

Retail Detail



Employee Pay During Snow Storms

The recent snow storm that hit Atlanta particularly hard last week, and the snowstorms that are hitting the Northeast this week, raise questions about whether and how hourly employees should be compensated for their time. Many workers have been stuck at work for extra hours or even days. Others have been stuck in their cars going to and from work, or stuck in retail stores and other businesses that demonstrated amazing grace to other stranded drivers in need. In these storm events, employees often take many more hours for their commute home than they normally would. In Atlanta, for example, there were many stories about 13 hour commutes.

A fundamental question is: Was any of this extra time compensable time that must be paid or taken into account for overtime calculation purposes under the FLSA?

The answer to this question depends on the circumstances. Here are the basic answers, depending on the circumstances that were most common:

- If an employee performed work while stranded, then the time he or she devoted to that work was compensable and must be paid in compliance with the FLSA. It is conceivable that an employer would not have known or had reason to know that the employee performed the work. In that event, the work would not need to be treated as compensable. If, however, the employer knows of the work or had reason to know of it (e.g., the employee told his supervisor of the work after performing it), it must be paid as compensable working time.
- If an employee did not perform work, then the extra time need not -- as a matter of law -- be treated as compensable. This means that, if an hourly analyst left work at 1 PM to return home, her commute normally takes 30 minutes, but because of the storm and resulting traffic it took her 9 hours, those 9 hours were not compensable because she did not perform work during the commute.
- There are several special situations that give rise to "gray areas" where the law might deem time to ultimately be non-compensable, but where that result is not certain:
 - The employee was stranded in his or her employer's vehicle, was instructed to safeguard the vehicle while stranded, and slept, watched TV, or surfed the internet while doing so.
 - The employee was stranded in his or her employer's vehicle, was not instructed to safeguard the vehicle, but chose to do so anyway.
 - The employee was instructed to transport or retrieve other employees or company goods during the storm, but was stuck periodically for lengthy amounts of time during which he made phone calls, checked emails, and napped.
 - The employee chose to transport or retrieve other employees or company goods during the storm.
 - While stranded, the employee chose to do trifling work-related activities that, while neither requested nor significant, arguably benefited his or her employer.

For these special situations, while it is possible that a good defense attorney could convince the U.S. Department of Labor's Wage and Hour Division or a court that some or all of the "extra" time devoted to the activities was not compensable, an employer should carefully consider the implications of choosing not to treat all of the time as compensable. First, it is possible that the Wage and Hour Division would deem the time compensable. In that event, the cost of defending the pay claim and then paying the amount owed would exceed the cost of simply paying the amount in the first place. Second, any claim made to the government or to an attorney who might file suit raises the likelihood that other issues will come to light and other employees will become involved. This will again increase the cost beyond that of simply paying the amount. And third, the positive employee relationship that payment of the time will bolster far outweighs the negative impact that a choice not to pay will have.

We note that all of the above pertains to employees who are not exempt from state and federal minimum wage and overtime requirements. For a discussion of special considerations impacting exempt employees affected by inclement weather, [click here](#).

The 2014 snow and ice storms will certainly have a negative impact on our retail economy. Your attention to the above suggestions will hopefully help to put the storms behind us, and perhaps generate goodwill among your workforce.

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