

December 2010

Employment

Snow Chaos: Your Questions Answered

Normally, a bit of snow is great fun. But with the unusually early snowfall and a cold winter predicted, employers will be concerned about employee absence levels. Are you legally obliged to pay employees who fail to make it to work because of adverse weather conditions? What steps can employers take if they suspect an employee is using the weather conditions as an excuse not to turn up to work? What are the implications for employers if schools close, if the office has to close, and for the employees who actually do make it in? These and other questions are answered below in the Pinsent Masons' Employment Team's 'Snow Guide'.

Out in the cold

As the winter weather bites, what protection do you have to provide for your employees from the chill?

For workers who work inside, certain regulations set out the rules on workplace temperatures. The general rule is that the temperature in workplaces should be at least 16 degrees Celsius. However, there is no legal minimum outdoor working temperature so employers need to rely on thermal risk assessments. In very cold weather, outdoor workers face two major health problems: hypothermia and frostbite. There is therefore extensive HSE guidance about protective clothing for cold weather, health issues and management guidelines (remember those warm drinks!)

Let it snow...

Do you have to pay staff who are unable to get into work due to snow and difficult transport conditions?

Employees are obliged to attend the office unless they are sick, on holiday or on maternity leave etc. The onus is, therefore, on employees to come into work. Technically, this applies even in extreme weather conditions. Therefore, if the office is open and employees cannot make it into work because they are 'snowed in', depending on the contract, you are entitled to treat their absence as unauthorised and are under no obligation to pay them. However, if an employee's normal mode of transport is out of action due to severe weather disruption, there are a number of other issues which an employer would need to consider before withholding pay.

First, you should encourage employees to explore alternative means of transport. However, employees should not feel pressured to risk their safety to get into the office so it may be sensible to consider whether employees could usefully work from home until the weather situation has improved. If this is not a viable option, then the alternatives available are for you to advise employees that:

- any time off work in these circumstances will be unpaid (ideally, you will have a contractual provision to support this); or

- they will be paid but will be expected to make up the time at a later date; or
- they can request to take the time off as paid annual leave or as unpaid time off for dependant's leave (e.g. if schools close - see more about this below).

If you do decide to withhold pay, although employees have statutory protection against an unauthorised deduction being made from their wages without their consent and so may potentially challenge the withholding of pay, the employer can argue that there was no entitlement to pay as no work was done.

Finally, there are 'custom and practice' and morale issues to consider. If historically you have paid staff unable to get to work due to adverse weather, the right to be paid may have been implied into their employment contracts by custom and practice. Please take legal advice in such circumstances. As far as morale is concerned, you may wish to assess whether not paying employees would be in the best interests of your business. It may be that the financial burden to the business of paying staff in these circumstances is outweighed by the benefits that such a gesture would have on staff morale and productivity in the long run - especially if the snowfall is particularly heavy and it is impossible to get into the office.

Enforced holiday?

Can you require an employee who cannot get into the office to take a day's holiday?

This is not likely to be an option for employers. Unless the employee's employment contract contains an express right for the employer to direct when their holiday is taken, employers cannot force employees to take a day's holiday without their consent.

School's out for...winter

If schools are closed or an employee's nanny is unable to make it to work because of the severe weather and there is no one else available to look after the children at such short notice, what are the implications for employers?

To avoid the office becoming a temporary crèche, there are statutory rules which allow parents to take time off when there is an 'unexpected disruption to childcare' and parents are protected from suffering a detriment for doing so. Arguably, a school closure is not the same as a disruption to 'childcare', however, if the school closure was announced first thing in the morning and alternative childcare arrangements cannot be made, this could be seen as constituting an emergency situation and employees would be entitled to statutory protection for taking the day off. Strictly, the day would be unpaid but not all employers will take this approach. It is also important for employers to adopt a consistent approach to the policy adopted for employees without children.

But I'm working from home, honest

If it is safe to travel, employees should come into work as usual. If employees are concerned that the conditions are not safe or if they are dependent on public transport systems that are badly affected, many employers take the view that employees should remain at home and do what work they can from there. This is becoming more feasible as many employees have Blackberries and, if not, then they can access their work email and office applications remotely via a laptop, home PC or mobile phone. However, even though they are at home, employees need to be clear that they must still work as far as possible (and not just watch the shopping channel and re-runs of Dallas!). A home working policy could be helpful here making it clear that working from home is a privilege, not a right and that the employer will, if necessary, monitor output.

Blame it on the snow

What if an employee could have made it into work but chooses not to?

If you believe that an employee is using the weather conditions as an excuse for absence (or lateness), particularly if they live locally (or are spotted in Selfridges), this could be a disciplinary matter. However, it is doubtful that most employers would want to devote time and resources to investigating the circumstances of each individual worker who is suspected of taking a 'snowball' day. In a blatant or persistent case you may, of course, choose to investigate the matter in the usual way and take any necessary action in line with the company's disciplinary policy. Alternatively, when the initial conditions that made travel to work impossible have subsided, you could let employees know by phone, email or text that any further time off will need to be taken as holiday. You may find that once this has been communicated, employees suddenly start finding ways to get in!

There's no business like snow business

What if you are forced to close the office due to the severe weather conditions?

If you decide to temporarily close your business premises at short notice because of unforeseen circumstances, such as heavy snowfall, and there is no work available for your employees as a result, you cannot usually withhold pay. If you do, employees could bring unauthorised deduction from wages claims to recover the pay owed. The only exception to this is if you have an 'unpaid lay-off' clause in your contracts of employment, or the employees expressly consent to being laid off without pay. There are, however, complicated rules surrounding lay-off clauses, including rules about statutory guarantee payments, and you should take legal advice before proceeding.

Cold comfort

What about the employees who actually make it into work? Should they get a day off in lieu as compensation?

It's true that these sorts of situations can lead to resentment among employees who have battled into work, often against the odds, especially if, once they are in the office, they have to work extra hard to cover those who are absent. Ideally, the employees' efforts should not go unnoticed but days' off in lieu or other financial rewards are probably unlikely. Employers should, however, carefully observe weather warnings and let employees leave when appropriate to avoid any treacherous travel conditions on the way home. Never ask staff to disregard official weather and travel advice unless you enjoy spending your evenings digging your colleagues' cars out of the snow in the office car park!

Minimise the chaos

Every year, the UK is increasingly beset by 'unexpected' snowy weather. It is therefore worth thinking about alternative ways to manage the situation. Employers should consider introducing an 'adverse weather policy' so employees know what you expect of them when severe weather strikes. This will also help avoid confusion and conflict when the snowfall arrives. Alternatively, you could amend your normal absence policy to cover such instances. The policy should contain guidance about workplace closures, disruptions to public transport, working from home and remote IT access, whether employees will be paid if they fail to attend work, disciplinary sanctions for 'snowball' days and whom employees should contact once they know they will be unable to make it in. With occurrences of severe weather on the rise, putting in place a clear adverse weather policy could be a worthwhile investment.

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Should you have any questions please contact **Chris Booth** (chris.booth@pinsentmasons.com) or your usual Pinsent Masons adviser who will be able to assist you further.

This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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