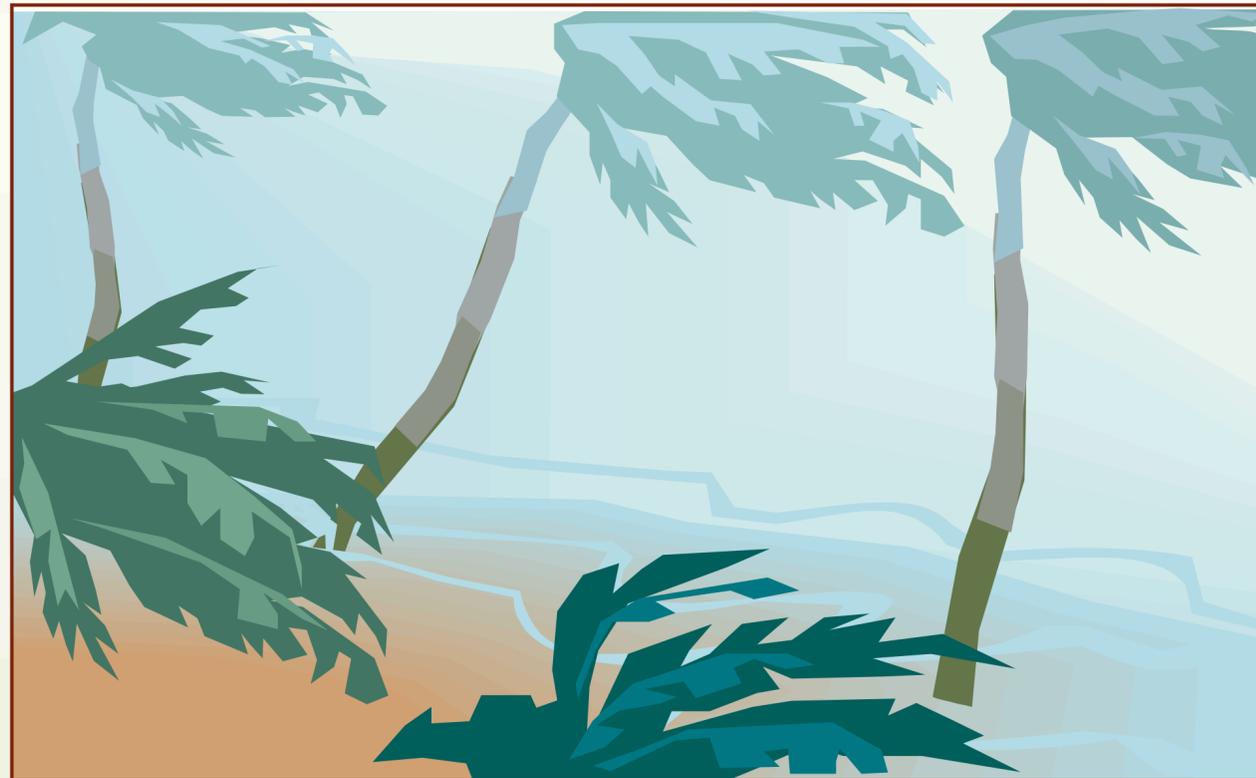


Hurricane Preparedness: Legal and Human Resources Considerations



HR/Personnel Concerns

- Address the HR and personnel issues involved with developing and implementing an effective Hurricane Policy/Disaster Plan.
- Establish a predetermined shut-down time so that employees will know how much time they have to prepare. This helps everyone plan and cuts down on feelings of anxiety.
- Consider providing time off as the storm approaches to allow employees time to prepare – particularly those that may be called upon immediately following the storm.
- Provide employees links and information from the Red Cross, and other local resources, to help employees prepare their homes for the storm.

HR/Personnel Concerns

- Secure a supply of emergency essentials such as flashlights, first-aid kits, tools, food and water for those who may have to be confined to the agency or who may have to respond following the storm.
- Provide employees with an information message line (out of the area in case of power loss) to find out about pre- and post-hurricane work schedules and emergency information.
- Prepare all personnel files and IT equipment that could be damaged by the elements. Ensure that all back-up devices and power supplies are functioning properly.

HR/Personnel Concerns

- ▶ Print out employee rosters before the storm's arrival. This will allow you to contact workers after the hurricane to determine their needs – and the needs of the agency.
- ▶ Re-think the “phone tree”; consider texting.
- ▶ Have resources available to provide counseling to employees and their families should they need it following the storm.

Refusal To Report for Work

- Employees who refuse to report to work before or after the storm.
- The reasons for the refusal will impact your obligations as an employer.
- OSHA would be implicated where employees are forced to work in unsafe conditions.
- § 784.05, Florida Statutes. Culpable negligence.
 - “Whoever, through culpable negligence, exposes another person to personal injury commits a misdemeanor of the second degree.”

Employees Who Flee the Storm

- Some employees may leave the county or state prior to the storm's arrival.
- They may be unable to return to work following the storm due to weather or travel conditions.
- Decisions should be made prior to the storm for addressing these issues – particularly with regards to employees whose post-storm duties may be essential to the organization.

ADA and FMLA Implications

- The legislative history of the ADA suggests that only mental disorders contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) will qualify as "impairments" under the ADA.
- This may preclude ill-defined conditions such as "job stress" that are not mental disorders diagnosable in accordance with the DSM from constituting an impairment within the meaning of the ADA.
- The EEOC has recognized that mere stressful life situations, which are not disorders recognized in the DSM, do not constitute "impairments" under the ADA.
- Hurricane or other disaster related-stress, however, may be covered under FMLA or the ADA.

Absenteeism Following the Storm

- Absenteeism which is the result of depression or stress-related disorders may be protected under the **ADA** or **FMLA** (rules can be complicated).
- Under **ADA** you may be required to provide the employee with a reasonable accommodation such as leave.
- Under **FMLA** you may be required to provide the employee with up to 12-weeks of job protected leave.
- Absenteeism or tardiness related to damaged homes, lack of electricity or damaged cars is not protected under either **ADA** or **FMLA**. This also includes traffic conditions and road closures.

Work Performance Issues

- ADA strictly prohibits inquiries regarding an employee's physical or mental condition.
- The ADA also prohibits an employer from treating an employee as if they were disabled.
- Therefore: Performance issues must be treated as performance issues.
 - Remember: An employer cannot inquire into the cause or make assumptions as to the cause.
- **Best Practice**: Utilize progressive discipline and referral to Employee Assistance Program (EAP).
- If employee claims disability or serious health condition: ADA and FMLA protections will apply.

FMLA – ADA Issues

- It's the employer's burden to identify when a request for a "sick day" or absence qualifies for FMLA coverage.
- Under FMLA, the employee isn't required to use particular words to get FMLA leave – the employee simply needs to give enough information about his or her ailment for the employer to be able to figure-out that the leave qualifies for FMLA coverage.
- The courts put the burden on the employer to inquire further if more information is needed to assess whether the leave qualifies for FMLA coverage.
- With regards to the ADA, it's the employee's burden to request a reasonable accommodation under the ADA.

Wage & Hour Issues

Exempt and Non-Exempt



Exempt and Non-Exempt Employees

- Your employees are classified under the Fair Labor Standards Act (FLSA) as either
 - exempt from the minimum wage and overtime requirements or
 - non-exempt and, therefore, subject to minimum wage and overtime requirements of FLSA.
- Minimum wage and overtime requirements are mandatory and cannot be waived by the employee.

Non-Exempt – Paid Hourly

- ▶ FLSA requires that an employer pay only for the hours an employee actually works.
- ▶ There is no legal requirement to pay the employee for time missed when the agency is closed due to a hurricane *or any event beyond the employer's control.*
- ▶ This also includes closures occasioned by the employer or the employee's not being able to get to work due to personal issues or closed roads.
- ▶ If an agency provides paid personal or leave days to each employee, the time missed because of hurricane closures or absences can be deducted from those days.

On Call Time

- ▶ An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call".
- ▶ An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with agency officials where he may be reached is not working while on call.

Waiting Time

- Whether waiting time is time worked under the Act depends upon the particular circumstances;
- Generally, if the employee was engaged to wait – that is considered work time;
- If the employee was waiting to be engaged – that is generally not considered work time;
- For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employee have been "engaged to wait."

Working At Home

- Keep in mind – an employee must be paid for all hours worked for an employer.
- If an employer knows or has reason to believe that an employee is continuing to work, then the time is working time and the employee must be paid.
- This includes work performed away from the premises or the job site, or at the employee's home.
- Therefore, non-exempt employees who work from home during or following the storm, must be paid for all hours worked.

§ 785.12 Work performed away from the premises or job site.



“White Collar” Exemptions

- The Fair Labor Standards Act provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative; or
 - Professional capacities.
- Keep in mind – exempt employees are not subject to either minimum wage or overtime requirements.
- The DOL not only places the burden on the employer to prove the employee meets the exemption requirements, but they also must act consistently with those requirements.

Salary Basis Test

- Exempt employees must regularly receive a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- An exempt employee's compensation cannot be reduced because of variations in the quality or quantity of the work performed
- An exempt employee must be paid the full salary for any workweek in which the employee performs any work
- An exempt employee, however, need not be paid for any workweek when no work is performed.

Salary Basis . . . Applied

- An exempt employee will not be considered to be paid on “a salary basis” if deductions from their predetermined pay are made for absences occasioned by the employer or by the operating requirements of the business.
- If an exempt employee is ready, willing, and able to work, deductions may not be made for time in a workweek when work is not available

Issues With Primary Duty

- To qualify for exemption under FLSA, an employee's “**primary duty**” must be the performance of exempt work.
- “Primary duty” means the principal, main, major or most important duty that the employee performs.
- Generally, employees who spend more than **50%** of their time performing exempt work will generally satisfy the primary duty requirement.
- Problems can arise when an exempt employee spends more than 50% of their time on non-exempt duties.

Emergency Work Exception

- An exempt employee will not lose the exemption by performing work of a normally non-exempt nature because of the existence of an emergency, such as a hurricane.
- When emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

These are minimum standards – you can go beyond those requirements and implement a policy where employees are paid more than minimum requirements



Speaker Contact Information

- Sean Miller: sean.p.miller@noaa.gov
 - Armen Gregorian: agregori@pbcgov.org
 - Dearmayl Sherrod: dsherrod@pbcgov.org
 - Vanessa Coe: vcoe@legalaid.org
- 