

# Management Alert



## Winter Storm Juno: Helping Employers Anticipate Wage & Hour and Workplace Safety Concerns

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As the Northeast braces for Winter Storm Juno, Seyfarth Shaw has prepared the following guidance to help employers navigate wage & hour issues arising from potential closures, as well as workplace safety issues related to severe winter weather.

### Wage and Hour Issues for Weather-Related Closings

As Juno prepares to pummel the Northeast with snow, employers should prepare for any weather-related closures of their offices, factories, or other facilities. The effect of a weather-related closure on compensation requirements varies for different types of employees and also varies by state.

#### Exempt Employees

Most employees who are exempt from federal overtime requirements and paid on a salary basis are not subject to reductions to their weekly salaries because of a closure. Even if an exempt employee misses a full day of work, the employer may not reduce the employee's weekly salary (unless the employee misses an entire work week). An employer that improperly reduces an employee's salary might lose or jeopardize the ability to treat the employee as exempt from overtime pay requirements — potentially a very costly mistake.

Even though employers will almost certainly have to pay exempt employees their full salaries regardless of storm-related closures, employers do have the right to charge exempt employees for vacation or PTO for any work that they miss. Employees who do not have enough accrued vacation or PTO to cover the closure, however, must still be paid their full weekly salaries.

The legal rules for paying exempt employees apply in all states. Of course, in deciding whether to charge employees with vacation or PTO, employers may also want to consider non-legal factors such as employee morale and the organization's finances.

#### Non-Exempt Employees

For non-exempt employees, federal law requires only that employers pay employees for the hours they actually work.

#### Telecommuting

In assessing pay requirements for all employees, employers should keep in mind that, even if an office or other facility is

closed, some employees might work remotely. Work performed remotely generally must be paid to the same extent as work performed on an employer's premises — even if the employer did not request that the work be performed. Non-exempt employees working remotely must generally be paid at their usual hourly rate (and subject to the usual requirements for overtime pay).

### **Reporting Pay**

Certain Northeastern states have additional requirements that apply to hourly employees who report to work when a facility is closed or not operating at full capacity. For example:

Connecticut has a reporting pay requirement that applies to employees in the "Mercantile trade." Employees in that industry must be paid four hours at their regular rate of pay, if they actually report for work. The "Mercantile trade" is defined as the wholesale or retail selling of commodities and any operation supplemental or incidental thereto. A two-hour guarantee is in place for the restaurant and hotel industries, if the employee was not "given adequate notice the day before" that she should not report for work.

Massachusetts mandates reporting pay for non-exempt employees of at least three hours at the statutory minimum wage (\$9.00) if they are scheduled to work more than three hours on a given day and actually report for work. Employees scheduled for less than three hours need only be paid for their scheduled hours.

New Hampshire requires reporting pay for non-exempt employees who actually report for work of at least two hours at their regular rate.

New Jersey requires reporting pay for non-exempt employees who actually report for work of at least one hour at their applicable wage rate (unless, prior to this report to work, the employer already made available to the employee the minimum number of hours of work agreed upon for the week).

New York requires "call-in pay" for non-exempt employees of at least four hours, or the number of hours in the regularly scheduled shift (whichever is less) at the basic minimum hourly wage (\$8.75) for employees who actually report for work. A 2009 New York Department of Labor opinion letter, however, interpreted the reporting-pay obligation as not applying if "the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed." Employees working in the hospitality industry may be subject to different requirements.

Rhode Island requires an employer to pay an employee who reports for duty at the beginning of a work shift (where the employer offers no work for him to perform) not less than three (3) times the employee's regular hourly rate of pay.

Washington, D.C., requires reporting pay of at least four hours at the statutory minimum wage (\$9.50) for non-exempt employees who actually report for work if they are scheduled to work for at least four hours. Employees scheduled for less than four hours need only be paid for their scheduled hours.

Some of the reporting pay requirements noted above may be waived if the employer makes a good faith effort to provide employees with reasonable advance notice that they should not report to work. Employers that foresee that their facilities will be closed should give employees who are scheduled to work as much notice as possible for both practical and wage/hour compliance reasons.

## **Severe Winter Weather Brings Workplace Safety Concerns**

In the wake of winter storms thousands of businesses, schools and government offices face the challenge of cleaning up significant ice and snowfall and trying to return to operation. For many of these employers, the unusual days ahead may require special attention to workplace safety issues. Storm cleanup poses significant hazards that must be addressed. Employees may be asked to perform tasks or volunteer to undertake certain responsibilities that are not within their regular job duties. In the hurry to get our communities up and moving again, many unfamiliar hazards can be easily overlooked by employers and employees. Even in these extraordinary circumstances, employers are responsible for the safety and health of their employees in the workplace and must take measures to prevent injury and illness.

Additionally, winter weather creates a variety of hazards that can significantly impact everyday tasks and work activities. These hazards include slippery roads/surfaces, strong winds and environmental cold.

### **Cleanup Often Involves Unfamiliar Tasks and Hazards**

Cleanup and recovery work presents a wide range of hazards that must be addressed by employers. Given that these hazards are unlikely to be the type regularly present in work environments, employers must pay special attention to winter storm cleanup activities and plan accordingly. Many of the hazards at issue can be minimized by knowledge, safe work practices and personal protective equipment. Before allowing or instructing employees to begin cleanup after a winter storm, each worksite and activity needs to be assessed to ensure the safety and health of employees.

### **Hazard Assessment and Protective Measures**

The hazards posed by winter storm cleanup and recovery work may include illness from exposure to the elements and/or cold stress, downed electrical wires, carbon monoxide and electrical hazards from portable generators, fall and “struck-by” hazards from ice, heavy snow, falling trees or working at heights, hazards posed by being caught in unprotected excavations or confined spaces, lacerations, musculoskeletal injuries, and being struck by traffic or heavy equipment.

Protective measures should involve:

- Evaluating every work area for all hazards.
- Heeding all warnings and alerts from emergency management officials.
- Consulting with local emergency management and utilities.
- Task-specific hazard exposure monitoring where necessary.
- Engineering or work practice controls to mitigate hazards.
- Supplying and requiring appropriate personal protective equipment.
- Assuming all power lines are live.
- Using portable generators and other cleanup equipment correctly.
- Using proper precautions in traffic work zones.

No winter storm cleanup activity should be permitted where the hazards are unknown and cannot be properly addressed. When in doubt, do not permit employees to take on cleanup responsibilities and enlist the aid of qualified contractors.

### **Cold Stress**

Even where there has not been significant snow fall or ice accumulation, environmental cold has the potential to adversely affect any employee exposed to extreme cold air temperatures and potentially puts them at risk of cold stress. According to OSHA, “as wind speed increases, it causes the cold air temperature to feel even colder, increasing the risk of cold stress to exposed workers, especially those working outdoors, such as recreational workers, snow cleanup crews, construction workers, police officers and firefighters. Other workers who may be affected by exposure to environmental cold conditions include those in transit, baggage handlers, water transportation, landscaping services, and support activities for oil and gas operations.”

Although there is no federal OSHA standard that covers working in cold environments, under the Occupational Safety and Health Act (OSH Act) of 1970, employers have a duty to protect workers from recognized hazards that are causing or likely to cause death or serious physical harm in the workplace. OSHA views cold stress as one such hazard.

Employers should be aware of the risk factors for cold stress and train their supervisors and employees accordingly. They are:

- Wetness/dampness, dressing improperly, and exhaustion.
- Predisposing health conditions such as hypertension, hypothyroidism, and diabetes.

- Poor physical conditioning.

OSHA also advises that a cold stress training program should include the following:

- How to recognize the environmental and workplace conditions that can lead to cold stress.
- The symptoms of cold stress, how to prevent cold stress, and what to do to help those who are affected.
- How to select proper clothing for cold, wet, and windy conditions.

Employers should:

- Monitor workers physical condition.
- Schedule frequent short breaks in warm dry areas, to allow the body to warm up.
- Schedule work during the warmest part of the day.
- Use the buddy system (work in pairs).
- Provide warm, sweet beverages. Avoid drinks with alcohol.
- Provide engineering controls such as radiant heaters.

All outdoor work requires proper preparation, especially in severe winter weather conditions. Employers who regularly have employees working outside should take special care during and following extreme weather to ensure that all tasks and worksites are evaluated for hazards, and that the appropriate training and protective measures are in place.

Employers with questions about the requirements summarized above or any other impacts that the storm may have on their legal obligations as employers are encouraged to contact [Alexander J. Passantino](mailto:apassantino@seyfarth.com) at [apassantino@seyfarth.com](mailto:apassantino@seyfarth.com), [Richard L. Alfred](mailto:ralfred@seyfarth.com) at [ralfred@seyfarth.com](mailto:ralfred@seyfarth.com), [Loren Gesinsky](mailto:lgesinsky@seyfarth.com) at [lgesinsky@seyfarth.com](mailto:lgesinsky@seyfarth.com), [Meagan Newman](mailto:mnewman@seyfarth.com) at [mnewman@seyfarth.com](mailto:mnewman@seyfarth.com), [James L. Curtis](mailto:jcurtis@seyfarth.com) at [jcurtis@seyfarth.com](mailto:jcurtis@seyfarth.com), or any Seyfarth Shaw attorney with whom you work.

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