

Insights, News & Events

# COMPREHENSIVE FAQs FOR EMPLOYERS ON HURRICANES AND OTHER WORKPLACE DISASTERS

Insights  
Aug 29, 2019

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 areas most impacted by the storms. Nevertheless, the information here is of more widespread applicability than just the current hurricane season, 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 your Fisher Phillips attorney.

## TABLE OF CONTENTS

1. [MILITARY LEAVE AND EMERGENCY WORKERS](#)
2. [FAMILY AND MEDICAL LEAVE](#)
3. [UNEMPLOYMENT COMPENSATION](#)
4. [WORKPLACE SAFETY ISSUES](#)
5. [WAGE AND HOUR ISSUES](#)

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10. [WORKPLACE DONATIONS TO NATURAL DISASTER VICTIMS](#)
11. [LABOR RELATIONS](#)
12. [WORKERS' COMPENSATION](#)
13. [IMMIGRATION LAW](#)
14. [PLANT CLOSING LAWS](#)

## 1. MILITARY LEAVE AND EMERGENCY WORKERS

**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 in the wake of recent hurricanes.

### 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:

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- **Prohibition against discrimination:** under the Act, a person cannot be denied initial employment, reemployment, retention, promotion, or any benefit on the basis their 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, Florida, Georgia, and South Carolina all have state laws patterned after USERRA that contain specific requirements for military personnel. North Carolina law also provides protections for members of the military and national guard who must take leave from work to serve during a natural disaster. For more specific information on the interplay between these laws and USERRA, contact your Fisher Phillips attorney.

## 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.



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## HOW DO I KNOW IF MY EMPLOYEES ARE COVERED?

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

- hold a civilian job and have a reasonable expectation that employment will continue indefinitely;
- provide advance written or verbal notice that they intend 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 five-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.

## 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 (DHS) 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



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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 their 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.

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 for paid administrative leave for public employees who are certified disaster service volunteers of the American Red when the American Red Cross requests the employee's participation in response to "Level II" and above disasters. Public employees may be granted leave 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.

USERRA does not protect National Guard members when they are on state active duty. Texas does have a state law that protects National Guard members on state active duty (Texas Labor Code Section 21.002(8(A))). However, state law governing state active duty only applies to an employer that had 15 or more employees in 20 weeks in the current or preceding calendar year.

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 who are certified disaster service volunteers of the American Red Cross a paid leave of absence for up to 15 working days in any 12-month period following a disaster designated as Level II or above 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 and the Cabinet for leave to respond to a disaster occurring outside of Florida, but within the boundaries of the United States.

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. 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 National Guard with respect to legal proceedings and contractual relationships. Members of the National Guard are also entitled to the protections available under USERRA. The relationship between these requirements and federal law cannot be fully explored here.

**South Carolina:** Employers must reinstate employees returning from duty in the South Carolina National Guard, South Carolina State Guard, or another state's National Guard or State Guard. Both public and private employees are covered by these provisions if they are members of the South Carolina National Guard or State Guard and enter into

state duty. The provisions also apply to employees who work in South Carolina, are members of another state's National Guard or State Guard, and enter into state duty.

Employers are required to reinstate employees to their position or another position with equivalent seniority, status and salary, unless employers' circumstances make re-employment unreasonable. Employees must submit a written application for re-employment within five days after their honorable release from duty or within five days after their release from hospitalization continuing after their honorable release from duty. If employees are no longer qualified for their position, employers can re-employ them in another position that they are qualified for if it provides appropriate seniority, status and salary.

Public employees who receive official military orders to serve during a declared emergency are entitled to 30 days of paid leave per declared emergency in addition to the 15 workdays of paid military leave granted each year. The 15 days of short-term military leave and the 30 additional days of leave for a declared emergency are based on regularly scheduled average workdays. Additionally, public employees who are certified disaster service volunteers of the American Red Cross are eligible for disaster service volunteer leave. Employers may authorize paid leave for eligible employees for up to 10 workdays in each calendar year to participate in specialized disaster relief services for the American Red Cross, upon request of the Red Cross for the services of those employees. Public employers must pay employees on disaster service volunteer leave, and leave is in addition to other leave to which they are entitled.

South Carolina state law also provides protection for volunteer firefighters and volunteer emergency medical services personnel. The term "volunteer emergency medical services personnel" refers to an emergency medical services employee who does not receive monetary compensation for services to a first responder agency, an organized rescue squad, or a county emergency medical service system and does not work for another related entity for monetary compensation. An employer may not fire an employee who is a volunteer firefighter or a volunteer emergency medical services personnel and who, when acting as a volunteer firefighter or a volunteer emergency medical services personnel, is part of the firefighter mobilization plan and is responding to an emergency where the President of the United States has declared a state of

emergency or where the Governor has declared a state of emergency in a county in the State.

**North Carolina:** A member of the North Carolina National Guard, or the national guard of another state, who is called to active duty during a natural disaster is entitled to take unpaid leave from their employment. An employee returning from active duty of 30 days or less, is entitled to reinstatement in their previous position or a position of similar seniority, status, and salary, as long as the employee submits a written application to the employer for reemployment within five days of release from duty or from hospitalization continuing after release; the employee is still qualified for employment; and the employer's circumstances have not changed, causing reinstatement to be unreasonable. For service of more than 30 days, the employee must apply in writing within 14 days of release from duty. (If the employee is hospitalized due to an injury or illness sustained in active duty, different rules apply.)

**Georgia:** Employees can take leave to perform military or active state service, participate in certain assemblies or training, and attend U.S. armed forces' service schools. Employers must reinstate employees returning from such leave if certain conditions are met.

Excluding leave from a temporary position, employees are covered by the military leave provisions if they take leave to perform military service; take leave to participate in assemblies or annual training; take leave to attend U.S. armed forces' service schools for up to six months; are or become members of the Army National Guard, Air National Guard, Georgia Naval Militia, or State Defense Force, or other reserve components of the U.S. armed forces (members of another state's Army or Air National Guard are also covered if they are Georgia residents); are Georgia National Guard members and are called to active state service; or are members of another state's National Guard and are called to state-sponsored active duty service.

**ONE OF OUR EMPLOYEES ADVISED US THAT THEY WANTED TO VOLUNTEER WITH THE HURRICANE RELIEF EFFORT AND HAS SINCE 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 other policies.

## **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 they have 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 they must return back to work as soon as possible following the eight-hour rest period.

## **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.

[Return to table of contents](#)

## **2. FAMILY AND MEDICAL LEAVE**

### **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. The federal government, along with many state legislatures, have extended broad reemployment protections to many who assist with

hurricane relief efforts, 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.

## **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, South Carolina, Georgia, North Carolina 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.

Federal 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 (ADA).

## **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?**

The FMLA provides up to 12 weeks of leave protection to the spouse, child, or parent of a uniformed service member on active duty or called to active duty. Active duty or a call to active duty means duty under a call or order to active duty in support of a contingency operation. 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. This provision would presumably apply to NDMS responders described under the Military Leave and Emergency Workers section above. Nevertheless, state calls to active duty do not qualify for FMLA leave unless under the president’s order pursuant to a contingency operation.

Employers are 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.

[Return to table of contents](#)

## **3. UNEMPLOYMENT COMPENSATION**

### **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. The maximum recovery under state law is \$235 per week for 26 weeks.

**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. DUA is available only during a Disaster Assistance Period, which begins with the first Sunday following the date that the major disaster is declared. Federal Emergency Management Agency (FEMA) and DUA regulations determine when the Disaster Assistance Period begins and ends. 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.

Individuals whose employment or self-employment was impacted by a hurricane may be able to apply for Disaster Unemployment Assistance (DUA) with the Texas Workforce Commission (TWC) as a result of an amendment to the Presidential Disaster Declaration (FEMA 4332-DR). TWC's website contains more information about Disaster Unemployment Assistance, including the deadline for filing an application for assistance. Applications can be taken online through Unemployment Benefit Services or by calling a TWC Tele-Center Monday through Friday between 8 a.m. and 5 p.m. at 800-939-6631.

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.

**South Carolina:** The base period is the first four of the last five completed calendar quarters preceding a claim's starting date. The claim's effective date determines the base period, not the date of unemployment. Alternatively, if an employee does not qualify using the standard base period, an alternate base period may be used. The alternate base period is the four most recently completed calendar quarters, including lag quarter wages – the most recently completed quarter preceding a new claim's effective date.

To be eligible, employees must (1) have at least \$1,092 in covered employment (with an employer who paid UI taxes)

during the base period's highest quarter; (2) have earned at least \$4,455 from covered employment during the base period; and (3) have total base period wages that are equal to, or exceed, 1.5 times the high quarter wages' total.

**North Carolina:** The base period is the first four of the last five completed calendar quarters prior to the quarter in which you file a new claim. A benefit year is the 52-week period beginning with the effective date of your valid claim. The effective date your of claim will be the Sunday prior to the date you complete your claim.

**Georgia:** The base period is the first four of the last five calendar quarters completed at the time an employee files a claim. An alternative base period consisting of the most recently completed four calendar quarters will be used only when a claim cannot be established using the regular base period. To be eligible for unemployment compensation, employees must have earned qualifying wages in at least two of the four quarters of the base period. The total wages in base period must equal or exceed at least one and one-half times the amount of money they were paid in the highest quarter. A secondary calculation will be made when the sole reason that a claim cannot be established is the one and one-half times requirement.

## **IS THERE A WAITING PERIOD FOR UNEMPLOYMENT BENEFITS?**

There is no established waiting period in Alabama. In Mississippi, Louisiana, Texas, Florida, Georgia, North Carolina and South Carolina, there is a one-week waiting period.

## **IS THE WAITING PERIOD FOR UNEMPLOYMENT CLAIMS WAIVED DUE TO THE DISASTER?**

**Mississippi:** Mississippi's one-week waiting period may be waived if the President of the United States declares a major disaster with regard to individual assistance in accordance with Section 401 of The Robert T. Stafford Disaster Relief and Emergency Assistance Act.

**Louisiana:** There has been no formal waiver of the waiting period.

**Texas:** No. The initial DUA application must be filed online or by telephone through the Texas Tele-Center. 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. Individuals can file for Disaster Unemployment Assistance (DUA) with the federal government. Individuals unemployed as result of a major disaster declared by the President may collect DUA if (1) that individual is out of work as a "direct result" of a major disaster; (2) does not qualify for standard unemployment insurance from any state; and (3) applies for benefits 30 days after the disaster is declared.

**South Carolina:** There is no formal waiver of the waiting period, but the state suggests that individuals file for Disaster Unemployment Assistance (DUA) with the federal government. Individuals unemployed as result of a major disaster declared by the President may collect DUA if (1) that individual is out of work as a "direct result" of a major disaster; (2) does not qualify for standard unemployment insurance from any state; and (3) applies for benefits 30 days after the disaster is declared.

**North Carolina:** There is no formal waiver of the waiting period by the North Carolina Department of Commerce, Division of Employment Security (DES), however workers who are out of work as a direct result of a hurricane may be eligible for benefits from the Disaster Unemployment Assistance program, which is funded by the federal government in areas affected by natural disasters. There is no waiting period for these benefits.

**Georgia:** There is a one-week waiting period, which is usually the first week that an individual files a claim.

**Alabama:** There is no established waiting period.

## **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 state law does 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.

**South Carolina:** Unemployment benefits are reduced by the receipt of vacation pay, retirement pay or similar periodic payment attributable to a former employee's employment.

**North Carolina:** North Carolina's unemployment statute does not appear to address the handling of paid vacation time, however the weekly benefit amount for an individual who is partially unemployed will be reduced by the amount of any wages the individual receives in the benefit week in excess of twenty percent (20 percent) of the benefit amount applicable to total unemployment and the North Carolina Wage and Hours Act defines wages to include vacation pay. Thus, an employee receiving vacation pay may receive benefits if the vacation pay they are receiving would not

amount to the benefits they would otherwise receive for total unemployment.

**Georgia:** An employer may establish a policy or enter into a contract denying payment of accrued vacation leave upon separation from employment. Further, an employer may establish a policy or enter into a contract disqualifying employees from payment of accrued vacation upon separation should an employee fail to adhere to specific requirements. Should the employment contract require the payment of accrued vacation upon termination, an employer must pay the accrued vacation.

### **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.

### **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 so long as the employer has no obligation to make the payments, then the unemployment benefits will probably not be reduced or lost.

### **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.

## WHERE CAN I OR MY EMPLOYEES GET FURTHER INFORMATION?

**Alabama:** <https://labor.alabama.gov/unemployment.aspx> or call 1-800-361-4524.

**Mississippi:** [www.mdes.ms.gov](http://www.mdes.ms.gov)

**Louisiana:** [www.LAWORKS.net](http://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://floridajobs.org/Reemployment-Assistance-Service-Center/reemployment-assistance/claimants> and

<http://floridajobs.org/Reemployment-Assistance-Service-Center/reemployment-assistance/claimants/disaster-unemployment-assistance>

**South Carolina:** <https://dew.sc.gov/dua>

**North Carolina:** <https://des.nc.gov/DES>

**Georgia:** <https://dol.georgia.gov/individuals-faqs-disaster-related-benefits>

**Federal Disaster Unemployment Assistance:**

<http://workforcesecurity.doleta.gov/unemploy/disaster.asp>

[Return to table of contents](#)

## 4. WORKPLACE SAFETY ISSUES

### IS OSHA GOING TO RELAX ENFORCEMENT OF ITS VARIOUS STANDARDS DUE TO THE MASSIVE DISRUPTION ASSOCIATED WITH A HURRICANE?

The Occupational Safety and Health Administration (OSHA) cannot tell employers to ignore or violate OSHA and consensus standards, even in the face of such disruption. In the case of past hurricanes, tornados and blizzards, 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. Of course, hazards continue and OSHA's emphasis on assistance over enforcement does not meet employers should take shortcuts on safety even in the face of such extreme need.

## WHAT OSHA OFFICES MAY BE INVOLVED IN EITHER OFFERING COMPLIANCE ASSISTANCE OR ISSUING CITATIONS?

Regions 4 and 5 include Florida, Alabama, Mississippi, Texas, Georgia, South Carolina, North Carolina, and Louisiana. During past Gulf Coast hurricanes, the Baton Rouge Area Office was the most heavily involved in overall response, followed by the Mobile, Alabama Area Office, and the offices in Birmingham, Alabama and Jackson, Mississippi. Jacksonville, Florida, has authority over the Florida Panhandle, while the Fort Lauderdale Area Office had responsibility for South Florida. OSHA's Region IV Response Team has previously been sent to Texas to assist with efforts there.

## WHAT ONLINE RESOURCES ARE AVAILABLE WITH REGARD TO KEEPING WORKERS SAFE DURING CLEAN UP AND RECOVERY OPERATIONS?

OSHA has established pages on its [www.OSHA.gov](http://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. Employers should start with OSHA's excellent pages on [Hurricane Preparedness and Response](#) and [Flood Preparedness and Response](#).

## WHAT ARE THE GREATEST THREATS TO EMPLOYEES?

The greatest threats to most employees are presented during the clean-up phase, and when restarting businesses. This is because employees are faced with unusual circumstances, or are generally performing different tasks than their usual jobs. Our firm's basic safety approach for these circumstances is set out below:

- ■ **Step 1:** Think before you act. If the work involves non-routine tasks, you should pause and conduct a Job Safety Analysis (JSA) to determine the possible hazards, and then provide training and personal protective equipment (PPE).
- **Step 2:** Take advantage of available resources. Although power might be out and accessing the internet may be

challenging, OSHA, FEMA, local municipalities, and other organizations have sound guidance for you to use. They include:

- [Texas department of Public Safety](#)
- [FEMA](#)
- [USA.gov – Disasters and Emergencies.](#)
- [NIOSH –comprehensive Worker Safety Guidance – Flooding](#)
- [CDC – Preparing for a Hurricane or Tropical Storm.](#)
- [CDC – After the Disaster – Specific Injury and Illness Topics.](#)
- **Step 3:** Anticipate that disasters never follow the rules and plans. Expect problems. In your planning, always engage in a “what-if” analysis and plan for the worst. Larger companies may consider creating a “what-if committee” that periodically brainstorms about such issues (consider it an expanded process hazard analysis applied to every aspect of your business).
- **Step 4:** Stay alert for hazards posed by fatigue. Advise your employees to avoid skipping meals and, ensure they stay well hydrated.
- **Step 5:** Pay attention to your surroundings. Watch out for power lines and electrocution hazards presented by generators and water damage.
- **Step 6:** Recognize that rising waters will contain a soup of fecal matter, fuel, rotten food, chemicals, heavy metals, and other risks. Provide PPE for your employees, and remember necessary vaccinations. Vigilantly attend to open wounds while anticipating rashes and infections. [OSHA has provided a detailed fact sheet on these subjects to assist you.](#)
- **Step 7:** Protect employees from mosquitos. Many of the affected areas were already dealing with mosquito-borne diseases; [OSHA has provided a quick fact sheet to assist.](#)
- **Step 8:** Remember that generators and gas tools generate carbon monoxide, so be careful about indoor usage. The U.S. Consumer Product Safety Commission has developed

a [one-page fact sheet](#) to provide suggestions for best practices.

## **DO OSHA STANDARDS DESCRIBE WHEN IT IS UNSAFE TO RETURN EMPLOYEES TO THE WORKPLACE?**

Section 13(a) of the OSHA Act defines “imminent danger” to include “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.

## **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: “If you believe working conditions are unsafe or unhealthy,” it says, “you may [file a complaint](#) with OSHA concerning a hazardous working condition at any time. If possible, bring the conditions to your employer’s attention. If the condition clearly presents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and, where possible, a worker has brought the condition to the attention of the employer, the worker may have a [legal right to refuse to work](#) in a situation in which he or she would be exposed to the hazard.” Employees are protected if they refuse to do a job and have a good faith belief they are exposed to imminent danger.

OSHA discourages employees from walking off the job. 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) due to the urgency of the hazard, there is not enough time 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.

## **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.

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. Respirators may be necessary if working in a moldy building or otherwise exposed to fungi. Electrical hazards are especially an issue. Electric Work Practices training to recognize and avoid electrical hazards may be essential. 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.

## **DO I NEED TO INOCULATE MY EMPLOYEES FOR VARIOUS ILLNESSES?**

After recent devastating hurricanes, the CDC website initially stated 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. The CDC has provided information on [recommended immunizations for disaster responders](#).

As during the previous hurricane clean-ups, 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 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.

## **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 generate scores of citations following storms.

## **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, 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.”

## ARE THERE ADDITIONAL RESOURCES YOU WOULD RECOMMEND REVIEWING?

- ■ ■ Since the hurricanes of the early 2000s, the CDC has established its guidance on [Floodwaters or Standing Waters](#).
- Medical Recommendations for Relief Workers and Emergency Responders can be found here: [NIOSH Interim Guidance for Pre-exposure Medical Screening of Workers Deployed for Hurricane Disaster Work](#). This document provides interim guidance on medical screening for workers before beginning disaster response activities.
- [NIOSH Interim Post Exposure Medical Screening of Workers Leaving Hurricane Disaster Recovery Areas](#): provides Information on working in physically demanding, unclean, or unstable work environments, such as hurricane recovery areas.

[Return to table of contents](#)

## 5. WAGE AND HOUR ISSUES

### WHAT DO WE DO ABOUT LOST TIME RECORDS FOR WORK ALREADY PERFORMED BUT NOT YET PAID?

If the only records of hours worked are lost or unusable, then there is no perfect solution. Recreate the most-accurate accounting you can under the circumstances. Perhaps the best approach is to have each employee make the best-possible estimate of their hours worked. You should obtain the employee's written acknowledgement of their best recollection and should include the employee's authorization allowing later corrections in worktime and pay should more accurate hours-worked information become available.

### HOW DO WE RECORD EMPLOYEES' WORKTIME WITHOUT OUR ELECTRONIC TIME CLOCKS?

Employees may record all hours worked by using handwritten timesheets or by other means. To ensure accuracy, each employee should enter their own time and

should record the actual times when the employee's work starts and stops each workday.

## **AS WE RECOVER, MUST WE KEEP PAYING OVERTIME ON TOP OF OUR OTHER BURDENS?**

There is no Fair Labor Standards Act (FLSA) "emergency" exception that relieves the obligation to pay FLSA-required wages. Employees subject to the FLSA's overtime provision must receive overtime premium at a rate of at least 1.5 times their regular rates of pay for all hours worked over 40 in the employer's designated seven-day workweek(s).

Employees covered by a collective bargaining agreement or some other contract or enforceable understanding might be due more in overtime compensation than the FLSA requires. Perhaps the terms of that agreement or understanding relax those requirements in emergencies. However, no such exception can override the FLSA's requirements.

## **CAN AN EMPLOYEE VOLUNTEER TO PERFORM RECOVERY SERVICES FOR US WITHOUT PAY?**

The FLSA does not permit employees to "volunteer" work to their private-sector employer under any but the narrowest of circumstances. Employers considering any kind of unpaid volunteer services by their employees should carefully evaluate the legality of permitting this. Somewhat-different FLSA "volunteer" principles apply to public-agency employees in certain situations.

## **MUST WE KEEP PAYING EMPLOYEES WHO ARE NOT WORKING?**

Under the FLSA, for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible difference relates to employees treated as exempt FLSA "white collar" employees whose exempt status requires that they be paid on a salary basis. Generally speaking, if such an employee performs at least some work in the employee's designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek. There can be exceptions, such

as might be the case when the employer is open for business but the employee decides to stay home for the day and performs no work. A U.S. Department of Labor opinion letter addressing these matters can be accessed [here](#).

Also, non-exempt employees paid on a “fluctuating-workweek” basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work. There are a few exceptions, but these are even more-limited than the ones for exempt “salary basis” employees.

Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

## **CAN WE CHARGE TIME MISSED TO VACATION AND LEAVE BALANCES?**

The FLSA generally does not regulate the accumulation and use of vacation and leave. The salary requirements for exempt “white collar” employees can implicate time-off allotments under various circumstances. The USDOL has provided some guidance on this topic in an opinion letter that is accessible [here](#). Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

## **IS THERE ANYTHING ELSE TO KEEP IN MIND?**

Remember also that other requirements, such as those applying to government contractors or subcontractors, as well as those of states or other jurisdictions, can also be relevant to these questions.

[Return to table of contents](#)

## **6. RETIREMENT PLANS**

**CONTRIBUTIONS TO OUR PENSION PLAN AND 401(K) 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 deadlines for employee pension and welfare benefit plans for victims of the disaster in the affected states. For example, the USDOL has in the past issued statements that it will not seek to enforce ERISA violations for late contributions to retirement plans or deposit of employee contributions, including loan repayments, for plans, plan sponsors and employers who are located in a county identified for individual assistance by FEMA due to the effects of major hurricanes. To be eligible for the relief, the plan sponsor must act reasonably, prudently, and in the interest of employees to comply as soon as practical under the circumstances.

Detailed descriptions of the disaster areas and the relief granted are available on the IRS and DOL-dedicated web pages at:

- ■ ■ <https://www.irs.gov/newsroom/tax-relief-in-disaster-situations>
- <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-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.

## **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. However, as indicated above, the USDOL has in the past indicated that it will not seek to enforce violations of ERISA

for late deposit of employee contributions to a retirement plan if attributable to a major hurricane and the employer or service provider is located in a county identified by FEMA as eligible for individual assistance.

## **WHAT IF WE CAN'T MEET OUR PAYROLL TAX DEPOSITS OR FILE OUR FORM 5500 ON TIME BECAUSE OF THE HURRICANE?**

In the past, the IRS has issued relief extending the deadline for filing the Form 5500 Annual Return/Report for employee benefit plans and granting an extension of certain filing deadlines for businesses and individuals located in one of the counties affected by a major hurricane.

## **OUR EMPLOYEES HAVE LOST HOMES AND NEED ASSISTANCE. IS THERE ANYTHING WE CAN DO TO PROVIDE THEM ASSISTANCE?**

Yes. The IRS has, in the past, announced liberalized procedures for loans and hardship distributions to victims of hurricanes. These procedures allow faster and more liberalized access to hardship distributions for individuals working or residing in counties effected by the disaster (as identified by FEMA). A detailed description of the relief granted by the IRS in the past is available at:

<https://www.irs.gov/newsroom/retirement-plans-can-make-loans-hardship-distributions-to-victims-of-hurricane-harvey>.

Employers may also assist employees with rehabilitation-related expenses following the disaster. So long as the expenses are reasonable and necessary, the employer's payments will generally be qualified (i.e., employees may exclude those payments from their taxable income). The IRS has specifically commented that medical, temporary housing, and transportation expenses following a flood are qualified, and employers may deduct those costs as business expenses as long as they are reasonable.

Employers can also set up a leave-sharing program to allow employees to donate their accrued, unused paid time off or leave to a pool that can be used by affected employees. Donation of leave programs must be carefully structured in compliance with existing guidance to ensure that the employee donating their leave is not taxed on the leave that they thought they had given to others. Employers wanting to create a long-term assistance program for employees

impacted by natural disasters and other hardships may also consider establishing a 501(c)(3) foundation.

[Return to table of contents](#)

## **7.GROUP HEALTH PLAN ADMINISTRATION**

### **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.

### **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.

### **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. For example, in response to past severe hurricanes, all pharmacists in Texas were granted temporary authority to dispense up to a 30-day supply of medication (other than a Schedule II controlled substance) even if the prescriber cannot be reached, based on their discretion. Additionally, some healthcare providers, such as Aetna and UnitedHealthcare, are allowing patients to refill medications early.

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.

[Return to table of contents](#)

## 8.SPECIAL COBRA ISSUES

### **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 employee's 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](http://www.usps.com) for the most recent delivery information.

## **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 USDOL 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 them 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 terminate the coverage for nonpayment of premiums.

According to the USDOL, the guiding principle for plans must be to act reasonably, prudently, and in the interest of the workers and their families who rely on their health plans for their physical and economic well-being. In response to past severe hurricanes, the USDOL stated that plan fiduciaries should make reasonable accommodations to prevent the loss of benefits for failure to pay or timely respond to an election notice, for example, to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes due to the hurricane. However, any extensions of grace periods or waivers of COBRA deadlines must be cleared with your insurer or stop loss carrier.

## **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](http://www.usps.com) and change your address online. In light of this, you may want to extend grace periods to ensure coverage is not lost. However, any extensions of grace periods or waivers of COBRA deadlines must be cleared with your insurer or stop loss carrier.

[Return to table of contents](#)

## **9.HIPAA PRIVACY REQUIREMENTS**

### **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?**

The privacy restrictions mandated by the Health Insurance Portability and Accountability Act (HIPAA) 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 person’s 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 person’s 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.

[Return to table of contents](#)

## **10. WORKPLACE DONATIONS TO NATURAL DISASTER**

### **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 employer’s 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 recipient’s 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 five-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 person’s 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 experience developing Employer-Controlled Foundations for clients that wish to set up a tax-exempt fund and can assist and getting it adopted quickly and efficiently. Please contact a Fisher Phillips attorney if you are interested in learning more.

[Return to table of contents](#)

## 11.LABOR RELATIONS

### **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.

## **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.

## **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.

## **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, so as to engage in meaningful bargaining over that change on request. 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.

## **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.

## **IF I DECIDE TO CLOSE MY BUSINESS AS A RESULT OF A HURRICANE, HOW MUCH NOTICE DO I HAVE TO GIVE TO THE UNION?**

You are required to give the union notice of your decision to go out of business sufficient to allow for meaningful bargaining over the effects of your decision upon request. There is no one rule as to how much notice is sufficient under the circumstances. Depending on the circumstances, as little as a couple of days’ notice may be considered sufficient. 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.

## **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.

## **WHAT HAPPENS IF I CLOSE MY BUSINESS 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 may impose a bargaining obligation on the new employer on the theory that it is the "alter ego" of the previous employer, or if together they constitute a "single 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.

## **I WOULD LIKE TO MOVE THE WORK THAT USED TO BE DONE AT MY HURRICANE-STRICKEN 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 sufficient notice to the union of its decision to allow for meaningful bargaining over at least the effects of your decision upon request. 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. Under certain circumstances (particularly where labor costs are either a direct or indirect factor in the work relocation decision, then the employer may also have a duty to bargain over the underlying decision itself. Note also that your collective bargaining agreement might address a plant closure or transfer of work situation.

[Return to table of contents](#)

## 12. WORKERS' COMPENSATION

### **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, 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 careful. An employee who has suffered emotional distress 1) without any physical injury and 2) which did not occur as the result of "sudden, unexpected, and extraordinary stress related to the employment," may be able to sue his employer in court for actual damages.

**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. Injured workers must file injury reports within 30 days of the injury.

**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, 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.

**South Carolina:** An employer may be held liable for some reckless or intentional action on the part of the employer. One may bypass the workers' compensation system and sue their employer in court for a full range of damages, including punitive damages, pain and suffering, and mental anguish under certain circumstances.

**North Carolina:** The only exception to the exclusivity provision of the North Carolina Workers' Compensation Act is an exception for intentional misconduct by an employer, which is a narrow exception and is ultimately tantamount to an intentional tort and has only been applied in the most egregious cases. Exposure to dangerous substances or coming into contact with dead bodies as part of an employee's job would unlikely fit within this exception unless

such expose and resulting injury is predicated on the employer's intentional misconduct.

**Georgia:** Employees are limited to damages available under the state workers' compensation law, and they cannot sue their employer outside of the workers' compensation process for punitive or other damages.

## **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 recovery.

## **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.

## **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.

## **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, Florida, Texas, Louisiana, Alabama, Mississippi, Georgia, and South Carolina 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.

## **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.

[Return to table of contents](#)

## **13. IMMIGRATION LAW**

### **HOW DO I COMPLETE I-9 FORMS FOR PERSONS WHO ARE DISPLACED AND HAVE NO DOCUMENTS?**

In the past, DHS has provided guidance regarding I-9 documents for hiring individuals who are displaced as a result of a hurricane and its aftermath.

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. 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."

### **WHAT HAPPENS TO EMPLOYEES ON TEMPORARY VISAS WHO CANNOT WORK?**

Pending specific guidance from DHS, these workers would presumably be treated as if they were on an approved, unpaid leave, and therefore would not be out-of-status for failing to work.

### **MUST I PAY AN H-1B ALIEN THE SALARY LISTED IN THE PETITION EVEN IF THAT PERSON CANNOT NOW WORK?**

Again, you could presumably put such a person on an unpaid leave of absence until they are able to work again. Additionally, in the past DHS has instructed officers to use discretion in adjudicating cases involving failures to maintain lawful status where such failure was related to a hurricane.

### **WHAT HAPPENS IF AN APPLICATION OR RESPONSE DEADLINE IS MISSED?**

In the past, DHS has allowed individuals to apply for changes of status or extensions of status, even after the expiration of their statuses, where the delay is due the

hurricane. Likewise, both DHS and the USDOL have previously extended deadlines and not issued denials based on abandonment prior to the expiration of the extended deadline.

## **WHAT HAPPENS TO CASES THAT WERE PENDING IN CITIZENSHIP AND IMMIGRATION SERVICES OFFICES IN THE AFFECTED AREAS?**

Pending damage assessment, you can assume 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 <https://my.uscis.gov/appointment>. Individuals may also call USCIS Customer Service at 800-375-5283.

[Return to table of contents](#)

## **14. PLANT CLOSING LAWS**

### **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 Texas, Louisiana, Alabama, Mississippi, Florida, Georgia, North Carolina and South Carolina have yet to enact a WARN-like notice requirement at the state level, the federal law would govern all such obligations for employers operating in those states. Note that some states, such as Alabama, have laws

requiring notice to government officials in the event of layoffs of more than 25 employees.

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 hurricanes. 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 two-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."

## **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 two-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 two-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.

## **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.

[Return to table of contents](#)

For more information, contact your Fisher Phillips attorney.

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*This Legal Alert provides an overview of specific state and federal laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*