



Every year, employers along the Gulf Coast begin planning for hurricane season. Those preparations must include not only protecting business operations and assets, but also a plan for addressing labor issues. Hurricanes have posed unique human resources challenges for employers with operations in Houston and the Gulf Coast Region. Hurricanes Harvey and Irma caused between \$150 and \$200 billion dollars of damage to Texas and Florida, comparable to the costs from Hurricane Katrina in Louisiana.

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

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

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

WAGE & HOUR ISSUES:

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

Generally, the FLSA does not require employers to pay non-exempt hourly employees who are not working. Therefore, an employer who is closed due to a natural disaster does not have to pay its non-exempt employees for this time because no work is available. An exception to this general rule exists where there are employees who receive fixed salaries for fluctuating workweeks (i.e. non-exempt employees who have agreed to work an unspecified number of hours for a specified salary). An employer must pay these employees their full weekly salary for any week in which **ANY** work was performed.

For exempt employees, an employer will be required to pay the employee's full salary if **ANY** work was performed during the workweek, even though the worksite is subsequently closed or unable to reopen due to weather or other disasters. However, an employer may **require** exempt employees to use allowed leave for this time off or make up lost time in another work week.

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

As long as the employer is open for business, the DOL considers an absence caused by transportation or other difficulties experienced during weather emergencies to be an absence for personal reasons. For example, an employer may refuse to pay an exempt employee who is absent because of an evacuation (or require the employee to use accrued vacation time) for the full day that he or she fails to report to work. If an employee is absent for one or more **full days** for personal reasons, the employee's salaried status will not be affected if deductions are made from a salary for such absences and the employer has a valid payroll deduction authorization. **However, a deduction from salary for less than a full-day's absence is not permitted.**

We recommend caution, however, in docking salaried employees' pay, and suggest you first consult with legal counsel. A full day deduction can quickly become a partial day deduction if exempt employees are responding to emails and phone calls while absent from work (which is common). Moreover, many employers choose to instead require exempt employees "make up" lost time after they return to work (e.g., work on the weekend or extended hours). This practice is not allowed for non-exempt employees, who must be paid overtime for all hours worked over 40 in a work week.

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

Volunteer Time: The FLSA does not allow employees to "volunteer" to perform their job (or other productive work) for an employer in the wake of a natural disaster. For example, if the employee is still performing their normal job duties for the benefit of the employer, then he or she must be compensated for those services regardless of the employees' request. There are some exceptions for employees of private nonprofit organizations, but employers should generally be cautious about having employees "volunteer" to assist the employer during or after an emergency, if those duties benefit the company.

On Call or Waiting Time: An employee who is required to remain on call or wait for an event (i.e. power to be restored) is considered working and the employer may be required to pay that employee for all of the time. For example, maintenance workers who are required to remain on premises during a storm to deal with emergency repairs must be compensated, even if they perform no work.

Time Records: In the event a natural disaster destroys or temporarily interferes with an employer's timekeeping records or system, it should attempt to recreate the records using the most accurate means available. There is no perfect solution, but it is advisable to ask employees to review and sign their re-created timecards to ensure the records are as accurate as possible. If an employer resumes normal operations but the timekeeping system is still unavailable, the employer should attempt to maintain contemporaneous timesheets in some form (handwritten or by other available methods). Having employees record when their work starts and stops each workday will help prevent disagreements about actual work time.

LEGAL PROTECTIONS:

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

In many states, there are important protections for employees who evacuate for natural disasters. For example, Texas law prohibits an employer from discriminating against an employee who “leaves the employee’s place of employment to participate in a general public evacuation ordered under an emergency evacuation order.” TEXAS LABOR CODE § 22.002. Employers violating this law may be liable for lost wages, benefits, and other damages. “Evacuation Orders” are defined broadly to include not only mandatory, but recommended evacuations. This protection does not apply to individuals employed as emergency services personnel (including fire fighters, police officers, emergency medical technicians, etc.) or those who are necessary “to provide for the safety and well-being of the general public, including a person necessary for the restoration of vital services.” We believe it is reasonable to interpret this statute as including not only utility workers and other obvious recovery personnel, but also employees working for gas stations, grocery stores, and other critical services.

At the federal level, an employee’s hurricane related absence might be protected if it is connected to military leave or similar emergency response service. USERRA protects the reemployment rights of military personnel, reservists, and non-military volunteers who are called upon by the National Disaster Medical System (NDMS). These non-military volunteers are often medical clinicians, but may also include non-medical professionals such as logistical specialists, veterinary professionals, or communication and administrative specialists, to name a few. A number of states (Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina and Texas) have adopted similar first responder protections modeled after the natural disaster coverage included in USERRA. Generally, protected employees are protected from discrimination or retaliation as a result of their service, employers are required to maintain their seniority and benefits while on leave, and have a right to return to reemployment with the same pay and benefits.

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

Yes, employees affected by a natural disaster are entitled to leave under the FMLA for a serious health condition caused by the disaster. Additionally, employees affected by a natural disaster who must care for a child, spouse, or parent with a serious health condition may also be entitled to leave under the FMLA. Some examples of storm related issues might include absences caused by an employee’s need to care for a family member who requires refrigerated medicine or medical equipment not operating because of a power outage.

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

The WARN Act, a federal law, imposes notice requirements on employers with 100+ employees for certain plant closings and/or mass layoffs that affect 50 or more full time employees. However, an exception does exist where the closing or layoff is a direct result of a natural disaster. Nonetheless, the employer is required to give as much notice as is practicable. If an employer gives less than 60 days’ notice, the employer must prove that the conditions for the exception have been met. If such a decision is contemplated, it is advisable to

consult with legal counsel about the possible notice requirements to ensure compliance with the WARN Act.

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

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

HURRICANE AND DISASTER PREPARATION CHECKLIST

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