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Hurricane Ready: 5 Ways Florida Employers Can Prepare for the Next Big Storm

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1. What can an employer do if it loses time records for work already performed and not yet paid or an employee is prevented from verifying or logging time electronically?

Federal law, specifically the Fair Labor Standards Act (FLSA), does not provide specific guidance on this issue. However, the FLSA requires payment for the hours that an employee worked. Employers may decide to create the most accurate time records possible if the original time records are lost or damaged. There may be a few approaches to this problem. An employer may decide to pay each employee based on the number of hours normally worked (assuming this information is available). Another option could be to ask each employee to estimate, as accurately as possible, the number of hours he or she worked. Regardless of the approach an employer chooses to take, employers might try to obtain written authorization from the employee allowing it to make corrections (and possibly deductions from future wages) if more accurate time records become available.

2. May an employer require an employee to report to work even if he or she believes it is unsafe to do so because of weather?

Unlike some states, Florida does not have a law that prohibits employers from taking action against employees who refuse to work because of an impending hurricane. However, such a situation requires caution.

Under the Occupational Safety and Health Act, "every working man and woman in the Nation" is assured "safe and healthful working conditions." This applies to all employment in any workplace within the United States as long as the employer has one or more employees. Hurricanes and other disasters present obvious safety concerns that employers need to consider when asking employees to come into work during adverse weather, including vehicle accidents, slips and falls, flying objects, electrical hazards from downed power lines, exhaustion, and dehydration. An employee that reasonably believes he or she has been put in imminent danger because he or she was forced to go to work during a hurricane may file a complaint with the Occupational Safety and Health Administration against the employer and then ask for whistleblower protection.

3. May an employer count absences due to the storm against an employee's Family and Medical Leave Act (FMLA) allotment if the employer's facilities are closed?

The FMLA regulations do not specifically address natural disasters. The regulations state that if, for some reason, the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing for two weeks for winter holidays or an employer closing a plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Thus, it appears that if an employer's business is closed for a week or more because of a storm, the days the business is closed would not count against an employee's FMLA leave allotment.

If the business is closed for less than a week, the FMLA's regulation pertaining to holidays provides guidance. The FMLA regulation provides, "the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave." Similarly, if a business is closed for a day or more during a week in which an employee is on FMLA leave, the entire week would count against the employee's FMLA leave allotment. If, however, the employee is taking FMLA leave in increments of less than a week, only the days that the business is closed and on which the employee would be expected to work can be counted against the employee's FMLA allotment.

4. Are employees entitled to take leave after a hurricane?

Eligible employees are entitled to take leave under the FMLA for a covered serious health condition, including those caused by a disaster such as a hurricane. Additionally, employees who must care for a child, spouse, or parent with a serious health condition may also be entitled to leave under the FMLA regardless of the hurricane.

For those employees who are part of an emergency services organization (such as the National Guard or Army Reserve), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) may apply. USERRA prohibits discharging, denying initial employment, denying promotion, or denying any benefit of employment because of a person's membership, performance of service, or obligation to perform service in uniformed service. While USERRA does require advance notice of military service, there is no time limit within which notice must be given; notice must simply be "timely." In the event of a hurricane or other natural disaster, there would be short notice. The notice may be written or oral, and it may be provided by the employee or an appropriate officer of the military branch in which the employee is providing uniformed service.

Further, the FMLA, as amended by the National Defense Authorization Act, extends up to 12 weeks of FMLA leave protection for the spouse, child, or parent of a uniformed service member called to active duty. This leave may be taken for any "qualifying exigency" arising out of the family member's commitment, and leave may commence as soon as the service member is notified of an impending call or order.

Even in the absence of state or federal protection, an employer's internal policies may extend protection to individuals affected by natural disasters. Of course, there is nothing that prevents an employer from voluntarily extending an employee's leave, even in the absence of any legal obligation.

5. Are employees who are discharged as a result of the storm entitled to unemployment compensation?

Employees who are out of work for reasons other than their own misconduct generally are entitled to unemployment compensation under Florida law. However, in Florida, like many states, an employer's unemployment compensation account is not charged when an employee is discharged because of a natural disaster.

That said, a hurricane can present unique circumstances. For example, in one Florida case, an employee's failure to report to work without good cause after the employer expressly directed him to do so as a result of Hurricane Ivan constituted misconduct and unemployment insurance was rightly denied.

The Bottom Line

Planning for a hurricane ahead of time can save employers thousands of dollars in lost revenue. Florida employers can prepare by creating a business emergency disaster and recovery plan to protect both the business and its employees and by planning for potential legal and human resources issues that may arise.

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