

In the aftermath of Hurricane Sandy many businesses have been and may continue to be disrupted. These developments raise questions for employers regarding how to properly pay employees when the amount of work is low or uncertain.

To help organizations understand their responsibilities regarding these issues, we provide a brief overview below. This information is not intended to be all-inclusive and your situation may warrant special considerations.

### [Disaster Unemployment Assistance](#)

The New York State Department of Labor administers the Federal Disaster Unemployment Assistance (DUA) program which may entitle employees to benefits during periods where they are out of work. Note that DUA operates in conjunction with ordinary unemployment insurance benefits.

[Click here for the Fact Sheet](#) issued by the New York State Department of Labor.

### [Payment Obligations to Exempt and Non-Exempt Employees](#)

Where a business is shut down or too slow to provide work to the current roster of employees, the employer's obligation to pay its employees should be guided according to whether an employee's status is exempt or non-exempt under the Fair Labor Standards Act. An employer's payroll system should already be set up to indicate which employees are or are not exempt, and this information should also be contained on the Section 195 Notice and Acknowledgment Forms required by the New York Labor Law.

#### [Exempt Employees](#)

If an exempt employee works at all - even remotely - during any week in which the business is shut down, his or her full regular salary must be paid.

If the business is closed and an exempt employee performs no work, then no salary must be paid.

If an employer's business remains open, and an exempt employee is absent for one or more days due to personal reasons (such as travel disruptions or tending to issues with their home) and does no work on those days, the employee does not have to be paid for those days. Alternatively, an employer may require that exempt employees take vacation or take leave (if they have such accrued benefits) without jeopardizing their exempt status. Of course, nothing precludes the employer from continuing to pay the employee his or her full salary without charging it against any paid time off entitlement.

#### [Non-Exempt Employees](#)

If an employer's business is shut down (meaning no work is being done), or if it is open but there is no work for non-exempt employees, an employer is not required to pay those non-exempt employees. If the business is open and non-exempt employees are permitted to work a modified schedule, (i.e. come late/leave early), those non-exempt employees need only be paid for those hours actually worked. If an employer asks that their non-exempt employees be present at the place of business until the situation is assessed, they are "on call" and must be paid, even if it turns out there is no work for them.

#### [Layoffs](#)

Exempt or non-exempt employees can be laid off at any time, including for lack of work. Employees who

are laid off under these circumstances should be reminded to file for unemployment insurance benefits and/or the DUA. Under both Federal and New York State plant-closing laws (WARN Acts), exceptions to the notice requirements exist for certain emergent situations. Whether these laws apply to an employer's business depends on a number of factors, including the overall number of employees, how many are out of work and whether they are likely going to be called back to work.

## Unionized Workforces

Different rules regarding layoffs may apply where an employer's workforce is unionized. The collective bargaining agreement should be reviewed to determine an employer's right to layoff, any notice that must be given to the Union and whether layoffs and recall must be in seniority or reverse-seniority order.

## Work from a Remote Location

Work from a remote location is working time. Any employee who performs work from off-site must be compensated for that time as though it was performed in the employer's facility. Employees should be directed to record all of their working time so that it can be accounted for in the upcoming payroll.

## Hospitality Industry

Different rules apply to those employers conducting business in the hospitality industry, which includes hotels and restaurants.

## Further Inquiries

For more information or questions concerning obligations of employers in the hospitality industry, please contact Eric Su at 212.216.1108 or [ESu@tarterkrinsky.com](mailto:ESu@tarterkrinsky.com). For all other inquiries concerning the above, please contact Laurent S. Drogin or Richard L. Steer at the contact information below:

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