

# HR GUIDE FOR HURRICANE AND DISASTER PREPARATION

## PREPARING FOR THE WORST



Hurricanes have posed unique human resources challenges for employers with operations in Houston and the Gulf Coast Region. According to the Congressional Budget Office, Hurricane Katrina alone wiped out more than 400,000 jobs.

### **The economic effects of hurricanes have long term consequences on the businesses in the region.**

While many employers are working around the clock on recovery efforts, other employers find themselves unable to function for extended periods because of damage or loss of utilities.

Although one can never be fully prepared for such natural disasters, it is important to be aware of the federal and state laws that address such situations. This quick go-to guide can be used by employers in navigating through the legal and business implications created by events such as Hurricanes Katrina and Ike. In addition, the information contained within may be applicable to other disasters, such as fires, flu epidemics, and workplace violence.

### COMMON FAQs:

#### 1. Is there any law that protects employees who are absent from work during or after a hurricane?

Chapter 22 of the Texas Labor Code prohibits an employer from discriminating against an employee who "leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order." Employers violating this law may be liable for lost wages, benefits, and other damages. Although there are no cases construing this statute, there are several important points for employers to consider:

- "Evacuation Orders" are defined broadly to include not only mandatory, but recommended evacuations. The statute does not contain an "end date" for job protection, although it would almost certainly include periods during which elected officials are recommending that employees not return to an affected area.
- Chapter 22 does not apply to individuals employed as emergency services personnel (including fire fighters, police officers, emergency medical technicians, etc.) or those required to provide services for the benefit of the general public during emergency situations, provided that the employer provides adequate emergency shelter for those individuals during any disaster.
- Chapter 22 also does not apply to a person who is necessary "to provide for the safety and well being of the general public, including a person necessary for the restoration of vital services." We believe it is reasonable to interpret this statute as including not only utility workers and other obvious recovery personnel, but also employees working for gas stations, grocery stores, and other critical services.

#### 2. If a work site is closed because of weather, or unable to reopen because of damage and/or loss of utilities, am I required to pay affected 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.

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.

#### 3. Is it lawful to dock the salaries of exempt employees who do not return to work when needed after an emergency or disaster?

The 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.**

We recommend caution, however, in docking salaried employees' pay, and suggest you first consult with legal counsel. 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.

**4. What are other wage and hour pitfalls that employers should be aware of following a hurricane or other natural disaster?**

**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 nonprofit 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.

**5. Can employees affected by a hurricane seek protected leave under the Family and Medical Leave Act ("FMLA")?**

Yes, 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.

**6. If a work site or business is damaged and will not reopen, what notice must be provided to affected employees?**

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.

**7. Our human resources department has been disrupted, and it may be weeks before things are back to normal — will the government extend any of the customary deadlines governing employer payment for benefits, pension contributions, and other subjects during this recovery effort?**

During previous natural disasters, particularly Hurricane Rita and Hurricane Katrina, many governmental agencies and entities did extend 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. Regardless of what extensions may be granted, employers should be fully aware of laws such as the Texas Payday Act and implement any policies or plans necessary to minimally interrupt the payment of wages to their employees.

**8. Employees from other states want to donate leave to affected employees in Texas, is this lawful?**

Yes. Employers can allow employees to donate leave to a leave bank and then award the donated leave to the affected employees.

## HURRICANE AND DISASTER PREPARATION CHECKLIST

- Identify and notify those employees you believe should be deemed "emergency services personnel" who will be required to work during a storm or evacuation order. Make arrangements for providing these employees with food and shelter. Make sure to have procedures in place for evacuation of these employees in the event the hurricane or other disaster causes the workplace to become unsafe.
- Identify your "essential employees." These are employees that you cannot require to be at work during a hurricane or evacuation but you believe are vital to the continued operations of your company. Determine what incentives you can provide these employees to entice them to work during a disaster or to return to work as soon as possible. These incentives can include shelter, hot meals, fuel, as well as arrangements for family members.
- Establish a contingency plan to address the needs of those employees who may be temporarily living in company facilities during a storm or disaster. Ensure you can provide such necessities as gas, food, and shelter to these employees.
- Establish a contingency plan to ensure security of payroll data and the ability to continue payment of wages to your employees if offices are damaged or power is lost.
- Review your existing policies to determine how to distribute paychecks to employees who cannot come to work because of weather or lack of power.
- Establish a communication plan. This will include identifying ways to keep the lines of communication open with your employees even if power is out in the local community. Collect primary and secondary contact sources from your employees. Consider establishing a toll-free phone line where employees can obtain updated information regarding the company's status during an emergency.
- Review applicable leave policies and procedures to address and allow for disaster-related leave requests, including how such leave will be treated (i.e. paid or unpaid).
- Formulate a team of decision makers who will have authority to make crucial decisions in the midst of the hurricane or other disaster related to other human resources matters. This team should establish a method of communicating with each other during the hurricane.
- Review any existing Employee Assistance Programs and ensure employees know how to utilize these programs during the aftermath. A successful Employee Assistance Program can promote the fast and efficient return of your employees.
- Remember to be sensitive to the needs of your employees who have experienced extensive property damage or personal devastation. Always keep in mind that human life and safety trumps all other business necessities.