

Louisiana Employment Law Letter

A monthly survey of employment law developments in LOUISIANA

H. Mark Adams, Editor; Jennifer L. Anderson and Jennifer A. Faroldi, Associate Editors

Jones Walker

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Q & A

Disaster recovery FAQs for employers

Most of you have faced not only immediate but also long-term employment issues as a result of the recent hurricanes. That's why we're devoting another issue to helping you sort out some of those important questions. If your company and employees were affected by the disasters, it has now become apparent that the disaster-recovery process will be a long and hard one, but we all know that making South Louisiana better than before will be well worth the effort and wait. In the meantime, we hope to put to rest some of the employment questions that have been on your mind so you can get back to business.

Employment records

Can we hire individuals who — because of Katrina — can't provide documentation that the law ordinarily requires? Yes. On September 6, the U.S. Department of Homeland Security (DHS) announced that it wouldn't penalize employers for the next 45 days for hiring Katrina victims who *at this time* can't provide documentation that the law normally requires.

Ordinarily, employers are responsible for completing and retaining employment verification (I-9) forms for new hires. The forms require you to verify employment eligibility and establish identity through original documents presented by the employee. Many victims of hurricanes Katrina and Rita lack the documents needed to verify work eligibility because of evacuation from or damage to their homes. Also, because of the interruption of government functioning in the affected areas, many victims won't be able to apply for and receive new documents in the time period required by the employment verification rules.

You as the employer should still complete the I-9 forms to the extent possible but indicate that the required documentation is unavailable because of Katrina and/or Rita. Also, follow up with the employees to obtain acceptable documentation when it becomes available. At the

end of the 45-day period, DHS will review the policy and make further recommendations.

What postdisaster obligations arise regarding employees who have applied for and are awaiting work visas? Some employees had applied for work visas before the recent hurricanes, and the U.S. Citizenship and Immigration Services recognizes the impact that the disasters had on immigrant communities along the Gulf Coast. The agency is currently reviewing processes that will allow for the continuation of operations and provide assurances that the immigrants can receive benefits and services. When those services become available, they'll be posted at www.uscis.gov.

Federal contractors

Are federal contractors and subcontractors required to develop affirmative action plans for disaster-relief work? No. On September 9, the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) waived the affirmative action requirements for federal contractors and subcontractors. But while the OFCCP's memo explaining the waiver didn't specify which types of contracts or subcontracts fall under the waiver, the agency's director, Charles James, clarified that it applies to "service and supply contracts" — not construction contracts. Federal contracts and subcontracts for construction work are still subject to the affirmative action requirements. A copy of the memo containing the waiver's full terms can be found at www.dol.gov/esa/ofccp.

Unemployment benefits

Do any programs provide unemployment assistance to Hurricane Katrina victims? Yes. When President George W. Bush declared disaster areas after the recent hurricanes, several individual assistance programs became available. One is the Disaster Unemployment Assistance (DUA) program, which helps those whose employment or self-employment has been lost *or* interrupted as a direct result of a major disaster and who *aren't* eligible for regular state unemployment insurance. DUA is funded by the Federal Emergency Management Agency but administered by state unemployment agencies.

To apply in Louisiana, individuals may report in person to the nearest job center, file over the Internet at the Louisiana Department of Labor's website at www.laworks.net, or call (866) 783-5567. For more information about the DUA program, you may also call the DOL at (866) 487-2365.

As for those who are eligible for regular state unemployment compensation benefits, they can receive those benefits if they can't work because of the hurricanes. Eligibility requirements vary from state to state. Generally, qualified employees can receive the benefits if they're unemployed for reasons unrelated to their own misconduct. Louisiana has a one-week waiting period for the benefits, although the Louisiana Department of Labor has stated that claims will be processed as soon as possible.

Employees in Louisiana who receive accrued vacation pay from employers also can receive unemployment compensation benefits. Those benefits, however, can be reduced by the amount of the vacation pay (or other wages) they receive.

Reemployment help

Do any programs provide reemployment assistance to victims of the recent hurricanes? Federal law authorizes the states to create reemployment assistance programs. To date, however, Louisiana hasn't announced any such program. Dislocated workers can access temporary job information at (866) 487-2365. The DOL's website also invites individuals who lost their jobs because of the recent hurricanes to visit www.jobsearch.org/katrinajobs for employment information.

Health insurance

What choices do employees have if they're no longer working and therefore are ineligible for regular health care coverage? Those employees may elect COBRA coverage. You should remember to provide them with notice of their COBRA rights if a qualifying event occurs. In those circumstances, the COBRA-covered plan should notify the plan administrator, who then should send COBRA information and election forms to the employees. The notices are timely when they're sent up to 45 days after the "COBRA-qualifying event," and employees then have 60 days to elect coverage.

Taxes on donations

Are an employer's direct donations to employees affected by the recent hurricanes taxable to those employees? No. An employer's direct donation to affected employees isn't taxable to the employees. Therefore, you aren't obligated to withhold on the payments to the employees — as long as they qualify as "disaster relief payments" under Section 139 of the Internal Revenue Code and are paid to benefit the employees for reasonable and necessary personal and living expenses.

Direct payments to employees aren't deductible for you as the employer unless you make them to a tax-exempt organization to qualify them as charitable donations. If you choose to set up a tax-exempt organization for that purpose, you may begin accepting donations before the IRS determines the charitable status. As with the program established after the September 11, 2001, attacks, the government has agreed to expedite applications for tax-exempt status to aid victims of the recent hurricanes and may grant that status within as few as 10 days.

Leaves of absence

Do we have to provide nonmedical leaves of absence to employees as a result of the recent hurricanes? No, but it's probably a good idea to do so. Above and beyond whatever leaves of absence are required by state or federal law, you may choose to provide your employees with other nonmandated leaves, such as paid vacation

time, paid personal leave, unpaid personal leave, sick leave, and bereavement leave. If you don't have those types of leave policies available already, you may consider instituting them to accommodate employees who were affected by the recent disasters. Likewise, those of you who already have similar leave policies might choose to extend them for accommodation purposes.

While strict adherence to leave policies is normally encouraged, a relaxed approach to company leave policies during a natural disaster will likely benefit your company in the long run — by positively affecting employee morale and strengthening your community image. Just remember to apply all leave policies uniformly among employees.

What types of leaves of absence may be mandated by law because of Hurricane Katrina? You may be required to allow certain leaves of absence under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Employers covered by the FMLA must provide up to 12 weeks of leave to employees who are eligible for FMLA leave and have an FMLA-qualifying condition or other qualifying circumstance. Disaster-related injuries to your employees or qualifying family members may result in the need for FMLA leave.

Also, you may be required to extend leave to individuals impaired physically or emotionally by Hurricane Katrina if (1) the injury constitutes a disability under the ADA and (2) the leave would be considered a reasonable accommodation under the Act. Unlike with FMLA leave, leave as a reasonable accommodation under the ADA may not necessarily be limited to 12 weeks.

Occupational safety

Are there any safety guidelines that employees participating in the Hurricane Katrina cleanup should follow? Yes. The Occupational Safety and Health Administration has published fact sheets to aid those of you whose employees are participating in the cleanup and recovery efforts. The Bush administration is urging individuals participating in that necessary but dangerous work to take proper health and safety precautions to avoid sustaining injuries from downed power lines, falls, and other potential accidents. Employers are responsible for providing and maintaining a safe workplace for employees, and the administration is responsible for setting and enforcing certain safety standards. Fact sheets on natural disaster recovery — addressing cleanup hazards, food cleanup, flooding, fungi, downed power lines, and potential injuries caused by falls, electrical mishaps, chainsaws, and tree trimmings — are available at www.osha.gov. The Centers for Disease Control and Prevention also provides helpful information relating to numerous other risks associated with cleanup and recovery efforts at www.bt.cdc.gov/disasters/hurricanes/.

Litigation

What happens to ongoing employment claims and litigation in the areas affected by Hurricane Katrina? Employers with ongoing

litigation should be aware that state and federal courts and governments have taken action to preserve statutes of limitation and suspend deadlines when litigants can't pursue or defend matters because of the disaster. Please contact your attorney if you have any questions about deadlines in ongoing or potential legal matters.

Storm stirs up significant pay issues

Must we continue to pay our employees for time spent away from work after Hurricane Katrina? It depends. As all of you probably know, employees are classified as either exempt or nonexempt depending on their positions and duties. You don't have to pay nonexempt workers for the time spent away from work after a natural disaster. Of course, those of you who have the means may very well choose to do so, and many have. Exempt employees, on the other hand, must be paid their full salary for any workweek in which they perform any amount of work — regardless of how little work is actually performed.

You can make deductions from exempt employees' pay, however, if they're absent from work for more than one day as a result of a sickness or disability *and* the deductions are made in compliance with a plan, practice, or policy. Employers that make improper deductions from exempt employees' pay risk losing the exemption and thereby becoming obligated to pay overtime to those workers.

Unionized employers should check their collective bargaining agreements or talk to the union directly before unilaterally delaying any wage payments. All employees should be kept abreast of all issues involving their wages. Uncertainty in that area can cause key employees to seek other employment and lead to morale problems.

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