reminder that employers should be prepared to address storm-related issues if they are required to close their businesses and as they prepare to resume normal operations. For example, employers need to determine whether closing the office means having to pay workers who stay home, being on the hook for unemployment compensation, and whether Workers' Compensation applies to weather-related injuries.

### 1. Does the Fair Labor Standards Act (FLSA) require me to pay employees who miss work because of the weather?

The answer to this question depends on whether the employee is exempt or non-exempt.

**Exempt Employees:** If the business closes because of the weather, the FLSA requires employers to pay an exempt employee his or her regular salary for any shutdown that lasts less than a week. Under the FLSA, an employer cannot deduct an exempt employee's pay based on the quantity or quality of the employee's work or when he or she is ready, willing and able to work but no work is available. Thus, deducting an exempt employee's pay for absences due to a business closing that lasts for less than a week would jeopardize the employee's exempt status. A private employer may, however, deduct the period of absence from the employee's paid vacation or paid time off, as long as the employee receives his or her full salary for the week.

If the business remains open but an employee cannot get to work because of the weather, an employer can deduct an exempt employee's salary for a full day's absence. Under the FLSA, an employer can deduct an exempt employee's pay for a full-day absence taken for personal reasons without jeopardizing the employee's exempt status. Employers cannot, however, deduct an exempt employee's salary for less than a full-day absence without jeopardizing the employee's exempt status.

**Nonexempt Employees:** Under the FLSA, employers generally are not required to pay nonexempt employees for any days that the employee does not perform any actual work. Thus, employers are not required to pay employees for days they did not come to work or for days when the business was closed because of a weather event. This does not apply to nonexempt employees who are paid on a fluctuating workweek basis. These employees must be paid their full weekly salary for any week during which any work is performed, even if they miss some work due to the storm.

**State Reporting Pay Requirements:** Be aware that some states have reporting pay or "show-up" pay requirements that require employers to pay a minimum amount to employees who show up for work even if they do not perform any work. States that have such requirements include California, Connecticut (certain industries), Massachusetts, New Hampshire, New Jersey, New York, Oregon (this law only applies to minors), and Rhode Island as well as the District of Columbia. Employers should familiarize themselves with the requirements of these state laws. Additionally, collective bargaining agreements may require employers to pay employees for a guaranteed minimum number of work hours regardless of the number of hours actually worked.

### 2. May I count absences due to the storm against an employee's Family and Medical Leave Act (FMLA) allotment?

Although the FMLA regulations do not specifically address natural disasters, the regulations state that if, for some reason, the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks

(e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Thus, it appears that if an employer's business is closed for a week or more because of the storm, the days the business is closed would not count against an employee's FMLA leave allotment.

If the business is closed for less than a week, the FMLA's regulation pertaining to holidays likely would apply. The FMLA regulation provides, "the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave." Similarly, if a business is closed for a day or more during a week in which an employee is on FMLA leave, the entire week would count against the employee's FMLA leave allotment. If, however, the employee is taking FMLA leave in increments of less than a week, only the days that the business is closed and on which the employee would be expected to work can be counted against the employee's FMLA allotment.

### 3. Am I required to pay an employee for on-call time?

Under the FLSA, if the employer requires an employee to be on-call while the office is closed due to a weather emergency and the employee cannot effectively use the time for his or her own purposes, the employer must pay the employee for the on-call time. Employers are not required to pay employees who are at home and available to the employer but able to use the time for their own purposes. State laws may impose different or more stringent requirements for on-call time.

### 4. Are employees who are discharged as a result of the storm entitled to unemployment compensation?

Employees who are out of work for reasons other than their own misconduct generally are entitled to unemployment compensation as long as they have met the requirements of the state's unemployment compensation laws. In some states, an employer's unemployment compensation account is not charged when an employee is discharged because of a natural disaster. Employers should check the laws of the states in which they do business.

### 5. Are Workers' Compensation claims the exclusive remedy for employees who are injured at work due to conditions that resulted from a tropical storm or hurricane?

Generally, employees who are injured during the course and scope of employment are limited to Workers' Compensation claims and cannot sue the employer in court over the injuries. If, however, the injuries are the result of an employer's deliberate or intentional conduct rather than an accident, the employee may have the ability to sue the employer in state court. Employers should check the laws of the states in which they do business.

### 6. What steps can I take to ensure my employees' safety upon their return to work?

The Occupational Safety and Health Administration (OSHA) states that employers are responsible for providing a safe and healthful workplace for their employees. Employers are required to protect workers from the anticipated hazards associated with the response and recovery operations that workers are likely to conduct. OSHA's Response/Recovery page features a link to OSHA's Hurricane eMatrix, which outlines the activities most commonly performed during hurricane response and recovery work and provides detailed information about the hazards associated with those activities.

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## Employment Practices Liability News & Alerts

See <http://www.osha.gov/dts/weather/hurricane/response.html>. The eMatrix is designed to help employers make decisions to protect workers and offers recommendations for personal protective equipment, safe work practices, and precautions for each activity.

**Employers' Bottom Line:** Employers may be faced with a variety of

employment-related issues during the hurricane season.

**For more information about CIRMA's Employment Practice Liability Helpline Program, please contact your CIRMA Risk Management Consultant.**

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*Have a question or concern about Employment Practices?*

Call the EPL Helpline at 844-426-9086

Or e-mail them at

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