



Quarterly

Your Keys to Compliance



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Inclement Weather and the FLSA

Due to inclement weather or other disasters, an employer may need to close their office for the safety of employees. Travel during these times may be hazardous. The national weather service says that everyone is potentially at risk during winter storms. The actual threat depends on the situation. Recent observations indicate the following:

Deaths related to ice and snow:

- About 70% occur in automobiles.
- About 25% are people caught out in the storm.

Deaths related to exposure to cold:

- 50% are people over 60 years old.
- Over 75% are males.
- About 20% occur in the home.

Closing an office may bring up questions regarding payment of wages to exempt employees. The Department of Labor has answered some common questions in an Opinion Letter.

1. During office closures due to inclement weather or other disasters, may a private employer direct exempt staff to take vacation (or leave bank deductions) or leave without pay without jeopardizing the employees' exempt status?

The FLSA does not require employer-provided vacation time. Where an employer has proposed a bona fide benefits plan, it is permissible to substitute or reduce the accrued leave in the plan for the time an



employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if the employee still receives in payment an amount equal to the employee's guaranteed salary.

However, an employee will not be considered to be paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.

Thus, if the employer closes the office due to weather or other disasters for less than a full workweek, the employer must pay the employee's full salary even if: (1) the employer does not have a bona fide benefits plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank.

Since employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s). Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account in the situation presented above, whether for a full or partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account or has a negative balance in the leave bank account still must receive the employee's guaranteed salary for any absence(s) occasioned by the employer or the operating requirements of the business.

2. If the private employer's offices remain open during inclement weather or other

Hearing Impairments and the ADA

A hearing impairment is a disability under the ADA if: (1) it substantially limits a major life activity; (2) it substantially limited a major life activity in the past; or (3) the employer regarded (or treated) the individual as if his or her hearing impairment was substantially limiting.

The determination of whether a hearing impairment is substantially limiting must be made on an individualized basis.

If an individual uses mitigating measures, such as hearing aids, cochlear implants, or other devices that actually improve hearing, these measures must be considered in determining whether the individual has a disability under the ADA. Even someone who uses a mitigating measure may have a disability if the measure does not



correct the condition completely and substantial limitations remain, or if the mitigating measure itself imposes substantial limitations.

Measures that merely compensate for the fact that someone has a substantially limiting hearing loss but that do not actually improve hearing, such as sign language interpreters or lip-reading, are not mitigating measures. Furthermore, if an individual does not use mitigating measures, then the hearing impairment must be considered as it exists, without speculation about how a mitigating measure might lessen the hearing loss.

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. The information must be kept in files separate from general personnel files and

FLSA Continued...

types of disaster, can exempt staff be directed to take vacation (or leave deductions) or leave without pay if they fail to report to work without jeopardizing the employees' exempt status?

Leave bank or salary deductions may be made when the employee is absent from work for a day or more for personal reasons other than sickness or accident. Thus, if an employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made from the employee's salary for such absences. An absence due to inclement weather does not constitute an absence due to sickness or accident. Therefore, an employee who is absent due to inclement weather, such as because of transportation difficulties, is absent for personal reasons. In the situation described above, a private employer may require an exempt employee who fails to report to work to take vacation or make leave bank deductions without jeopardizing the employee's exempt status. When the office is open, an exempt employee who has no accrued benefits in the leave bank account does not have to be paid for the full day(s) s/he fails to report to work due to such circumstances as a heavy snow day.

3. *If the private employer's employees are probationary or have used all of their accrued vacation (or leave bank) time, can the employer choose not to pay them for time not worked without jeopardizing the employee's exempt status such as in a*

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circumstance where an employee stays home half a day due to inclement weather?

Deductions from salary for less than a full day's absence are not permitted under the regulations. Therefore, where the employee's absence is for less than a full day, payment of an amount equal to the employee's guaranteed salary must be made even if the employee has no accrued vacation or other leave benefits. A deduction from an employee's leave bank or salary may be made for absences of one or more full days for personal reasons, other than sickness or accident.

An employer will lose the exemption if it has an actual practice of making improper deductions that demonstrates it did not intend to pay employees on a salary basis. On the other hand, isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions. Moreover, if an employer has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

ADA Continued...

must be treated as a confidential medical record.

Employers are required to provide adjustments or modifications that enable qualified people with disabilities to enjoy equal employment opportunities unless doing so would result in undue hardship (i.e., significant difficulty or expense). Employers should not assume that all persons with hearing impairments will require an accommodation or even the same accommodation.

When an employee asks for an accommodation, no "magic words" (such as "ADA" or "reasonable accommodation") are required. An applicant or employee simply has to inform his employer (verbally or in writing) that he needs an adjustment or change in the workplace or in the way things are usually done because of a hearing impairment.

Employers are prohibited from harassing or allowing employees with disabilities to be harassed in the workplace. When harassment is brought to an employer's attention, management and/or the supervisor must take steps to stop it.

For additional information, go to www.eeoc.gov