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Picking Up the Pieces: Employer Responsibilities in the Aftermath of Hurricane Harvey

BY KIM RIVES MIERS, MISHELL PARRENO TAYLOR, AND DEIDRA NGUYEN

Hurricane Harvey is relentlessly drenching southeast Texas and the surrounding areas, resulting in unprecedented flooding and damage. As the storm rages, many employers are wondering how to respond and what happens next. After the waters and dangers subside—and even as they continue to process the personal toll inflicted by the storm—affected employers will face a host of legal and practical issues. This article summarizes some of the primary questions that may arise in the near term.

Wage and Hour Issues

There are several payroll-related concerns that can be triggered by an emergency situation. We start with a refresher on who must get paid when operations are shuttered due to weather.¹

Non-Exempt Employees. Under the FLSA, as well as Texas law, non-exempt workers must be paid only for the time they work. As a result, employers need not compensate non-exempt employees who are not working because of a storm. Notably, it does not matter whether the absence is based on the employer's decision to close a worksite or the employee's decision to stay home (or evacuate). If the worksite is open, but the employee decides to stay home or to leave a shift early, the non-exempt employee does not need to be paid for the hours missed.

There may be exceptions during a weather event for waiting time, or on-call time. The FLSA considers employees to be "on call" if they must remain on the employer's premises and are unable to use their time for their own purposes.² Thus, for example, employees who are required to remain at a location that has lost power in case power returns should be paid for the time spent holding down the fort despite their inactivity.

1 Specific agreements between employers and employees also might be relevant to this topic, along with applicable workplace policies or collective bargaining agreements.

2 See, e.g., 29 C.F.R. §§ 785.14, 785.15, 785.17.

Exempt Employees. When an employer shuts down its operations because of adverse weather conditions for less than a full workweek, exempt employees must be paid their full salary.³ This rule also applies if exempt employees work only part of a day. Thus, if an employer decides to send staff home early due to deteriorating conditions, it may not dock exempt employees' pay. Indeed, if an employer deducts from the employee's salary in this situation, it risks losing the exemption applicable to that employee.

Nonetheless, and barring any state law or overly restrictive company policy to the contrary, exempt employees may be required to use accrued leave or vacation time (in full or partial days) for their absences. While it might not be a popular move, an employer can direct exempt employees to take paid time off for the closure, pursuant to the employer's *bona fide* leave or vacation policy. If, on the other hand, an employee does not earn or does not have any available leave time, the employee is entitled to his or her full guaranteed salary if the employer decides to close due to weather.⁴

If an employer is open for business, on the other hand, an exempt employee who elects to stay home due to the weather situation is considered absent for personal reasons. In lieu of paying salary, an employer with a *bona fide* leave or vacation policy may require the employee to use his or her accrued paid time off to cover the absence. As long as it is permitted by state law, leave time in this circumstance may be taken in full or partial days.

If an employer has a leave policy, but the absent employee does not have a leave account balance, the employer is not obligated to pay the employee. The employer can place the employee on unpaid leave for the full day(s) that he or she failed to report to work for personal reasons. Employers should bear in mind that salary deductions for less than a full day's absence are not permitted, even though leave balance deductions are allowed for partial-day absences. As a result, if an exempt employee with no leave balance misses half a day, the employer must pay that employee his or her salary for the entire day, with no partial deduction for the absence. Meanwhile, an employee with a leave balance in the same scenario could be required to use half a day of paid time off to cover the absence.

Remote Work. Employers should consider how to address situations where employees work from home due to Harvey, whether as a long-term or short-term solution. As noted earlier, non-exempt employees must be compensated for all time spent working. Accordingly, employers must pay non-exempt employees for performing any work remotely, even if the employee did not have express permission to work from home. Employers, moreover, may need to rely on employee self-reporting of hours worked in such a scenario. To help minimize the risk of wage and hour violations for employees who are working from home, employers must implement, communicate and strictly enforce a time and attendance policy that clearly explains what constitutes compensable time and requires employees to accurately record all time worked.

Exempt employees, too, must be paid their regular salary in this circumstance. Even if an exempt employee spends only a few minutes working remotely, he or she must be paid the usual salary for the day and the workweek. In instances where a partial day is worked, the exempt employee can be directed to use appropriate leave time for the balance of the time, as discussed above.

Delay in Wage Payments? One possible consequence of a natural disaster like Harvey is the delayed processing of employees' wage payments. Texas law generally requires payment of wages twice a month

³ 29 C.F.R. § 541.602(a) (explaining that deductions may not be made when work is unavailable at the employer's instruction); See U.S. Dep't of Labor, Wage and Hour Div., [Opinion Letter FLSA2005-46](#) (Oct. 28, 2005) (stating that exempt employees must be paid when "the employer closes operations due to a weather-related emergency or other disaster for less than a full workweek"); U.S. Dep't of Labor, Wage and Hour Div., [Opinion Letter FLSA2005-41](#) (Oct. 24, 2005).

⁴ If state law and the company's policy permits, an employer theoretically could allow an employee to carry a negative vacation balance and then recoup the time later. This approach can become complicated, however, particularly if the employee separates before eliminating the negative leave balance.

for non-exempt employees and at least once a month for FLSA-exempt employees.⁵ Louisiana law requires payment of wages no less than twice a month for employees who are nonexempt under the FLSA in certain occupations, such as manufacturing and oil and mining operations.⁶ Louisiana law further mandates that employers notify employees of any changes in the method and frequency in which they will be paid.⁷

Employers may be unable to process or fund payments to satisfy this requirement, especially in the immediate wake of the storm. The Texas Workforce Commission has advised that, should an employer need to change the designated payday, “it would be best to give employees advance written notice thereof setting out the next three paydays – 1) the last old payday; 2) the first new payday; and 3) the next-following new payday.”⁸ Consistent with this suggestion, and as a courtesy, employers should inform employees of any wage payment processing problems and advise them of when they can expect payment. Notice should be made in writing, as soon as practicable, and is warranted particularly where employees are on direct deposit and might otherwise write checks against anticipated deposits. Indeed, open and ongoing communication with employees about wages, scheduling, and related matters is highly recommended throughout the recovery period.

Although some laxity may be afforded to those who experience significant difficulty meeting these types of obligations as a result of this unfolding disaster, Texas and Louisiana have not indicated if there may be any relief or waiver of the normal wage payment laws. Furthermore, if payroll is processed in Texas or Louisiana for employees working in other states, it is important to be mindful of those state laws and potential penalties for delayed payment. For example, if the timely payment of wages to employees in California is compromised, an employer may be subject to monetary penalties under the Labor Code. Employers that cannot meet payroll obligations must simply do their best: notify employees as stated above, keep records of the reasons for the delay, and make arrangements to pay employees as promptly as possible.

Voluntary Payments or Advances in Paychecks. Of course, given the enormous toll that Harvey is taking, employers with sufficient ability might consider paying wages (full or partial) for a set duration, even where not required. This extra step could help plug the gap until any government assistance may kick in and might be particularly appropriate in the hardest-hit locations, where employees may have lost everything. It can also obviously boost morale, demonstrate loyalty, and enhance the employer’s reputation. It is important to be mindful to properly document any pay advancements to avoid any future questions of deductions in future wages that may result from any advancements. The voluntary payment of wages (whether full or partial payments), should be reported and treated as wages for purposes of tax treatment.

Impact of a State of Emergency?

Given the upheaval, some employers might assume that their obligations change if a state of emergency is formally declared. That assumption is mistaken, however. On the whole, an employer’s duties do not change if the government announces a state of emergency.⁹

Further, Texas has a special statute protecting employees who evacuate pursuant to a governmental order.¹⁰ In Texas, employers may not discharge or otherwise discriminate against an employee who “leaves the employee’s place of employment to participate in a general public evacuation ordered under an emergency

5 Tex. Lab. Code §§ 61.011 to 61.013. Louisiana’s wage frequency law similarly does not apply to FLSA-exempt employees. In Louisiana, an employer generally may pay its employees on a monthly or semi-monthly basis so long as the employer designates the pay schedule in advance. Special rules apply for certain industries. La. Stat. Ann. § 23:633.

6 LA Rev. Stat. Sec. 23:633 (entities with fewer than ten employees are exempt from this requirement). Failure to comply with Sec. 23:633 may result in a fine of not less than \$25.00, but not more than \$250.00 for each day’s violation.

7 *Id.*

8 Texas Workforce Comm’n, [Especially for Texas Employers: Frequency of Pay](#).

9 See Kim Rives Miers & Lauren Timmons, [Inclement Weather FAQs: Who Gets Pay for a Snow Day?](#), Littler Insight (Jan. 19, 2017) (noting that a couple of jurisdictions offer protections to employees who miss work during a state of emergency).

10 See Kerry E. Notestine, [The Texas State Statute Prohibiting Discrimination Because of an Evacuation](#), Littler Insight (Sept. 17, 2008).

evacuation order.”¹¹ The definition of an emergency evacuation order includes an official statement issued by a governmental entity to “*recommend* the evacuation of all or part of the population of an area stricken or *threatened* with a disaster.”¹² The statute creates liability for the loss of wages or benefits (e.g., vacation pay) incurred by the employee as a result of the violation.¹³ There is an exemption for emergency services personnel (police, firefighters, EMTs, or those whose employment involves providing “services for the benefit of the general public during emergency situations”) if the employer provides adequate emergency shelter.¹⁴

While the Texas statute appears to be limited to an employee who leaves work for an evacuation, it would be prudent to treat employees who did not report to work because of any evacuation in the same way. The statute can be interpreted to cover voluntary as well as mandatory evacuations because it refers to official statements *recommending* evacuation. And as a practical matter, it may not be clear why an employee missed work, such that an employer may need to ask the reason for the absence. Additionally, the law does not define which government officials may issue a covered emergency evacuation order, and orders by mayors of small towns or minor county government officials could fall within the reach of the statute, particularly in light of the fact that in Texas, mayors and county judges are responsible for emergency preparedness and response within their local jurisdictions. As a result, it is possible that employers may have no knowledge of evacuation orders affecting some of their employees. Given the ambiguities in the law, an employer should be cautious in terminating or disciplining an employee who missed work during an evacuation associated with Hurricane Harvey, absent specific information provided by the employee that the absence was not because of the evacuation.

Leaves of Absence and Reasonable Accommodations

Employers should bear in mind that employees may be entitled to use leave time, or require reasonable accommodations, to deal with the ramifications of Harvey.

For example, employees that have suffered a serious injury or illness—or who have a family member who did—may be entitled to leave under the federal Family and Medical Leave Act (FMLA). State or local law may also apply to certain employees. Even if not covered by federal, state, or local laws providing for time off for illness, an employee may qualify for sick or other leave under a company policy or collective bargaining agreement. As such, it is important to remind front line managers and supervisors of governing policies on this subject and their possible application during this time period.

Employers should be aware that employees absent from work to assist with relief efforts may separately qualify for protected time off. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which effectively applies to every public and private employer and has no minimum employee requirement, employees may take a leave of absence for service in the uniformed services. For purposes of disaster relief, “uniformed services” include specified service by members of the National Disaster Medical System, appointment of a “System member” of the National Urban Search and Rescue Response System¹⁵ into federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act,¹⁶ the National Guard if called by the President of the United States, and any other category of persons designated by the President during a time of national emergency.¹⁷ Service in the

11 Tex. Lab. Code § 22.002.

12 Tex. Lab. Code § 22.001(2) (emphasis added).

13 Tex. Lab. Code § 22.003.

14 Tex. Lab. Code § 22.004.

15 The National Urban Search and Rescue Response System was established under the authority of the Federal Emergency Management Agency to organize federal, state and local emergency response teams into integrated federal disaster response task forces.

16 8 U.S.C. § 4303(13).

17 As of this publication, President Trump has not yet designated any such category of persons.

National Guard for a unit activated by a state governor, rather than the president, and work for the Federal Emergency Management Agency generally would not be considered part of the uniformed services under USERRA.

Under Louisiana law, employees may qualify for leave when they are called to duty as a volunteer first responder pursuant to an operations plan developed by the state Office of Homeland Security and Emergency Preparedness. Qualifying “first responders” include medical personnel, emergency and medical technicians, volunteer firefighters, auxiliary law enforcement officers and members of the Civil Air Patrol. While such leave is unpaid, employees may use accrued vacation or sick leave, and deductions from exempt employees’ pay must conform to the principles outlined above.¹⁸

When faced with employee requests to take time off to assist with relief and rescue efforts, employers should take care to confirm whether the requested relief is related to uniformed services or volunteer first responder duties so that they can appropriately determine employees’ leave and reinstatement rights.

Even if applicable leave laws and employer policies and practices do not provide for non-medical leaves of absence, the circumstances of a natural disaster will probably present extraordinary circumstances that may allow an employer to grant the time off to employees directly or indirectly affected by the disaster. While strict adherence to leave policies is the conservative and prudent management approach for employers in normal operating circumstances, when a disaster strikes employers should be flexible and considerate by expanding or at least temporarily relaxing otherwise restrictive existing leave policies. In making exceptions, employers must remain mindful of state and federal antidiscrimination laws, and ensure that such exceptions are based on legitimate, non-discriminatory reasons and are consistently applied across the workforce. Inconsistent application of workplace rules and policies are often relied upon by employees raising claims of discrimination.

Employers should also be prepared to handle employee requests for accommodation. The Americans with Disabilities Act (applicable to employers with 20+ employees) and related state and local antidiscrimination laws require employers to provide reasonable accommodations to qualified employees with disabilities. Because employees who are physically or emotionally (e.g., post-traumatic stress disorder) injured by Hurricane Harvey’s impact may be entitled to reasonable accommodation, employers should take all such inquiries seriously.

Unemployment Benefits

Employees who are displaced from their positions due to Hurricane Harvey may be eligible for unemployment compensation from the Texas Workforce Commission¹⁹ or the Louisiana Workforce Commission.²⁰ State unemployment benefits typically run for 26 weeks. The government sometimes has the authority, however, to extend those time limits.

Moreover, pursuant to the disaster declaration issued by President Trump, unemployment benefits could be offered to workers who lose their jobs due to Hurricane Harvey, but do not qualify for state benefits, such as self-employed individuals. If after filing for state unemployment compensation an employee is ineligible for state assistance, the employee may be eligible for Disaster Unemployment Assistance (DUA). This federally-funded program is made available for individuals who live or work in counties made the subject of a disaster declaration. Employees must file for regular unemployment compensation benefits before filing for DUA, and

¹⁸ La. Rev. Stat. §§ 23:10171 et seq.

¹⁹ The Texas Workforce Commission takes the position that a “[f]ailure to come into work on a day when authorities have closed area roads and are recommending against travel will likely not be considered disqualifying misconduct in an unemployment claim. An employer would have the burden of proving that the employee really could have come to work, despite the inclement weather conditions.” Texas Workforce Comm’n, *Especially for Texas Employers: Bad Weather – Pay and Attendance Issues*.

²⁰ For general information on unemployment benefits in Texas, visit the Texas Workforce Commission’s [website](#). Information about benefits available in Louisiana is available at the Louisiana Workforce Commission’s [website](#).

if the employee is ineligible for standard state unemployment compensation, the employee then may receive DUA.²¹ Employers may want to consider letting employees know about eligibility for these programs if the employer cannot provide work for employees as a result of the storm.

WARN Notification

Relatedly, employers that decide to close a facility or implement a mass layoff must evaluate whether notice will be required under the federal Worker Adjustment and Retraining Notification Act (WARN).²² Neither Texas, nor Louisiana, has a state-law equivalent to WARN.²³

Briefly, the WARN Act requires a covered employer (100 or more employees) to give 60 days' notice prior to a plant closing or mass layoff. A *plant closing* occurs when a facility is permanently or temporarily closed and 50 or more full-time employees suffer a job loss. A *mass layoff* occurs when either of the following suffer a job loss: (a) 500 or more full-time employees at a facility; or (b) 50 or more full-time employees at a facility constituting at least 33% of the workforce.²⁴ A job loss includes a layoff of six months or more. When required, WARN notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.²⁵

While WARN provides some leeway in the case of a natural catastrophe, the exception is quite limited. Employers may give shortened (or retroactive) notice if the disaster was a direct cause of the job losses, and may be able to rely on the "unforeseeable business circumstances" exception if the disaster was an indirect cause. Nonetheless, employers are not relieved completely of their WARN notice obligations. They must give "as much notice as is practicable" (even if that is retroactive notice), and they must state why they were unable to give notice earlier.²⁶

Qualified Disaster Payments

The Internal Revenue Code section 139 provides that an employer may make payments to its employees that constitute "a qualified disaster relief payment" without any income or payroll tax consequences. "A qualified disaster relief payment" means any amount paid to or for the benefit of an individual to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a "qualified disaster," or to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster. Note that this exclusion is applicable to the extent the employee's disaster-related expense has not been compensated for by insurance or otherwise.

A "qualified disaster" is generally one that is declared by the President of the United States. Hurricanes Katrina, Rita and Wilma were all presidentially declared "qualified disasters" within certain affected areas. Thus, employers may make payments to their employees to help them with living or personal expenses or repairing their homes without having to withhold or pay income and payroll taxes.

21 Dep't of Homeland Security, Federal Emergency Mgmt. Agency, [Federal Aid Programs for the State of Texas](#) (Aug. 25, 2017); see also Dep't of Homeland Security, Federal Emergency Mgmt. Agency, [Disaster Unemployment Assistance Fact Sheet](#) (Aug. 9, 2017).

22 See, e.g., Bruce Millman & Daniel Thieme, [WARN Notice - One More Burden for Employers Recovering from Sandy?](#), Littler Insight (Nov. 27, 2012).

23 That being said, notice may be required or recommended to a state agency in the event of a mass separation, for unemployment purposes. See, e.g., La. Admin. Code tit. 40, § 323.

24 29 U.S.C. § 2101(1)-(3). A "facility" includes an operating unit within a facility.

25 20 C.F.R. §§ 639.4, 639.6.

26 See, e.g., 29 U.S.C. § 2102(b); 20 C.F.R. §§ 639.7, 639.9.

Moving Forward

Employers plainly have many issues to tackle in Harvey's wake, including balancing the needs and morale of their workforce with continuing the business of doing business. In addition to the topics highlighted herein, employers may need to consider issues related to employee assistance programs, property and casualty claims, workers' compensation inquiries, benefits continuation options, and tax reporting duties—all on top of basic operational needs. We hope our clients and friends have weathered the storm safely and are prepared to rebuild as needed. We are standing by to answer any questions and help however we can.

8/31/17 UPDATE

On August 30, 2017, the Internal Revenue Service ("IRS") announced²⁷ that 401(k)s and similar employer-sponsored retirement plans can make loans and hardship distributions to those affected by Hurricane Harvey. Someone who lives outside of the disaster area may also be able to take a retirement plan loan or hardship distribution if they want to use the money to assist a child, parent, grandparent or other dependent who lived or worked in the area affected by Hurricane Harvey. According to the IRS website, withdrawals must be made by January 31, 2018. For a complete list of eligible counties, visit <https://www.fema.gov/disasters>.

²⁷ <https://irs.gov/pub/irs-drop/a-17-11.pdf>