Hurricanes and Other Disasters: Employment Related FAQs

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This list of frequently asked questions was originally prepared by the law firm of Fisher Phillips in 2005, in response to Hurricanes Katrina, Rita and Wilma. In the wake of other potential hurricanes, severe weather and other catastrophes we have updated and expanded it.

This article addresses many employment-related issues facing employers in the wake of hurricane-related disasters; consequently, in addition to federal laws, we also focus on certain state laws, especially those in the Gulf Coast area. Nevertheless, the information here is of more widespread applicability than just Hurricane Gustav, and may be helpful following any unexpected natural catastrophe.

As with any brief summary of complex issues, the information provided here is not intended to serve as legal advice, and is no substitute for consultation with an experienced attorney. Most situations are highly fact specific. You should consult with counsel before taking action in any area that could result in legal liability.

For further information contact any office of Fisher Phillips, or email us at FP@laborlawyers.com.

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MILITARY LEAVE AND EMERGENCY WORKERS

1. **A number of our employees have been called upon to serve as relief workers to help with the hurricane devastation. Do laws such as USERRA protect them as they would national guard members, reservists and other members of the uniformed services?**

Probably, yes. Congress created the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) in an effort to bring the laws regarding military leave up to date with the realities of military service and modern workplace law. Although USERRA initially received little attention, it has gained new prominence for legislators and employers alike since the terrorist attacks on 9/11, and likely will again in the wake of Hurricanes Gustav, Hannah and Ike.

1. **What does USERRA cover?**

USERRA is a broad pro-employee statute, significantly restricting the treatment of employees who perform services protected by the statute. Although USERRA is similar to other laws (such as the Family Medical Leave Act and COBRA) in some respects, it is unique in many others, including the creation of a presumption in favor of the complainant. It provides three major categories of employer obligations:

- prohibition against discrimination: under the Act, a person cannot be denied initial employment, reemployment, retention, promotion, or any benefit on the basis of his or her membership, application for service, or obligation for service in the armed forces;
- continuation of benefits while on leave: USERRA also requires employers to provide eligible employees with up to five years of unpaid leave during the life of their employment. Throughout this period, the employee's seniority, health care and pension benefits must be maintained; and
- right to reemployment: returning service members have a virtually unfettered right to reemployment by their pre-service employers upon timely application for return to work.

Louisiana, Mississippi, Alabama, Texas, and Florida all have state laws patterned after USERRA that contain specific requirements for military personnel. For more specific information on the interplay between these laws and USERRA, contact legal counsel.

1. **What does this have to do with hurricane devastation?**

In addition to military personnel called up to serve in the federal response to the hurricane disasters, the Bioterrorism Preparedness and Response Act extended USERRA's protections to certain federal emergency workers dispatched to assist with national disasters, including those employees performing as intermittent disaster response appointees upon activation of the National Disaster Medical System (NDMS), even if they are not otherwise members of the uniformed services. NDMS programs include: 1) DMAT (Disaster Medical Assistance Team); 2) DMORT (Disaster Mortuary Operational Response Team); 3) VMAT (Veterinary Medical Assistance Team); 4) NPRT (National Pharmacy Response Team); and, 5) NNRT (National Nurse Response Team). Members of the commissioned corps of the Public Health Service (PHS) also qualify for USERRA protection, as

would any other category of persons designated by the President as "uniformed services" at times of national emergency.

1. **How do I know if my employees are covered?**

To establish USERRA eligibility, an employee must meet the following five conditions:

- hold a civilian job and have a reasonable expectation that employment will continue indefinitely;
- provide advance written or verbal notice that he or she intends to leave for service (or training, in some cases) with NDMS or another qualifying program. In cases of emergency necessity, as well as circumstances where it is unreasonable to provide notice, failure to do so is excused;
- engage in service that does not exceed the 5-year cumulative limit of time be released *honorably* from NDMS (or another qualifying federal program); and
- subsequently submit a timely application for re-employment or report back for work in a timely fashion.

To the extent that employees are unable to meet these criteria, or to the extent that they volunteer to serve with the relief effort despite the fact that they were not activated under any of the covered federal programs described above, they would not qualify for USERRA protection. Nonetheless, military employees may qualify for protection under broader state laws patterned after USERRA, or under state laws protecting emergency relief workers.

1. **One of our employees is a relief worker hired by the state (not NDMS) to help with the hurricane devastation. Does state law impose obligations on us with regard to this employee?**

It depends. If a state or local government provides protection to individuals it calls upon to provide disaster relief services, then you will be bound to follow those laws. You will find a general description of these laws below.

Louisiana: State law has detailed requirements for private and public employees called to duty as "first responders" pursuant to an operations plan by the Department of Homeland Security and includes, but is not limited to, medical personnel, emergency and medical technicians, volunteer firefighters, and auxiliary law enforcement officers. Such employees must be placed on temporary leave pursuant to the employers policy regarding such employees leaves of absence, and must be reinstated to their prior position upon return to work provided the employee reports back to work within 72 hours from his or her release from duty, or recovery from illness or injury resulting from activities as a "first responder" (and subject to further restrictions not discussed here). Such leave is designated as unpaid, but employees may, with their employer's permission, use vacation, sick leave, and accrued compensatory leave during this term of service. Employees acting as "first responders" are required to give employers as much advance notice as practical including departure date and the anticipated length of absence.

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Louisiana also provides emergency services/disaster leave for public employees working for state governments in designated disasters or for the American Red Cross in disasters designated as Level III. A public employee certified by the American Red Cross as a disaster services volunteer may be granted paid leave, upon approval of the employing agency, for a period not to exceed 15 work days in any 12-month period to participate in relief efforts of the American Red Cross. Approval may be denied if it is determined that granting such leave would pose a hardship on the employing agency. Employees must notify the public employer of their intention to leave as soon as is practicable.

The employee must provide the public employer with specific information such as: proof of certification as a Trained Disaster Volunteer; nature and location of the disaster the employee is assigned to; anticipated duration of leave; type of service employee will provide to Red Cross; identity and title of Red Cross official supervising employee and the unit the employee will be in; written request for the employee's services from a Red Cross official. Employees must be reinstated to their previous positions of public employment within 24 hours of providing notice to the employer of their intent to return.

Mississippi: State law provides emergency services/disaster leave for public employees working for local or state governments in designated disasters or for the American Red Cross in disasters designated as Level II, when the American Red Cross requests the employee's participation. Public employees may be granted discretionary administrative leave with pay for a time not to exceed 20 days in any 12-month period. While on leave, such employees are not considered to be employees for purposes of workers' compensation claims for injuries or illnesses incurred.

Alabama: State law provides for emergency services leave in disasters designated by the American Red Cross as Level IV or higher for public employees. Upon the request of the American Red Cross, state employees certified as Disaster Services Volunteers by the American Red Cross may be granted leave with pay for a time not to exceed 15 days in any 12-month period. These public employees must be compensated at the regular rate of pay while working for the Red Cross.

State law also provides protection for volunteer firefighters, emergency medical technicians, volunteer deputies, and amateur radio operators. The term volunteer emergency worker includes any individual who does not receive monetary compensation for performing any of the above-listed functions. It is unlawful for any employer, public or private, to terminate an employee for missing work time due to their response to an emergency call *prior to* the time the employee was to report to work, but any time lost, may be charged against the employee's regular compensation. You may request that your employee provide a statement from the chief of the volunteer fire department or the head of the emergency medical services stating that the employee responded to a call and the time thereof. This provision applies not only to disasters such as hurricanes, but to any emergency as that term is defined in the law.

Texas: State law has detailed requirements for employees assisting in emergency situations that cannot be fully explored here. In general, members of the state military forces are entitled to the same protection as individuals performing services in the uniformed services of the United States receive under USERRA. Effective 2007, Texas expanded its military leave laws to also include employees who are members of any other state's military forces.

State employees called to active duty in the state military because of an emergency are further entitled to paid leave of absence without salary deduction. Texas also provides for 10 days of disaster services leave during each fiscal year for state employees certified as volunteers by the American Red Cross, or who are in training to become Red Cross volunteers. Any such employees may not suffer a deduction in salary, vacation, sick leave, overtime credit, or compensatory time for time spent working in disaster relief, but Texas limits the number of state employees who are Red Cross volunteers to 350 at any one time during the fiscal year. In addition, in order to come within the law's protection, such leave must be taken 1) at the request of the American Red Cross; 2) with the authorization of the employee's supervisor; and 3) with the approval of the Governor.

Florida: The Florida Disaster Volunteer Leave Act grants state employees certified as volunteers by the American Red Cross a paid leave of absence for up to 15 working days in any twelve month period following a disaster designated as Level II by the American Red Cross. An employee granted leave under this Act is not considered an employee of the state for purposes of workers' compensation claims that may arise relating to such leave. By its express terms the Act applies to natural disasters occurring within Florida's borders. The Act requires approval of the Governor land the Cabinet for leave to respond to a disaster occurring outside of Florida, but within the boundaries of the United States.

In certain situations, the Florida Uniformed Service members Protection Act may extend additional protection to members of the U.S. Armed Forces, U.S. Reserve Forces, and the Florida National Guard with respect to legal proceedings and contractual relationships. The relationship between these requirements and federal law cannot be fully explored here.

Members of the Florida National Guard are also entitled to the protections available under USERRA. Such protections extend beyond the employment situation, prohibiting discrimination against members of the Florida National Guard by schools, colleges, and universities. Officers or employees of the state, counties, school districts, municipalities, or political subdivisions of the state who are members of the Florida National Guard and who perform active duty for the state in an approved event, disaster, or operation are entitled to a 30-day paid leave of absence (for each such event or disaster), with no loss of time or efficiency rating. This leave may not be extended except by executive order.

1. **One of our employees advised us that he wanted to volunteer with the hurricane relief effort and has been absent from work. What are our obligations with regard to this employee?**

If the employee does not qualify for federal USERRA protection, or is not designated for protection under state or local law, then you are not obligated to provide such protection. Nevertheless, the employee may be eligible for FMLA leave or leave under one of your company's other policies.

1. **How long after they finish working for NDMS do employees have to return to us?**

If an employee works for NDMS for a period of 30 consecutive days, the employee must return to work on the first full regularly scheduled work day occurring after the employee has had safe transportation home plus an eight hour rest period. If it is impossible or unreasonable for the employee to return to work within this time frame through no fault of the employee, then the employee must return back to work as soon as possible following the eight-hour rest period.

1. **Are employees who participate in NDMS eligible for health care coverage and continuation?**

Yes. NDMS employees have the same USERRA right to elect continued health care coverage as military personnel do. NDMS employees also have the right to immediately reinstate health insurance coverage upon their return to work.

FAMILY AND MEDICAL LEAVE

1. **Does family and medical leave apply to this situation?**

Employees requesting leave could conceivably be protected by the Family and Medical Leave Act (FMLA) to the extent they otherwise meet FMLA eligibility requirements. Even in the absence of state or federal protection, an employer's internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily extending an employee's leave, even in the absence of any legal obligation.

As with many employment laws, the worst thing an employer (or as is often the case, an untrained supervisor) can do at times like this is to reject immediately an unorthodox leave request before the facts are in. As you can see, the federal government, along with many state legislatures, have extended broad reemployment protections to many who are now assisting with the relief effort, regardless of whether they are members of the uniformed services, and regardless of whether they are doing so on a voluntary basis. When in doubt, the wisest approach is to work with counsel to ensure legal compliance, thereby minimizing exposure to costly litigation.

1. **One of my employees was already on FMLA leave at the time we had to suspend operations. How should we handle the leave now?**

Although certain states may impose greater obligations than federal law, neither Louisiana, Mississippi, nor Alabama have such laws, which means that FMLA will govern leave obligations. Texas and Florida have family and medical leave provisions for state employees only.

The law makes clear that employees on qualified FMLA leave are entitled to no greater rights, benefits or protections than they had before taking leave. While FMLA regulations provide little guidance with respect to your obligations in the context of a natural disaster, they do make clear that if an employee is legitimately laid off during the course of FMLA leave, then your responsibility to continue leave, maintain health benefits, or even restore the employee may cease at that time, absent any conflicting obligations pursuant to a collective bargaining agreement, employee handbook, or otherwise. By analogy, the same should hold true for an employee whose work assignment has been suspended due to any other intervening event, including a natural disaster such as a hurricane.

Nonetheless, it is the employer's burden to show that the employee would have been laid off (or terminated for lack of work) during the FMLA leave period, and therefore not entitled to job restoration. If the employees establish that they would instead have been reinstated, reassigned, transferred, or permitted to telecommute had they not taken FMLA leave, then their benefits continue until exhausted. FMLA regulations further state that any period in which business activities have been suspended and employees are not otherwise expected to report for duty cannot be counted against the employee's 12-week FMLA entitlement.

The best approach is to treat employees as you would any other employee in their job classifications. If a similarly situated co-worker is permitted to telecommute or transfer to another location, then benefits for the FMLA-qualifying employee should be continued until the 12-week leave entitlement has been exhausted, at which point your existing leave policies would dictate any continuing obligations. In certain situations, as evaluated on a case-by-case basis, additional unpaid leave may also be available to disabled employees as a form of reasonable accommodation under the Americans with Disabilities Act.

3. One of our employees is seeking leave in connection with a spouse who was recently dispatched as an emergency responder. Are we obligated to provide such leave, and for how long?

In early 2008, FMLA was amended by the National Defense Authorization Act, which extends up to 12 weeks of FMLA leave protection to the spouse, child or parent of a uniformed service member called to active duty. This leave may be taken for any "qualifying exigency" arising out of the family member's commitment, and leave may commence as soon as the service member is notified of an impending call or order.

While this provision would presumably apply to NDMS responders described under the Military Leave and Emergency Workers section above, it is not slated to take effect until the issuance of final regulations defining the scope of the term "qualifying exigency." In the meantime, the Department of Labor is encouraging all employers to voluntarily extend this leave to qualifying employees, pending finalization of the regulations.

The active duty amendment is expressly incorporated into FMLA's statutory framework. Once the amendments take effect, employers will be expected to apply existing recordkeeping and

amendments take effect, employers will be expected to apply existing recordkeeping and designation procedures to active duty leave and, where appropriate, utilize certification forms and related paperwork. Senior-level managers and HR practitioners should therefore be sure to coordinate this leave with other types of FMLA leave that remain available to eligible employees, and to take steps to ensure that front-line supervisors are counseled to avoid premature rejection of such requests.

UNEMPLOYMENT COMPENSATION

1. **My employees are not working because of the hurricane. Are they eligible for unemployment compensation?**

Yes, as long as your employees have earned the appropriate level of wages during the "base period" of time (which varies by state). Unemployment compensation is paid when employees are out of work for reasons other than their own misconduct.

Alabama: The employee must have insured wages in at least two quarters of their base period in order to qualify for unemployment benefits. The base period is the first four of the last five completed calendar quarters before the week an initial claim application is filed for a new benefit year. Wages paid during your base period are used to determine if the employee has enough wages to qualify for a claim and to calculate how much can be paid in benefits to the employee. The total base period wages must equal or exceed 12 times the high quarter earnings in order to be eligible for unemployment benefits. The high quarter is the base period quarter during which the employee was paid the highest amount of wages from covered employment. The average earnings of the two highest base period quarters must equal at least the minimum amount specified by law.

Mississippi: The base period is the first four of the last five completed calendar quarters prior to the effective date of the claim. The employee must have worked in at least two quarters of the base period, earned at least $780 in the highest quarter and earned forty times the weekly benefit amount in the base period.

Louisiana: The base period is the first four of the last five completed calendar quarters before the quarter in which the claim is effective. To receive unemployment benefits, the employee must have been paid at least $1,200.00 in total base period wages, and wages must have been earned in at least two of the four quarters in the base period. Total wages paid in the base period must equal or exceed 11/2 times the highest quarter of wages.

Texas: The base period is the first four of the last five calendar quarters before the first day of the benefit year. The benefit year consists of the 52 weeks consecutive to the effective date of the first valid claim.

Disaster Unemployment Assistance (DUA) is available if employment has been lost or interrupted as a direct result of a major disaster. Direct result means an immediate result of the major disaster itself, and not the result of a longer chain of events caused or worsened by the disaster.

Based on a request by the Governor, the President of the United States must declare a major disaster in the state, define the areas and authorize payments of benefits under the DUA program. Announcements will be made by the news media in the disaster area advising the DUA is available, and how and when you must file for benefits.

Employees who have already established an unemployment insurance (UI) benefit year before the disaster occurred and have not exhausted regular and/or extended benefits to which they are entitled are not eligible for DUA.

Florida: The base period is the first four of the last five calendar quarters immediately preceding the first day of an individuals benefit year. The benefit year consists of the one-year period beginning with the first day of the first week for which the individual first files a valid claim for benefits.

1. **Is there a waiting period for unemployment benefits?**

Alabama: No established waiting period.

Mississippi: There is a one-week waiting period.

Louisiana: There is a one-week waiting period.

Texas: There is a one-week waiting period.

Florida: There is a one-week waiting period.

1. **Is the waiting period for unemployment claims waived due to the disaster?**

Alabama: No established waiting period.

Mississippi: The Department of Labor did not enforce the waiting period for individuals affected by Hurricane Katrina, but there has been no formal waiver of the waiting period. At this time, Mississippi does not accept claims over the internet.

Louisiana: The Department of Labor has issued a statement that it will process claims for unemployment benefits "as soon as possible," but, there has been no formal waiver of the waiting period. The Department has suggested that all individuals should file on the internet to speed up claims processing.

Texas: No. The initial DUA application must be filed by telephone through one of seven Texas Tele-Centers. The disaster assistance period begins with the first week following the date that the major disaster begins. Eligibility for DUA benefits will be determined on a week-to-week basis. For each week a DUA claim is filed, the reason for being unemployed must be as a direct result of the disaster. DUA benefits may not be paid for any week of unemployment that is more than 26 weeks

after the declaration date of the disaster.

Florida: Currently, standard operating procedures for unemployment benefits claims are in place in Florida.

1. **If we are paying out accrued vacation pay, may employees also collect unemployment?**

Alabama: Certain types of payments, such as wages, vacation pay, holiday pay, workers compensation, sick pay, and payments under the WARN Act (the plant closing law), may be deducted from unemployment benefits.

Mississippi: Wages over $40 per week may be deducted from unemployment benefits. This means that payment for services to the employer, including commissions and bonuses can reduce benefits.

Louisiana: Unemployment benefits can be reduced by wages earned by an individual. This means all payments for services, including vacation pay, holiday pay, dismissal pay, commissions, bonuses and WARN Act payments may reduce unemployment benefits.

Texas: Certain types of payments, such as wages, vacation pay, holiday pay, workers compensation, sick pay, and payments under the WARN Act (the plant closing law), may be deducted from unemployment benefits.

Florida: Unemployment benefits are reduced by any earned income payable to the extent it exceeds the federal hourly minimum wage rate. For these purposes, "earned income" means gross remuneration derived from work, professional services, or self-employment, including commissions, bonuses, back pay awards, and the cash value of all remuneration paid in a medium other than cash. Although Florida Statutes do not specifically list vacation pay in the definition of earned income, vacation pay would likely be considered "derived from work" and therefore used to reduce unemployment benefits.

1. **Can we make up the difference between an employee's regular pay and unemployment compensation received, without jeopardizing the unemployment benefits?**

Yes, if the payments made are not earned by the individual and the employer has no obligation to make the payments, then the unemployment benefits will probably not be reduced or lost.

1. **If I give my employees other financial assistance, will this reduce their unemployment compensation benefits?**

No, as long as the assistance is not conditioned on the individual providing services to the employer, and the employer has no obligation to make the payments, then the unemployment benefits will probably not be reduced or lost.

1. **If my employees are not eligible for state unemployment compensation benefits, what other benefits are they eligible for?**

An individual who does not meet the eligibility requirements for state-provided unemployment compensation may be eligible for federal aid under the Disaster Unemployment Assistance program. This is a federal program under the Department of Labor and administered by the state. It provides financial assistance to individuals who have lost their job or business as a direct result of a major disaster declared by the President of the United States, and who are not eligible for regular unemployment insurance benefits.

1. **Where can I or my employees get further information?**

Alabama: http://dir.alabama.gov/citizen/ or call 1-800-361-4524.

Mississippi: http://mdes.ms.gov/wps/portal/#null or call 1-888-844-3577.

Louisiana: www.LAWORKS.net or call 1-866-783-5567 or 1-888-LAHELPU.

Texas: http://www.twc.state.tx.us/ui/uiclaim.html or call 1-800-939-6631

Florida: http://www.floridajobs.org/unemployment/uc_emp_claims.html

Federal Disaster Unemployment Assistance:
http://workforcesecurity.doleta.gov/unemploy/disaster.asp

OSHA

1. **Is OSHA going to relax enforcement of its various standards due to the massive disruption associated with Hurricanes Gustav, Hannah and Ike?**

OSHA cannot tell employers to ignore or violate OSHA and consensus Standards, even in the face of such disruption. In the case of Katrina and of some other recent hurricanes, OSHA mobilized its Compliance Officers and Industrial Hygienists to provide "compliance assistance" during the period of initial clean up, and did not meaningfully focus on issuing citations. Prior to Rita, OSHA mobilized Compliance Officers from throughout the U.S. to go to affected states and provide information and guidance, and to coordinate safety for federal responders. After Rita, OSHA mobilized resources in South Texas, and Compliance Officers are working out of its quickly enlarged Austin area office. OSHA compliance officers from throughout the U.S. assisted with Katrina. On September 2, 2008, OSHA again announced assistance following Gustav.

1. **What OSHA Offices may be involved in either offering compliance assistance or issuing citations?**

Regions 4 and 5 include Florida, Alabama, Mississippi, and Louisiana. During the Katrina clean-up, the Baton Rouge Area Office was the most heavily involved in overall response, followed by the Mobile Area Office. Jacksonville, Florida, has authority over the Florida Panhandle. The Birmingham, Alabama, and Jackson Mississippi Offices were also affected by Katrina. The Fort Lauderdale Area

Office has responsibility for South Florida. OSHA's Region IV Response Team was sent to South Texas before Rita hit, and coordinated with FEMA in Austin, Texas during Katrina, and presumably following Hannah. OSHA has not yet made any posting for Florida.

1. **What on-line resources are available with regard to keeping workers safe during clean up and recovery operations?**

OSHA has established pages on its www.OSHA.gov website where employers can access numerous audio and printed guidelines to specific work practices dangers likely associated with clean up and recovery, including flooding, electrical, fall protection, personal protective equipment, chain saws, mold, bloodborne pathogens and bacterial issues, tree trimming, trenching, and heat exposure. Materials can be accessed at www.osha.gov/OshDoc/hurricaneRecovery.html.

1. **What other on-line materials are available?**

OSHA links to the CDC website, which also provides information covering numerous areas of concern at www.bt.cdc.gov/disasters/hurricanes/katrina.asp.

1. **Do OSHA Standards describe when it is unsafe to return employees to the workplace?**

Many factors obviously enter in and each employer will have to consider OSHA Standards and commonsense issues. Section 13(a) of the OSHA Act defines "imminent danger" as . . . "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to 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." OSHA discusses "imminent danger" as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Once again, this guidance is general, and employers must determine when this unusual state exists.

1. **Can an employee refuse to work because of safety concerns?**

On OSHA's "worker" page of its website, it expressly instructs employees to approach their employer first when they believe that working conditions are unsafe or unhealthy. OSHA states, "refusing to do a job because of potentially unsafe workplace conditions is not ordinarily an employee right under the OSHA Act." OSHA goes on to state that "employees do have the right to refuse to do a job if they believe in good faith that they are exposed to imminent danger, and good

faith means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe that it did exist."

OSHA discourages employees from walking off the job and states that the employee must generally satisfy four conditions to do so, including 1) asking the employer to eliminate the danger, and the employer then refusing to do so; 2) the employee genuinely believing that an imminent danger existed and the employee did not refuse to work for other reasons; 3) a situation where a reasonable person would agree that there is a real danger of death or serious injury; and 4) there is not enough time due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection. In addition to OSHA Act protections, employees may also be protected under the National Labor Relations Act as engaging in "concerted protected activity" where they indicate that their refusal to work or complaint is on behalf of other employees or about an issue of interest to other employees. Under these circumstances, an employer may have a right to "permanently replace" the employee; however, discipline or discharge may be unlawful.

1. **What are some of the first safety hazards as waters recede and clean up begins?**

OSHA fact sheets raise the risk of heat exhaustion, and the need for sunscreen, frequent rest breaks, and abundant potable water. Toilet and hand wash facilities must be made available. Over-exertion and problems associated with working in the water, including concealed holes and snakes, are a problem.

First aid kits should be available because of the increased risk of infection, and hand washing should be practiced more so than usual. Additional first aid and CPR training may be necessary. Preliminary inspections of worksites for stability, electrical hazards, and flood risk are essential. Architectural and engineering guidance may be necessary. Fire protection and trenching are obvious areas of risk.

Employers should establish a plan for contacting medical personnel in the event of an emergency, and should be aware of unusual hazards, such as downed power lines, frayed electrical wires, gas leaks, or poisonous snakes. You should also recognize the dangers associated with fire, and carbon monoxide from using fuel-powered generators and other equipment. Life vests may be necessary.

Even where specific chemical hazards are not apparent, waterproof boots or steel-toed shoes may be necessary, as well as gloves, long pants, and safety glasses. Sneakers and soft shoes are almost certainly not acceptable. Dust respirators may be necessary if working in a moldy building or otherwise exposed to fungi. Electrical hazards are especially an issue. Likewise, more fire extinguishers and basic training may be required than under usual circumstances.

The key is for employers to insist that their supervisors and employees take the time to analyze each job, meet regarding the work, ensure that employees are trained, and then follow procedures to the letter. As an example, electrocutions, falls, and injuries associated with utility poles and tree limbs

are always a risk to telecommunications, utility, and construction workers; but even skilled linemen may cut corners when faced with a disaster of the magnitude of a hurricane.

Similarly, as the water begins to recede, employees often underestimate the hazards associated with flood waters which have been contaminated by chemical, pesticide, and petroleum runoff, sewage, and even human remains. Employees may adopt a casual approach to unmarked chemical containers, disregard risks associated with mold, and forget that the widespread use of portable generators poses hazards ranging from carbon monoxide overexposure, to backflow of electricity, to live power lines presumed to be de-energized.

1. **Do I need to inoculate my employees for various illnesses?**

After Katrina, the CDC website initially stated under, "Interim Immunization Recommendations for Emergency Responders," that Tetanus and Diphtheria inoculations may be necessary, as well as Hepatitis-B vaccine series for persons who will be performing direct patient care or otherwise expected to have contact with bodily fluids.

As during the Katrina clean-up, employers should be prepared to follow the guidelines of the Bloodborne Pathogen Standard in the event of exposure to water and waste material possibly containing blood or other potentially infectious material. The CDC indicated that during Katrina there was no indication for the following vaccines to be provided, including Hepatitis-A, Typhoid, Cholera, Rabies, and Meningococcal vaccine. The CDC maintains "Immunization Information for Hurricane Katrina," and may add new information for the current storms.

The CDC recommends Hepatitis A vaccinations for many people living in affected areas, but not for Responders. Individuals assisting with clean-up are encouraged to receive a dosage of Tetanus-Diphtheria Toxoid if they have not had a booster shot in 10 years; if contact with blood or other bodily fluids is anticipated, Hepatitis B vaccinations may also be appropriate. Excellent resources are at the EPA 2005 Hurricane website: www.epa.gov/Katrina and CDC's Hurricane Gustav site: www.bt.cdc.gov/disasters/hurricanes.

1. **Are there any areas more likely than others to be cited by OSHA?**

Every year OSHA issues large numbers of Citations under the Hazard Communication, Scaffolding, Personal Protection Equipment (PPE) and Fall Protection Standards, all of which may be implicated by recovery efforts. As examples, employees may be exposed to spilled chemicals or perform "non-routine tasks," such as cleaning floors with bleach, which may necessitate obtaining new Material Safety Data Sheets (MSDS) and providing additional Haz Comm training. Similarly, gloves, dust masks and respirators may temporarily be necessary, which may require documented job safety analysis and training. Fall protection and scaffolding always generates scores of citations following storms.

10. **What are some of the common electrical issues?**

Electrical utilities engaged in work under the electric generation, distribution, and transmission standard, should familiarize themselves with 1910.269 and ensure that employees evaluate each job, conduct pre-work meetings, utilize the proper Personal Protective Equipment, including gloves, take all efforts to de-energize lines, ground, and avoid electrical hazards.

Be especially wary of back feed in electrical conductors which may be inadvertently energized by other energy sources, including circuit ties/switch points, lightning, generators, and downstream events.

Recognize that testing for energy sources may not alone be sufficient, and ensure that proper lock out/tag out procedures are followed, and that employees are aware that downed wires can energize other objects, including telephone/CATV/fiber optic cables.

Ensure that employees adhere to safety rules regarding boom-supported aerial platforms, such as cherry pickers or bucket trucks, especially with regard to the risk of falls, electrocutions, and collapses or tip overs.

Ensure that employees use a body harness or restraining belt with a lanyard attached to the boom or basket of the aerial lift to prevent the worker from being ejected or pulled from the basket.

As required, properly used brakes, wheel chocks, outriggers, and where necessary cones, signage, and/or flaggers to minimize the risk of "struck-bys."

WAGE-HOUR

1. **What do we do about lost time records for work already performed but not yet paid?**

Try to create the most accurate time records possible. There are two approaches to this problem. The first is to pay each employee based on the number of hours normally worked (assuming this information is available). The second is to ask each employee to estimate as accurately as possible the number of hours worked. The second approach is less likely to result in claims based on an under-payment of wages, but may be more cumbersome. Either way, you should obtain written authorization from the employee allowing you to make corrections (and possibly deductions from future wages) if more accurate time records become available.

1. **We used electronic/computerized time clocks. How should we track time while those are disabled or unavailable?**

You may record all hours worked by handwritten timesheets. Employers are not required to use time clocks under the FLSA. To ensure the accuracy of the timesheet, it is preferable that employees each fill out their own and record the actual times they start and stop work each day of the workweek. For example, IN- 8 am, OUT- 12 pm, IN- 1 pm, OUT- 5 pm, rather than just listing 8 hours for the day.

1. **As we rebuild our operation, is there any flexibility to avoid having to pay overtime as everyone will be working long hours?**

There is no flexibility at this time with respect to nonexempt employees to whom the FLSA requires you to pay the minimum wage and overtime. Employees covered by the FLSA's overtime requirement must receive 1.5 times their regular rate for all time worked over 40 hours during a "workweek" (i.e. during the employers designated 7-day period for measuring overtime). If you have a collective bargaining agreement, it may contain additional overtime requirements.

1. **Can an employee "volunteer" to work off-the-clock performing services in the employer's employee-assistance center?**

No, where the employee's time benefits the employer. For example, where the employer sets up a hotline or other arrangements to assist Company employees with job-related benefits or information, employees volunteering to perform such services are engaged in "hours worked" for FLSA purposes because the work involved in providing those services benefits the employer.

1. **Do we have to keep paying our employees if they are not working because we have had to suspend operations on account of hurricane damage?**

Generally the answer is no unless you have a policy providing for pay under these circumstances which could give rise to a contract claim. The FLSA requires you to pay employees for all hours worked. Here, because the employees are not working, they are not entitled to pay. One exception is for employees whose exempt status requires that they be paid on a "salary basis." If such employees do not work at all during the particular workweek, you do not need to pay their salary for that workweek. But if such exempt employees work at some point during the workweek they are generally entitled to their entire salary for that particular workweek.

One approach you might consider is requiring employees to use vacation or leave balances for the days not worked. The U.S. Department of Labor, however, has sometimes disapproved of employers forcing salaried-exempt employees to use vacation or leave balances for days not worked because of employer operations. Another approach would be to establish lower salaries going forward if you anticipate employees working reduced weeks for an extended period of time. Of course, either approach might have a negative impact on employee morale and have legal risks. We recommend contacting legal counsel before implementing either approach.

1. **If we continue to pay employees during the period they are out of work, can we charge their vacation and leave balances?**

Unless your vacation and leave policies allow for this, such a practice could give rise to a contract claim. Assuming your policies do not address this, you may want to forgo paying employees not working and instead offer them the option of using their vacation and leave balances during this period. (Also, see previous FAQ with regard to salaried-exempt employees).

[illegible]

1. **Can we allow employees to contribute their available vacation or other leave time to employees who will be out of work on account of the hurricane?**

Yes, you may allow employees to contribute such time, but if you require them to do so they could have contract claims unless your vacation and leave policies address this practice.

1. **When is travel time considered "hours worked" for purposes of computing overtime pay due?**

You should try to apply the usual FLSA rules to travel-time issues. Here is a summary of the general rules which cover most situations:

Commuting/Local Travel

a. Normal commuting to and from work is not considered hours worked.
b. Travel between a normal place of reporting and an assignment is hours worked.
c. Travel between one assignment and another during a work day is hours worked.

One-Day Trips Out of Town

a. Travel between home and a place of assignment on a one-day trip to another city generally is hours worked. Different rules may apply to employees who ordinarily travel from home to a variety of work locations.
b. If such travel is by air, the time spent traveling between home and the airport, in both directions, is not counted as hours worked.

Overnight Trips by Air

a. Travel on overnight trips by air counts as hours worked when it occurs during normal working hours, even if the travel occurs on a weekend or other day off.
b. If it occurs outside of normal working hours, travel on overnight trips by air is not counted as hours worked, unless the employee actually performs work during the travel.

Overnight Trips by Car

a. If the employee is traveling as a passenger in a car on an overnight trip, the same rules apply as indicated above for overnight trips by air.
b. If the employee is required to drive a vehicle for an overnight trip, all of the travel time is considered hours worked (excluding bona fide meal periods). Different rules may apply to employees who ordinarily travel from home to a variety of work locations.
c. If the employee is allowed to use public transportation but instead drives for personal reasons, hours worked will be the lesser of: 1) the time spent driving, or 2) the time that would have been considered hours worked if the employee had used public transportation.

RETIREMENT PLANS

1. **Contributions to our pension plan are due in the next few weeks. Because of the hurricane, we either can't make the contribution or can't determine how much is owed. What can we do?**

Following a Presidential declaration of a major disaster for the portions of one or more states, IRS, DOL, and PBGC routinely issue releases providing for extension of various reporting and filing deadlines for employee pension and welfare benefit plans for victims of the disaster in the affected states.

Detailed descriptions of the disaster areas and the relief granted are available on the agency websites.

IRS: http://www.irs.gov/newsroom/article/0,,id=108362,00.html

PBGC: http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/disaster-relief-announcements/page14055.html

"Affected" plans are those located in one of the parishes or counties declared by the President to be eligible for individual assistance. A plan is located in one of these areas if:

- the employer that maintains the plan has its principal place of business there (in the case of a single employer plan); or
- employers employing more than 50% of the plan's active participants have their principal places of business there (in the case of multiple or multiemployer plans); or
- the office of the plan administrator is located there; or
- the office of the plan's primary record keeper is located there; or
- the office of the enrolled actuary or other advisor who has been retained to determine the plan's funding requirements is located there.

An office is "located" in the affected area if it is the site of the plan's records or the worksite of the persons responsible for determining minimum funding requirements for the period.

IRS computer systems automatically identify taxpayers located in the covered disaster area and apply automatic filing and payment relief. Affected taxpayers who reside or have a business located outside the covered disaster area must call the IRS disaster hotline at 1-866-562-5227 to request tax relief.

If an affected taxpayer receives a penalty notice from the IRS, the taxpayer should call the telephone number on the notice to have the IRS abate any interest and any late filing or late payment penalties that would otherwise apply.

that would otherwise apply.

1. **Our 401(k) record keeper or bank trustee is not operating. How do employees access their accounts? Where do we make contributions to the plan?**

The employer is under a legal requirement to submit funds to the record keeper/trustee as soon as reasonably possible, and no later than the 15th of the month following the payroll. If the record keeper is not operating, the employer should take reasonable steps to segregate the funds in a separate account for the participants to address this problem. See Q and A 4 below.

1. **Our payroll system has been destroyed and we cannot make 401(k) contributions. What do we do?**

Contributions may be made late so long as they are made to the 401(k) trust as soon as reasonably possible. In the meantime, keep the contributions separate from your general assets, and if possible, set up a trust in favor of the plan at another financial institution, and contribute there. There is always a chance that you will be required to make up any earnings which have been lost as a result of the delay in contributions or repayments if you do not make a reasonable effort to make these payments as soon as possible. In addition, you may have to pay a 15% excise tax to the IRS. This tax can be waived for good cause shown.

GROUP HEALTH PLAN ADMINISTRATION

1. **If our employees are no longer working, are they still entitled to health insurance coverage?**

Not necessarily. You need to check your plan document (if self-insured) or call the insurance company (if fully-insured) to determine how long employees who are not actively working may remain covered by your health plan. Once this period expires, insurance coverage must be terminated (unless the insurance company or self-insured plan otherwise agrees to waive its eligibility provisions), and a COBRA notice must be sent. If your plan is self-insured and if you decide to waive plan eligibility provisions, you must make sure stop-loss insurers are notified and agree to cover claims relating to participants who would otherwise be ineligible for coverage.

1. **What happens to health coverage if employees are not working and unable to pay their share of premiums?**

In the normal course of events, health coverage will cease when premium amounts are no longer paid. However, several actions might be taken that would allow coverage to continue. First, the insurer providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and the employer reopens its doors. More likely, the employer may make an arrangement with the insurer providing health coverage to pay the employees portion of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors.

Each situation will be different, depending upon the insurer and the relationship between the employer and the insurer. Therefore, each fact situation will have to be individually investigated.

1. **The physician network we use is not functioning. How do our employees get health services?**

There are several things you can do. First, check with your HMO or insurer to determine if the organization has designated replacements for the providers which are not functioning. In many cases, you may be able to substitute out-of-network providers without employees incurring additional costs. A number of insurers may be willing to waive out of network penalties, deductibles or co-pays, and in certain cases, may be willing to waive plan restrictions such as limitations on prescription refills. If you have a PPO which is lacking critical specialties or providers, contact the PPO providers or administrator to see if they have found replacements or to make sure they are willing to waive any exclusivity agreements that might exist. If you have employees or dependents who need critical prescriptions that cannot be filled in your area, contact the drug manufacturer. Many manufacturers are providing free drugs to those in need. You can also contact FEMA at 1-800-621-3362 (or 202-621-3362) to see what critical medical services are present in your area, and how providers can be contacted.

SPECIAL COBRA ISSUES

1. **We need to send COBRA notices to former employees, but we don't know where they are or if their homes have been destroyed. What do we do?**

In many cases, COBRA requires mailing of notices and election forms to a last known address. To fulfill this legal requirement, you should send COBRA notices to your employees last known address, assuming that they have not called to report new addresses. This effort should be made even if you know that mail is not being delivered, and you should keep records to establish this process. Daily updates are made to the U.S. Postal Services website regarding mail acceptance and delivery to the affected areas. Go to www.usps.com for the most recent delivery information.

1. **We haven't received a COBRA payment from a former employee. What do we do?**

By law, you must provide a 30-day grace period for COBRA payments from former employees and their dependents. You may provide a longer grace period if you choose. It is important to frequently check with the DOL and IRS for notices regarding applicable COBRA notice periods.

At the end of the 30-day grace period, we recommend sending a letter to the last known address of the COBRA participant reminding him or her that a premium payment is missing and that COBRA coverage will be terminated if not received shortly. The new COBRA rules require that you send a notice of termination to the last known address of the participant if you do terminate the coverage for nonpayment of premiums.

1. **We've told employees to send COBRA payments to an address that no longer exists or no longer receives mail. What do we do?**

Go to the post office and fill out a business forwarding card or go to www.usps.com and change your address online.

COMPLYING WITH HIPAA REQUIREMENTS

1. **What are our obligations under the HIPAA privacy rules if we are contacted by officials asking for emergency personal health information about one of our employees?**

HIPAA privacy restrictions only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions. Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them. We recommend you treat all medical information as confidential, and afford it the same protections as those granted by HIPAA in connection with your group health plan.

In certain circumstances, if you have plan information, you can share it with government officials acting in their official capacity, and with health care providers or officially chartered organizations such as the Red Cross. For example, you can share protected health information with providers to help in treatment, or with emergency relief workers to help coordinate services.

In addition, you can share the information with providers or government officials as necessary to locate, identify, or notify family members, guardians or anyone else responsible for an individual's care, of the individual's location, general condition or death. In such case, if at all possible, you should get the individual's written or verbal permission to disclose. However, if the person is unconscious or incapacitated, or cannot be located, information can be shared if doing so would be in the persons best interests. In addition, information can be shared with organizations like the Red Cross, which is authorized by law to assist in disaster relief efforts, even without a persons permission, if providing the information is necessary for the relief organization to respond to an emergency.

Finally, information can be disclosed to authorized personnel without permission of the person whose records are being disclosed if disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

WORKPLACE DONATIONS TO VICTIMS OF A NATURAL DISASTER

1. **Is it possible for us to create a charitable trust through which employees can make tax-deductible contributions to assist other employees who suffered losses in the storm?**

Yes, it is now possible for an employer to create a "tax efficient" charitable fund (i.e., all contributions are tax-deductible to the donors and all distributions are income tax-free to the recipients) to provide disaster relief assistance to its own employees. After the 9/11 disaster, Congress enacted the Victims of Terrorism Tax Relief Act of 2001, which allowed employers to establish a 501(c)(3) private foundation for the sole purpose of providing disaster relief assistance to the employers employees and their families (an "Employer-Controlled Foundation").

In order to avoid IRS concerns regarding private inurement, there are very specific requirements that must be followed to preserve the tax advantages described above with respect to an Employer-Controlled Foundation. Generally, those requirements are as follows:

1. 1. the employer must take all appropriate steps to establish an official 501(c)(3) charitable organization, which normally requires creation of a not-for-profit entity and the filing of certain tax forms (both initially and on an ongoing basis);
   2. the class of disaster relief recipients must be "large or indefinite";
   3. disaster relief recipients must be selected based upon "an objective determination of need" (e.g., disaster relief distributions must be purely needs-based, and may not be based upon factors such as the recipients position or seniority with the employer);
   4. the selection of disaster relief recipients and the determination of need must be made by either (i) an independent committee of the Employer-Controlled Foundation, "a majority of the members of which are persons other than persons who are in a position to exercise substantial influence over the affairs of the controlling employer" or (ii) "other procedures and standards" that are "adequate substitutes to ensure that any benefit to the employer is incidental and tenuous"; and
   5. disaster relief distributions may not be made to, or for the benefit of, a "disqualified person" with respect to the employer (generally, "any person who was, at any time during the 5-year period ending on the date of such transaction, in a position to exercise substantial influence over the affairs of the organization" and members of such a persons family) or a member of the independent committee referred to in d) above.

Most of these requirements exist to ensure that an Employer-Controlled Foundation has a purely charitable purpose, and is not simply an additional employee benefit offered by the employer. If any of these requirements are not satisfied, there is a risk that contributions for disaster relief assistance will not be tax-deductible to the donors.

We have developed a package for clients that wish to set up a tax-exempt fund that can be adopted quickly and efficiently. Please contact a Fisher Phillips attorney if you are interested.

NATIONAL LABOR RELATIONS ACT

1. **My workforce is unionized. Can my company make changes to unionized employees work schedules or duties in response to the hurricane?**

The National Labor Relations Act (NLRA) imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Generally speaking, employers who make unilateral changes to these facets of employment may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless your collective bargaining agreement provides otherwise.

Many collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling and layoffs. The first authority for determining your rights and obligations is your own collective bargaining agreement.

1. **I have a "force majeure" clause in my contract. Does it cover the damage caused by the hurricanes?**

Possibly. A "force majeure" clause is one that sets out your rights and duties in the event of an emergency situation created by an unforeseeable force of nature (or the like). Whether a hurricane triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer.

1. **There is no force majeure clause in my contract. Does that mean I still have to abide by all of the contract provisions during the crisis?**

The general duty to bargain over changes in contractual terms may be suspended where compelling economic exigencies compel prompt action. The law views "compelling economic exigencies" as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action and make a unilateral change.

Although a hurricane would seem to fit the description of a "compelling economic exigency," realize that its effect will be different for every employer. That is, while it may suspend the duty to bargain for one employer whose only facility was completely destroyed, it will likely not suspend the duty for an employer that has lost significant accounts or contracts as a result of the storm.

In practice, the safest course of action (and the one most likely to avoid future litigation) is to notify the union in all cases, even if you believe that your particular situation fits into the "compelling economic exigency" category.

1. **How much notice do I have to give the union before I make a change to my contract?**

The law requires employers to give the union "adequate" notice of a proposed change to the collective bargaining agreement, and an opportunity to bargain about that proposed change. There is no hard and fast rule as to how much notice is adequate. But where an employer can show a need

for a prompt change and time is of the essence, a notice period as short as a couple of days might be considered adequate under the circumstances.

1. **Due to damage caused by the hurricane, my company must go out of business. Do I have to notify the union before I do this?**

An employer has the right to cease operations and go out of business completely without first bargaining with the union over its decision. But an employer that decides to close its operation must give the union adequate notice of its decision, and bargain over the *effects* of the decision to close if the union requests bargaining.

1. **If I decide to close my business as a result of the hurricanes, how much notice do I have to give to the union?**

Again you are required to give the union "adequate" notice of your decision to go out of business. There is no one rule as to how much notice is adequate under the circumstances. Depending on the circumstances, as little as a couple of days notice may be considered adequate. Remember that you may still be subject to state and federal laws with respect to plant closure notifications. state and local plant closing laws are discussed in more detail in these materials.

1. **What is my bargaining obligation after I've made the decision to close my business and I notify the union of my decision to close?**

Once the decision has been made to close a business and the union has been adequately notified, you are required to bargain over the effects of the closure on employees if the union requests such bargaining. By way of example, these "effects" can include: severance payments, letters of recommendation, vacation payouts and continuation of health insurance benefits. Remember that your collective bargaining agreement may already provide for the continuation of some of these benefits in a plant closure situation.

1. **What happens if I close my business on the Gulf Coast altogether, and then reopen a brand new facility elsewhere? Do I still have to bargain with the union?**

Reopening the same or similar business at a later date could result in a duty to bargain with the new employees (if a company uses a business shutdown in order to avoid bargaining obligations). The law imposes a bargaining obligation on the new employer on the theory that it is the "alter ego" of the previous employer.

While union avoidance is likely not the motivation of an employer that decides to close its operation due to hurricane damage, the result could be the same. If the subsequent employer has the same or similar ownership, management, business objective, customers, and supervision as the prior entity, the law could possibly impose a renewed duty to bargain with the previous union, and could even require the new company to follow the terms of the previous collective bargaining agreement.

Many contracts have specific provisions that cover situations in which the employer relocates its business. In that case, the provisions of the collective bargaining agreement would govern.

1. **I would like to move the work that used to be done at my Gulf Coast facility to one of my other existing facilities. Do I have to bargain with the union about that?**

An employer has the right to close part of its business and transfer work elsewhere without bargaining with the union over the decision to do so. This decision must be based on a legitimate economic justification and not on a desire to replace union employees with non-union employees.

As with a complete shutdown, an employer that decides to close part of its operation and transfer work elsewhere must give adequate notice to the union of its decision. Following proper notice, the union has the right to demand that the company bargain over the effects of the decision to close a facility and transfer the work. Bargaining over the effects of the decision to close may include discussions about topics such as severance pay, continuation of benefits, and the right to fill the jobs in the new location. Note also that your collective bargaining agreement might address a plant closure/transfer of work situation.

WORKERS' COMPENSATION

1. **My employees have physical and psychological injuries from exposure to dangerous substances, or from coming into contact with dead bodies in the course of their work. Will they be limited to the recovery of workers compensation, or can they sue the company for damages in court?**

Generally, under state law, your employees will be limited to workers' compensation remedies if they are injured physically as a result of an accident occurring in the course and scope of their job duties. If their physical injuries result from deliberate or intentional (rather than accidental) conduct, however, such employees will likely have the right to sue you in court for all of their actual losses (compensatory damages), including mental distress damages, as well as for punitive damages. Beyond this, there are significant differences in the laws of the states that were affected by the hurricanes.

Mississippi: Mississippi courts broadly interpret the scope of the workers' compensation laws to cover not only negligent (accidental or careless) behavior, but also reckless or grossly negligent conduct. Thus, in Mississippi, it is likely that employees injured as a result of conduct which is not the result of a deliberate act will be limited to receiving only workers' compensation benefits.

Alabama: In Alabama, employees who are seeking to recover for psychological injuries (not physical injuries) are allowed to file separate lawsuits outside of workers' compensation against their employers. In such suits, they can recover for mental distress and punitive damages.

Louisiana: In Louisiana as well, employers must be extremely careful. There, an employee who has suffered emotional distress as a result of the negligence of his employer can sue in court for actual and punitive damages even if the employee has not suffered any physical injury so long as the court does not conclude that the claim was "spurious," i.e. falsified and without evidentiary support.

Texas: In Texas, as in Mississippi, workers' compensation is the exclusive remedy for acts which are negligent, or even "willfully negligent," as the Texas courts have defined the term; thus, an injured Texas employee subject to workers' compensation laws is generally limited to workers' compensation remedies, except in obvious cases of intentional acts (e.g., a direct and willful assault on the employee by the employer). Texas employers may opt out of the state workers' compensation scheme by posting an appropriate bond. Those who do opt out are not protected from damages suits even in cases in which workers are injured on the job through pure negligence.

Florida: Florida courts, similar to their counterparts in Texas and Mississippi, consider workers' compensation law as the exclusive remedy unless the act triggering injury was "virtually certain" to cause injury. In addition, the exclusive coverage of workers' compensation for unintentional acts applies to injuries that are either physical or psychological. Accordingly, in Florida, an employee is limited to workers' compensation remedies for injuries, whether physical or psychological, that result from conduct which is less than intentional or deliberate.

1. **How can my company avoid being sued for workplace injuries in court (for damages exceeding workers' compensation benefits)?**

The bottom line for all employers seeking to avoid such claims, especially when employees are going to be exposed to extremely unpleasant or potentially dangerous or shocking circumstances, is to use "reasonable care" in making and supervising all such job assignments. Plan such work carefully to protect your employees from any physical danger or psychologically shocking circumstances which you can possibly anticipate in the course of their duties. The more "careless" or "reckless" your actions appear to be in assigning or supervising such work, the more likely it is that a court in any state will allow an employee to sue for damages in court, rather than be limited to workers' compensation.

1. **Should I ask for volunteers when assigning unpleasant or potentially dangerous duties?**

Yes, we recommend that employers ask for volunteers to perform such duties when they are required. Warn volunteers in detail about any dangerous or unpleasant circumstances they can expect, and require them to execute full releases, approved by counsel in advance, from any liability which may result from their decision to participate. Any employee who is unwilling to sign a release should be assigned to other duties.

1. **What else can I do to minimize the likelihood that my company will be sued for a workplace injury?**

Give employees who do agree to perform such duties any and all protective clothing and equipment which is necessary for safety or reasonably desirable in the circumstances. Minimal compliance with the provisions of OSHA is only a starting point for protection from employee lawsuits. Every reasonable step should be taken to minimize the likelihood that employees who agree to perform "hurricane" duties are protected from potential psychological harm as well as physical harm. Finally, treat your employees even better than you would expect to be treated in the circumstances: never let them think you do not care about their safety or well-being.

1. **How can I reduce the risk of physical injury or emotional distress to those performing hurricane duty under these conditions?**

As a general matter, you must continue to comply with OSHA standards. OSHA has posted information on its website regarding Cleanup and Recovery from Hurricanes. Fact sheets are available (in English and Spanish) about dangers associated with recovery efforts. Please visit www.osha.gov to obtain a printout of that information.

Beyond those regulations, you should exercise reasonable care to become informed about the risks to the workers and take reasonable steps to protect your workers from those identified risks. The primary step is to inform your workers of the potential physical and psychological risks of working in the area.

In addition, you should

- maintain a list of workers, the tasks to be performed and the location of the workers;
- provide safety equipment appropriate to the tasks that the workers are assigned to complete; and,
- make sure that anyone who is to work in a flooded area has had a current tetanus shot.

You should also have workers sign a statement that they have been made aware of the risks and that they have received safety equipment, if it is required for their particular tasks.

1. **Are "volunteers" considered employees?**

In determining whether a worker is a true volunteer, most states primarily consider whether the person is being compensated or will otherwise receive benefits. Louisiana has a broader definition for employees that includes anyone rendering service for another. Like most states, Louisiana, Alabama, and Mississippi will strongly consider the amount of control exercised by the employer over the workers and the power to dismiss the workers when determining whether a worker is an employee. If you are compensating so-called "volunteer" workers and exercising control over their work, then it is likely that the state will consider them to be employees. The more compensation you provide and the more control you exercise, the more likely it is that they will be considered employees.

1. **How do I handle true volunteers?**

If workers are volunteers, they are not considered employees and therefore, are not covered by workers' compensation. For this reason, you need to take some preventive steps before accepting volunteers:

- maintain a list of the people volunteering and *require each volunteer to sign a comprehensive release*;
- the release should identify the potential physical and psychological risks that the volunteer may encounter; and,
- no one should be allowed to volunteer unless they have signed a release.

IMMIGRATION LAW

1. **How do I complete I-9 forms for persons who are displaced and have no documents?**

There is no guidance from DHS on this issue yet. DHS has in the past provided guidance regarding I-9 documents for hiring individuals who are displaced as a result of a hurricane and its aftermath. We will monitor the DHS for any guidance on I-9 procedure for employers hiring persons who do not have I-9 documents.

There is a Receipt Rule to allow individuals to provide a receipt for replacement documents for original work authorization documents, for a 90-day period, after which time, the original replacement document must be presented.

Receipt Rule: Originally effective September 30, 1997, amended by interim rule on February 9, 1999; the rule explaining when receipts may be used in lieu of original documents in the Form I-9 process now provides that: "If an individual's document has been lost, stolen or damaged, then he/she can present a receipt for the application for a replacement document. The replacement document needs to be presented to the employer within 90 days of the date of hire or, in the case of reverification, the date employment authorization expires."

1. **What happens to employees on temporary visas who cannot work?**

Although there is no guidance from DHS yet, presumably these workers would be treated as if they were on an approved, unpaid leave and therefore would not be out-of-status for failing to work.

1. **Must I pay an H-1b alien the salary listed in the petition even if that person cannot now work?**

Again, there is no advice from DHS, but presumably you could put such a person on an unpaid leave of absence until he or she is able to work again.

1. **What happens to cases that were pending in Citizenship and Immigration Services Offices in the affected areas?**

There is no indication yet from DHS about what will happen to pending cases. This may be because CIS officials have not been able to assess the damage firsthand. We suspect that all cases that were pending in affected offices will need to be re-filed. This may cause substantial delays for work permits, travel documents, and permanent residence interviews.

USCIS prepares for hurricanes and tropical storms by temporarily closing offices, if necessary, in the projected path of any storm. If an office is closed, or if individuals are evacuated from their homes, USCIS will automatically reschedule all appointments until a time when it is safe to resume operations.

Individuals may make an InfoPass appointment in another USCIS office. The InfoPass website is www.infopass.uscis.gov. Individuals may also call USCIS Customer Service at 800-375-5283.

PLANT CLOSING LAWS

1. **Do we have any liability under the WARN Act if we are forced to suspend operations without prior notice on account of the storm and its aftermath?**

Probably not, so long as you take steps to issue appropriate notice going forward. The federal WARN Act does impose a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so for economic reasons. It is important to keep in mind that these quoted terms are defined extensively under WARN's regulations, and that they are not intended to cover every single layoff or plant closing. As Louisiana, Alabama, Mississippi and Florida have yet to enact separate notice requirements at the state level, the federal law would govern all such obligations for employers operating in those states.

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff. Fortunately, even in cases where its notice requirements would otherwise apply, the WARN Act provides a specific exception "if the plant closing or mass layoff is due to any form of natural disaster...." This provision would clearly apply to a Hurricane such as Gustav, Hannah or Ike. To qualify for the exception, you must be able to show that the plant closing or mass layoff was a direct result of the natural disaster. Businesses that are indirectly impacted may still benefit from a similar provision, known as the "unforeseeable business circumstances" exception.

This exemption is a limited one, in that an employer relying upon it must still provide "as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period." In other words, once you are in a position to evaluate the immediate impact of the disaster upon your workforce, you must then provide specific notice to "affected employees."

along with a statement explaining the failure to provide more extensive notice, which in this case would obviously be tied to the unforeseeable nature of the hurricane and its aftermath.

Any such notice must contain the following information: 1) Whether the planned action is expected to be permanent or temporary, and if a plant is being closed, a statement to that effect; 2) the expected date the plant closing or mass layoff will commence, as well as the anticipated date of layoff or termination (within a 2-week window); 3) an indication as to whether bumping rights exist; and, 4) the name and phone number of a company official who can be reached for further information. For employees residing in the immediate path of the hurricane, any attempt to notify them will be difficult at best, but the law suggests that notice may be effectuated through written correspondence to their last known address. Of course, many of these facts may not yet be known, in which case the Department of Labor takes the position that "notice need only contain such information as is available at the time the notice is given."

1. **What if my workforce is unionized?**

In the case of union-represented employees, notice is far simpler, as it need only be served upon the collective bargaining representative, containing the following information: 1) the name and address of the work site where the planned action will occur, and the name and phone number of a company official to be contacted for further information; 2) whether the planned action is expected to be permanent or temporary and, if a plant is to be closed, a statement to that effect; 3) the expected date of first separation and anticipated schedule if layoffs are to occur on more than one date (within a 2-week window); and, 4) the job titles to be affected and names of workers currently holding those positions.

In either event, notice must also be delivered simultaneously to the state dislocated worker unit, and to the chief elected official of the local municipality in which the affected facility resides. Both notices must contain the following information: 1) the name and address of the work site where the planned action will occur, and the name and phone number for a company official to be contacted for further information; 2) whether the planned action is expected to be permanent or temporary, and, if a plant is to be closed, a statement to that effect; 3) the expected date of first separation and anticipated schedule if layoffs are to occur on more than one date (within a 2-week window); 4) the job titles of positions to be affected and names of workers currently holding those positions; and, 5) the name of each union representing affected employees and the name and address of the unions chief elected officer.

1. **Will the government really enforce this law in light of the catastrophe?**

In the aftermath of hurricanes, the extent to which the Department of Labor will focus upon enforcement of the WARN Act remains to be seen. Nonetheless, the law provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to $500 per day. More importantly, it provides for a private cause of action in federal court, suggesting

that employers may soon be responding to lawsuits arising under the WARN Act regardless of the enforcing agency's official position.

Consequently, we advise that you evaluate your current situations to ascertain whether the most recent disaster has triggered a WARN Act qualifying event in your organization. If so, provide as much notice to affected employees as is practicable under the circumstances. When in doubt, the best approach is to work through counsel to arrive at a safe, but practical solution to a potentially thorny situation for many employers that are impacted by the disaster, either directly or indirectly.

For further information on these topics or other employment-related disaster issues, contact any office of Fisher Phillips.