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Hurricane Irma Forces Employers to Consider Effects on Employee Pay

Commentary by Aaron Tandy

Florida officials' early estimates forecast that Florida businesses stand to lose over \$50 billion in lost economic output, lost revenue, and property and crop damage from Hurricane Irma. They privately admit the figure will likely be higher. In addition, hourly workers and sometimes salaried workers may also lose income, sometimes much needed pay, because Irma forced businesses to close early and remain closed for days.

Unlike some states that have rules regarding pay for inclement weather closure, or require or encourage inclement weather days be paid time off, Florida provides little or no guidance to employers regarding compensating employees for lost time because of Irma. Instead, employers must look to the Fair Labor Standards Act (FLSA) and Department of Labor regulations, which provide for different treatment of hourly, nonexempt employees and salaried employees. Further, an employer's own policy manual or a collective bargaining agreement may need to be consulted to arrive at an answer.

EMPLOYEE PAY

As a general rule, the FLSA obligates employers to pay hourly, nonexempt employees only for those hours that

are actually worked. Therefore, if an employer closes a business early in anticipation of a hurricane, the employer is not required to pay nonexempt employees who are sent home due to the approaching storm. Nor is there a legal requirement to pay such workers if the business remains closed during and after the storm. Such missed time is not considered to be "hours worked" for determining pay for hourly, non-exempt employees. However, time spent at work helping the business close or prepare for Irma would be compensable.

Businesses may allow these employees to use vacation time, paid time off (PTO) or sick leave (as long as it is in compliance with company policy) to cover the time lost; however, if employees have already used up such time, an employer is not required to provide more PTO days simply because the business did not operate due to a hurricane. Businesses are free to provide compensation to non-exempt employees for time missed as a "bonus" or to boost employee morale, but are not required to do so. However, any voluntary payments made would not be considered "hours worked" so it would not be counted towards a calculation of overtime. In addition, if hourly, nonexempt employees didn't come to work after the business re-opened, businesses are not required to allow workers to make up missed time even if they

are unable to report to work because of impacts Irma made on infrastructure or transportation.

One wrinkle is that if an employer has previously allowed hourly, nonexempt employees to telecommute (i.e., work from home or another location), employers will be responsible for compensating employees for hours worked and arranging to properly record and document this time while the normal business location is closed. And employers may be required to offer temporary telecommuting to disabled employees under the Americans with Disabilities Act, and pay these employees for hours worked outside the office. Yet another wrinkle are employees employed under a flex time or fluctuating schedule who are guaranteed payments regardless of the number of hours worked in a week. As long as the business is not closed for a full workweek, these employees must be paid.

A different set of rules applies to exempt employees. The FLSA requires employers to pay exempt employees their full salary if the business was closed for less than a week regardless of how many hours the exempt employee actually worked. Conversely, if the business is closed for an entire workweek then employers are not required to pay exempt employees for that week, unless these employees are permitted to telecommute and record any amount of

working hours because then they must receive their full salary for that week. Once the business reopens, employees who choose not to come to work, or not to work from home if it is permitted, would be required to take a PTO day for the missed work or have deductions made from their salary for missing the full day of work as long as the absence is not for illness or disability.

RECOVERING LOST TIME

Any efforts by businesses to recover some of that lost time following Irma must comply with the FLSA regulations, such as overtime rules. Businesses may not circumvent the FLSA simply because they lost productive time. It is possible that business interruption insurance might cover payments made to employees during the time the business was closed. Or, given that Gov. Rick Scott declared a state of emergency for all Florida counties, assistance may be available from programs such as the Federal Emergency Management Agency's unemployment assistance program.

Understanding the law is important to avoid, even inadvertently, FLSA violations or unexpected pay obligations, including overtime, that may further impact businesses already dealing with the economic effects of Irma's visit.

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