

KD Alert: Helpful Information for Employers and EPL Carriers in Sandy's Aftermath

By Philip R. Voluck and Keith Gutstein
(November 9, 2012)

As many of our clients, friends, acquaintances and others continue to deal with the severe hardships caused by Hurricane Sandy, this disaster has likely triggered a variety of challenges for employers under state and federal employment laws. With businesses struggling to re-open and resume operations, KD has gathered together a number of general employment issues for companies to consider as a result of Hurricane Sandy.

Deductions in Pay from Exempt Workers.

A deduction of a day's pay for an exempt employee because the employer was closed due to inclement weather is improper according to the U.S. Department of Labor (DOL). Such a deduction could jeopardize an otherwise applicable overtime or minimum wage exemption. Deductions for partial day absences generally violate the salary basis rule. Exempt employees must receive a full day's pay for the partial day worked. Full day deductions for exempt employees are only permissible in limited situations.

Deductions in Pay from Non-Exempt Workers.

Generally, employers are not required under the Fair Labor Standards Act (FLSA) to pay non-exempt employees for hours not actually worked by them, including absences caused by a natural disaster like Hurricane Sandy. The employer has the discretion to allow or require non-exempt workers to use any accrued leave, paid or otherwise, available to them for such absences.

Reductions in the Leave of an Exempt Employee.

An employer can substitute or reduce an exempt employee's accrued leave for the time an employee is absent from work, provided that the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed even if the employee has no leave remaining.

Weekend or Night Work.

Extra pay for working weekends or nights is a matter of agreement between the employer and the employee (or the employee's representative). The FLSA does not require extra pay for weekend or night work. However, the FLSA does require that covered, nonexempt workers be paid not less than time and one-half the employee's regular rate for time worked over 40 hours in a workweek. Some states have laws impacting pay when a certain number of hours are worked in any given day.

Computing Vacation Pay, Sick Pay, and Holiday Pay.

The FLSA does not require payment for time not worked, such as vacations, sick leave or holidays (Federal or otherwise) or natural disasters. These benefits are matters of agreement between an employer and an employee (or the employee's representative).

Changing an Employee's Scheduled Hours of Work.

The FLSA has no provisions regarding the scheduling of employees, with the exception of certain child labor provisions. Therefore, an employer may change an employee's work hours without giving prior notice or obtaining the employee's consent (unless otherwise subject to a prior agreement between the employer and employee or the employee's representative).

There may also be implications under Title VII of the Civil Rights Act of 1964, as amended (Title VII). In this regard, caution is advised when selecting those employees whose hours are to be changed in order to avoid claims of discrimination and/or retaliation or disparate impact.

Notices to Terminated or Laid Off Employees.

The FLSA has no requirement for notice to an employee prior to termination or lay-off. In some situations, the WARN Act provides for notice to workers prior to lay-off. Some states may have requirements for employee notification prior to termination or lay-off.

OSHA.

OSHA has outlined the activities most commonly performed during hurricane response and recovery work. Among these are Best Practices for Hurricane Response and Recovery Operations designed to help employers make decisions to protect workers and offers recommendations for personal protective equipment, safe work practices, and precautions for each activity.

Worksite Evaluation.

Evaluate the work site to identify if safety or health hazards such as the following are present: fall, electrocution, noise, cut/laceration hazards; high ambient temperatures; hazardous substances; or infectious materials.

Exposure Monitoring.

As appropriate, conduct task-specific exposure monitoring during response and recovery activities. Consider the contaminants normally associated with the task/operation and those associated with the site conditions resulting from the effects of the hurricane (e.g., release of unknown chemicals, entry into confined spaces that may now be permit-required). Ask workers about how they perform the task/operation, to obtain useful information about the equipment and materials used and the conditions under which the task/operation is performed.

- Inspect all evacuation routes and alerting systems and repair any damage as soon as practical.
- Inspect all fire protection and suppression equipment that may have been damaged by the storm.
- Ensure that first aid supplies and services, and medical care are replenished.
- Clean all cafeteria and meal break areas, including refrigerators, to ensure that employees do not consume food or beverages that were exposed to floodwaters or perishables that may have spoiled.

Evaluate the work that workers will be performing in hurricane-impacted areas. Use this information in consultation with a physician or other licensed health care professional, to identify any additional medical examinations, tests, or vaccinations required.

The Centers for Disease Prevention and Control (CDC) has published [Interim Immunization Recommendations for Disaster Responders](#).

Disaster Unemployment Relief.

For New York City and several suburban counties, Governor Cuomo has announced a temporary measure that will include unemployment benefits for many not ordinarily eligible, such as those who were unable to get to work and independent contractors. In addition, both New Jersey and Connecticut have expanded the reach of their unemployment laws to provide a broader spectrum of relief.

Please note that aside from FLSA, laws might vary from state to state on some of the topics mentioned above. For more information on wage and hour issues in the aftermath of a natural disaster, please contact the attorneys in KD's Employment Law Practice Group. We continue to wish those affected by this storm a safe and speedy recovery. | www.kaufmandolowich.com