

WE ARE UNDER WATER—NOW WHAT? LEGAL ISSUES TO CONSIDER WHEN DISASTER STRIKES

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The headlines of late--hurricanes, epidemics, cyberattacks, earthquakes, civil unrest—are a cause of concern to all of us and bring up many different employment law issues for employers. Beyond creating a disaster response and communication plan, what are the legal issues that may arise for employers before, during, and after disaster strikes.

TEXAS EVACUATION STATUTE

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 evacuation order." Tex. Labor Code § 22.002. 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." Tex. Labor Code § 22.001(2)(emphasis added). 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. Tex. Labor Code § 22.003. 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. Tex. Labor Code § 22.004.

The Texas statute 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. Therefore, employers should use caution before disciplining an employee for leaving work or not reporting to work as some employees could be affected by evacuation orders about which employers did not know.

While the statute covers an employee who "leaves work," employers should be extremely cautious not considering this statute with respect to employees who do not report to work due to an evacuation order.

The statute appears to cover voluntary, as well as mandatory, evacuations as the statute says "recommending evacuation".

The reason that an employee missed work may not always be clear, and it may be necessary for an employer to ask the reason for the absence. An employee may admit that he or she did not evacuate and missed work for another reason (*e.g.*, staying home to protect property). An employer, however, should not terminate or otherwise discipline an employee who missed work during an evacuation, absent specific information provided by the employee that the absence was not *because* of the evacuation.

For multi-state employers, other states have similar but not identical statutes that will need to be considered.

WAGE AND HOUR CONSIDERATIONS

No Emergency Exception. The Fair Labor Standards Act (FLSA) does not have an “emergency” exception that relieves employers from its obligation to pay wages or to keep accurate records. If a natural disaster like a flood destroys the records, employers will need to recreate an accounting with its employees of their best-possible estimate of hours worked.

Another issue that arises in disaster recovery is that employers treat its employees who assist in recovery operations as “volunteers” and therefore do not pay at least minimum wage. Under the FLSA, employees may not volunteer services to for-profit private sector employers. There are no general regulations that permit volunteering of services to an employer in the private sector. All hours worked must be paid, at least minimum wage. In fact, time spent in work for public or charitable purposes at the employer’s request, or under the employer’s direction or control, or while the employee is required to be on premises, is working time. 29 C.F.R. § 785.44. Therefore, if the employer is having its employees assist in clean up efforts for another entity, this time must also be paid (although it could be paid at a different rate, as long as it was at least minimum wage). There are different “volunteer” regulations for employees who work at a public-sector employer, which is outside the scope of this paper.

Generally, the FLSA does not require employers to keep paying nonexempt employees who are not working due to a natural disaster or unexpected occurrence. Employers do not have to pay *nonexempt* employees for time away from work, but an employer may not dock the pay of *exempt* workers who work any time during a week, except in full-day increments and only for time away from work not occasioned by the employer or the operating requirements of the business. This means that if an employer closes the business, and an exempt employee is ready, willing and able to work, the employer may not make deductions from the exempt employee's weekly pay. 29 CFR § 541.602.

Employers may require employees to use paid time off (vacation, personal days) for absences, but once available paid time off is used, the employer must pay exempt employees their weekly salary in any week in which the employee works, unless the employer demonstrates legitimate reasons for full-day deductions.

The employer must pay exempt employees for time missed because of disaster-related absences if the employee worked at any time during a regular workweek. The employer may dock exempt employees for complete days missed during a workweek if the employee missed work for a personal reason, sickness or disability. If the employee is available to work and the employer's place of business is closed, that would not be a personal reason permitting a full-day deduction from pay. A Department of Labor (DOL) opinion letter indicates that an employer does not have to pay exempt employees for full-day absences for failing to report to work because of circumstances related to weather emergencies (*e.g.*, transportation difficulties) when the employer is open for business. The DOL would consider this to be a personal reason for the absence. FLSA 2005-41 Opinion Letter (October 24, 2005). If an exempt employee misses an *entire regular* work week, their employer may withhold pay.

Employers also may require employees to use paid time off for time missed during disasters. Employers generally can require nonexempt employees to exhaust paid time off if the employee misses work. The employer also can require exempt employees to use paid time off even if the absence was not due to the fault of the employee, such as for time missed from work due to closures based on inclement weather or other disasters. FLSA 2005-7 Opinion Letter (January 7, 2005). Thus, an employer would not violate the

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