

Employment and Benefits Issues in the Wake of Hurricane Sandy

November 13, 2012

In the wake of Hurricane Sandy, employers with employees and operations on the East Coast face a myriad of questions regarding how to handle weather-related closures of their facilities, business disruptions, and evacuation and displacement of numerous workers and their families from their homes. Generous employers are also considering ways to assist those affected by the storm.

The effect of a storm closure on employment requirements varies for different types of employees and also varies by state. Below are some considerations regarding how to deal with the aftermath of the storm from an employment and benefits perspective.

The Fair Labor Standards Act

The FLSA, which presents numerous potential wage and hour violations when skies are clear, may pose an even greater threat of liability to employers that are scrambling to get their operations up and running again after the storm.

Keeping Track of Hours Worked

For example, claims based on under-payment of wages may occur if Hurricane Sandy destroyed employee time records, resulting in employers inadvertently failing to pay employees for work performed prior to the disaster. Additionally, employers should avoid violating minimum wage requirements under the FLSA when employees volunteer to perform job-related services off the clock. Because the FLSA definition of "employ" includes "suffer or permit to work," time spent by employees volunteering to perform job-related services after a natural disaster may constitute hours worked where the employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done.

Paying Employees for Time the Employer Was Not Open for Business

Under the FLSA, if an employer suspends operations on account of damage from the Hurricane, the employer must pay non-exempt employees only for the hours they worked. Conversely, unless an employer suspends operations for an entire workweek, exempt employees must be paid their regular weekly salary regardless of the number of hours they worked. Although some employers may opt to deduct time from an employee's accrued vacation and leave for the period an employee remains out of work after the Hurricane, employers should be wary that collective bargaining agreements or employment contracts may limit the right to deduct from an employee's accrued vacation or leave time.

Telecommuting

Because the FLSA applies to employees regardless of their physical location, if an employer did not suspend business operations and non-exempt employees were allowed to telecommute or work from home after the storm, employers must pay their employees for that time. This issue also relates to instances where teleworkers perform overtime during or after the storm. Many employers have policies requiring all overtime to be approved in advance. Even if this is the case, employers should be aware that permitting non-exempt employees to telework will constitute hours worked where the employer knows or has reason to know that the employees are continuing to work and the employer is benefiting from the work being done. In such a circumstance, overtime that is not technically approved must still be compensated.

De Minimis Work

While employers must ensure that their non-exempt employees are paid for all time worked, even time spent working from home, there are certain limits on this requirement. Specifically, if a non-exempt employee "logged on" for a few minutes from home, perhaps to send an email or save a document, the employee would not necessarily have to be compensated for that time, so long as the employee limited the work to a brief instance. Such insubstantial or insignificant periods of time employees work outside scheduled working hours is referred to as "*de minimis* time." Importantly, this exception only applies to a few seconds or minutes of work - the generally accepted standard is a ten minute period or less in the *aggregate* for the amount of time spent working. Limited though it may be, this exception does relieve the burden on the employer to a degree by not requiring work time to be tracked and recorded with an unfeasible amount of accuracy.

State Specific Wage & Hour Issues

In addition to federal law, there are state requirements that employers affected by the storm must also consider.

Call-In Pay

There are instances in natural disasters where an employer may call in some of its exempt and non-exempt employees and then send them home shortly thereafter. In such cases, if an exempt employee attends work and is later sent home due to weather conditions, he or she must still be paid for the entire day. For non-exempt employees, requirements vary by state. Employers should be aware of these requirements and determine if their particular state poses any applicable obligations.

For example, in New Jersey, an employee must be paid for at least one hour at the applicable wage rate, unless, prior to reporting to work, the employer already made available to the employee the minimum number of hours of work agreed upon for the week.

New York requires non-exempt employees outside of the hospitality industry who report to work "by request or permission of the employer" to be paid for at least four hours, or the number of hours in the regularly scheduled shift (whichever is less) at the basic minimum hourly wage (\$7.25). This requirement does not apply, however, if "the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed." In the hospitality industry, an employee who reports to work at the behest of his or her employer must be paid under the following requirements:

- a) For at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;
- b) For at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and
- c) For at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less.

In Rhode Island, an employer must furnish at least three hours of work to any non-exempt employee who reports to work. If the employee is sent home before the end of the three hours, that employee is entitled to "not less than three (3) times the regular hourly rate" for the hours worked.

In Connecticut, employees who work in wholesale or the "retail selling of commodities and any operation supplemental or incidental thereto" must be paid for four hours at their regular rate of pay if they actually report for work.

Processing Wage Payment

Many states have specific requirements concerning the frequency with which employees must be paid. Employers that were directly affected by Sandy may be facing significant obstacles in processing their payroll and meeting those requirements.

In New York, most employees must be paid on a semi-monthly basis, however, manual workers are required to be paid on a weekly basis, not later than seven days after the end of the week in which wages are earned. Compounding this problem is the requirement that employers notify employees of any change in paydays at least seven calendar days prior to such change. New Jersey requires that employees be paid at least twice during each calendar month, with exceptions for "bona fide executive, supervisory and other special classifications of employees," who may be paid once per calendar month. Because no formal exceptions have been issued due Hurricane Sandy, if companies cannot meet these requirements, it is recommended that they keep careful records of the reasons for the delay and inform employees in writing about the problem. If at all possible, employers should include in this writing an estimate of when employees can expect to be compensated.

Immigration Status Issues

Employers of nonimmigrant visa holders, and particularly professionals in H-1B visa classification and temporary workers in the H-2 classifications, are subject to very specific requirements as to hours, wages, and duties. DOL regulations do not permit an employer to "bench" H-1B professional workers for any reason and, accordingly, an employer may have an obligation to continue to pay H-1B workers on employer-mandated leave the "actual wage" set in the Labor Condition Application. This payment obligation may apply even under circumstances where other federal and state employment laws would not require the employer to pay the worker.

That being said, employers may grant nonimmigrant employees' requests for leaves of absence to deal with the results of a natural disaster, provided that the leave is clearly temporary, is requested by and for the benefit of the employee, and all parties intend to resume the employer/employee working relationship within a reasonable period of time. United States Citizenship and Immigration Services has provided no significant guidance on the length on leaves of absence.

In addition, other changes in the terms of employment or relocation of the employee to a different facility might require an internal notification and/or the filing of a new Labor Condition Application on behalf of H-1B visa holders. In some cases, employers may be required to file petitions to amend earlier-approved petitions on behalf of nonimmigrant employees, in order to notify the government of the change in circumstances.

The Consolidated Omnibus Budget Reconciliation Act (COBRA)

Under a COBRA-covered health plan where coverage is terminated due to a cessation of operations, an employer must send COBRA notices to employees and their covered dependents to their last known address. This may be problematic if Hurricane Sandy has destroyed an employee's home that was the last known address, or if the employee is temporarily displaced.

Even if an employer properly complies with COBRA notice requirements, given the displacement, destruction and distractions caused by Hurricane Sandy, a former employee may be unable to make a COBRA continuation coverage election within the applicable time period or pay COBRA premiums on a timely basis. Employers that have not received a COBRA payment from a former employee after the expiration of the statutory grace period must decide whether to terminate coverage or extend the grace period for COBRA premium payment by a reasonable period under the circumstances.

It should be noted that in the wake of Hurricane Katrina, the U.S. Department of Labor (the DOL) issued guidance requiring plans to toll deadlines for a period of time during and after the storm for election of COBRA continuation coverage, payment of COBRA premiums, and notice of COBRA qualifying events. To date, the DOL has not issued similar relief in connection with Hurricane Sandy. However such guidance may be forthcoming.

The Health Insurance Portability and Accountability Act (HIPAA)

HIPAA Deadlines

Hurricane Sandy may also impact compliance deadlines under HIPAA. After Hurricane Katrina, the DOL issued guidance tolling certain HIPAA deadlines, allowing plans to disregard periods of time during and following the Hurricane for purposes of special enrollment rights under HIPAA, the break in coverage period for applying the pre-existing condition limitation, and the provision of HIPAA certificates of creditable coverage. The DOL has not indicated whether it will issue any guidance regarding HIPAA deadlines in connection with Hurricane Sandy.

HIPAA Privacy

HIPAA provides that employer-sponsored group health plans are required to protect the privacy of an employee's "protected health information". In the wake of a natural disaster such as Hurricane Sandy, officials may contact employers in their role as group health plan administrators and ask for an employee's emergency personal health information. Group health plans covered by HIPAA can share information as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for an employee's care. When possible, the plan should obtain verbal permission from the employee to share this information. If the employee is incapacitated or not available, the plan may share information if doing so is in the employee's best interest. In addition, when the plan shares information with disaster relief organizations that are authorized by law or by their charters to assist in disaster relief efforts, it is unnecessary to obtain an employee's permission to share the information if doing so would interfere with the organization's ability to respond to the emergency.

In connection with Hurricane Sandy, the President and the Secretary of Health and Human Services issued waivers for New York and New Jersey under the Social Security Act, retroactive to October 27, 2012, waiving sanctions and penalties arising from noncompliance with the following provisions of the HIPAA privacy regulations: (a) the requirements to obtain a patient's agreement to speak with family members or friends or to honor a patient's request to opt out of the facility directory; (b) the requirement to distribute a notice of privacy practices; and (c) the patient's right to request privacy restrictions or confidential communications. However, the waivers are limited to the designated geographic area and only during the emergency period. Waivers of these HIPAA requirements are limited to a 72-hour period.

ERISA-Covered Plans and Tax Relief

Employers that have suspended operations as a result of Hurricane Sandy, even temporarily, must decide whether to maintain benefits for employees during the suspension. Employers dramatically affected by Hurricane Sandy may be unable to make contributions to employee pension and welfare benefits plans. Issues of particular concern arise when an employer's 401(k) record keeper or bank trustee is not operating, if employees cannot access their accounts, or if employers cannot afford to contribute to benefits plans.

Deadlines and Extensions

Employers and plan sponsors of health and welfare plans must comply with numerous filing and notice deadlines, and failure to comply can result in costly penalties and excise taxes. Similarly, employees and beneficiaries are subject to deadlines to secure a benefit or challenge a denial of a benefit. Failure to meet these deadlines could result in loss of coverage or the loss of a right to challenge an adverse benefit decision.

Storm-related closures of employers, third party administrators and other businesses may disrupt critical operations affecting employee benefits. During the recovery effort following many previous natural disasters, governmental agencies and entities extended certain deadlines governing employer payment for benefits, pension contributions, and other benefit issues. For instance, in response to Hurricane Katrina, the government required plan administrators to disregard almost 5 months in determining the timeliness of a benefit claim or an appeal of an adverse benefit determination. In addition, in certain circumstances the DOL did not enforce the requirement that "plan assets" (e.g., amounts withheld from employee wages for contributions to 401(k) plans) be immediately segregated from the employer's general assets and deposited in the plan's trust. As of the date of this Alert, Congress and the relevant agencies have not enacted a comprehensive relief act similar to the Katrina Emergency Tax Relief Act of 2005 (KETRA). However, the following government entities have announced relief measures in response to Hurricane Sandy:

- The Internal Revenue Service (IRS) [extended the deadlines for various tax filings and payments](#) for individuals and businesses affected by Hurricane Sandy. This relief applies generally to those located in specified counties in Connecticut, New Jersey and New York, and case-by-case relief may be available to others, including companies with records are located in the storm area or workers who went to the area to assist in recovery efforts. Affected individuals and businesses have until February 1, 2013 to make the applicable filings and tax payments that would otherwise be due during the period from October 26, 2012 to February 1, 2013. This extension applies to various filings and payment, including payroll and excise tax returns and payments for the third and fourth quarter, and Form 990 series returns for tax-exempt organizations. If payments and filings are made by the extended deadline, interest will be abated and there will be no penalties assessed for late filing or payment. The IRS may issue further guidance addressing additional relief.

- The Pension Benefits Guaranty Corporation (PBGC) [announced deadline extensions](#) to February 1, 2013 for persons responsible for meeting a PBGC deadline who are located in the disaster area or cannot reasonably obtain the information or assistance required as a result of Hurricane Sandy. Penalties will be waived and potential enforcement actions will not be commenced for various requirements, including certain single-employer plan termination deadlines, certain multiemployer plan filing and notice deadlines, reportable event notices, and filing of appeals or requests for reconsideration of appeals. Premium payments due between October 26, 2012 and February 1, 2012 will be treated as timely if made on or before February 1, 2013, although applicable interest will be charged. The PBGC will offer additional relief on a case-by-case basis.
- The New Jersey Taxation Division extended the deadline for New Jersey business tax filings and payments for businesses with operations disrupted by the storm. Filings and payments due between October 30, 2012 and November 14, 2012 will be timely if made by November 14, 2012. This extension applies to businesses located in New Jersey, businesses located out of state that have operations in New Jersey or are located in another state affected by the storm, and businesses with tax records located in New Jersey.
- The New York Taxation and Finance Department [extended the deadline for tax filings and payments](#) to November 14, 2012 for taxpayers directly affected by the storm. This extension applies to those filings and payments that were originally due from October 26, 2012 through November 13, 2012. [Additional guidance](#) was issued specifically with respect to affected employers. This guidance extends the deadline for certain withholding taxes, including the remittance of income taxes withheld by employers and withholding taxes or metropolitan commuter transportation mobility taxes that are remitted by employers. The deadline for remitting these taxes is also November 14, 2012.
- The Massachusetts Department of Revenue announced an [automatic extension](#) to February 1, 2012 for certain tax filings and payments that were originally due between October 29, 2012 and January 31, 2013. This extension applies to the filing of certain tax returns, as well as estimated corporate excise tax payments and estimated personal income tax payments. The guidance enumerates filings, payments and circumstances that are not covered by the extension, including employer and other withholding taxes.

- The Connecticut Department of Revenue Services extended the deadline for state tax filings and payments due the week of October 31, 2012 to November 7, 2012. A list of the tax deadlines to which this extension applies can be found on the Department of Revenue Services [website](#).
- The Pennsylvania Departments of Revenue and Labor & Industry extended the deadlines for certain business and individual tax payments and filings due between October 29, 2012 and October 31, 2012 to November 7, 2012. This extension includes employer withholding tax filings.

Plan sponsors and administrators should monitor developments in the coming weeks, and should carefully review the eligibility criteria and the requirements for all relief measures.

In addition to the response by governmental entities, employers and plan administrators may want to consider voluntarily extending their own deadlines in the wake of Hurricane Sandy. For instance, under many group health and welfare plans, employees can only change benefits elections during open enrollment or when they have experienced a specific [qualifying event](#). Employers that hold open enrollment in the fourth quarter should consider extending the enrollment deadlines if participants have been affected by the storm. Employers with fully insured plans should obtain approval for any storm-related changes from their insurance carriers. In addition, plan sponsors may consider voluntarily amending their plans to provide a "hardship" extension of deadlines for filing claims or appealing an adverse benefit determination. All decisions to extend such deadlines should be made and documented in accordance with the applicable fiduciary duties.

401(k) and 403(b) Plan Hardship Distributions and Plan Loans

As employers scramble to help employees who have had to evacuate and rebuild their homes, sponsors of 401(k) or 403(b) plans may consider offering in-service hardship distributions if they are not currently offered. The uses of hardship distributions from a 401(k) or 403(b) are limited, but include costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments) and certain expenses relating to the repair of the employee's principal residence. In connection with other natural disasters, such as Hurricane Katrina, Congress broadened the items for which hardship distributions could be taken and waived the 10% early distribution penalty for distributions to those prior to age 59 ½. To date, no such relief has been enacted with regard to Hurricane Sandy. Until such time as it has, hardship distributions may not be the ideal way to pay for the recovery process, as they are limited to certain uses and could have negative tax implications.

Similarly, employers may consider offering plan loans under their 401(k) or 403(b) plans, if they do not already do so. Employers that have restrictions on the number of outstanding plan loans permitted may consider amending the plan to increase the limit to allow affected participants to access their 401(k) or 403(b) plan monies to recover from the storm. Generally, if permitted by the plan, a participant may borrow up to 50% of his or her vested account balance up to a maximum of \$50,000. The loan must be repaid within 5 years, unless the loan is used to buy the participant's principal home. Loan repayments must be made in substantially level payments, at least quarterly, over the life of the loan. The benefit of this feature is that a 401(k) or 403(b) plan loan is not taxable if it meets certain criteria.

Employers concerned that these features (or easing of loan restrictions) will encourage employees to "raid" their 401(k) or 403(b) plan accounts should consider offering a low or no interest loan to employees from the employer's general assets. A below-market interest (or interest free) loan between an employer and an employee is considered a "compensation-related loan" under the Internal Revenue Code (Code). The Code provides that where the outstanding amount of the loan between the borrower and lender does not exceed \$10,000 and the principal purpose of the loan is not the avoidance of federal tax, the imputed interest will not be considered taxable.

***Employer and Employee Payments and Charitable Donations to Employees
Affected by Hurricane Sandy***

Hurricane Sandy has been designated as a [qualified disaster for federal tax purposes](#). As a result, an employer or any other person may make "qualified disaster relief payments" to an individual affected by the storm, which are excludable from the recipient's income. Qualified disaster relief payments generally include payments that cover reasonable and necessary personal, family, living or funeral expenses, or reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or its contents to the extent that these expenses are incurred as a result of the qualified disaster. Qualified disaster relief payments may not be made for expenses that are compensated for by insurance or otherwise (*i.e.*, FEMA assistance).

An employer-sponsored public charity may accept donations from employees and distribute such donations as qualified disaster relief payments to other employees affected by the storm, so long as certain safeguards are in place to ensure that the assistance serves a charitable purposes rather than the purposes of the employer. Such donations may be claimed by the donor-employee as a charitable deduction and, if the payment is a qualified disaster relief payment, it will not be includable in the recipient-employee's taxable compensation.

Additionally, an employer-sponsored private foundation may be used. The IRS has announced that employer-sponsored private foundations may provide relief to employees that are victims of Hurricane Sandy without affecting the foundation's tax exempt status so long as the employer ensures that the aid does not result in impermissible private benefit to the employer.

Accordingly, employers that do not already have a charitable organization may consider establishing one, as it enables employees to receive tax deductions for their charitable contribution. The requirements for establishing a tax-exempt organization are quite technical and can take time to arrange and be approved by the IRS; however the IRS has announced an intention to [expedite the approval process for organizations seeking tax-exempt status](#) to provide relief to those affected by Hurricane Sandy.

Donated Leave Time

The IRS has recently issued guidance [on the tax treatment of donations made through employer leave-based donation programs](#) in response to Hurricane Sandy. Pursuant to this guidance, an employer may offer a program for employees to donate vacation, sick or personal leave in exchange for cash donations by their employer to qualified tax-exempt organizations that provide relief for Hurricane Sandy victims. These cash payments must be made by January 1, 2014. Amounts donated are deductible by the employer and will not be included in the employee-recipient's wages. However, the employee-donor may not claim the donated leave as a charitable contribution.

These programs may offer both employers and employees an alternative way to contribute to the relief effort. However, before instituting a leave-based donation program, an employer should carefully consider the administrative feasibility of such a program. Difficulties may arise in placing a value on donated leave, especially in situations where the employee would not otherwise be entitled to any cash payments for unused leave.

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

When a natural disaster occurs and employees are called into service, employers must be aware of rules prohibiting discharging, denying initial employment, denying promotion, or denying any benefit of employment because of a person's membership in, performance of, or obligation to perform uniformed service. Additionally, USERRA governs a qualified employee's right to elect continued health care coverage. To the extent that USERRA does not protect employees, state laws mirroring USERRA may provide more extensive protection.

Conclusion

If you have any questions about the legal issues implicated by Hurricane Sandy, please contact your Proskauer relationship lawyer or any of the lawyers listed in this alert.

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