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Insights

Weathering an Employer's Duties During the Storm

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As Florida's first significant hurricane of the season forms in the Gulf of Mexico, employers should be prepared to pivot quickly in the face of mandatory evacuations and potential loss of electricity and property damage and consider HR-related legal issues and liability that could arise before, during and after a major storm.

Before the Storm

A common issue employers face when a hurricane is approaching is whether they can require employees to report to work despite the storm, and whether the employer may take adverse action against an employee who fails to report to work because of the storm. An employer likely can require an employee to report to work, even where an evacuation order for the area has been issued.

In *Gillyard v. Delta Health Group, Inc.*, 757 So. 2d 601 (Fla. 5th DCA 2000), the Florida Fifth District Court of Appeals, which has jurisdiction over Brevard, Lake, Orange, Osceola, Seminole, and Volusia counties, among others, dismissed an employee's complaint against her former employer who terminated her employment when she failed to report to work at a nursing home following the issuance of mandatory evacuation orders for Flagler County because of severe fires. The court ruled that "neither the Governor's executive order nor the [county] order requiring mandatory evacuation . . . is a law, rule or regulation as defined" in Florida's Private-Sector Whistleblower Law. Moreover, the found that "[n]o reasonable interpretation of [the Whistleblower Law] would make the act of remaining in Flagler County to care for nursing home patients an activity, policy or practice of Defendant in violation of a law, rule or regulation. Abandoning nursing home patients would constitute violation of the criminal laws of this state. Any other construction of Section 448.102(3), F.S. on these facts would lead to an absurd result."

However, a later case, *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So.3d 904 (Fla. 4th DCA 2013), presents a potentially different result if an employee reasonably believes that a mandatory evacuation order is a law, rule or regulation, and the employee is terminated after objecting to the

employer's requirement to report to work. Although an employer may be within its rights to terminate an employee who fails to report to work despite a mandatory evacuation order, employers should also consider the safety of employees and the risk of liability where an employee is injured as a result of working in unsafe conditions.

During the Storm

Employers must remain complaint with wage and hour laws. An employer may not make deductions from the salaries of employees who are exempt from overtime under the Fair Labor Standards Act for time away from work during the hurricane if the workplace is closed; provided the closure is less than a full workweek. The employer may require exempt employees to use available paid leave benefits but may not deduct from their salaries if no paid leave benefits are available.

On the other hand, an employer is not required by law to pay hourly (non-exempt) employees for the hours missed when the workplace is closed, because it is non-working time. Similarly, if an hourly employee decides not to report to work because of the storm, the employer is not required by law to pay for non-working time. The employer may require hourly employees to use available paid leave benefits if they decide to to report to work because of the storm, but the employer is not required to allow the employee to use paid leave benefits and is otherwise not required to pay the employees if no paid leave benefits are available.

Employers who voluntarily pay hourly employees for non-working time should be consistent to avoid potential discrimination claims. For example, if two employees claim to be unable to report to the office due to the storm, an employer who offers to pay one employee for non-working time but forces the other employee to use PTO or remain unpaid might find itself defending against a claim by the latter employee if that employee alleges different treatment based on a protected class (discrimination) or protected activity (retaliation).

When an employee is called up by the National Guard or Reserves to participate in the storm response, either before, during or after the storm, an employer must comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which 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. Employees on USERRA leave may, at their option, use available paid leave benefits to be paid for their time away from work.

After the Storm

Where an employee cannot report to work due to, for example, transportation difficulties experienced as a result of the storm, the absence is considered an absence for personal reasons under the U.S. Department of Labor's regulations. An employer does not have to pay a non-exempt employee for any work time missed as the result of transportation difficulties resulting from weather. An employer may make a deduction from an exempt employee's salary for a full day absence for this reason (provided the employee performed no work that day) or an employer may require the employee to use paid leave benefits for the full day absence for this reason. However, an employer cannot make a deduction from the exempt employee's salary for any absence less than a full day.

If an employer allows remote work in the wake of the storm, non-exempt employees must still be compensated for all time worked remotely, and the employer should bear in mind it may have to rely on employees' self-reporting their work hours. Exempt employees working remotely must still be paid their regular salary although an employer can require the employee to use paid leave benefits for any partial workdays.

Employers also have some flexibility if a storm delays the processing and delivery of wage payments to employees as Florida has no law governing the frequency of wage payments. However, if an employer has employees outside of Florida, the employer should take note of the laws of those other jurisdictions concerning frequency of wage payments to employees.

Employees affected by a hurricane may seek protected leave under the Family and Medical Leave Act ("FMLA") for any serious health condition caused by the hurricane or where the employee must care for a child, spouse, or parent with a serious health condition. Even if the employee is not covered by federal, state, or local laws that allow time off for injury or illness, employers should assess whether an employee may be eligible for leave under any of the employer's policies or under a collective bargaining agreement. Ultimately, if the employer changes how it enforces its leave policies due to a hurricane, the employer should make sure any changes to enforcement are applied consistently to all employees and that the employer's actions are always supported by legitimate, non-discriminatory reasons.

If a business is unable to reopen for an extended period of time in the aftermath of a storm, the effect on employee benefits such as paid leave and health insurance is rather complex and must be decided on a factual basis pursuant to ERISA, the FMLA, COBRA, and other laws. Furthermore, the federal WARN Act imposes 60-day advance notice requirements on employers with 100 or more employees for certain plant closings and mass layoffs. Where a plant closing or mass layoff is the result of a natural disaster, the employer is required to give as much notice as is practicable. Employers outside of Florida may have to comply with other states' "mini-WARN" laws.

Traditional Labor Issues and Non-Union Employers

Not all employees will agree with an employer's decision to remain open for business before, during, or after a storm. Employees might complain to each other or post their gripes on social media, citing to perceived safety concerns. Employers are advised to recognize when employee speech is protected speech under the National Labor Relations Act (NLRA). Specifically, Section 7 of the NLRA protects non-management employee's rights "to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis added), even when the employees are not members of a union. Accordingly, employers should exercise caution to mitigate against the risk of a retaliation claim before terminating or disciplining employees for engaging in speech that could be protected speech under the NLRA.

The considerations set forth above are only examples of a few of the many legal issues that could arise and result in potential legal liability on the part of an employer in the face of a hurricane. Additional issues may arise under the Americans with Disabilities Act, the Occupational Safety and Health Act, and unemployment laws, to name a few. Employers should consult with their employment law counsel to ensure compliance with best practices and to limit legal exposure.

Lowndes wants everyone to stay safe during the hurricane season. Our employment law attorneys stand ready to help employers "weather" (pun intended) employment issues that arise during this hurricane season and beyond.