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Winter Is Here For Employers: 5 Ways To Cope

By **Vin Gurrieri**

Law360, New York (January 4, 2018, 8:46 PM EST) -- With much of America starting 2018 in the grip of record cold and blizzard conditions, employers should be taking care to avoid missteps that can cause legal trouble, like not properly paying workers on snow days or failing to maintain safe environments.

Kristen Gallagher, a partner at McDonald Carano LLP, said employers facing situations where inclement or dangerous conditions exist should first look at what their legal obligations are under federal, state and local statutes and then consider what actions make sense in terms of employee morale.

"Hopefully, [an employer has] prepared some sort of flexibility in its employee handbooks already," Gallagher said, while adding that a business can make additional accommodations for workers in specific situations "as long as it's within the letter of the law."

Here, attorneys give five tips to help employers safely navigate the winds of winter.

Make Sure Everyone Is Paid Properly

While most businesses will remain open in less than ideal conditions, some may decide that severe weather warrants closing shop and giving staff a snow day.

Either way, employers must remain mindful of the consequences that any inclement weather will have on workers' pay, attorneys say.

Pamela Moore, a partner in McCarter & English LLP's Hartford, Connecticut, office, said that whether employees get paid on a snow day depends on if they are classified as exempt, salaried workers under the Fair Labor Standards Act.

Those individuals must continue being paid even if a business closes for a snow day, she said, noting that the only time businesses can make deductions from their salaries is in situations where they are out of work for personal reasons or potentially for medical reasons pursuant to a leave policy.

Nonexempt workers who are paid on an hourly basis, however, don't have to be paid for time they don't work, even if they are not working because weather has forced a closure, Moore said.

"Hourly workers do not have to be paid [in that situation], period," Moore said.

Carla Reeves of Goulston & Storrs PC also pointed out that should a storm be worse than

anticipated and a business is forced to close early for the day, hourly employees still have to be paid at least for the time they spent at work.

Don't Forget About Morale

Gallagher said another minefield for employers in the face of winter storms is employee morale.

When making decisions, she said, employers may want to consider other factors beyond their legal obligations, such as whether to allow employees to use accrued paid time off for severe weather conditions, offer them an extra PTO day, or suspend absentee policies.

"These are things employers can craft ahead of time, but they're certainly not required," Gallagher said.

Reeves said employers should also consider that highly compensated workers tend to work remotely when the weather is at its worst, while support staff like secretaries are usually the ones who have to brave the elements and make potentially hourslong commutes.

"Employers want to be aware of [this] dynamic and the effect it could have on morale," Reeves said.

Be Mindful of Government Directives

Whenever Old Man Winter unleashes a major storm, state and local officials will usually get ahead of the situation by instructing the public on school closures, impassable roads and other dangers.

One thing a government can do is declare a state of emergency, for which degrees of severity can vary.

If that happens, an employer could potentially risk legal liability if a worker is injured on the perilous trek to work, attorneys say.

While Moore said there "would have to be a pretty extreme situation" for an employer to face such a claim, it's not out of the realm of possibility.

For example, if a business ignores a state directive that people stay off the roads, tells workers to report, and a worker gets injured in an accident, then Moore said it's "theoretically possible there might be a tort claim.

"In that situation, the employer could be accused of violating a recognized standard of care by taking an action that was the proximate cause of the worker's injury. The rule of reason should apply, as in, 'Is it reasonable for an employer to require employees to come in?'" Moore said.

By following guidance from state and local officials, particularly in areas where people predominantly drive to work, employers will be on better footing, Reeves said.

"It puts you in a better position after the fact if people say you made the right decision or you made the wrong decision," Reeves said.

Take Precautions With Outdoor Workers

Businesses with outdoor workers, whether landscapers, delivery companies or private plowing operations, are particularly vulnerable when there's severe cold or other nasty weather.

Under the Occupational Safety and Health Act, Moore noted, employers must follow the law's general duty clause, which says employers must provide a reasonably safe work environment for employees.

If an employer determines there isn't an unreasonable safety risk, it must still take certain precautions to ensure that a legal claim doesn't arise. That can include training workers to safely deal with extreme elements and also making sure to provide adequate protective equipment.

Moore gave the example of employees having to work outdoors on a day when frostbite is a risk. In that situation, she said, an employer can limit workers' time outside and make equipment like warm garments available.

Have a Plan for Critical Employees

While some businesses like law firms have an office setting and can easily allow employees to telecommute, other operations may provide essential services that require employees to be physically present.

Hospitals and fire departments, for example, can't get by without personnel on hand, even if the weather is especially rough or if a state of emergency is in effect.

In such cases, Moore said, it helps employers like hospitals to designate key individuals as critical employees that must report to work even if conditions are poor — and have a procedure in place for ensuring they get there safely, like sending SUVs to pick them up and drop them off during a blizzard.

"Most [employers] will have an emergency plan in place long before the weather event happens, and then they just have to implement it," Moore said.

While other sectors like retail and hospitality don't provide services as essential as hospitals', they similarly need to have workers on hand or they won't be able to operate.

In those situations, Moore said that employers can't force any particular workers to come in and should first look for volunteers — like people who can walk to work or take public transit — while also making sure they don't later retaliate against workers who aren't able to report.

--Editing by Mark Lebetkin and Kelly Duncan.

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