



The GSH

60-Second Memo

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Light Dusting: A Brief Survey of Snow Day Issues for Employers

By Matthew J. Feery, Esq.

Snow Day. Is there a more welcoming phrase during the long, cold winter months? (Well, yes. Many. Like "single malt scotch" or "World Champion Chicago Cubs." Sadly, blizzards of historic proportion remain more likely than the latter, sometimes leading to imbibing of the former. But I digress.) Who doesn't like an impromptu break from work where snowball fights, sledding, and double-dog dares are encouraged? Growing up, declaring a snow day was easy. In grade school, I employed a bright line test: if the school bus didn't show up, it was a snow day. In college, that standard morphed into a totality of the circumstances test, taking into account such factors as the time of my morning class, the amount of snow (if any) on the ground, and how late I may have been out "studying" the night before. Unfortunately, the easy decisions that came during the halcyon days of youth often don't exist in the business world, and advising companies on inclement weather policies and closings is rarely simple. Closing down because of snow or any inclement weather means losing productivity, money, and time. On the other hand, staying open during inclement weather risks the safety of employees and the general public, as well as risks engendering ill will among employees. If the decision was not hard enough already, mishandling office closures can expose employers to legal liability. With proper planning, however, employers can lessen the chances of adverse consequences from office closures snowballing into a flurry of legal claims.

Let's get a few basic questions answered right away. One common complaint heard around offices this time of year goes something like this: "I can't believe they're staying open in this! Shouldn't they be forced to close? What if I get in an accident on the

way [in/home]? I'll sue them!" Contrary to what some people think, there is no legal requirement for businesses to close during inclement weather. And while there are almost always exceptions to the rule, commuting to and from work - even in a storm - generally is not covered by worker's compensation, and employers generally are not otherwise liable for accidents occurring during an employee's commute (accidents occurring when an employee is driving on company business is another matter, however).

If an employer chooses to stay open during a storm, it should have a policy that clearly communicates to its employees what is expected of them when bad weather hits, including what impact staying home will have on any tally of attendance policy violations. Employers can force employees who choose to stay home during inclement weather to use accrued vacation time or PTO. The Department of Labor has even taken the position that salaried, exempt employees who choose to stay home and not work during inclement weather can have their pay docked (at full-day intervals) because those employees are staying home for personal reasons unrelated to sickness or disability. *See* 29 C.F.R. § 541.602(b). Of course, the Department's opinion is not law, so employers deduct an exempt employee's salary at their own risk. Lest employers think they only face wage and hour liability during inclement weather, staying open during winter storms also increases the chances of employee and customer injuries on company premises. Therefore, companies should always remember to take such basic steps as shoveling parking lots and walkways and using salt (not sand - I mean come on now) to de-ice.

Just because employers can stay open during inclement weather, however, does not mean they should forgo planning for a closure. Developing a policy for office closures and distributing it to employees is a prudent idea (a "best practice" to our buzzword-loving friends). The policy should emphasize how the company takes employee safety seriously, and it should clearly describe a means for employees to learn of the company's closing. (I recommend against telling them to show up and check whether the doors are locked.) While a mass e-mail may seem like a good idea, it is not without problems. Not all employees may have a work e-mail account, and not every employee may have Internet access at home. Instead, consider providing employees with a telephone number they can call to find out, via voicemail, whether the company is open.

After determining how employees will be informed of the company's closure, an employer again needs to determine how it will handle employees' pay, taking into account both fiscal considerations and employee morale and perceptions of fairness. The simplest (and most expensive) option is to pay all employees for the day as if the closure had never happened. (This may come as a shock, but the Department of Labor generally has no issue with that approach.) Employees with pre-planned vacation or PTO for that day would still be required to use that vacation or PTO.

The other options available to employers during a closure are more complicated and typically turn on whether the employee in question is exempt or non-exempt. Employers can force all

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employees to use vacation time or PTO. The Department of Labor has taken the position that because vacation time (or PTO) is a non-mandatory benefit, employers can require employees to use that benefit during an office closure. Employers can also choose just not to pay employees for the day in question. That said, employers should *not* deduct pay from an exempt employee's salary due to an office closure because the Department will see that as contrary to the salary basis test. See 29 C.F.R. § 541.602(a).

A clear, coherent inclement weather policy crafted through consultation with legal counsel to ensure wage and hour compliance will help avoid many of these legal problems. But remember, there's still the question of employee morale. School closures mean unexpected childcare needs and increased stress for parents. Longer commutes from bad roads can lead to shorter workdays. A distracted and disgruntled employee working shorter hours isn't the best recipe for productivity. Telecommuting solves some of these problems, yet creates others. And there are, of course, other issues from inclement weather that could arise depending on the workforce and circumstances in question. But those are topics for another day. It's snowing outside, my hot chocolate is ready, and Super Bowl XX is being replayed on TV. Sounds like time for a snow day.

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