

# Insight

IN-DEPTH DISCUSSION

SEPTEMBER 8, 2017

## Hurricane Irma: 10 Challenges for Employers

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Hurricane Irma shows no sign of relenting as it barrels toward Florida and the Southeast Coast of the United States. As noted in [a prior Littler article](#) about Irma, safety and security are the top priorities at this point.

Once the storm passes, however, employers will face a host of unusual challenges, on top of their basic operational needs and personal concerns. We discussed a number of these employment issues in-depth in our recent article concerning [Hurricane Harvey](#), which wreaked havoc in Texas and Louisiana. Because employers in the Southeast will now contend with the same dilemmas, we briefly highlight the key issues likely to affect employers in Irma's path. Employers are encouraged to review our prior articles for more detail.

### 1. Calculating the Wages of Non-Exempt Employees

Under the FLSA, as well as pertinent state laws, 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.

There may be exceptions during a weather event for waiting time, or on-call time. For example, the FLSA, as well as North Carolina law, 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.<sup>1</sup>

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<sup>1</sup> See North Carolina Dep't of Labor, [Handy Reference Guide to the North Carolina Wage and Hour Act](#).

## 2. Calculating the Wages of 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.<sup>2</sup> This rule also applies if exempt employees work only part of a day.

If an employer is open for business, on the other hand, an exempt employee who misses work 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. Unpaid leave, in full-day increments, may be an option for employees who do not have a leave account balance.

## 3. Reliance on Remote Work

Employers trying to get up to speed after Irma may choose to consider allowing employees to work remotely (i.e., at home), whether as a long-term or short-term solution. As noted earlier, non-exempt employees must be compensated for all time spent working. Thus, employers must pay non-exempt employees for performing any work remotely and, moreover, may need to rely on employee self-reporting of hours worked in such a scenario. Exempt employees, too, must be paid their regular salary in this circumstance, unless leave time can be applied for partial days.

## 4. Potential Delays in Wage Payments

One possible consequence of a natural disaster such as Irma is the delayed processing of employees' wage payments. This situation can cause employers to unintentionally run afoul of state law. Georgia, for example, requires employers to establish pay periods divided into at least two equal periods within the month.<sup>3</sup> In South Carolina, moreover, an employer must provide 7 calendar days' advance notice to employees if there is a change to the designated payday or a decrease in the employee wage rate.<sup>4</sup> Yet, as a practical matter, employers may be unable to process or fund payments to satisfy these requirements, especially in the immediate wake of the storm.

Although some laxity may be afforded to those who experience significant difficulty meeting these types of obligations as a result of the hurricane, the states currently in Irma's path (Alabama, Florida, Georgia, North Carolina, and South Carolina) have not indicated if there may be any relief from or waiver of the normal wage payment laws. Furthermore, if payroll is processed in these states for employees working in other states, it is important to be mindful of those state laws and potential penalties for delayed payment.<sup>5</sup>

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2 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).

3 Ga. Code Ann. § 34-7-2. In addition, the payments made on each pay date must correspond to the full net amount of wages or earnings due the employees for the period for which the payment is made.

4 S.C. Code Ann. § 41-10-30(A).

5 For example, if the timely payment of wages to employees in California is compromised, an employer may be subject to monetary penalties under that state's labor code.

## 5. Applicable Leaves of Absences

Employers should bear in mind that employees may be entitled to use certain types of leave to deal with the ramifications of Hurricane Irma.

For example, employees who 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. Dade County, Florida has its own family and medical leave ordinance, for example.<sup>6</sup> Even if not covered by federal, state, or local laws providing for time off for illness or injury, an employee may qualify for sick or other leave under a company policy or collective bargaining agreement.

Certain employees may be eligible for leave as volunteer emergency responders. In South Carolina, an employer may not terminate an employee who serves as a volunteer firefighter or EMT and who responds to a declared state of emergency in lieu of coming to work.<sup>7</sup> Alabama and North Carolina have similar laws providing for such unpaid leave.<sup>8</sup>

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), employees may take a leave of absence for duty 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 System<sup>9</sup> into federal service,<sup>10</sup> 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.<sup>11</sup>

Relatedly, to the extent that employers relax enforcement of their leave policies in light of Hurricane Irma, they should remain mindful of state and federal antidiscrimination laws. Employers should try to ensure that all exceptions are based on legitimate, non-discriminatory reasons and are consistently applied across the workforce.

## 6. Duty to Provide Reasonable Accommodations

Additionally, employers in the affected region should be prepared to address 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 Irma’s impact may be entitled to reasonable accommodation, employers should take all such inquiries seriously.

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6 Dade County, Fla., Ordinance §§ 11A-29 et seq.

7 S.C. Code Ann. § 6-11-1460.

8 Ala. Code § 36-21-160; N.C. Gen. Stat. § 166a-19.76.

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

10 38 U.S.C. § 4303(13).

11 As of this publication, President Trump has not yet designated any such category of persons. Service in the National Guard for a unit activated by a state governor, rather than the president, and work for the FEMA generally would not be considered part of the uniformed services under USERRA.

## 7. Unemployment Benefits

Employees who are displaced from their positions due to Hurricane Irma may be eligible for unemployment compensation from the applicable state workforce commission.<sup>12</sup> 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 declarations issued by President Trump, unemployment benefits could be offered to certain workers who lose their jobs due to Hurricane Irma, but do not qualify for state benefits, such as self-employed individuals. 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.

## 8. Federal WARN Notification

Employers that ultimately decide to close a facility, or implement a mass layoff, due to Irma's effects must evaluate whether notice will be required under the federal Worker Adjustment and Retraining Notification Act (WARN).<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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 notice is retroactive), and they must state why they were unable to give notice earlier.<sup>16</sup>

## 9. State Plant Closure or Mass Layoff Notifications

Some states have enacted mini-WARN laws or otherwise require notice to a state agency in the event of a mass layoff. Neither Florida, nor North Carolina, has such a state statute. But other Southeastern states have certain notice duties that might be triggered following Irma.

Specifically, in Alabama, Georgia, and South Carolina, employers are obligated to notify the state unemployment agency of a mass separation. Alabama and Georgia require notice about separations due to lack of work, implemented at about the same time and for the same reason, involving 25 or more employees from a single establishment.<sup>17</sup> Notice in Alabama is due as soon as the separation date is determined "and in no event later than the date of the actual separation." Employers in Georgia must provide notice, using specified forms, to the state Department of Labor within 48 hours of the layoff.

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<sup>12</sup> General information about unemployment benefits is available from the [Alabama Department of Labor](#), the [Florida Department of Economic Opportunity](#), the [Georgia Department of Labor](#), the [North Carolina Division of Employment Security](#), and the [South Carolina Department of Employment and Workforce](#).

<sup>13</sup> See, e.g., Bruce Millman & Daniel Thieme, [WARN Notice – One More Burden for Employers Recovering from Sandy?](#), Littler Insight (Nov. 27, 2012).

<sup>14</sup> 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. A job loss includes a layoff of six months or more. 29 U.S.C. § 2101(1)-(3).

<sup>15</sup> 20 C.F.R. §§ 639.4, 639.6.

<sup>16</sup> See, e.g., 29 U.S.C. § 2102(b); 20 C.F.R. §§ 639.7, 639.9.

<sup>17</sup> See Ala. Admin. Code r. 480-4-1-06(ah), 480-4-3-10; Ga. Comp. R. & Regs. 300-2-4-10.

Meanwhile, in South Carolina, notice of a mass layoff involving 10 or more workers must be filed with the pertinent office no later than 10 calendar days (exclusive of Sundays and holidays) after the separation.<sup>18</sup> Employers are instructed to use a designated form for notice. South Carolina employers also should inform all affected employees that notice has been submitted, and a claim therefore initiated, so as to avoid duplication of efforts and redundant filings.<sup>19</sup>

## 10. Qualified Disaster Payments to Employees

Internal Revenue Code section 139 provides that an employer may make a payment to an employee that constitutes “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. A “qualified disaster” is generally one that is declared by the President of the United States. Prior hurricanes have been presidentially declared “qualified disasters” within certain affected areas.

In short, with such a designation, 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.

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. Employers also may need to handle employee requests for loans and hardship distributions from employer-sponsored retirement plans, if the funds are needed to rebuild or to assist a close relative or dependent affected by Irma.

For now, we hope our clients and friends stay safe, and we are ready to help employers tackle this complex situation as it unfolds.

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<sup>18</sup> S.C. Code Ann. Regs. 47-19.

<sup>19</sup> South Carolina Dep’t of Emp’t and Workforce, *Employer Handbook on the South Carolina Code*, at 50 (July 2011), available at <https://dew.sc.gov/docs/default-source/employers/employerhandbook.pdf>.