

# Client Alert **Employment & Labor**

## *Wage and Hour Issues Post-Sandy*

Among the myriad complications created by Hurricane Sandy are those relating to the compensation due to employees who were unable to work during the storm and its aftermath, either due to their own individual circumstances or due to the closure of the employer's facility. Because the law treats exempt and non-exempt employees differently with regard to this issue, we will provide separate analysis for each category of employee. Additionally, we will address post-Sandy issues in the unemployment insurance and volunteer services arenas.

### **Non-Exempt Employees**

As a reminder, non-exempt employees are those employees who are required to receive overtime when they work more than forty hours in a given work week. As a general matter, the Fair Labor Standards Act ("FLSA") does not require employers to compensate non-exempt employees for time not actually worked, including for any normally scheduled work that the employees were unable to perform due to a weather-related emergency. However, in the wake of Hurricane Sandy, there are nevertheless several compensation issues relating to non-exempt employees that require attention.

First, non-exempt employees who are compensated on a "fluctuating-workweek" basis are entitled to their full weekly salary even if, due to the storm, they worked fewer hours during the week(s) of and after the storm than they otherwise would have.

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Second, non-exempt employees who were “on-call” during the storm must be compensated for their time. An employee is generally considered “on-call” when he or she must be available, on short notice, to report to the office, or to respond to a call or email, and thus is not free to use the time for his or her own purposes.

Third, under New York law, an employee who, upon request or permission of his or her employer, reports to work on a given day, must be compensated for the lesser of four hours, or the number of hours in a regularly scheduled shift, at the basic minimum hourly wage. New Jersey law imposes a similar requirement; however, the reporting employee, under New Jersey law, is only entitled to one hour of pay.

Fourth, employers should bear in mind that FLSA-mandated overtime pay requirements remain in effect even if, but for the storm, the employees at issue would not have needed to work overtime. In other words, employees working overtime to “catch up” on work they were not able to perform earlier due to the storm must nevertheless receive overtime pay for such work.

Finally, employers should consult applicable employee handbooks, written policies, and collective bargaining agreements, as these policy statements sometimes impose additional compensation obligations.

### Exempt Employees

In contrast to non-exempt employees, exempt employees are generally entitled to their full salary for any week in which they perform any work, regardless of how many days or hours they worked, subject to limited exceptions set forth in the FLSA. For example, deductions from pay are permissible when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, in the event that an employer’s operations remained open during the storm, and an exempt employee was absent for personal reasons and did not perform any work either at home or the office, the employer may deduct that day’s pay.

Prior to taking any such deductions, however, the employer should first determine if the employee has any accrued leave time and if so, charge such time accordingly. Where an employer has a bona fide benefits plan, the employer may substitute or reduce the employee’s accrued leave bank to account for the time an exempt employee was absent from work due to the storm, even if the absence was for less than one full day.

### Unemployment Insurance

Under New Jersey law, an employee may be eligible to collect unemployment insurance benefits if he or she is unable to work and earn wages for a week or more through no fault of his or her own. Thus, for example, if a business was closed for a week due to Hurricane Sandy and, as a result, one of its employees received no pay (or only partial pay) for that week, that employee may be eligible for unemployment insurance benefits. Under New York law, an employee need only be without employment for one day before he or she becomes eligible for unemployment insurance benefits.

Additionally, federal Disaster Unemployment Assistance (“DUA”) provides financial assistance to individuals whose employment or self-employment was lost or interrupted as a direct result of a major disaster and who are *not* eligible for regular unemployment insurance benefits. Individuals who are typically ineligible for unemployment insurance benefits include company officers and owners. In order to qualify for DUA, an individual must either (a) no longer have a job or place to work, (b) be unable to reach his or her place of work, (c) be unable to work due to damage to his or her place of work, or (d) be unable to work because of an injury caused by the disaster. In the wake of Hurricane Sandy all 21 counties in New Jersey have qualified for DUA, and individuals can apply for it by filing an unemployment claim at [www.njuifile.net](http://www.njuifile.net) on or before December 3, 2012.

### Volunteer Emergency Services

The FLSA rarely permits employees to volunteer unpaid time to their employer. Thus, an employer will likely be required to compensate employees for voluntary emergency services rendered to the employer.

Additionally, under New Jersey law, an employer may not terminate, dismiss or suspend an employee who fails to report to work because he or she is serving as a volunteer emergency responder during a state of emergency such as Hurricane Sandy. An employee qualifies as a “volunteer emergency responder” if he or she is an active member in good standing of a volunteer fire company, a volunteer member of a duly incorporated first aid, rescue or ambulance squad, or a member of any county or municipal volunteer Office of Emergency Management, provided the member’s official duties include responding to a fire or emergency call.

Although employers are not required to compensate employees for time missed responding to an emergency, a volunteer emergency responder may charge his or her absence as a vacation or sick day, assuming the employee has such days available.

### Recommendations

- » To avoid state and federal department of labor scrutiny, and to minimize confusion in the wake of an emergency office closing, it is imperative that employers properly classify their employees as exempt or non-exempt, and that they pay overtime where required.
- » Employers should review and update employee handbooks, as well as other written policies, to protect against exposure to unexpected liability in the event of future emergency office closures.
- » It is particularly important that employers implement a policy on exempt employee pay which sets forth the limited the circumstances under which employers can deduct from an exempt employee's pay, and establishes a mechanism for complaint and reimbursement if an improper deduction is taken.

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If you have any questions regarding the above, please contact any of the following Sills Cummis & Gross attorneys.

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