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In the wake of the devastating earthquake in Haiti, U.S. employers, even those without operations in Haiti, will be facing employment issues related to the aftermath of the tragedy and the ongoing relief effort.

Employment Issues Following the Haitian Earthquake

By Tanja L. Darrow and Jim E. Hart

Swift action must be partnered with careful planning when responding to any disaster. This holds especially true in the case of the devastation in Haiti. The 7.0 magnitude earthquake that struck on January 12, 2010 was the worst in the region in more than 200 years. The International Red Cross fears that as many as 150,000 people have died and untold numbers are still trapped.

Lack of food, shelter, supplies, expertise, and infrastructure, as well as possible civil unrest, are only some of the massive challenges Haiti faces. The crisis has prompted a multi-national response at governmental, corporate and individual levels. This article addresses common issues that employers face during a disaster and those that have arisen following the earthquake in Haiti, in particular: (1) responding to various employment-related issues encountered when a corporation and its employees seek to aid the relief effort either with monetary donations or donation of skill, expertise or goods; and (2) managing personnel issues for companies with business interests in Haiti.

CORPORATE EFFORTS TO HELP EARTHQUAKE VICTIMS

Donations, Corporate Restrictions on Solicitation and Use of Corporate Resources

Many companies maintain non-solicitation policies to avoid disruptions to business operations or disturbance of personnel and/or clients. Companies that prohibit commercial solicitations at work or through company resources (*i.e.*, selling, purchasing or advertising goods or services for any outside business interests or for profit/personal economic benefit) may be allowing exceptions during this time of urgent calls for donations and aid for the victims of the Haiti earthquake. However, this innocent good deed could violate the company's non-solicitation policies or restrictions on use of e-mail or other electronic resources. Employers should evaluate their policies and determine whether they are applicable or warrant relaxing under the circumstances to employees' efforts to provide aid to Haiti. Making exceptions to a written or practical policy may give rise to a claim that the policy doesn't exist or exceptions should be made for other kinds

of solicitations, including union-related communications. Consequently, any employer considering modifying a specific policy should consult with counsel with respect to the implications of an exception. To avoid the legal implications of exceptions to corporate policies employers should consider controlling directly any relief effort involving its employees.

Sending Workers Abroad to Assist in Relief Efforts

Corporations often have the expertise and infrastructure to play a critical role in alleviating suffering and destruction following an earthquake. Corporate-sponsored missions to Haiti to bring medical, emergency response, engineering, building or other skills are one way to help. In so doing, a corporation will have to think through the various implications of such a trip, particularly in an environment where there is the potential for civil unrest, such as in the wake of a massive earthquake. For a company looking to send staff to Haiti for relief operations, either by paying them if they volunteer or by sending them on a sponsored trip, many basic wage and hour, workers' compensation, and other issues must be considered for the time the employees are in Haiti. A company will need to determine which U.S. or relevant state laws, if any, apply to employees while in Haiti. Some laws, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act and Title VII expressly state that they apply to employees while outside the United States, but many others do not. Companies should have a firm grasp of which relevant state or federal laws apply while an employee is in Haiti. Some companies have taken the extra step in analogous situations of asking volunteers to sign releases or waivers of liability associated with the trip. In so doing, a company must be aware that some worker protections cannot be waived by release.

Workers' Compensation

Similar to sending employees on any business trip, employers will want to ensure there is adequate insurance coverage for employees sent abroad to assist with the Haitian relief effort. Because it is often mandatory, workers' compensation is a typical form of insurance coverage that must be considered. When deploying employees to Haiti, at a minimum, a company should call its workers' compensation carrier to ensure there is coverage for its employees participating in overseas aid work. Workers' compensation is state specific. In many cases, employees are covered by workers' compensation if the employer sends the employee abroad and compensates the employee. However, employers should be mindful that coverage may not extend beyond a particular state or the territorial United States, and the company should check the scope of its respective policy. Depending on the company at issue, relief work may be considered "usual and customary" to the company's typical operations. Nevertheless, some workers' compensation carriers may not consider relief efforts to be part of the "covered territory." If there is no coverage, a company could seek a stand-alone policy to cover the foreign relief operations.

Travel Precautions

A company should also consider alerting employees to the dangers of traveling to a foreign region severely affected by a natural disaster. For instance, the malnutrition, lack of shelter, proliferation of injuries, and unsanitary conditions that exist in the aftermath of the earthquake in Haiti will increase the risk of the spread of communicable disease. To the extent possible, companies should take precautions for those employees, contractors or volunteers exposed to these conditions. One of the best tools to ensure the safety of employees is obtaining as much information about conditions on the ground. Companies should search out available resources. For example, the Centers for Disease Control issues guidance for relief workers and others traveling to Haiti for earthquake response. It can be found at wwwnc.cdc.gov/travel/content/news-announcements/relief-workers-haiti.aspx. In this same regard, the State Department has issued travel tips that advise on several topics, including registering with the U.S. embassy, safety and security, crime and criminal penalties. This information can be found at travel.state.gov/travel/cis_pa_tw/cis/cis_1134.html.

With possible breakdowns in compliance or enforcement mechanisms of Haitian health regulations, a company with a workforce in Haiti should review or formulate its own emergency response plan, which can be based, for example, on domestic emergency response plans for outbreaks of communicable diseases. These plans should designate a point person, set out protocols for reduced operations during an occurrence of outbreak, put in place travel controls, limit face to face meetings, manage the return to work of contagious individuals, and implement distancing strategies, coughing etiquette and precautions as needed.

Compensating Volunteers

Employers who send employees to volunteer to participate in the mission in Haiti should remain mindful of compensation issues. For example, with respect to non-exempt employees, it is important to note that the Federal Labor Standards Act, which governs wage and

hour issues in the United States, provides an exemption for employment in foreign countries. Consequently, the FLSA would not apply to any full workweek during which an employee performs work in a foreign country, even if the employer has its main office in the United States. In addition, there may be applicable exemptions (including for bona fide volunteer activities) and remedies for those employees that may claim not to have been appropriately compensated. For additional information, employers can visit the Department of Labor's website at www.dol.gov/whd/FLSA/index.htm. For the same reasons, a company should be sure to check whether the state(s) from which they operate seek to cover employees working abroad.

Donations

It is estimated that the devastating earthquake in Haiti affected more than three million people, leaving many children orphaned and citizens homeless, seriously injured, or far worse. There is little doubt the impact will be felt for months and years to come. The United Nations recently requested \$562 million in aid, earmarking half for food aid, and the remaining half for medical aid, shelter, water, sanitation and food preparation equipment. Many will want to be a part of the global response to Haiti's emergency. For those interested in assisting, the United States government has established a webpage with information: www.whitehouse.gov/haitiearthquake_embed. While there are virtually countless organizations accepting donations on behalf of the relief effort in Haiti, donation opportunities can also be found at the following websites:

www.clintonbushhaitifund.org

www.usaid.gov/helphaiti

www.redcross.org

www.care.org

Aside from direct contributions or matching employee donations, employers and employees may also consider creative means of contributing. For example, some companies allow employees to cash out paid time off in exchange for contributions. A few companies with strict dress codes will allow employees to wear jeans and casual wear in exchange for contributions to the relief effort. While donations that trigger wage and hour claims should be reviewed by counsel, there are many ways to help and companies and their employees can exercise some flexibility.

Adopting Children from Haiti

During this time of great need, employers may encounter employees interested in adopting a child orphaned by the earthquake in Haiti. Experts estimate that more than 50,000 children were living in licensed orphanages in Haiti when the quake hit. Six hundred of them were in the process of being adopted. In 2009, U.S. citizens adopted approximately 330 children from Haiti. Although the earthquake has literally crushed buildings that housed the adoption programs, causing a complete stalling of the adoption process, interested families should still visit the Haiti Earthquake & Disaster Information Page for more information at www.haiti.adoption.com.

Immigration Issues

Given the displacement of thousands caused by the horrific earthquake in Haiti, many employers may face immigration issues either from their Haitian workforce, or employees attempting to gain visas for Haitian family members. Fortunately, the U.S. Citizenship and Immigration Services said Homeland Security Secretary, Janet Napolitano, granted Haiti Temporary Protected Status ("TPS") because of the earthquake. As a result, the nearly 200,000 Haitians in the United States when the earthquake struck will be allowed to remain and work for up to 18 months to aid in their country's recovery. Temporary Protected Status is a temporary immigration status granted to eligible nationals of a certain country because of "temporary negative conditions," including armed conflict or an environmental disaster, that prevent nationals from returning home safely. Applications for TPS opened this week, and will continue for 180 days. Applicants must prove their Haitian citizenship, as well as their residence in the United States before the earthquake struck. Individuals without nationality who last resided in Haiti also may apply for TPS. Although shielded from deportation, Haitian TPS holders cannot become permanent U.S. residents or U.S. citizens. Additionally, since the earthquake, U.S. Immigration and Customs Enforcement has halted the deportation of Haitians.

Expansion of Leave Policies

In times of disaster, with family members missing and communication methods gone, some employees may request leave time to go to the affected area to render aid or engage in search activities. Also, injuries sustained during the disasters may qualify employees for leave. Even if an employer's policies do not allow non-medical leaves of absence, the circumstances of a disaster will probably present extraordinary circumstances that may allow an employer to grant the time off to employees affected by the catastrophe. 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 leave policies. Companies should consider the balance of the impact of exceptions to corporate policies with public service and image concerns. There are repercussions to a company's public image in the community from its response in times of great public need. This is particularly true with respect to the duration of bereavement and military leaves pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) for those who may be called to duty to participate in the U.S. effort to provide relief to Haiti.

HELPING AND MANAGING A COMPANY'S HAITIAN WORKFORCE

Communication with Employees

As a result of the complete destruction of telephone service in the devastated areas, telephone communication with employees who were working in Haiti is virtually impossible. However, Haiti's Internet connectivity remains robust even after the earthquake, but only because its telecommunications infrastructure is not dependent on the country's lone undersea fiber optic cable link, which was knocked out during the quake. Moreover, the country's leading telecommunications provider continues to fortify its communications infrastructure. Consequently, a company with an operating website might consider creating space on that website for employee communications. If a website does not have password-protected communications already, consider adding that capability. For example, employees could use their name and employee ID or Social Security number (if permitted by state law) to access and communicate private information. Where possible, an employer's website should set out, at least in an area of the website to which access is restricted to employees, the company's current and anticipated operating plans – for example, expected hours of operation, facilities being reopened, temporary alternative work locations, and company units that will resume operations. A company should consider candidly assessing on its website the possibility of furloughs, layoffs, payment arrangements, benefits, or even the closing of the business.

Delayed Wage Payments

One anticipated effect of a disaster is the delayed processing of employees' wage payments. Employers' wage payment obligations vary from state to state. Companies experiencing significant difficulty meeting payroll obligations as a result of unforeseen disaster, including the inability of service providers to process payrolls, have no guarantee that they will receive leniency in the enforcement of wage payment laws.

To the extent an employer has a workforce in Haiti that is unionized, employers are advised to review their collective bargaining agreements, some of which address this issue directly, or consider approaching the union to address the delayed wage payment issue before unilaterally delaying any payments.

We also suggest that employers promptly notify their employees of any wage payment processing problems and advise them of when they can expect payment, particularly where employees are on direct deposit and might otherwise write checks against anticipated deposits.

Providing Time Off

Employers should be aware that in the event of a natural disaster, such as an earthquake, many employees will need time off. After a disaster, employers can effectively help ease what may otherwise be crippling emotions by providing additional time off to employees.

Employee Benefits

Since employees may be using medical benefits (including counseling), information on the status of benefits, who to contact regarding

claims, and how benefits are to be maintained in the unique circumstances of the disaster, should be communicated via the company's website. Consider providing general notice regarding benefits through posting "legal notices" with newspapers of general circulation in the disaster area (many newspapers will publish electronically before they resume "hard copy" distribution) and in areas where employees may have relocated, including areas where government sponsored shelters are being maintained.

Utilization of Employee Assistance Programs (EAP)

Many employers have EAPs, which are typically capable of providing individual or group counseling and support. These programs can be very effective when employees in a workplace have experienced a traumatic event. When an entire region has suffered a disaster, employers should consider offering the services of outside grief counselors, if necessary or requested by employees, to help employees cope with emotional issues.

Employers with the necessary resources that do not yet have an EAP in place may wish to consider implementing one as soon as possible. Employers may also inquire of their insurance companies of the availability of EAP services, as many medical insurance policies cover counseling and other services similar to those provided by an EAP.

Continuation of Employee Benefit Programs

In a disaster, the widespread closure of facilities and the wholesale displacement of employees, many of whom may have been injured, create unprecedented benefits issues. The recent tragedy will require employers to make coverage decisions such as whether they will maintain benefits for employees – especially where the employee, or the business, may at least temporarily not be working or operating. Should an employer decide to continue coverage, the employer should contact its benefits vendors to determine how coverage is to be maintained during this period.

Assuming that a business closes indefinitely because of a disaster, a key issue to employees will be the status of the company's benefit plans and whether employees are eligible to continue to participate in the plans. Most insurance policies require a minimum number of active employees for a policy to continue in effect. Also, health and life policies typically provide for conversion rights when policies terminate for other than non-payment of premiums, and where no replacement coverage is obtained.

Time sensitive elections and employee responses that may not have been extended by the government, such as the allowable 60 days for employees to elect COBRA coverage, may be extended by a plan administrator/employer. However, such extension cannot be done unilaterally and requires the agreement of any affected vendor and the adoption of a uniform extension "standard" with respect to employees in like circumstances.

Going forward, companies renewing insurance policies of all kinds should confirm the availability of benefits for natural disasters.

Death Benefits

Employers who have lost employees as a result of the earthquake in Haiti should promptly review the possibly applicable policies for coverage, including life insurance, accidental death and dismemberment, and/or Haitian workers' compensation benefits. Appropriate information and forms should be communicated as promptly as possible to the next of kin. Employers should be aware that many states have specific statutes governing the distribution of final paychecks and death benefits, which may apply in those circumstances where a deceased employee has more than one beneficiary.

Property and Casualty Insurance

Employers who suffer losses of any type should notify their applicable insurance carriers as soon as possible. Not only will this expedite the processing of claims and receipt of necessary benefits, but many insurance policies have strict time limits for reporting losses. Companies should also check their policies to see if they have "business interruption" coverage or benefits.

RECOMMENDATIONS FOR THE FUTURE

Few can dispute that given our experiences with sometimes traumatic changes and events of the past few years, employers are

becoming much more prepared for emergency situations. The Department of Homeland Security (DHS) identified and endorsed a “national preparedness standard” known as NFPA 1600 prepared by the American National Standards Institute. The NFPA is now the “National Preparedness Standard” for private businesses and offers a comprehensive process for establishing an emergency preparedness plan. The 2010 edition of the NFPA 1600 can be found at www.nfpa.org/assets/files//PDF/NFPA16002010.pdf. While this article focuses on standards to be applied in Haiti, the principles described in the plan can be generally applied whether in or outside the United States.

Many businesses have utilized the NFPA 1600, a voluntary standard, as a benchmark against which preparedness is measured. Employers should remain mindful that guidelines and recommendations can quickly evolve into legal requirements. According to NFPA 1600, an employer’s disaster preparedness plan should include the following:

- Publish evacuation procedures to all employees and routinely conduct evacuation drills (as well as fire drills);
- Maintain accurate emergency contact information to reach employees and next of kin;
- Establish and publicize mechanisms (e.g., website, telephone chain, recorded announcement) through which the employer may apprise its employees of any pertinent developments;
- Reassess the means and manner in which critical information is stored, both physically and electronically to prevent irreparable physical damage from crippling the company’s operations; and
- Review existing property, casualty, business interruption, life, and other insurance policies, and modify such coverage where necessary or prudent.

Additionally, employers have a general duty to provide employees with a safe workplace, and we strongly encourage employers to conduct a workplace safety audit on these and other issues. We suggest a five-step audit, for which a company may want to retain an appropriate expert, on the following:

1. Emergency responsive procedures;
2. Evacuation procedures;
3. Identification of all natural disaster possibilities and reasonable control measures;
4. Evaluation of health and safety training programs; and
5. Review of written safety programs.

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 Tanja L. Darrow is a Shareholder in Littler Mendelson’s Los Angeles office, and Jim E. Hart is a Shareholder in Littler Mendelson’s Orange County office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Darrow at tdarrow@littler.com, or Mr. Hart at jhart@littler.com.