

A Short Refresher On Discrete Legal Issues During Natural Disasters

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As they say, an ounce of prevention is worth a pound of cure.

In that spirit, what follows are certain pay and leave issues employers may confront during times of natural disaster – all of which are better to be thought about ahead of time, to the extent possible, instead of "in the moment" once a natural disaster strikes.

Pay Issues

Pay issues during natural disasters primarily arise in regard to exempt level employees. Non-exempt employees typically (although not always) are paid an hourly rate for their work. Therefore, in those situations, non-exempt employees do not have to be paid for any hours that they do not work, whether or not due to the natural disaster. However, if a non-exempt employee is instead provided with a guaranteed salary, he/she must be paid their full weekly salary for any week during which ANY work is performed for his/her employer (with a few limited exceptions typically inapplicable to natural disasters). Regarding exempt level employees, employers are required to pay them their regular pay for that workweek unless the natural disaster dictates that the business be closed (or the employee cannot perform work remotely) for the ENTIRE workweek. However, employers may require exempt employees to exhaust any accrued but unused paid time off.

Another issue that sometimes arises is when an employer marshals its employees to provide volunteer services to other employees or to the community. If the volunteer work that employee is doing mirrors, or is substantially similar to, work that they otherwise would perform for their employer, such "volunteer" time may actually be compensable time. Further, if the volunteer work could be reasonably perceived by an employee as required, and that employee is injured, he/she also may file and be able to prevail on a workers' compensation claim.

Also, employees who are unable to work due to a natural disaster, may be eligible to apply for and receive unemployment benefits. North Carolina employees out of work because of a natural disaster also may qualify for Disaster Unemployment Assistance benefits.

Leave Issues

Many of the usual cast of "leave" characters also come to bear during natural disaster scenarios. For example, an employee who is entitled to take, and does meet Family Medical Leave Act (FMLA) requirements for an FMLA-covered entity, may take unpaid time off from work. Any employee who, because of a disability, requires an Americans with Disabilities Act (ADA) accommodation to perform their job, including time off from work, should be granted such a request assuming that it does not cause an undue hardship for the business. For those who employ veterans, it will be necessary to bone up on the Uniformed

Services Employment and Reemployment Rights Act of 1994 (USERRA) right to re-employment requirements for returning service members.

A final word of caution - Employers should not take adverse action against employees for engaging in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA) – to wit, employees may complain (possibly online) during times of natural disaster that their employer is being feckless in its handling of the disaster. Terminating or otherwise disciplining employees for these comments risks the ire of the National Labor Relations Board (NLRB).

As with most human resources issues, the primary goal should be not to respond with a knee-jerk reaction to pay, leave, and/or other employee issues when natural disasters strike. A considered reaction, with the advice of legal counsel, is always prudent.

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