

SEPTEMBER 8, 2017 | WAGE & HOUR COMPLIANCE

Hurricanes Headaches: HR FAQs for Employers

✘ Hurricane Florence is approaching the United States, and first and foremost, employers need to make sure their employees, customers, and guests are safe from the storm.

Natural disasters such as hurricanes, earthquakes and tornadoes have posed unique human resource (HR) challenges from wage-hour to FMLA leave and the WARN Act. The best protection is to have a plan in place in advance to ensure your employees are paid and well taken care of during a difficult time.

Although no one can ever be fully prepared for such natural disasters, it is important to be aware of the federal and state laws that address these situations. Our guidance can be used by employers in navigating through the legal and business implications created by events such as hurricanes. In addition, the information may be applicable to other crises and disasters, such as fires, flu epidemics and workplace violence.

Frequently Asked Questions

If a work site is closed because of the weather or cannot reopen because of damage and/or loss of utilities, am I required to pay affected employees?

The Fair Labor Standards Act requires employers to pay their **non-exempt** employees only for hours that the employees have actually worked. Therefore, an employer is not required to pay nonexempt employees if it is unable to provide work to those employees due to a natural disaster.

An exception to this general rule exists when there are employees who receive fixed salaries for fluctuating workweeks. These are nonexempt employees who have agreed to work a specified number of hours for a specified salary. An employer must pay these employees their full weekly salary for any week in which any work was performed.

For **exempt** employees, an employer will be required to pay the employee's full salary if the work site is closed or unable to reopen due to inclement weather or other disasters for less than a full workweek. However, an employer may require exempt employees to use available leave for this time.

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

The U.S. Department of Labor considers an absence caused by transportation difficulties experienced during

weather emergencies, if the employer is open for business, as an absence for personal reasons. Under this circumstance, an employer may place an exempt employee on leave without pay (or require the employee to use accrued vacation time) for the full day that he or she fails to report to work.

If an employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made from a salary for such absences. However, a deduction from salary for less than a full-day's absence is not permitted.

We recommend caution, however, in docking salaried employees' pay and suggest that you first consult with legal counsel. Moreover, many employers instead require employees to "make up" lost time after they return to work, which is permissible for exempt employees. This practice is not allowed for nonexempt employees, who must be paid overtime for all hours worked over 40 in a workweek.

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

On-call time: An employee who is required to remain "on call" at the employer's premises or close by may be working while "on call," and the employer may be required to pay that employee for his "on call" time. For example, maintenance workers who remain on the premises during a storm to deal with emergency repairs must be compensated — even if they perform no work — if they are not free to leave at any time.

Waiting time: If an employee is required to wait, that time is compensable. For example, if employees are required to be at work to wait for the power to restart, that is considered time worked.

Volunteer time: Employees of private not-for-profit organizations are not volunteers if they perform the same services that they are regularly employed to perform. They must be compensated for those services. Employers should generally be cautious about having employees "volunteer" to assist the employer during an emergency if those duties benefit the company and are regularly performed by employees.

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.

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

The Worker Adjustment and Retraining Notification (WARN) Act, a federal law, imposes notice requirements on employers with 100 or more employees for certain plant closings and/or mass layoffs. However, an exception

exists 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.

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

During previous natural disasters, particularly Hurricane Sandy and Katrina, many governmental agencies and entities extended the deadlines for certain reports and paperwork. Therefore, it is expected that with future natural disasters, the government will provide some deadline extensions, but, as with every natural disaster, the government's response will vary.

Regardless of what extensions may be granted, employers should be fully aware of state laws and implement any policies or plans necessary to minimally interrupt the payment of wages to their employees.

Employees from other states want to donate leave to affected employees. 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.

Disaster Preparation Checklist

- Identify and notify those employees whom you believe should be deemed "emergency services personnel" and will be required to work during a storm or evacuation order. Make arrangements for providing these employees with food and shelter. Make sure to have procedures in place for the evacuation of these employees if the hurricane or other disaster causes the workplace to become unsafe.
- Identify your "essential employees." These are employees whom you cannot require to be at work during a natural disaster but you believe are vital to the continued operations of your company. Determine what incentives you can provide to 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 and 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 that you can provide such necessities as gas, food and shelter to these employees.
- Review your existing policies to determine how to distribute paychecks to employees who cannot come to work because of adverse weather conditions or a 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, through which 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 related to other human resource matters in the midst of the hurricane or other disaster. This team should establish a method of communicating with each of its members during the hurricane.
- Review any existing employee assistance programs and ensure that employees know how to utilize these programs during the aftermath. A successful 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.

Natural disasters can pose a myriad of HR challenges for employers. While many employers are working around the clock on recovery efforts, other employers find themselves unable to function for extended periods of time because of damage or loss of utilities. The economic effects of a natural disaster will have long-term consequences on businesses in the affected region.