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No Work, Who Gets Paid?

by Bernadette Starzee

As the lights came back on last week and the post-Sandy cleanup work began, employers had more on their minds than making sure their offices were habitable.

Many wondered whether they should pay their employees for the time the offices were shuttered.

"We have received a lot of calls from clients asking whether they are legally required to pay employees if they couldn't work because the offices had no power," said Joe Campolo, managing partner of the Bohemia law firm Campolo, Middleton & McCormick.

The answer is, different rules apply for different categories of employees.

Who gets paid

"Generally speaking, employees paid on an hourly basis do not have to be paid for time not worked," said Andrew A. Kimler, a partner at the Lake Success law firm of Vishnick McGovern Milizio.

The Fair Labor Standards Act and New York labor laws do not contain exceptions for emergency circumstances, said Tara Daub, a partner in the labor and employment law group in the Jericho office of Nixon Peabody.

"The same rules regarding payment apply whether there's a disaster or not," Daub said.

But the employer has to tell the workers in advance that the office will be closed.

"Under New York law, employers are required to pay a minimum level of 'call-in pay' if the employee shows up for work but the employer is closed and has no work for the employee to perform, unless the employer has taken steps to notify the employee of the closure in advance," Daub said. In most industries, the call-in pay rate equals four hours at the New York minimum wage rate.

Daub added that companies should have a system in place for notifying employees in advance of an office closure. "Some employers provide employees with a telephone number they should call to listen to a recording giving notice of weather-related delays or closures," she said.

Unlike hourly workers, salaried employees must be paid for the entire week, without any deductions, if they worked a portion of the workweek but then were unable to work the remainder of the week because of a company's closure, Kimler said. In many cases, salaried workers with power at home may have performed duties, such as calling clients or prospects.

"They may have done some work on the weekend before, knowing that Sandy was coming," said A. Jonathan Trafimow, a partner who heads the employment law practice group for the Garden City law firm **Moritt Hock & Hamroff**.

It would be unusual for a salaried, exempt employee to have performed no work over the course of the week, **Trafimow** added. However, if the company is closed for the entire workweek, and salaried workers in fact performed no work, the company is not obligated to pay them.

"Companies need to pay attention to how employees are recording time if they are working remotely," Daub said.

Finding the right balance

Employers must walk a fine line between satisfying their bottom line and keeping good people happy. While Long Island businesses suffered heavy losses in the aftermath of Superstorm Sandy, so did their employees, many of whom experienced costly property damage or worse, in addition to the inconveniences associated with being without power. Under the circumstances, docking employees' pay is

akin to adding insult to injury.

"A lot of our clients would like to pay their employees for the time they were closed, but some can't afford to," Campolo said. "If a business is closed for one day because of a storm, they may pay employees, but when it drags on for a week to 10 days, it's difficult, especially in a retail environment, when you don't have revenue coming in."

Campolo said employers have a couple of options in addition to paying or not paying.

"They can pay people normally and have them make up the hours, such as on Saturdays," he said. "Or the employees can use their vacation time."

If a company pays its employees now, it may cut into what it pays them later.

It's all one pot of money," Campolo said. "If they pay them for this week, they may have to pay them less in end-of-year bonuses."

How to do it

It was challenging for some companies without power to meet payroll obligations.

"Some clients couldn't get into their , but people have to be paid under the law, and many can't go without their paychecks," Campolo said. "For clients writing manual checks, we recommended paying two-thirds of gross pay. One-third usually goes to taxes and other deductions. The employer can then true up the total with the next paycheck."

With respect to making payroll, Kimler recommends that employers that are having difficulty make every effort to document the problems they are encountering and what steps they have taken to overcome them.

"This would probably constitute a defense to a claim of intentionally violating the law," Kimler said.