

## CIVIL UNREST, PROTESTS ALERT



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In the wake of recent civil unrest, protests, rioting and fires, employers may have questions related to their workplace and their employees. This Alert is designed to address the top five common questions that affected businesses and employers may be asking at this time as a result of the disaster – remember we are here to help!

### **What obligations does our business have to communicate with employees?**

As a best practice, employers should take steps to communicate with each and every employee and ensure that each employee is accounted for and safe. The employer should secure from employees their contact information and, if they've had to relocate, their current address as well as, if possible, multiple emergency contacts. Managers can and should assist in the employer's effort to communicate with employees, and employees should be advised of where, how and when to communicate with the employer. When necessary, if the employer is able to set up a "hotline" or centralized point of contact where employees can gain status updates from any affected businesses, it should seek to do so. Employees should be informed of their obligation to keep in contact with the employer as well and what is expected of them in this regard. Many employees may be facing significant personal challenges. Employers should seek to exercise patience and be willing to make exceptions to policies when extenuating and extraordinary circumstances arise, keeping in mind the importance of making employee-related decisions in a consistent manner.

### **Can an employee refuse to report to work if he or she wants to participate in a protest, or believes the workplace is not safe?**

Time off from work to participate in a protest or similar event is personal time off, and should be treated in accordance with the company's policies and past practices. If the employer affords employee time off for vacation or personal reasons (with or without pay), employees can and should be able to utilize such benefits in accordance with the employer's policies, which may include providing notice in the amount and via the means as stated in the employer's policy. Employers should not pass judgment on the reason an employee seeks to use paid time off benefits. Approval or denial decisions should be consistent with company policy and practice and based on legitimate business needs. Employers should not take into consideration subjective opinion or belief about, or preference for, how employees may use such time off.

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As for employees who seek time off from work because of a legitimate belief that it is unsafe for them to report (whether the workplace itself is unsafe, or is located in an unsafe area, or where commuting to work presents safety risks), the employer should engage such employees in a discussion to understand the specific reason for the employee's concern or fear. Where a catastrophic event may have impacted places where employees live and work, employers and employees should use common sense and not compromise their lives or the lives of others in reporting to or remaining at work if it is unsafe to do so. The U.S. Occupational Safety & Health Administration (OSHA) generally discourages employees from abandoning their jobs without first communicating with the employer about any legitimate safety concerns. However, in urgent and imminent situations that are hazardous to one's health or life, OSHA explains that employees do have the right to refuse to do a job that they believe in good faith exposes them to imminent danger. When it comes to employer obligations to provide a healthy, safe and hazard-free workplace, OSHA provides a number of resources to assist employers. Please see <https://www.osha.gov/as/opa/worker/employer-responsibility.html> for more information on keeping your employees and your workplace safe.

### **Are employers required to pay employees for time when the company is closed due to an emergency?**

The answer depends on the employee's classification as exempt or non-exempt. If employees are non-exempt, they only need to be paid for the hours that they spend working (assuming no contract, collective bargaining agreement or applicable reporting time pay law requires they be paid otherwise). So, even if non-exempt employees may be otherwise ready, willing and able to come to work, if they cannot work because the employer does not make work available, as may occur if the employer is unable to open for business due to looting, rioting, fire damage or the like, for example, there is no obligation to pay them for this time. The same is true for non-exempt employees who may want to report for work but are unable to safely do so. If they do not work, they are not entitled to be paid. Note that employees who may work remotely do need to be paid for such time. If employees have paid time off benefits available, the employer should enforce its paid time off benefit policies accordingly.

If employees are exempt from minimum wage and overtime requirements, they are entitled to their FULL weekly salary for any week in which ANY work is performed. When an exempt employee is ready, willing and able to work, the employer cannot withhold or deduct pay from an exempt employee's weekly salary for employer-mandated closures of less than one week. However, such employees need not be paid for any full workweeks in which they perform no work at all, even if this is due to a business closure, again absent a contract or collective bargaining agreement indicating otherwise.

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### **We are not certain when we will be up and running and so our employees are in an “on-call” situation – must we pay them while they are waiting to be called back to work?**

Generally the duty to pay non-exempt employees who are “on call” arises only if they are not able to use the waiting time effectively for their own purposes. In other words, if your employees are required to remain on or near company premises, or otherwise are not free to use the waiting time for their own purposes and can be considered to be “engaged to wait” for the employer’s call to action, then in this scenario the time spent waiting is compensable time. If the employees are free to engage in their own pursuits until such time as they employer contacts them, then they are fairly said to be “waiting to be engaged,” which is not considered payable time.

### **Several employees who are reservists in the military and members of the National Guard have voluntarily responded to a federal call for military personnel to assist with keeping order. Do I have to grant these employees time off to voluntarily respond to search and rescue efforts?**

Yes. If you have military service employees who are responding to a federal call for help either on a voluntary or involuntary basis then the employer's obligations in this instance are governed by the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA entitles employees to take up to five years of job protected leave in connection with military service. For this purpose, “service in the uniformed services” includes “all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war.” This includes reservists and those in the National Guard. Military leave under USERRA is generally unpaid unless the employer has a policy, practice or contract that requires payment of wages during such time off. Employees on military leave can be allowed – but not required – to use paid time off benefits for any period of otherwise unpaid military leave from work.

#### **Additional resources:**

SBA – [Emergency Preparedness Guide](#)

Ready.gov – [Preparedness Planning for Your Business](#)