Hurricane Helene Client Alert

Comprehensive FAQs for Employers

SESCO and staff send our thoughts and prayers to all of those throughout the Southeast who have been impacted by Helene! Lives, homes, property, towns and infrastructure have been completely lost and destroyed. To our valued clients, always know we are as close as your telephone as you have questions or needs.

Please consider the following FAQs as you work through the significant challenges that affect your business, valued employees and your clients.

1. **Can employees refuse to work because of hurricane-related safety concerns? –** OSHA expressly instructs employees to approach their employer when they first believe that working conditions are unsafe or unhealthy. If there is a condition that clearly presents a risk of serious physical harm, the employee may have a legal right to refuse to work in a situation that they would be exposed.

2. **Should we provide Family and Medical Leave due to leaves caused by the hurricane? –** Employees requesting time away from work could conceivably be protected by the FMLA to the extent they develop a serious health condition or need to care for a family member with such a condition as defined by the Act. Of course, there is nothing to prevent you from voluntarily providing an employee with leave in the absence. These personal leaves can certainly be granted on a case-by-case basis.

3. **A few employees have been called to serve as relief workers. Do laws protect their leave?** Probably, yes. USERRA (Uniform Services Employment and Re-employment Rights Act of 1994), is a broad statute, significantly restricting the treatment of employees who perform services protected by the statute.

4. **An employee requested leave as they want to volunteer with the hurricane relief effort. What are our obligations? –** If the employee does not qualify for federal USERRA protection or a state or local military leave, then you are not obligated to provide such protection. However, you certainly can allow this leave with or without pay on case-by-case basis.

5. **Many of our employees have lost homes, property and/or have significant damage. Is there anything that we, as an employer, can do to provide them assistance? –** Yes, there are at least four (4) ways in which an employer can assist these employees:

- **Loans and hardship distributions:** The IRS has, in the past, announced liberalized procedures for loans and hardship distributions to victims of hurricanes. A detailed description of relief granted by the IRS can be found on their website.

- **401(k) Plans:** Amend 401(k) Plans, pursuant to 2019 IRS regulations. Employers can amend their 401(k) Plans to provide hardship distributions for expenses and losses (including loss of income) incurred by employees on account of a disaster declared by FEMA under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

- **Leave-Sharing Programs:** Employers can also set up leave-sharing policies to allow employees to donate their accrued, unused paid time off to a pool that can be used by affected employees. Leave programs must be carefully structured to ensure compliance in that those employees donating their leave are not taxed on the leave that they gave voluntarily to other employees.

- **Charitable Foundation:** Employers wanting to create a long-term assistance program for employees impacted by natural disasters and other hardships may consider establishing a 501(c)(3) foundation in which employees, families and other entities can make tax-deductible contributions to assist other employees who suffered losses.

6. Wage and Hour – Payroll Compliance

- **Must we continue to pay employees who are not working? –** Under the Fair Labor Standards Act (FLSA), for the most part the answer is no. FLSA minimum-wage and overtime requirements are attached to actual hours worked in a workweek. This applies to nonexempt employees.

  - If employees are considered exempt under one of the FLSA's "white-collar" exemptions then generally speaking, yes. If an exempt employee does any work during the seven (7) day workweek, the salary basis rules require that they be paid.

  - If the employer is open for business and the exempt employee decides to take a day off for personal reasons and performs no work, then they are not required to be paid for that time.

  - If the business closed but the exempt employee is able and ready to come to work, then the exempt employee may be required to be paid.

- **Can we charge time missed as caused by the hurricane to vacation, PTO or other paid leave balances? –** The FLSA generally does not regulate the accumulation and use of paid time off. It will be up to the employer's policy and practice. Further, the salary requirements for exempt "white-collar" employees can implicate time-off allotments under various circumstances.

- **Can an employee volunteer to perform recovery services for the business without pay? –** The FLSA does not permit employees to "volunteer" work to their for-profit private sector employer.

7. **Do we have any legal liability if we are forced to suspend operations without prior notice because of the hurricane and its aftermath? –** Probably not, so long as you take steps to issue appropriate notices as soon as practical. The Federal Worker Adjustment and Retraining Notification (WARN) Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so because of a natural disaster.

8. **Employee Benefit Issues**

- **Contributions to our pension plan and 401(k) are due in the next few weeks. Because of the hurricane, we either can't make the contribution or can't determine how much is owed. What can we do? –** Following a presidential declaration of a major disaster for the portions of one or more states, the IRS, USDOL and Pension Benefit Guarantee Corporation (PBGC) routinely issue releases providing for extension of various deadlines for employee pension and welfare benefit plans.

- **What if we can't meet our payroll tax deposits or file our Form 5500 on time because of the Hurricane? –** In the past, the IRS has issued relief extending the deadline for filing the Form 5500 Annual Return/Report for employee benefit plans and granting an extension for certain filing deadlines.

- **If our employees are no longer working, are they still entitled to health insurance coverage? –** Not necessarily. Please check your plan document or call your carrier to determine if employees who are not actively working may remain covered by your health plan. Once this period expires, you must terminate insurance coverage and provide a COBRA notice.

- **What happens to health coverage if employees are not working and unable to pay their share of premiums? –** In the normal course of events, health coverage will cease when premium amounts are no longer paid. However, several actions might be taken that will allow coverage to continue.

    1. The insurer providing the health coverage may voluntarily continue the coverage while the disaster is sorted out.

    2. You may arrange with the insurer providing health coverage to pay the employees' portions of premiums to keep the coverage in place (at least temporarily) until you can reopen the business.

- **We need to provide COBRA notices to employees, but we don't know where they are or if their homes have been destroyed. What do we do? –** All you can do is provide COBRA notices and election forms to the last-known addresses.

9. Unemployment Compensation

- **How can we or our employees get information about unemployment benefits due to the inability of working because of the hurricane? –** Simply Google your state unemployment office to determine eligibility, waiting periods, deductions from benefits and similar issues.

- **If my employees are not eligible for state unemployment compensation benefits, what other benefits may they be eligible? –** An individual who does not meet the eligibility requirements for state-provided unemployment compensation may be eligible for federal aid under the Disaster Unemployment Assistance Program.

We are sure that our valued clients will have many other questions that are not addressed in this FAQ or will have follow-up questions. Please know that we are always as close as your telephone/email to assist you through this very, very difficult time.

Again, our thoughts and prayers go out to all affected and we wish to all a safe and quick recovery.

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