

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Labor & Employment Law

WHEN SNOW DAYS IMPACT GOVERNMENT CONTRACTS: BALANCING INCLEMENT WEATHER AND THE FLSA

By Julia Di Vito

Winter weather can be frustrating for all employers, but government contractors face some unique challenges. Employees who work in government facilities may be unable to work when the government closes its facilities, or employees may be unable to travel in to the worksite even when the worksite is open. In these situations, government contractors unexpectedly lose a day (or more) of work on the contract. Contractors often wonder what their obligations are to pay employees for a day when they are unable to bill the government. The answer depends on the applicability of the Fair Labor Standards Act (FLSA) to the contractor's employees.

Employees who are not exempt from the overtime requirements of the FLSA and who are paid on an hourly basis are paid only for hours they work. If the worksite is closed or the employee chooses not to come to work due to inclement weather, non-exempt employees do not need to be paid for those hours. Employers may choose to allow the employees to use personal or vacation leave, if provided by the employer, for the time they are absent. Thus, although winter weather may cause contractors to miss out on hours that could be billed to the government, they are not required to pay non-exempt employees when work is not being done.

However, the issue is not so simple when determining whether salaried employees, exempt from the overtime requirements of the FLSA, must be paid when work is missed due to inclement weather. The FLSA provides an exemption from the requirement to pay overtime for employees hired as bona fide executive, administrative, professional, and outside sales employees, as well as certain computer employees. To qualify for one of these exemptions, an employee must meet certain requirements based on his or her job duties and must

be paid on a salary basis. To remain an exempt employee, an employee must receive his or her full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

When an exempt employee misses work because of inclement weather, whether an employer must pay the employee for the time missed depends on whether the employee's worksite is closed or whether the employee decides not to go to work because of difficult travel conditions. If a contractor's employee works exclusively at a government facility, and cannot perform work his or her work at the contractor's facility, then the employee's worksite is closed when the government is closed. Conversely, if the employee is able to work at the contractor's facility when the government facility is closed, or if the employee works exclusively at the contractor's facility, then the employee's worksite is considered closed only when the contractor is closed. Finally, even when the employee's worksite is open, he or she may choose to stay home due to the inclement weather.

If the employee's worksite is closed due to inclement weather, the FLSA considers the employee "ready, willing and able to work," even if he or she may not be able to travel in the inclement weather to the worksite. In this situation, a contractor may require exempt employees to use vacation or personal leave for the days the worksite is closed, even if using that leave will result in a zero or negative leave balance. However, no matter whether the employee has leave time available, the employer may not deduct anything from an exempt employee's salary if the worksite is closed for less than one workweek. Thus, to ensure an exempt employee continues to be an exempt employee, the employer must

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pay the employee for the time the worksite is closed if the worksite is open during other days that workweek. Note that if the worksite is closed for the entire workweek, the contractor may choose to not pay the employee for that week and still maintain the employee's exempt status.

Another common scenario during the winter is that the worksite is open for business, but the employee is unable to travel to work due to inclement conditions. As when the worksite is closed, the employer may require an exempt employee to use his or her vacation or personal leave time for the days he or she misses work because he or she cannot travel to the worksite. However, unlike when the worksite is closed, the FLSA allows employers to reduce an exempt employee's salary in full-day increments if he or she is absent for one or more full days for personal reasons, other than sickness or disability, and the worksite remains open. The Department of Labor has advised employers that an employee who is absent due to inclement weather is absent because of personal reasons. Thus, if the worksite is open, and an exempt employee does not work for a full day because of snow or other inclement weather, the employer may deduct from the employee's pay without jeopardizing the employee's status as an exempt employee, even if the employee works during other days that week.

If you have not already informed or reminded your employees of the company's inclement weather policies, now is a good time to do so. It is important to ensure compliance with inclement weather regulations because failure to comply could result in losing an exemption to the FLSA and gaining the requirement to pay overtime. Additionally, make sure any inclement weather policies set out in your employee handbook reflect the policies you put into practice. □

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