

Five employer considerations in the face of a natural disaster

Whether it is a hurricane threatening landfall, a wildfire devastating portions of a state, or another natural disaster, here are five issues affected employers may consider as they face employee safety issues, possible property damage, and potential work closures.

Safety Issues

Safety and security are, of course, the foremost concerns as employers prepare for any emergency. For example, as the Southeast progresses through hurricane season, both state and federal agencies have urged residents to pay attention to warnings and stock emergency supplies. The Federal Emergency Management Agency (FEMA), similar state agencies, and the Centers for Disease Control (CDC) have issued general storm and disaster preparedness information:

- [CDC preparation guide](#) for hurricanes
- [FEMA hurricane preparation guidance](#); and
- The [FEMA Mobile App](#).

Employers can also consult the U.S. [Department of Labor storm recovery](#) website for guidance on unemployment assistance, dislocated worker grants, and Occupational Safety and Health Administration considerations.

Calculating wages of employees during and after a natural disaster

After giving the requisite care to the safety of employees and themselves, employers should look to address some of the typical questions that arise following an emergency.

For example, there may be questions about how to pay employees (exempt and nonexempt) if a workday is cut short or if all work is suspended for a few days.

Depending on the severity of the damage, some employers may voluntarily continue paying employees their wages (full or partial), which requires forethought and potentially tax planning.

Under the Fair Labor Standards Act (FLSA), 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 the scope or impact of a natural disaster. 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).

If the worksite is open, but the employee decides to stay home, the non-exempt employee does not need to be paid for the hours missed. There are exceptions, such as "on-call" time. For example, under the FLSA and many state laws, employees who must remain at a job location without power in case power returns should be paid for their time despite their inactivity. State wage and hour laws may require employers to pay employees for other types of activities, so employers should be cautious and confirm they are paying their employees appropriately.

When an employer shuts down its operations because of adverse weather or another calamity for less than a full workweek, exempt employees must be paid their full salary, assuming they work any time at all during the week. This rule also applies if exempt employees work only part of a day. Nonetheless, and barring any state law or overly restrictive company policy to the contrary, exempt employees may be required to use accrued leave or vacation time (in full or partial days) for their absences.

Leaves of absence and reasonable accommodations

Once the storm, wildfire or other natural phenomenon has passed, employers may see a surge in employee requests for time off, leaves of absence, or reasonable accommodations. For example, employees suffering a serious injury or illness—or who have a family member who died—may be entitled to leave under the federal Family and Medical Leave Act (FMLA).

Depending on the circumstances, some affected employees might qualify for paid sick leave under state or local law, a company policy or collective bargaining agreement. It is important to remind front-line management of applicable policies and how they should respond during this time.

When faced with employee requests to take time off to assist with relief and rescue efforts, employers should take care to confirm whether the requested relief is related to volunteer first responder duties to appropriately determine employees' leave and reinstatement rights.

Many states, including California and Louisiana, protect employees who serve as volunteer emergency or first responders and are called into action during natural disasters. California employers may not discharge or otherwise discriminate against employees who take a temporary leave of absence to respond to an emergency in their roles as volunteer firefighters, emergency rescue personnel, or reserve peace officers. Under many state statutes, this leave may be unpaid.

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 anti-discrimination 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 the storm may be entitled to reasonable accommodation, employers should take all such inquiries seriously.

To the extent employers relax enforcement of their leave or other policies in light of extenuating circumstances, any changes should be deliberate, communicated to all management and staff, and applied consistently and fairly. Employers should remain mindful of local, state and federal antidiscrimination laws. Any exceptions must be based on legitimate, non-discriminatory reasons and consistently applied across the workforce.

Duties imposed by local ordinances

Local ordinances may also affect employer leave, or other, obligations. For example, in Florida, Miami-Dade County has its own family and medical leave ordinance. In Dade County, private employers with 50 or more employees must provide family and medical leave to eligible employees. Permissible reasons for, and the length of leave under the ordinance largely are the same as those under the FMLA.^[1] Even in good weather, employers should keep an eye out for any applicable municipal ordinances affecting their labor and employment duties.

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. In the past, 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.

As the above points indicate, employers' concerns regarding severe weather and other calamities extend beyond emergency supplies and safety considerations. We hope our friends, clients, and colleagues stay safe, and we will continue to offer any assistance possible during any recovery time.

[1] Local ordinances concerning employee wages and benefits may be preempted by state law.