

MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

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LEGAL AND LEGISLATIVE UPDATE

by

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Winter Weather Blues: What employers need to do when employees aren't needed at work

The Forecast according to Federal and State Wage Laws

There is an expression that if you don't like New England weather, just wait a minute as it will change. We have all experienced the challenges of getting to or from work in bad weather, especially during winter months. One of the biggest challenges for employers during these dark and cold months is determining if and when to close because of bad weather and how many employees, if any, are "essential" for that workday. In 2013/2014 the first reported snow fall in New Hampshire was on November 3rd and the last was on April 12th, 2014. In the month of February 2014 alone there were over 20 days of reported snow fall somewhere in the state. With those weather challenges many employers likely had to make staffing decisions. This year will surely have many of the same challenges as we have already experienced snow and ice storms and those storms caused power outages and travel nightmares.

Woody Allen once wrote that "Eighty percent of life is just showing up." While some can debate the percentage, there is no doubt that showing up is an essential function of most jobs. New Hampshire has a law that requires a minimum of pay when an hourly/non-exempt employee reports to work even when there is no work for him/her there that day.

That law, RSA 275:43-a, provides:

275:43-a Required Pay. – *On any day an employee reports to work at an employer's request, he shall be paid not less than 2 hours' pay at his regular rate of pay; provided, however, that this section shall not apply to employers of counties or municipalities, and provided further that no employer who makes a good faith effort to notify an employee not to report to work shall be liable to pay wages under this section. However, if the employee reports to work after the employer's attempt to notify him has been unsuccessful or if the employer is prevented from making notification for any reason, the employee shall perform whatever duties are assigned by the employer at the time the employee reports to work.*

An Administrative Rule that accompanies that statute (LAB 803.03) also provides, in pertinent part, exceptions and limits to this two (2) hour reporting pay rule. Those exceptions include:

(h) Employees who report to work and then request to leave on the basis of illness, personal or family emergency shall be exempt from RSA 275:43-a providing that a written explanation, initialed by the employee is entered on the employee's time slip or card;

(i) Employees who are hired and report to work with the expectation that they will work less than two hours and are notified in advance of their schedule shall be exempt from RSA 275:43-a provided that the notification is in writing; or

(j) Health care employees of community based outreach services providers who voluntarily make scheduled changes to meet the needs of the physically or mentally infirm clients they serve and who sign a statement upon hire stating that they understand this job requirement are exempt from RSA 275:43-a.

In short, employers should have a system to notify employees not to report to work (e.g. text, email, website, call in, television or radio announcements). Employers who make a good faith attempt to notify employees may not be required to pay that two (2) hour minimum. However, if an hourly or salaried/non-exempt (not overtime exempt) employee is scheduled to and expects to work more than a few hours in a workday, and doesn't receive notification from his/her employer that his/her services aren't required that day, and shows up at work the employer has the option of paying the employee for the two (2) hours and sending him/her back home or putting him/her to work and paying him/her for the hours worked. If the employee refuses the work no wages may be due.

Ok so what happens when the business is shut down altogether because of weather? Under state wage laws, if an hourly employee doesn't report to work and performs no work, no wages are due. For salaried employees the story is a bit different.

Under the FLSA, if as a result of a snow or ice storm (not a planned shut down) an employer closes for a day (less than a full week) the employer must pay the salary for exempt employees for the full or partial days the business is closed. That is if that employee performed work in that week. However, that employer can require that those employees use their accrued leave time for that full or partial day. Note: If under the employer's policy the employee can't use sick leave for personal time (not a PTO

system) then the employer can't require the employee to use sick time under those circumstances. If the employer stays open and the exempt employee doesn't come in to work the employer doesn't have to pay the employee for that day as that can be treated as an absence for personal reasons (provided it is a full day.) If the exempt employee shows up late or leaves early on that day the employer can require the use of PTO, if available, for the non-working time that day (same exception in the case of sick pay). Finally, if the exempt employee works from home you have to pay for the full day (unless they took half a day to go sledding, skiing, to catch up on sleep, watch daytime TV etc).

Under NH wage laws salaried employees get a bit more protection, and as such, NH employers have to provide the greater protection to their salaried employees. In short, under RSA 275:43-b, a salaried employee who performs work in a pay period (not limited to a week as under FLSA) must, with only a few exceptions, be paid a full salary for that pay period without regard to the quality or quantity of the employee's work that period. While there are a few exceptions, the one that applies here is:

the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

It is important to note that this provision only deals with the payment of full or the reduction of salary. In other words, just like as under the FLSA, an employer in NH can still charge or debit a salaried employee's paid leave account when that employee doesn't show up for work or perform at least a half day of work on a day when the business is closed because of weather or other types of emergencies. So much for salaried employees watching websites or TV announcements like school aged kids who look anxiously for a school closure or "snow day". In this era of telecommuting and connectivity if that salaried employee doesn't venture out or perform work via phone, computer or otherwise, the employer can charge him/her for leave time.

Yes, in New Hampshire, where winter weather can disrupt travel and business operation for at least six (6) months of the year, employers need to be aware of their obligations and rights under federal and state wages laws. Being unaware of or not following these provisions can result in, employers could be, as Paul Simon sang, "*Slip sliding away*" into wage claims and audits with the Department of Labor.

As James Taylor sang, "*It's best to keep a weather eye for the coming storm*" and, above all else, let's be careful out there!

Attorney Jim Reidy is a partner at Sheehan Phinney Bass + Green. His practice is in the area of labor and employment law where he exclusively represents management.

Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.