

## ALERTS AND UPDATES

### Guidance For Employers' Hurricane and Disaster Preparation

August 26, 2011

Hurricanes can present unique challenges for employers. Although it is practically impossible to be fully prepared for any natural disaster, it is important for employers to be aware of employment laws that may be implicated in such situations.

When a hurricane or other emergency occurs, numerous federal and state employment laws are implicated, including those discussed below. Keep in mind that this information may be applicable to other disasters, such as fires, flu epidemics and workplace violence. This Guidance addresses federal laws.

#### Layoffs, reduction of pay and reduction of work hours

##### Fair Labor Standards Act (FLSA)

- **Non-exempt employees.** The FLSA requires employers to pay non-exempt employees only for hours that the employees have actually worked. Therefore, an employer is not required to pay non-exempt employees if the employer is unable to provide work to those employees due to a natural disaster. An exception to this general rule exists where there are employees who receive fixed salaries for fluctuating workweeks. These are non-exempt employees who have agreed to work an unspecified number of hours for a specified salary. An employer must pay these employees their full weekly salary for any week in which *any* work was performed.
- **Exempt employees.** For exempt employees, an employer will be required to pay the employee's full salary if the worksite is closed or unable to reopen due to inclement weather or other disasters for less than a full workweek. However, an employer may require exempt employees to use allowed leave for this time.
- **Exempt employee chooses to stay home because of weather.** The Department of Labor (DOL) considers an absence caused by transportation difficulties experienced during weather emergencies, if the employer is open for business, as an absence for personal reasons. Under this circumstance, an employer may place an exempt employee on leave without pay (or require the employee to use accrued vacation time) for the *full day* that he or she fails to report to work. If an employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made from a salary for such absences. However, a deduction from salary for less than a full-day's absence is not permitted, although the employer may make a partial day time deduction from the employee's leave bank (if there is insufficient time in the leave bank, no deduction from salary can be made). Caution is recommended, however, in docking salaried employees' pay. Moreover, many employers instead require employees to "make up" lost time after they return to work, which is permissible for exempt employees. This practice is not allowed for non-exempt employees, who must be paid overtime for all hours worked over 40 in a work week.

## Other FLSA issues

- **On call time:** An employee who is required to remain on call at the employer's premises or close by may be working while "on call" and the employer may be required to pay that employee for all of his time. For example, maintenance workers who remain on premises during a storm to deal with emergency repairs must be compensated, even if they perform no work, if they are not free to leave at any time.
- **Waiting time:** If an employee is required to wait, that time is compensable. For example, if employees are required to be at work to wait for the power to restart, that is considered time worked.
- **Volunteer time:** Employees of private not-for-profit organizations are not volunteers if they perform the same services they are regularly employed to perform. They must be compensated for those services. Employers should generally be cautious about having employees "volunteer" to assist the employer during an emergency, if those duties benefit the company and are duties regularly performed by employees.

**Worker Adjustment and Retraining Notification Act (WARN).** The WARN Act, a federal law, imposes notice requirements on employers with 100+ employees for certain plant closings and/or mass layoffs. However, an exception does exist where the closing or layoff is a direct result of a natural disaster. Nonetheless, the employer is required to give as much notice as is *practicable*. If an employer gives less than 60 days' notice, the employer must prove that the conditions for the exception have been met. If such a decision is contemplated, it is advisable to consult with legal counsel about the possible notice requirements to ensure compliance with the WARN Act.

## Employees Taking Leave After Disaster

**Family and Medical Leave Act (FMLA).** Employees affected by a natural disaster are entitled to leave under the FMLA for a serious health condition caused by the disaster. Additionally, employees affected by a natural disaster who must care for a child, spouse, or parent with a serious health condition may also be entitled to leave under the FMLA. Some examples of storm related issues might include absences caused by an employee's need to care for a family member who requires refrigerated medicine or medical equipment not operating because of a power outage.

**Uniformed Services Employment and Reemployment Rights Act (USERRA).** For those employees who are also part of an emergency services organization (such as the National Guard or a Reserve unit), the USERRA may apply. USERRA prohibits discharging, denying initial employment, denying promotion, or denying any benefit of employment because of a person's membership, performance of service, or obligation to perform service in uniformed service. While USERRA does require advance notice of military service, there is no time limit within which notice must be given; notice must simply be "timely." In the event of a hurricane or other natural disaster, there will be short notice. The notice may be written or oral and it may be provided by the employee or an appropriate officer of the military branch in which the employee is providing uniformed service.

## Continuation of Employee Benefit Programs

**ERISA and COBRA.** During times of natural disaster, facilities closure and employee displacement creates issues, often unprecedented, involving benefits. During such times where, even temporarily, employees and/or the business may not be working or operating, employers must make coverage decisions as to whether benefits will be maintained for employees.

Where an employer decides to continue coverage, employers should contact their benefits vendors to determine how and to what extent coverage is to be maintained during a time of disaster. During such times, it is the ERISA-covered benefits of life, health and disability coverage that employees and their dependents are often most concerned about and seek to maintain.

For a COBRA-covered health plan, the plan administrator (typically the employing entity) must be notified if an employee is no longer eligible for coverage under an ongoing plan because the employee is not working. Upon notification, the employer must send COBRA packages to employees and their covered dependents. The general rule for all notices is that they need only be sent to an employee's last known address. According to the Department of Labor, COBRA notices are timely when sent up to 45 days from the COBRA "qualifying event." Generally, the decision to discontinue coverage and terminate any and all benefit plans must be communicated to the employee within 30 days or less.

During previous natural disasters, many governmental agencies and entities extended the deadlines for certain reports and paperwork. Therefore, it is expected that with future natural disasters, the government will provide some deadline extensions, but as with every natural disaster, the government's response will vary.

### **Other Issues to Consider**

**Americans with Disabilities Act (ADA).** Under the ADA, employees who are physically or emotionally injured as the result of a catastrophe may be entitled to reasonable accommodation by the employer as long as it would not place undue hardship on the operation of the employer's business.

**Occupational Safety and Health Act (OSHA).** The purpose of OSHA is to assure . . . "every working man and woman in the Nation safe and healthful working conditions." . . . 29 U.S.C. §651(b). This applies to all employment performed in any workplace within the United States as long as the employer has one or more employees. 29 U.S.C. §653. When it comes to natural disasters, consider the following under OSHA:

- Employers are responsible to protect employees from unreasonable danger in the workplace, which includes an imminent "natural phenomenon" that will threaten employee safety and health.
- Hurricanes and other disasters present obvious safety concerns that employers need to consider when asking employees to come into work during adverse weather, including vehicle accidents, slips and falls, flying objects, electrical hazards from downed power lines, exhaustion from working extended shifts, and dehydration.
- An employee that reasonably believes he/she has been put in imminent danger because of being forced to go to work during a hurricane may file a complaint with OSHA against the employer and then ask for whistleblower protection.
- OSHA has issued fact sheets, in both English and Spanish, setting out issues and hazards relating to recovery and cleanup efforts following hurricanes or other disasters.

**National Labor Relations Act (NLRA).** NLRA generally governs relations among employers, employees, and labor unions. Collective bargaining is one of the keystones of the NLRA. The NLRA requires an employer and the representative of its employees to meet at reasonable times, to confer in good faith with respect to wages, hours, and other terms or conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

- Following a natural or other disaster, the employer may be required to make certain changes in the workplace if employees reasonably believe the workplace to be unsafe.
- OSHA and the NLRA both give employees the right to refuse to work in conditions they believe are unsafe. The employees must have a reasonable, good-faith belief that working would be unsafe, but the law protects them even if they're honestly mistaken about the danger. The two laws have slightly different standards.

**Protected concerted activity.** For both union and nonunion employees, refusing to work because of safety concerns can be a concerted activity that is protected by the NLRA. Concerted activity usually involves more than one employee, but it can consist of one employee acting on a matter that affects other workers.

Some collective bargaining agreements contain a "force majeure" clause, setting forth the employer's rights and duties in emergency situations caused by such things as unforeseeable forces of nature. And, in some situations, a disaster may force an employer to go out of business completely. Generally, an employer has the right to cease operations and go out of business completely without first bargaining with the union over its decision, but must bargain over the "effects" of the decision to close.

**Leave banks.** Employers may offer employees paid leave for time spent volunteering to assist with disaster relief efforts. Employers who maintain leave banks can also allow employees to donate leave to the leave bank and then award the donated leave to other employees who, in turn, use the leave to volunteer relief services. The FLSA does not regulate the provision or use of leave banks.

**Unemployment.** In many states, when an employee is laid off due to a natural disaster, the employer's account is not charged. An employer's account is also not charged if an employee is discharged for misconduct. A failure to report to work without good cause after the employer expressly directed him to do so as a result of Hurricane Ivan constituted misconduct connected with work in a Florida case. (*Gulf Power Co. v. Florida Unemployment Appeals Comm'n*, 912 So. 2d 1256 (Fla. 1st DCA 2005)).

**Federal relief.** Although many workers will be covered by the state's regular unemployment compensation program, those not covered may apply for Disaster Unemployment Assistance (DUA). DUA is a federally funded program that assists individuals who become unemployed as a direct result of a declared disaster. The program also covers self-employed individuals, owners of farms and ranches, farm and ranch workers, as well as fishers and others who are not normally covered by state unemployment compensation.

## **For Further Information**

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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