HR insight

Proven strategies for the human resources professional

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Highlights

Legal issues in the aftermath of winter storms

by Leanne Mehrman, Sal Simao, and Joanna Rich

When the number of snow/ice/cold days pile up, employers have to consider what effect office closings have on employee pay and benefits. The following is a list of common questions and issues that arise when the weather gets bad.

Paying employees: exempt vs. nonexempt

Q *Does the Fair Labor Standards Act (FLSA) require employers to pay employees who miss work because of the weather?*

A If the business closes because of the weather, the FLSA requires employers to pay an exempt employee her regular salary for any shutdown that lasts less than a week. You may not deduct from an exempt employee's pay based on the quantity or quality of her work or when she is ready, willing, and able to work but no work is available. Thus, deducting from an exempt employee's pay for absences due to a business closing that lasts for less than a week would jeopardize her exempt status.

If the business remains open but an exempt employee can't get to work because of the weather, you may deduct from her salary for a full day's absence. Under the FLSA, you can deduct from an exempt employee's pay for a full-day absence taken for personal reasons without jeopardizing her exempt status. However, you cannot deduct from an exempt employee's salary for less than a full-day absence without jeopardizing her exempt status.

Under the FLSA, you generally aren't required to pay nonexempt employees for any days they don't perform any actual work. Thus, you aren't required to pay employees for days they didn't come to work or for days the business was closed because of weather. That doesn't apply to nonexempt employees who are paid on a fluctuating workweek basis. They must be paid their full weekly salary for any week during which work is performed.

Snow days=PTO?

Q *Can employers require nonexempt employees who miss work because of the weather to use a vacation day or prevent them from using a vacation day?*

A Because the FLSA doesn't address that question, the answer depends solely on your policy and applicable state laws. If your policy requires employees to use any available PTO for any absences, then you may require the use of PTO for a missed day of work. However, if your policy gives employees the choice of whether to substitute PTO for unpaid leave, then you should follow the policy and not require the substitution of PTO.

Similarly, whether you must allow employees to use a vacation day also depends on your policy. For example, if your vacation policy requires advance notice to use a vacation day, you could refuse to allow employees to use vacation time to supplement their pay. However, if you have a PTO policy that allows the use of PTO for all absences, even without notice, you shouldn't prevent the use of a vacation day.

If there is no applicable policy, you may restrict or require the use of PTO or a vacation day during

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Editor's note:

How can you keep the flu from decimating your workplace? When can you dock an employee's pay? When do you have to pay for unexpected travel? Should you rehire an ex-employee? What are the wage and hour rules associated with weather events? As the HR representative at your company, you must answer a wide range of questions about employment laws, rules, and practices every day, so for this issue of *HR Insight,* I've included articles that answer the previous questions and more.

Sincerely,

Celeste Blackburn, Executive Editor

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a weather-related shutdown as long as you apply the restriction or requirement in a nondiscriminatory manner.

What about makeup days?

Q *Can an employer require exempt employees to make up work missed because of weather?*

A Under the FLSA, you must pay exempt employees the same amount each week regardless of the hours they work. Just as you can require exempt employees to work a weekend to finish a project, you can require them to complete work missed because of the weather.

Stuck at the office

Q *For how many hours must an employer pay when weather strands employees at work?*

A If an exempt employee works at all during the week, you must pay her regular salary. If she becomes stranded at work, even if it's for days, you're required to pay her regular salary.

You must pay a nonexempt employee for all time considered hours worked, and all hours worked must be counted when you determine overtime hours. If a stranded nonexempt employee performs work while he's stranded, he must be paid for all time worked, but if he is fully relieved of his duties—even if that just means going to another room to sleep, read a book, or visit with coworkers—that time isn't considered hours worked.

When the FMLA comes into play

Q *May an employer count absences due to the storm against an employee's Family and Medical Leave Act (FMLA) allotment?*

A Although the FMLA regulations don't specifically address natural disasters, they state that if your business activity has temporarily ceased for some reason and employees generally aren't expected to report to work for one or more weeks (e.g., a school closing during the Christmas/New Year holiday or summer vacation or a company closing a plant for retooling or repairs), the days your activities have ceased don't count against employees' FMLA leave entitlement. Thus, it appears that if your business is closed for a week or more because of a storm, the days the business is closed wouldn't count against employees' FMLA leave allotment.

If the business is closed for less than a week, the FMLA's regulation pertaining to holidays likely would apply. That regulation provides, "The fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave." Similarly, if a business is closed for a day or more during a week in which an employee is on FMLA leave, the entire week would count against the employee's FMLA leave allotment. If, however, the employee is taking FMLA leave in increments of less than a week, only the days the business is closed and on which the employee would be expected to work can be counted.

Is on-call on the clock?

Q *Is an employer required to pay an employee for on-call time?*

A Under the FLSA, if you require employees to be on call while the office is closed because of a weather emergency and they can't effectively use the time for their own purposes, you must pay them for the on-call time.

An issue of safety

Q *What steps can an employer take to ensure employees' safety upon their return to work?*

A The Occupational Safety and Health Administration (OSHA) states that employers are responsible for providing a safe workplace and protecting workers from the anticipated hazards associated with winter weather, such as icy walkways and cold temperatures. OSHA guidelines for working in winter weather are at www.osha.gov/dts/weather/winter_weather.

Bottom line

While we hope this year isn't another *snowmageddon*, if it is, knowledge of the applicable laws will help you make informed decisions about your employees during the next storm.

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They're baaack! 5 considerations for rehiring boomerang employees

by Sara Hutchins Jodka

The return of LeBron James to the Cleveland Cavaliers riveted the sports world and reinvigorated Cleveland. For employers, however, James' "going home" has prompted conversations about boomerang employees—i.e., employees who leave an employer only to return later. This article looks at this relatively new concept and outlines what factors employers should consider before rehiring a boomerang employee.

Considerations

In the past, when the question of whether to rehire a former employee came up, many employers belonged to one school of thinking: "If you thought the grass was greener on the other side, you can stay there." However, that mind-set has become the minority view. This shift is forcing recruiters and employers to rethink not only their recruiting strategies but also their hiring and exit practices. The shift seems to be spurred on by four major factors: (1) generational disparity, (2) the economy, (3) changing/expanding gender roles, and (4) skill specialization.

Generational disparity

The Veterans (born before 1946) and the Baby Boomers (born from 1946 to 1964) were hesitant to leave one job for another out of fear of being considered disloyal or a job-hopper. That is no longer the case. Now the percentage of employees who stay with one employer throughout their career is extremely low.

This trend first became noticeable for workers in Generation X (born from 1964 to the mid-1980s). In fact, it seems that when Generation X entered the workforce, it abandoned the idea of lifelong employment along with eight-track tapes. This change in ideology did not stop with Generation X. It continued with Generation Y, also known as the Millennials (born from the mid-1980s to the early 2000s). While many Gen Xers turned to job-hopping to survive, Generation Y took it further, turning to job-hopping as a means of career advancement.

The economy

This attitude shift is not based solely on workers' personalities. (Those pesky Gen Xers did not let listening to too much Nirvana rot their brains.) Economic factors play a key role as well.

Baby Boomers have been slow to leave the workforce because of financial constraints, meaning there have been fewer advancement opportunities for younger workers. Job-hopping is no longer a sign of poor character; it's a career plan. Many Gen Xers and Millennials think, "The only way to move up is to move on." In addition, most private-sector employers phased out defined benefit pension plans that rewarded long-term service long ago and replaced them with more portable 401(k) plans and other options. Thus, a major benefit of long-term employment dried up.

Also, Generations X and Y experienced the recession that started in 2008. Many workers lost their jobs and homes and basically had their lives turned upside down. Further, Generations X and Y have one thing Baby Boomers didn't have—student loan debt, and lots of it. The recession changed the way those groups look at things. Growing up, those generations were taught that if you go to college, you can get a good job with financial security. The recession proved that idea to be false for many jobseekers. For many, higher education is no longer the golden ticket to a good job. Now education is viewed as an investment that comes with risk just like traditional investments such as stocks and real estate.

Changing/expanding gender roles

More women are in the workforce than ever before, more families are dual income, and more women are breadwinners. Changing/expanding gender roles have caused employees to leave jobs for many reasons. Employees move so they can go to school, have children, or allow their spouse to get a better job. Also, some employees change jobs for better work-life balance. That leads some employees to opt for project-type work rather than a steady nine-to-five job. In other words, life happens, and flexible employers win out.

Skill specialization

Skill specialization is the last factor. The workforce has changed, and there is high demand for employees with specialized skills. Thus, employees with coveted skills are constantly offered new opportunities. Some employees leave because they can, not because they are disloyal. These days, money and job flexibility talk. Other employees stay because they have to, not because they are loyal. Employers are just as much at fault as employees because employers must learn how to retain top talent through job flexibility and creative benefit options (e.g., on-site day care).

Advantages

Generational disparity, the economy, changing/expanding gender roles, and skill specialization have made lifelong employment a thing of the past. The free-agent workplace is the future. The good news is, employers seem to be getting on board. Many employers no longer view an employee leaving as a betrayal, and many companies have changed their thinking about boomerang employees. They no longer see them as "ex-employees" or "traitors." Rather, they consider former employees to be "alumni" and continue to maintain their connections to them.

There is no denying the value of rehiring boomerang employees. Hiring and training new employees is expensive, and rehiring a boomerang employee has one of the highest returns on recruiting investment. In fact, rehiring a former employee costs one-third to two-thirds less than hiring a newbie. It makes sense for employers to rehire former workers to offset some of the costs.

Social media sites such as LinkedIn make it easy to keep track of former employees. Typically, it's less expensive to rehire former employees directly and bypass the search and recruitment process altogether. With former employees, you know what you are getting.

Another advantage of boomerang employees: They save on training and ramp-up time (time needed to get the employee oriented, settled, and ready to begin performing the job). Also, they tend to acclimate to the workplace more easily because they understand the structure and culture. They will know most of the key players if the company has not had a lot of turnover.

Finally, boomerang employees have gotten to see whether the grass really is greener on the other side. Many times, employees who have seen that it is not are better workers, more committed, more loyal, and better ambassadors for your brand.

Risks

However, everything is not positive. There are risks in hiring boomerang employees because not all returning employees are created equal. It's not always the "one that got away" who tries to return. There are five factors you must consider when rehiring a boomerang employee.

Number 1: circumstances of the employee's departure. Determine why and how the employee left. Not surprisingly, employees who left voluntarily on good terms are better suited to return than employees who left involuntarily or on bad terms. Consider whether the employee left because of dissatisfaction with the company or because of personal reasons—e.g., pregnancy or relocation of a spouse's job.

If the employee left because of a lack of opportunities for growth, because she thought she was underpaid, or because she had a less-than-stellar relationship with her supervisor or coworkers, it is unlikely that the issue has been resolved or things have stabilized in a manner that will result in long-term employment unless the company has undergone significant changes since she left. In addition, if she was fired or forced out, she should not be considered for rehire (unless, of course, it was discovered that the person who forced her out was the problem). Similarly, if an employee left involuntarily because of poor performance, it would be foolish to rehire her.

Also, some employers refuse to rehire employees who left to go to a competitor. There may be noncompete issues to consider in that situation. A rehire decision could become very expensive if it results in litigation with an employee's previous employer.

These considerations show why it's important to conduct and document exit interviews when employees resign or are terminated. Exit interviews give employees an opportunity to provide you with constructive feedback about their job, coworkers, and supervisors and the company as a whole. If you document what an employee said during an exit interview and retain that information, it will be an invaluable resource if you consider rehiring her a few years down the road.

Number 2: length of departure. How long was the employee away from your workplace? Employees who are gone for short periods take less time to train and acclimate to the company, its culture, and the demands of the job. Bottom line: The shorter the period, the more money your company can save.

Number 3: past performance. This consideration largely follows the first factor. One reason to keep good employment records is to determine whether an employee should be considered for rehire. Of course, no employer wants to rehire a poor performer or an employee with chronic attendance problems. However, large employers or employers with high turnover rates may have little or no institutional knowledge about a former employee's tenure. That means that if details about the employee's performance are not documented, the employer may not discover it.

This is why it's important to ask whether applicants have worked for your company before and, if so, why they left. If an employee was terminated, that information should come out. If an applicant lies and you hire him, he could be terminated for lying during the application process once the lie is discovered.

Number 4: performance at current employer and reason for returning. During their absence, there is a good chance boomerang employees have learned new skills, expanded their network, and experienced other successes. It is important to have a candid conversation with a potential boomerang employee and find out exactly why she wants to return. There are right reasons to return, and there are wrong reasons to return. A former employee wanting to return because she misses her colleagues is not a good reason. An employee wanting to return because she has not been successful in subsequent jobs is not a good reason, either. The best case is an employee wanting to return because he has had time to learn, grow, and develop new skills and believes you can take advantage of his expanded skillset and network.

Number 5: needs of the company. No matter how great a former employee was, rehire decisions ultimately come down to whether the company needs the employee's skills, has the money to hire him, and has a job for him.

Bottom line

In addition, hiring a boomerang employee can be political, and reintegrating a returning employee can be precarious. Key players may have changed since the employee left, and interpersonal relationships may have changed, too. Also, things may be tense if a boomerang employee leapfrogs a current employee, who might feel slighted by not getting the job.

On a personal note, I am happy LeBron is returning to Cleveland. When I practiced law in Cleveland, I had the pleasure of meeting him a few times. Although he was younger then, he was always polite, respectful, and gracious enough to pose for pictures.

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