Like it or not, winter is upon us as the calendar rolls into February, and Jack Frost is constantly lurking around the corner. In this space, we’ve talked about pay issues under the Fair Labor Standards Act (“FLSA”) when employees can’t make it to work or the business must close. On the flip side, however, some businesses, such as healthcare entities, provide critical services and often have no choice but to remain open to the best of their ability when winter strikes.

For these employers, adequate staffing is essential and that sometimes means requiring employees to remain on the employer’s premises to ensure they are available for their next shift or to cover for employees who can’t make it. In this situation, most prudent employers allow their stranded employees time to relax or sleep. But, is this time also compensable under the FLSA?

For some employees, the answer can depend on two factors. First, is the employee exempt or non-exempt from the FLSA? Second, was the employee required to remain at the worksite, or did they choose to do so of their own free will (for example, out of fear of travelling on treacherous roads)? If a non-exempt employee was required to stay at the worksite, the answer gets much trickier.
Is Sleeping Time Compensable Under the FLSA?

The inquiry into compensability of sleeping time has two broad prongs. First, FLSA regulations find that an employee who is required to be on duty for less than 24 hours is “working” even though he or she is permitted to sleep or engage in personal activities. For example, a telephone operator with an 11-hour shift was “working” even when allowed to sleep when not performing her duties. It made no difference that the employer furnished a place for her to sleep; her time was “given to” her employer. Thus, any non-exempt employees “on duty” for less than 24 hours may be entitled to pay for all of their time, including sleep.

Next, any employee who is required to be on duty for 24 hours or more may agree to exclude from compensable time any bona fide regularly scheduled sleeping periods of no more than 8 hours, as long as the employer furnishes adequate sleeping facilities. An agreement can be implied (for example, clearly stated in a policy acknowledged by the employee), but without an agreement, the whole period is compensable.

If an agreement exists, the employer must provide “adequate” sleeping facilities, and the sleep period must be “uninterrupted.” If the sleep period is interrupted by a call to duty, then the interruption is compensable. If the employee cannot get 5 hours of sleep, then the entire 8-hour sleeping period is compensable. Further, if the employee must spend his or her sleep time “with one eye and one ear open” to ensure the safety or well-being of people in his or her charge (such as patients in a hospital), then the time is compensable.

Is Waiting Time Compensable Under the FLSA?

Obviously, stranded employees wouldn’t spend their entire off-duty time sleeping. Is time simply spent “waiting” compensable? As we already mentioned, much hangs upon whether the employee was required to stay or chose to do so of their own free will because they were afraid to travel. Also relevant is whether the employee would be subject to being asked to pitch in outside of his or her regularly scheduled shift time (for example, to help cover a short-staffed situation). If so, it’s likely the employee would be considered “on call.”

The FLSA is clear that an employee who is required to remain on call on the employer’s premises or nearby enough that he or she cannot use the time effectively for his or her own purposes is considered to be working. There is a strong presumption under the FLSA that any time spent waiting is compensable if the employee is required to wait at the worksite. In this situation, overcoming that presumption would be a tough row to hoe for the employer.

Severe winter weather can cause quite a lot of chaos and confusion. This stress is doubled for those employers who have an obligation to remain open and staffed to the best of their ability. The midst of the mayhem is the least opportune moment to worry about FLSA liability. If you are uncertain as to your employees’ FLSA status and your obligations if you have a severe-weather staffing policy (or any employees who could be stranded at work), consult competent employment counsel before you, too, are left out in the cold.