



In many parts of the United States we experience extreme weather events such as hurricanes, tornadoes, violent thunderstorms, wildfires and blizzards. Often these natural disasters cause employers to close business operations for one or more days – usually without warning or preparation.

It is our hope that, by highlighting several key points that employers should know, we can assist your business to feel prepared to deal with whatever nature throws your way.

## Communication is Key

In times of trouble, employees are often unaware of who to call to discuss whether or not they should report to work. Taking into consideration both employment regulations and best principles of management, here is a policy you may wish to incorporate into your employee handbook:

*[COMPANY NAME] recognizes that emergency conditions may develop which, for the safety of our employees, might require the temporary closing of the company's facilities. Should that situation occur, a representative of management will announce that emergency conditions exist and will communicate that the company will close.*

*When an emergency closing occurs during the workday, exempt employees present for work will be paid for the entire day and non-exempt hourly employees present for work will be paid for the number of hours worked that day. Emergency closing during the workday will be announced to the various supervisors, who will be responsible for communicating the information to their employees.*

*If emergency conditions develop during non-working hours, it is your responsibility to make every effort to be in contact with your supervisor during these emergency situations to determine what the work schedule may be. Non-exempt employees who are required to report to work will be paid for all hours worked. Non-exempt employees who do not report to work when required will not receive pay for this time. Employees who are not required to report to work may use accrued PTO time.*

## How to Pay for Downtime

In the event of a serious storm, employers are often forced to close down operations for one or more days. Many employers wonder whether they are required to pay employees for these days and, if so, how?

According to Federal Wage and Hour regulations, for **non-exempt** employees, there is no requirement to pay employees for time lost due to a storm. Employers are only required to pay non-exempt employees for time actually worked.

**Exempt** employees are a different story. In most circumstances, an employer may not deduct from an exempt employee's salary. Nonetheless, and barring any state requirement to the contrary, you can create a policy that requires exempt employees to use accrued vacation or personal time if they are unable to report to work. If the exempt employee does not have any available leave time, and the employer decides to close for weather, the employee is entitled to their full guaranteed salary. If an employer is able to remain open, and the employee chooses to remain home, the employee should treat the absence as they would for any other personal time taken. If the employee does not have accrued time, the employer is able to place the employee on unpaid leave for the days they failed to report to work. As long as it is permitted by your state, leave time in this circumstance may be taken in full or partial days.

Although not a regulation, some employers choose to pay non-exempt employees for some or all lost time but that is a matter of company policy (and should be stated in the company handbook). Some employers argue that disaster pay to employees is good for employee morale during a difficult time and fosters employee loyalty. Others say that payment may be a good idea but the budget doesn't allow it. Either way, it is up to the employer.

## Unemployment Compensation

Some employers wonder, "If a storm prevents an employee from working for one or more days, is that employee eligible for unemployment compensation?"

The answer is a bit complicated because unemployment compensation is a function of each individual state, but the short answer is yes (as long as the employee has earned the appropriate level of wages during the "base period" of time - which varies by state)

Unemployment compensation is paid when employees are out of work for reasons other than their own misconduct but some states (like Florida) require a one-week waiting period, except that there is a special exception in the event of a disaster. There are many other qualifications a person must meet prior to drawing unemployment – for example, if an employee misses a day or two of work due to a hurricane then, technically, the employee can file a claim; however, if the employee has earned more than the weekly unemployment benefit would be then he or she would not be able to qualify. The bottom line is that, while an employee has the right to file a claim for a day or two of missed work, the odds are that he or she will not be eligible due to the qualification requirements.

Another consideration is how to navigate unemployment when accrued vacation time is being paid. Generally, unemployment benefits are reduced by any earned income payable (to the extent it exceeds the federal hourly minimum wage rate). Although Florida does not specifically list vacation pay in the definition of earned income, vacation pay would likely be considered “derived from work” and would be used to reduce unemployment benefits.

## Leave of Absence

FMLA, Military Leave, and company specific Unpaid Leave Policies are all things to consider during a time of weather related disaster. Although being out of work due to a natural disaster is not an FMLA qualifying event, an employee could qualify for FMLA leave if, as a result of a natural disaster, the employee suffers a physical or mental illness or injury that meets the definition of a “serious health condition” and renders them unable to perform their job. FMLA could also apply if the employee is required to care for a spouse, child or parent with a serious health condition who is affected by the disaster.

### **Calculating FMLA Leave When the Workplace Closes**

If an employer shuts down because of damage related to a hurricane or other natural disaster, and an employee was out on FMLA leave at the time the office closed, is the employee charged FMLA leave for these days?

The FMLA regulations (at 29 CFR § 825.200(h)) clearly state how an employer should calculate FMLA leave when it shuts down its operations:

- If for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement.

Therefore, regulations indicate that, if an employer's business is closed for a week or more because of a natural disaster, the days that the business is shuttered could not count against an employee's FMLA leave allotment.

**Keep in mind:** in these situations, employers cannot count the time against the employee's FMLA allotment even if it is obvious the employee would not have been able to perform the duties of the job during the break.

Employees serving in the National Guard may also require additional leave to assist in cleanup efforts. These employees assisting with relief efforts may separately qualify for protected time off. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), employees may take a leave of absence for service in the uniformed services. The USERRA covers employees engaged in the National Guard, given that the President of the United States calls the National Guard into action. Service in the National Guard for a unit activated by a state governor, rather than the president, and work for the Federal Emergency Management Agency generally would not be considered part of the uniformed services under USERRA.

It is also prudent to be prepared to handle requests for accommodation. The Americans with Disabilities Act (applicable to employers with 20+ employees) and related state and local antidiscrimination laws require employers to provide reasonable accommodations to qualified employees with disabilities. Because employees who sometimes physically or emotionally (e.g., post-traumatic stress disorder) injured by weather related incidents, those impacted may be entitled to an accommodation, and employers should take all such inquiries seriously.

### Next Steps

Regardless of regulations, a natural disaster will probably present extraordinary circumstances that may result in an employer deciding to grant time off to employees affected by the disaster. Strict adherence to leave policies helps to minimize exposure to risk in normal operating circumstances, but when a disaster strikes, flexibility and consideration go a long way in maintaining happy employees. Just remember, if you do choose to make exceptions, be mindful to not engage in discrimination - ensure that such exceptions are based on legitimate, non-discriminatory reasons and are consistently applied across the workforce. Inconsistent application of workplace rules and policies are often relied upon by employees raising claims of discrimination.

Natural disasters are not only scary, their impact can have a lasting effect on both employees and employers. But with good policies in place, a little preparation, and a lot of communication your business will be able to weather the storm.

It is our goal to:

1. Help ensure that your business is in compliance with all of the state and federal employment regulations and guidelines which affect your company and your employees;
2. Help eliminate your financial exposure in these areas; and
3. Develop the policies and systems which will help you employ and maintain a satisfied, happy and productive work force.

Seay Management provides Human Resources Management and Labor Relations consulting services. Seay Management does not provide legal advice and does not engage in the practice of law. If you need an attorney, we'll be glad to recommend one to you



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