

# Help Wanted: Worker pay in weather disasters

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When inclement weather strikes and employees can't get to work or their company closes, the question that often arises is, "Should the workers be paid?" The answer depends on whether they are nonexempt, which generally means hourly, or exempt, a category of

workers who must be salaried. The Help Wanted column tackles several of these questions below.

**DEAR CARRIE:** I am writing you about two people who missed two days from work because of superstorm Sandy. Both of them are hourly and they each had just two sick/personal days left for the year. Their employer deducted the missed days from that paid time off; so they have none left. Given the circumstances, is it legal for their employer to do that? -- **PTO Matter**

**DEAR PTO:** Believe it or not, the company gave them more than federal labor laws require. By law, employers don't have to pay nonexempt, or hourly workers, when they don't work -- even if the company was closed.

Employees who didn't get paid because they missed work might have an option for recouping the lost income. Nassau and Suffolk are among the New York counties declared a disaster area because

of Sandy. So residents who lost part or all of their income can apply for disaster unemployment assistance.

The state Labor Department looks at the claims on a case-by-case basis. The general unemployment benefits maximum is \$405 a week. So employees who made at least that amount, even with lost days, probably wouldn't qualify. The application deadline is Dec. 3.



For more information, call the state Labor Department at 888-209-8124.

**DEAR CARRIE:** Are employers required to pay salaried workers who were unable to work last week because of power outages at their place of employment? -- **Storm Pay?**

**DEAR STORM:** If by salaried, you mean "exempt," then yes, employers would have to pay them. The employees were willing and able to work, but couldn't because the company was closed.

Federal labor laws are strict when it comes to docking the pay of exempt workers, those workers who fall into the executive, administrative, professional and outside-sales categories. They are exempt from overtime and even minimum-wage regulations. But in exchange, employers generally have to guarantee them a salary of at least \$455 a week. So if the company closes, it has to pay them.

"If it's an exempt individual, they have to pay their salary in order to retain their exemption," said Irv Miljoner, who heads the U.S. Labor Department's Long Island office.

When exempt employees miss a full day for personal reasons, employers can deduct from their paid time off. If the employees have run out of those days, the company can dock their pay. It can do both without asking the employees' permission.

But when the company is closed, it has to have the employees' permission to use their paid time off to cover missed days, said Miljoner, citing case law.

Superstorm Sandy has disrupted so many workplaces that the U.S. Labor Department is temporarily forgiving isolated infractions, Miljoner said.

For example, if payroll-processing problems caused exempt employees' pay to be delayed by a week, something that would normally trigger a violation, the department probably wouldn't go after the company.

"If it's just one week or one pay period, and it's an isolated instance and proper payment resumes when the emergency is over, we consider that an isolated incident, and we would not find a violation," Miljoner said. "But the employer should correct the problem and pay the person as soon as possible."

**DEAR CARRIE:** My company closed on Tuesday, Oct. 30, the day after superstorm Sandy hit. On Wednesday, we found out that we would have to make up the time for Tuesday or use one of our sick or personal days in order to be paid. Can the company legally require this since I am exempt and I was willing and able to work? -- **Out Of Bounds?**

**DEAR OUT:** You have two questions here: The first is about hours worked and the second about pay.

Even though you are exempt, your employer can require you to make up the time, Miljoner said. If you fell behind on a project, for example, the company can ask you to stay longer.

"An employer may require any employee to work any amount of hours," Miljoner said.

As for requiring you to use a sick or personal day to cover your pay for the day the company closed, that's a no-no without your permission. See the question above.

**DEAR CARRIE:** I have an exempt employee who lives in an area that was under mandatory evacuation during Sandy. The employee did not evacuate. On Monday, "pre-Sandy," the office was open four hours, but

she did not come to work because she would not have been permitted to return to her community. In fact, she didn't report to work all week. On Tuesday, we were closed; on Wednesday we worked two hours; on Thursday we worked four hours and on Friday we worked five hours. Since she never showed I will be deducting from her accrued vacation days because she didn't work at all during the week. After reading your column I assume that would be legal. I assume also that I can dock her pay if she tells me that she can't return to work the week after the storm because her car has been destroyed and she cannot get a rental, or cannot locate gas for a borrowed car, or does not otherwise come to work and has exhausted her accrued vacation/sick days. Is this correct?  
**-- To Dock Or Not?**

**DEAR TO DOCK:** If she didn't show up for an entire week, for whatever reason, and she has run out of accrued time, you can dock her pay.

But here are some provisos, said employment attorney Richard Kass, a partner at Bond Schoeneck & King in Manhattan.

First, "An exempt employee can only be docked in full-day increments," he said. "Therefore, she can be docked only for days when she does not do any work at all.

And secondly, "The employer should be careful to make sure that the employee hasn't done any work from home," Kass said. "Work is work, even if it is performed at home on a cellphone or laptop, by the light of a flashlight."

For more on disaster unemployment assistance, go to <http://bit.ly/Q90na7>. For more on exempt employees, go to <http://1.usa.gov/sQRzCo>.

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