

Hurricane Harvey Deployment- Revisiting Leave Issues

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It is important for employers to remember that employee leave issues may arise in the wake of a natural disaster like Hurricane Harvey. Any employer may receive requests for leaves related to Hurricane Harvey and the employer does not need to be in the vicinity of Houston as national guard and other first responders are being called upon to assist and employees may have relatives in the areas hit by Hurricane Harvey. So this is not just for employers with locations in Houston or in Texas.

There are situations in which employees will be eligible for leave under the Family and Medical Leave Act ("FMLA") for his or her own serious health condition, including any physical or mental impairment caused by the natural disaster, or any "flare-ups" of a pre-existing condition that were caused by the natural disaster. Further, an employee who is physically or emotionally injured as a result of a natural disaster may be entitled to leave as a reasonable accommodation under the Americans with Disabilities Act.

Employees may also be entitled to FMLA leave due to the serious health condition of a child, spouse, or parent which has been caused or complicated by a natural disaster. For example, a child, spouse, or parent in need of specialized care may no longer have the access to such care, which may require granting an employee leave to care for that individual. Employers are encouraged to carefully review the requirements of the FMLA in the event an employee needs leave in the aftermath of any natural disaster.

In addition, natural disaster relief efforts often lead to military call-ups. Employees who are also part of an emergency services organization (such as the National Guard or a Reserve unit) may be entitled to certain rights and protections under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Under certain circumstances, USERRA provides job-protected leave for military service members upon "timely" notice. In the event of a natural disaster, employees entitled to such leave will likely have little notice; therefore, employers should be aware that such leave may be required on short notice. The Department of Labor has published the following guide which provides further information regarding USERRA: <https://www.dol.gov/vets/programs/userra/USERRA Pocket Guide.html>

Other Employment-Related Considerations

Under the Occupational Safety and Health Act, employers have an obligation to protect employees from unreasonable danger in the workplace, which includes an imminent "natural phenomenon" that will threaten employee safety and health. Hurricanes and other natural disasters present safety concerns that employers must consider when asking employees to come into work, such as vehicle accidents, slips and falls, and electrical hazards from downed power lines. Employees who reasonably believe that they are being put in imminent danger by being forced to go to work may file a complaint with OSHA, and would subsequently be entitled to whistleblower protection from any adverse employment actions. The Occupational Safety and Health Administration ("OSHA") has published the following fact sheet regarding hurricanes and other natural disasters: <http://www.osha.gov/dts/weather/hurricane/index.html>

Employee Benefit Related Considerations

Because there may be requests for FMLA leave and USERRA leaves related to Hurricane Harvey from employees located anywhere in the United States, employers need to remember there are benefit continuation and benefit resumption requirements under both of those laws as well as implications on when COBRA continuation coverage must be offered. Employers may want to review their procedures regarding continuation of leaves during such leaves and how and when they offer COBRA coverage. The U.S. Department of Labor has indicated that employers should be flexible with respect to employee elections with respect to persons affected by Hurricane Harvey and the first responders who have been called to assist with the disaster.

Employers offering differential payments to employees called into service may want to review their benefit plans as to how such payments are treated and to ensure that all are coded appropriately if any new vendors have been implemented to manage benefits or payroll.

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