

Employer Obligations in the Aftermath of a Natural Disaster

Many questions have arisen regarding an employer's obligations to its employees in the aftermath of Hurricane Sandy. Below we identify key issues for all human resources professionals to consider in evaluating their obligations in the aftermath of a weather emergency / natural disaster.

I. Employer Pay Obligations

Natural disasters such as Hurricane Sandy force employers to make last-minute decisions to close all or part of their operations or otherwise modify work schedules. But does an employer still have an obligation to pay wages despite the closure or employee's inability to work due to the natural disaster?

With respect to non-exempt employees, there is generally no obligation to pay wages for time that was not worked. However, if those employees perform work from home or log hours while away from the office due to a natural disaster, that time must be properly recorded, maintained and compensated. Additionally, some states like New York require "call in" or "show up" pay for employees who report to work under these circumstances. *See, e.g.,* 12 NYCRR § 142-2.3.

Exempt employees paid on a salary basis typically must be paid their weekly salary even if they work only a portion of the workweek. Employers may not make salary deductions for absences that result from the *employer's* partial-week closing of operations, including closings due to weather-related emergencies or disasters. Accordingly, absent any other permissible deduction, exempt employees must be paid their full salary if they perform any work in a workweek and only miss work time due to the employer's closure of operations. However, closures for a full workweek need not be paid, provided no work is performed. Further, full day deductions are permissible where the employer is open for business and the employee does not come to work (or perform any work remotely), as the employee is then absent for "personal reasons" within the meaning of 29 C.F.R. § 541.602(b)(1). *See* Dep't of Labor Opinion Letter FLSA2005-46 (Oct. 28, 2005).

The next layer of analysis with respect to exempt employees concerns whether time missed but paid can be deducted from accrued vacation or other "paid time off" (PTO). Such deductions do not violate the FLSA provided the full salary is paid, but many state laws regulate PTO. Again, provided no work is performed by the exempt employee, deductions from PTO corresponding to payment for the missed time generally are lawful. For example, should the employer open for business and the employee is unable to attend work due to the weather or storm-related damage, such time maybe deducted from the employee's accrued PTO under most state laws, including New York.

II. Leave Issues

Wage and hour concerns are not the only type of employment issues employers should consider in the wake of a natural disaster. Employers also should be familiar with state and federal leave and disability laws and how such laws may affect employees who need to take leave as a result of such a disaster.

Family and Medical Leave Act (FMLA). The FMLA does not require employers to provide employees time off to attend to personal matters arising out of a natural disaster such as cleaning a flood-damaged basement, salvaging belongings or contacting insurance representatives. However, an employee *would* qualify for FMLA leave when, as a result of a natural disaster, the employee suffers a illness or injury that meets the definition of a "serious health condition" and renders them unable to perform his/her 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. Employers are reminded that employees who sustain injuries resulting from a natural disaster, or have a child, spouse or parent who sustain injuries / suffer from a medical condition related to the natural disaster, may qualify for protection under the FMLA.

Americans with Disabilities Act (ADA). Employers are further reminded that, even if an employee is not eligible for FMLA, he/she still may be entitled to a reasonable accommodation for an illness or injury resulting from the natural disaster (which could take the form of a medical leave) under the ADA and the disability discrimination provisions of the New York State Human Rights Law. Such accommodation is required so long as it does not pose an undue hardship on the employer's operations.

Military Leave and Emergency Workers. Reservist employees who are called upon to serve as relief workers to help with hurricane relief likely are protected under the Uniformed Service Employment and Reemployment Act of 1994 (USERRA) along with members of the national guard and uniformed services. Employers are required to provide unpaid leave to such employees upon timely notice from the employee. Employers also are 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 law provides similar rights to employees called to service following a natural disaster.

III. Employee Benefits

Events like Hurricane Sandy often leave employers scrambling for ways to assist those affected by the storm. Below are some of the ways employers are responding:

Leave Sharing Programs. In the aftermath of storms like Hurricane Sandy, generous employees often want to share their paid leave with employees adversely affected by the storm. Employers can set up leave sharing banks to allow donated paid leave to be used by employees that need time off on account of the storm. IRS Notice 2006-59 provides guidance for setting up these programs to avoid adverse tax consequences.

Below are some of the key requirements needed for a leave sharing program to qualify under IRS Notice 2006-59:

- The leave must be used by employees who have been adversely affected by a "major disaster," as declared by the President under Section 401 of the Stafford Act, 42 USC Sec. 5170. Hurricane Sandy has received that designation in a number of states.
- The program may not allow donors to transfer leave to specific recipients.
- Leave recipients may not convert leave received under the program into cash.
- Leave under the program must be used for the disaster.
- Leave deposited in the bank for one disaster may only be used for that disaster.

If these and other requirements under the Notice are satisfied, the IRS will not treat a leave donor as realizing income or receiving wages, compensation, or rail wages with respect to the deposited leave. This also assumes that donated leave received by the recipient will be treated as "wages" for purposes of FICA, FUTA, and income tax withholding, and as "compensation" for purposes of RRTA and "rail wages" for purposes of RURT, unless excluded under a specific Code provision. Leave donors may not claim an expense, charitable contribution, or loss deduction on account of the deposit of the leave or its use by a leave recipient.

State leave laws also need to be consulted when implementing these programs.

Employer Provided Disaster Relief. On November 2, 2012, the IRS also alerted employers that because Hurricane Sandy is designated as a qualified disaster for federal tax purposes, qualified disaster relief payments made to individuals by their employer or any person can be excluded from those individuals' taxable income. Qualified disaster relief payments include amounts to cover necessary personal, family, living or funeral expenses that were not covered by insurance. They also include expenses to repair or rehabilitate personal residences or repair or replace the contents to the extent that they were not covered by insurance. Again, these payments would not be included in the individual recipient's gross income.

The IRS also announced that the designation of Hurricane Sandy as a qualified disaster means that employer-sponsored private foundations may provide disaster relief to employee-victims in areas affected by the hurricane without affecting their tax-exempt status.

Leave-based donation program. For past events similar to Hurricane Sandy, the IRS announced in Notice 2005-68 that it would not treat cash payments employers make to certain charitable organizations in exchange for employees' paid-time-off as gross income of employees if payments are made to relief of victims of the disaster, in that case Hurricane Katrina, and are paid before a certain date.

Employees who elected to give up paid leave for this purpose could not deduct the value of paid-time-off donated as charitable contributions. If these rules were followed, the IRS would not assert that the opportunity to make this election is constructive receipt of income. Whether the IRS will make a similar announcement for Hurricane Sandy remains to be seen. Again, state leave laws also need to be consulted when implementing these programs.

IV. Workplace Safety

Finally, the Occupational Safety and Health Administration (“OSHA”) mandates that all employers are responsible for the health and safety of its employees and for providing a safe and hazard-free work environment. With the arrival and aftermath of Hurricane Sandy, as well as with any natural disaster, this obligation cannot be dispensed/ignored.

Thus, before making a decision to allow employees to return to work after a natural disaster, an employer must ensure that the work environment is safe and secure. That means, among other things, checking the structural integrity of the office; the office’s heating and cooling systems; that there are no open and obvious hazards; and that the office’s electrical systems remained intact and are no danger to the employees.

As always, feel free to contact Chris Valentino (631-247-4653), Ana Shields (631-247-4657) or John Porta (631-247-4650) of Jackson Lewis with questions.