Akerman Practice Update

LABOR & EMPLOYMENT

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Hurricane Season is Here: Are You Prepared to Weather the Storm After the Storm?

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Though it has been six years since a major hurricane made landfall in South Florida, area employers should not let their guard down. The 2011 Atlantic Hurricane Season kicked off on June 1st and it is expected to be a busy one. Now is the time for employers to dust off their aging disaster preparedness plans and brush up on the laws which will inevitably impact their workplaces should disaster strike.

Update Your Disaster Preparedness Plan

Employers who resisted putting a disaster preparedness plan in place after the 2004-2005 hurricanes hit Florida should seriously consider crafting such a plan now. Additionally, employers who put disaster preparedness plans in place after 2005 should now take steps to update their plans. The ideal plan will provide valuable instructions and information to employees to guide them in their pre-storm preparations (both personal and professional) as well as to help employees safely return to work once the coast is clear. To that end, a plan should do all of the following:

- Establish an emergency hotline that employees can call to obtain information about office closures and schedules for reopening

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- Establish a "phone tree" so that all employees stay connected and are accounted for during and after the storm
- Establish policies for safeguarding computer equipment and paper and electronic files before the storm
- Establish policies for payroll and for addressing requests for paid and unpaid leave after the storm
- Establish policies for returning to work after the storm passes, and implement penalties for employees failing to do so when they are otherwise able

Review Laws Impacting Your Workplace Before and After the Storm

Fair Labor Standards Act ("FLSA")

An employer's failure to abide by the requirements of the FLSA during and after a weather-related event may jeopardize the exempt status of certain employees. Consistent with the FLSA, employees exempt from the minimum wage and overtime requirements must be paid their regular salaries for any week in which they perform work. Such employees need not be compensated for weeks when no work is performed either in the office or in a remote location.

The Department of Labor considers an employee's absence due to adverse weather conditions, when an employer remains open for business, as an absence for personal reasons. Thus, an employer that remains open for business during a hurricane (or other weather-related emergency) may lawfully deduct a full-day's pay from the employee's salary. Such a deduction will not violate the salary basis rule or otherwise affect the employee's exempt status. However, remember that deductions from salary for less than a full-day's absence are not permitted. So if an exempt employee is absent for two and a half days due to adverse weather conditions, and the employer remains open for business, the employer may deduct for the two full-days absence, but the employee must receive a full-day's pay for the partial day worked.

The rules are simpler when dealing with non-exempt employees. Non-exempt employees need only be paid for hours worked. If a non-exempt employee misses work, regardless of whether the employer remains open, then such employee is not entitled to payment for such time. Further, employers need not pay non-exempt employees for time lost due to a workplace closure. However, non-exempt employees should be permitted to use paid time off consistent with

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the employer's leave policies. Many times, in order to preserve employee morale, employers will pay non-exempt employees for lost time due to a workplace closure despite the absence of a legal obligation to do so.

Uniformed Services Employment and Reemployment Act of 1994 ("USERRA")

USERRA is a broad statute which protects the job rights of members of the uniformed services, including the National Guard, who voluntarily or involuntarily leave employment to fulfill their commissions. So long as certain criteria are met, USERRA guarantees members of the uniformed services re-employment upon completion of a tour of duty. The Bioterrorism Preparedness and Response Act, passed in 2002, extends USERRA's protections to certain disaster relief workers, including persons not otherwise members of the uniformed service. These workers include those dispatched pursuant to the National Disaster Medical System, a federally coordinated system providing medical care and assistance in the face of natural disasters, catastrophic events, and terrorist attacks. Employers must be mindful of the leave requirements and reemployment rights provided for under USERRA as well as the right to continued healthcare coverage under USERRA and its Florida counterpart, the Florida Uniformed Servicemembers Protection Act.

Family and Medical Leave Act ("FMLA")

Depending on the circumstances, employees requesting leave following a storm may qualify for leave under the FMLA. Leave requests following a storm should be handled in the same way as leave requests made prior to a storm.

Americans With Disabilities Act ("ADA")

The protections offered to employees under the ADA continue to apply notwithstanding a natural disaster. Employers must continue to make provisions for reasonable accommodations to qualified employees with disabilities after a storm, unless undue hardship is shown. In some instances, extended leave may constitute a reasonable accommodation.

Occupational Safety and Health Act ("OSHA")

Section 13(a) of OSHA provides, in pertinent part:

> The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to

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> cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.

Section 13(a) further provides that an order issued pursuant thereto, "may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger."

However, even in the absence of an OSHA investigation and enforcement order, an employee who believes in "good faith" that he or she is exposed to imminent danger may, assuming certain conditions are met, refuse to do a job. Specifically, consistent with 29 C.F.R. 1977.12(b)(2), the condition causing the employee concern "must be of such a nature that a reasonable person, under the circumstances then confronting the employee" would conclude there was an imminent danger and "there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels" like making a complaint to OSHA. "In addition, in such circumstances the employee, where possible, must have sought from his employer, and been unable to obtain a correction" of the imminent danger. Where the employee does seek a correction, the employee would also be protected by the anti-retaliation provision contained in Section 11(c) of OSHA.

Naturally, whether an imminent danger exists as a result of damage caused by a storm must be determined in view of all the facts and circumstances on a case by case basis. The bottom line is this – if an imminent danger exists or reasonably could be found to exist as a result of damage to the workplace – employees should not be required to return to work until that danger is eliminated.

For more information, please contact a member of our Labor & Employment practice.

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