

Cleaning Up from Hurricane Sandy: Important Employment Issues

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Natural disasters like Hurricane Sandy can create a host of employment challenges for employers, from wage-hour concerns to employee leave and employee safety. As businesses struggle to re-open and resume operations, here are some important employment guidelines to consider.

Are Employers Required to Pay Employees for Missed Work Time Because of a Natural Disaster?

Generally, employers are not required under federal law to pay non-exempt employees for hours not actually worked by them, including absences caused by a natural disaster. The employer has the discretion to allow or require non-exempt employees to use paid leave available to them for such absences. However, the employer may be obligated to pay non-exempt employees for hours not worked in the following situations:

- The employer has non-exempt employees who are paid fixed salaries to work fluctuating work weeks. Such employees must be paid their full weekly salaries if any work was performed during the week of a natural disaster.
- The employer agreed to pay for these types of absences pursuant to a collective bargaining agreement or its employee handbooks or policies.

- The employer requires certain non-exempt employees to be on-call at or nearby the workplace during a natural disaster (such as maintenance and repair, public safety, IT, or other essential personnel) and the employee cannot leave or use that time effectively for his or her own purpose. In these situations, the employees must be paid for the on-call time, even if no work is actually performed. This would not apply, though, if the employee were simply at home and available to be reached by company officials if needed.
- The employer requires employees to wait at the workplace either during or after the natural disaster (i.e., for power to return to the workplace). The waiting time is compensable.

Exempt employees generally must be paid for full or partial day absences caused by office closures lasting less than one work week due to a natural disaster, if s/he performs any work in that work week, including working from home. However, subject to the terms of any collective bargaining agreement or employment policy, an employer may require exempt employees to use paid leave available to them. However, if an exempt employee does not have sufficient accrued paid leave to cover the work time missed due to any weather closure, the employee must still be paid his or her full weekly

salary. Closures for a full work week need not be paid if no work is performed. Further, after re-opening the business, an exempt employee's absence caused by transportation difficulties is considered by the U.S. Department of Labor (DOL) to be a personal absence and the employer can place the employee on leave without pay, require the employee to use accrued leave time for a full day of missed work or to "make up" the lost time after s/he returns to work.

To avoid problems, employers should decide as soon as possible, and preferably before re-opening, whether they will offer paid "weather days" for employees who are absent because of a natural disaster and whether employees will be allowed or required to use vacation or paid time off to cover absences. Employers should also ensure that their payroll systems are accessible from alternate locations, if needed, and be prepared for changes such as employee absences, working from home or longer shifts. Also, state laws may impose additional payment obligations on an employer following a natural disaster and employers are advised to consult with legal counsel to ensure that they are in compliance with such laws.

Are Employees Entitled to Leave During or After a Natural Disaster?

Leave to Care for a "Serious Health Condition." The Family and Medical Leave Act (FMLA) does not expressly require employers to give employees time off to attend to personal matters arising out of a natural disaster. However, an employee would qualify for FMLA leave when, as a result of a natural disaster, the employee suffers a physical or mental illness or injury that meets the definition of a "serious health condition" and renders him or her unable to perform the job, or the employee is required to care for a spouse, child or parent with a serious health condition who is affected by the natural disaster (for example, a covered relative injured during the natural dis-

aster or power outages affecting administering medication or use of equipment). Such an impairment may even be significant enough to rise to the level of a disability, triggering an employer's obligations under the American with Disabilities Act (ADA) and similar state and local laws. For example, in the wake of a natural disaster an employee may become afflicted by post-traumatic stress disorder (PTSD) that renders the employee unable to perform his or her job. In such a situation, the employee may be entitled to take FMLA leave. The employer may be required to provide reasonable accommodations to the employee under the ADA and/or similar state or local statutes, such as the option to work from home or provide leave to receive treatment or counseling for his or her condition, as long as it would not place undue hardship on the operation of the employer's business.

When an employee requests leave as a result of a natural disaster, the employer should obtain as much information as possible from the employee to determine whether the absence qualifies as protected leave. Employers should ensure that medical certification is sufficient to cover the absence at issue. Where more information is required, employers must follow up with the employee to obtain the information necessary to designate the absence as FMLA leave. When an employer has reason to doubt the reasons for FMLA leave, they have the right to seek a second opinion to ensure FMLA leave is appropriate.

Military Leave and Emergency Workers. Employees called upon to serve as relief workers to help with a natural disaster are most likely protected under the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA) along with members of the national guard, reserve and uniformed services. Employers are required to provide unpaid leave to such employees upon timely notice from the employee (how much notice depends on the circumstances), written or oral, that they have been

called to service. Employers are also prohibited from discriminating against such employees because of their membership, application for service, or obligation for service in the armed forces, including terminating, denying employment, re-employment, retention, promotion, or any other benefit of employment. Throughout the employee's period of leave, the employee's seniority, health care and benefits must be maintained and the employee is entitled to re-employment rights upon timely application for return to work. New York has state laws patterned after USERRA that provides similar rights to employees called to service following a natural disaster.

Of course, employers may choose to offer employees paid leave for time spent volunteering to assist with emergency services and disaster relief efforts. Where employers maintain leave banks for employees, they can also allow employees to donate leave to the leave bank and then award the donated leave to other employees who, in turn, use the leave to volunteer disaster relief services to the community.

Are Employees Who Are Not Working Because of a Natural Disaster Entitled to Unemployment Benefits?

State unemployment benefits may be available to employees who are out of work due to a natural disaster. Unemployed workers will need to meet the standard eligibility requirements for collecting such benefits, including earning the appropriate level of wages during the "base period" of time and being out of work for reasons other than their own misconduct. An employee's failure to report to work after a natural disaster, without good cause, and after being directed to do so by an employer who is open for business, may qualify as misconduct. New York employers can consult the website of the [New York State Department of Labor](#) for more information. New Jersey employers should check the website of the [New Jersey](#)

[Department of Labor and Workforce Development](#). Connecticut employers can access the website of the [Connecticut Department of Labor](#). Pennsylvania employers can review the website of the [Pennsylvania Department of Labor and Industry](#).

Alternatively, employees may be eligible to receive Disaster Unemployment Assistance. This is a federal program under the Department of Labor and administered by the states. It provides financial assistance to individuals who have lost their jobs or businesses as a direct result of a major disaster declared by the President, and who are not eligible for standard unemployment insurance benefits. This assistance is also available to self-employed individuals, owners of farms and ranches, farm and ranch workers, as well as fishers and others who are not normally covered by state unemployment compensation. The President has declared New York, New Jersey, Connecticut, Delaware, Pennsylvania, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, West Virginia, and the District of Columbia to be federal major disaster areas following Hurricane Sandy. Information is or should be available in the near future from these states' departments of labor.

What Other Employment Issues Should You Be Aware of Following a Natural Disaster?

Employee "Volunteers." All employers, including private nonprofit organizations, should be mindful of allowing employees to "volunteer" their time to assist the employer after a natural disaster. According to the DOL, if any employee performs duties that they regularly perform and that benefit the employer, they cannot be treated as "volunteers" and must be paid their regular compensation for their services. Employers are advised to consult with legal counsel to ensure that employees are being treated appropriately following a natural disaster.

Continuation of Employee Benefit Programs. Employers should decide and discuss with their vendor as soon as possible whether and to what extent they will maintain coverage of employee benefits during situations where their business is not operating and/or employees are not working during and following a natural disaster. For a COBRA-covered health plan, the decision to discontinue coverage and terminate any and all benefit plans following a natural disaster must be communicated to the employees within 30 days or less of the natural disaster. If an employee is no longer eligible for coverage under an ongoing plan because the employee is not working during or after a natural disaster, the employer is required to send COBRA packages to employees and their covered dependents within 45 days of the “qualifying event” (most likely, the natural disaster). It is possible that the government will provide some deadline extensions and employers are advised to consult with their vendor or legal counsel to ensure they are in compliance.

Worker Adjustment and Retraining Notification Act (WARN). The federal WARN Act, 29 U.S.C. § 2101 et seq., which imposes various notice requirements on certain larger employers prior to plant closings and or mass layoffs contains an exception for events directly caused by a natural disaster that permits employers to give notice to employees as soon as practicable following the disaster. However, the employer will be required to affirmatively prove that it has satisfied the exception if it provides less than 60 days notice to employees. Some states, including New York and New Jersey have mini-WARN acts that apply to smaller employers. See the New York Worker Adjustment and Retraining Notification Act, N.Y. Lab. Law §§ 860 to 860-i (2011) and N.Y. Comp. Codes R. & Regs. tit. 12, § 921-7.1 (2011); the “Millville Dallas Airmotive Plant Job Loss Notification Act” (“NJ WARN Act”), N.J.S.A. 34:21-1, et seq. Connecticut has a plant closing law, see Conn. Gen. Stat. § 31-51o (2012). The City of

Philadelphia has an ordinance requiring notice for a group layoff which can be found at Title 9, Chapter 9-1500 of the Philadelphia Code.

Occupational Safety and Health Act (OSHA). Under OSHA, almost all employers are responsible for protecting employees from “imminent danger” in the workplace which is defined as “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” Such dangers would include certain “natural phenomenon” such as a natural disaster that threatens the safety and health of employees. Employers should be mindful of the unique safety concerns presented during and after a natural disaster when requesting employees come to work. OSHA provides employees with the “right to refuse to do a job if they believe in good faith that they are exposed to imminent danger, and good faith means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe that it did exist.” Thus, if an employee reasonably believes that an employer is putting him or her in imminent danger by demanding that they return to work during or after a natural disaster, s/he may file a complaint with OSHA and ask for whistleblower protection. OSHA has established pages on its website where employers can access numerous audio and printed guidelines to specific work practice dangers likely associated with clean up and recovery, including flooding, electrical, fall protection, personal protective equipment, chain saws, mold, bloodborne pathogens and bacterial issues, tree trimming, trenching, and heat exposure. See www.osha.gov.

National Labor Relations Act (NLRA). Employers’ treatment of employees following a natural disaster may be subject to the terms of a collective bargaining agreement. Employers

may be required to meet with labor representatives following a natural disaster and confer in good faith with respect to any consequent changes in wages, hours and other terms or conditions or employment, including the effects of a decision to go out of business completely. Further, like OSHA, the NLRA also gives employees the right to refuse to work in conditions they believe (reasonably and in good faith) would be unsafe. Thus, the employer may be required to make certain changes in the workplace. The refusal of employees, whether union or non-union, to work because of their reasonable good-faith belief that their safety will be compromised may be a “concerted activity” that is protected under the NLRA. Employers, unionized or not, also should be aware that employee complaints or comments posted on social media, including Facebook, YouTube, Twitter, LinkedIn, media sites and the like, concerning workplace safety, leave or wage policies following Hurricane Sandy, may well be protected “concerted activity” under Section 7 of the NLRA and that discharge or discipline for such activity may be considered unlawful by the NLRB. ♦

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