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The Texas State Statute Prohibiting Discrimination Because of an Evacuation

By Kerry E. Notestine

Three years ago, Littler prepared an ASAP on legal issues related to the evacuations associated with Hurricane Rita that hit the Northeastern Texas Gulf Coast. This month, Hurricane Ike slammed into the Texas Gulf Coast at Galveston, Texas, and Texas employers again are facing employment issues related to the hurricane. As a result, the 2005 ASAP has been revised and updated summarizing the discipline and compensation issues associated with employees missing work because of a weather emergency.

In Texas, employers may not discharge or otherwise discriminate against an employee who “leaves the employee’s place of employment to participate in a general public evacuation ordered under an emergency evacuation order.” Tex. Labor Code § 22.002. The definition of an *emergency evacuation order* includes an official statement issued by a governmental entity to “recommend the evacuation of all or part of the population of an area stricken or threatened with a disaster.” Tex. Labor Code § 22.001(2)(emphasis added). The statute creates liability for the loss of wages or benefits (e.g., vacation pay) incurred by the employee as a result of the violation. Tex. Labor Code § 22.003. There is an exemption for emergency services personnel (police, firefighters, EMTs, or those whose employment involves providing “services for the benefit of the general public during emergency situations”) if the employer provides adequate emergency shelter. Tex. Labor Code § 22.004.

During Hurricane Rita in 2005, public officials recommended that practically everyone on the Northeast Texas Gulf Coast evacuate in advance of the hurricane. This recommendation resulted in massive traffic congestion and multiple highway deaths. Government offi-

cial were much more limited in their evacuation orders this year preceding Hurricane Ike. Government officials issued mandatory evacuation orders for limited areas that would be directly affected by the hurricane storm surge, but they generally did not recommend that citizens evacuate from other areas. The Texas statute does not define which government officials may issue a covered emergency evacuation order, and orders by mayors of small towns or minor county government officials could fall within the reach of the statute. As a result, it is possible that some employees could be affected by evacuation orders about which employers did not know, although it would appear that most employees were not under a recommendation to evacuate because the Texas Governor and Houston Mayor did not issue voluntary evacuation orders of which we are aware.

Discharge and Discipline

While the Texas evacuation statute appears to be limited to an employee who leaves work for an evacuation, it would be prudent to treat employees who did not report to work because of the evacuation in the same way. The statute appears to have covered the voluntary, as well as mandatory, evacuations that covered much of the Eastern part of Texas during Hurricane Rita because the statute refers to an official statement recommending evacuation. Fewer employees missed work during Hurricane Ike because of an evacuation order due to the more limited evacuation recommendations given by government officials. The reason that an employee missed work may not always be clear, and it may be necessary for an employer to ask the reason for the absence. An employee may admit that he or she did not evacuate and missed

work for another reason (e.g., staying home to protect property). An employer, however, should not terminate or otherwise discipline an employee who missed work during an evacuation associated with Hurricane Ike, absent specific information provided by the employee that the absence was not *because* of the evacuation. Employers may want to compare the zip codes associated with the mandatory or voluntary Hurricane Ike evacuation orders with the home addresses of employees, or search other local evacuation orders, to determine if employees might be covered by the Texas statute.

Employee Compensation

There also are implications under the Fair Labor Standards Act (FLSA) associated with docking employees for time missed from work. Employers do not have to pay nonexempt employees for time away from work, but an employer may not dock the pay of *exempt* workers who work any time during a week, except in full-day increments and only for time away from work not occasioned by the employer or the operating requirements of the business. This means that if an employer closes the business, and an exempt employee is ready, willing and able to work, the employer may not make deductions from the exempt employee's weekly pay. 29 CFR § 541.602. Employers may require employees to use paid time off (vacation, personal days) for absences, but once available paid time off is used, the employer must pay exempt employees their weekly salary in any week in which the employee works, unless the employer demonstrates legitimate reasons for full-day deductions. The state evacuation statute also provides that an employer may not "discharge or in any other manner discriminate against" an evacuated employee. Tex. Labor Code, §22.002. The statute also specifically creates liability for "loss of wages and employer-provided benefits..." making it reasonable to assume that discrimination in pay practices would violate the statute. Tex. Labor Code, §22.003. Thus, an employer may not discriminate in its compensation policies for evacuated employees.

Applying these principles to absences because of Hurricane Ike, employers generally are not required under the FLSA to pay *nonexempt* employees who did not work as a result of the hurricane. The employer must pay exempt

employees for time missed because of hurricane-related absences if the employee worked at any time during a regular workweek. The employer may dock exempt employees for complete days missed during a workweek if the employee missed work for a personal reason, sickness or disability. If the employee is available to work and the employer's place of business is closed, that would not be a personal reason permitting a full-day deduction from pay. A Department of Labor (DOL) opinion letter indicates that an employer does not have to pay exempt employees for full-day absences for failing to report to work because of circumstances related to weather emergencies (e.g., transportation difficulties) when the employer is open for business. The DOL would consider this to be a personal reason for the absence. FLSA 2005-41 Opinion Letter (October 24, 2005). If an exempt employee misses an *entire regular* work week, their employer may withhold pay. Employers also may want to consider whether paying exempt employees compensation for missed work creates a morale problem with nonexempt employees who may not be paid. Moreover, the employer may not discriminate in its pay policies related to exempt employees based on evacuation status as described above related to nonexempt employees.

Employers also may require employees to use paid time off for time missed during Hurricane Ike. Employers generally can require nonexempt employees to exhaust paid time off if the employee misses work. The employer also can require exempt employees to use paid time off even if the absence was not due to the fault of the employee. The Administrator of the Department of Labor has issued an opinion that employers may require exempt employees to use vacation or other paid time off for time missed from work due to closures based on inclement weather or other disasters. FLSA 2005-7 Opinion Letter (January 7, 2005). Thus, an employer would not violate the FLSA by requiring exempt employees to use paid time off during a weather emergency, although the employer could not deduct from the employee's weekly pay if the employee had used all available paid time off. However, the employer requires the employee to use paid time off during an evacuation but did not unless the absence was due to the employee's personal choice, sickness, or disability.

Employers also must be consistent in compensation policies for evacuated employees or risk liability under the state evacuation statute. For example, an employer should not decline to pay employees for absences caused by a hurricane evacuation or require the use of paid time off if the employer has paid for time off for other involuntary facility closings such as for inclement weather or maintenance issues. Furthermore, an employer must comply with its own policy on the use of vacation or other paid time off, and to the extent that the policy does not require the use of paid time off in all involuntary situations (or the employer does not have a written policy on the issue), employees may have a claim under the Texas Payday Act for unlawful deductions. The laws of other states may provide even greater benefits.

Unemployment Compensation

Employees who are displaced from their positions due to Hurricane Ike may be eligible for unemployment compensation from the Texas Workforce Commission (TWC). If after filing for state unemployment compensation an employee is ineligible for state assistance, the employee may be eligible for Disaster Unemployment Assistance (DUA). This federally-funded program is made available for individuals who live or work in counties made the subject of a disaster declaration. Employees must file for regular unemployment compensation benefits before filing for DUA, and if the employee is ineligible for standard state unemployment compensation, the employee then may receive DUA. While employers typically are charged back on their accounts for unemployment compensation benefits, a TWC representative has informed us that employers will not be charged back for benefits arising from Hurricane Ike under either state unemployment compensation or the DUA. The TWC website indicates that October 15 is the deadline for applying for hurricane-related benefits. Employers may want to consider letting employees know about eligibility for these programs if the employer cannot provide work for employees as a result of Hurricane Ike.

Recommendation

As a general approach, employers should pay exempt workers for any time missed as a result of the Hurricane Ike evacuation (if they

worked any time during a regular workweek) and not require them to use paid time off for missed work. Unless the employer's policy or practice during other facility closings dictates otherwise, an employer permissibly can withhold pay from nonexempt workers who did not work or require them to use paid time off. Employers should not discharge or discipline employees for absences associated with the Hurricane Ike evacuation absent special and very limited circumstances. Fortunately, the scope of evacuations for Hurricane Ike was significantly more limited than the evacuations for Hurricane Rita.

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