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In the wake of Hurricane Rita, Texas employers must consider various legal issues associated with closed facilities and evacuations, including compensation and possible discipline.

## Texas Edition

*A Littler Mendelson Texas-specific Newsletter*

### Compensation and Discipline Issues Under Texas and Federal Law Associated with Hurricane Rita Evacuation

*By Kerry E. Notestine*

With the recent evacuations ordered by public officials in Texas because of Hurricane Rita, employers have had to address a number of legal issues. Almost all employers in the Eastern part of Texas closed facilities for several days because of the mandatory and voluntary evacuation orders. In particular, employers have inquired regarding the restrictions on disciplining workers for missed work and whether there are legal obligations to compensate employees for time away from work because of the evacuation. This ASAP summarizes those issues.

#### The Texas State Statute Prohibiting Discrimination Because of an Evacuation

There is a state statute in Texas that provides that employers may not discharge or otherwise discriminate against an employee who "leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order." Texas Labor Code, §22.002. The definition of an "emergency evacuation order" includes an official statement issued by a governmental entity to "recommend the evacuation of all or part of the population of an area stricken or threatened with a disaster." Texas Labor Code, §22.001(2)(emphasis added). The statute creates liability for loss of wages or benefits (e.g. vacation pay) incurred by the employee as a result of the violation. Texas Labor Code, §22.003. There is an exemption for emergency services personnel (police, fire fighters, EMTs, or those whose employment involves providing "services for the benefit of the general public during emergency situations") if the employer provides adequate emergency shelter. Texas Labor Code,

§22.004. The Patriot Act may preempt certain aspects of this statute to the extent that the Patriot Act requires security personnel to remain at certain facilities at all times, such as at petrochemical plants.

#### Exempt Employee Compensation Rules under the FLSA

There also are implications under the Fair Labor Standards Act (FLSA) associated with docking employees for time missed from work. Employers do not have to pay hourly employees for time away from work, but an employer may not dock the pay of exempt workers who works any time during a week, except in full-day increments and only for time away from work not occasioned by the employer or the operating requirements of the business. This means that if an employer closes the business, and an exempt employee is ready, willing and able to work, the employer may not make deductions from the exempt employee's weekly pay. 29 CFR § 541.602. The Administrator of the Department of Labor (DOL) has issued an opinion that employers may require exempt employees to use vacation or other paid time off for time missed from work. FLSA 2005-7 Opinion Letter (January 7, 2005). This, however, only applies to absences for personal reasons, sickness, and disability, and an employer may not require an exempt employee to use paid time off for other reasons. The regulations also require a preexisting bona fide plan providing for substitution of paid time off for sickness or disability. See 29 CFR § 541.602; prior regulation 29 CFR § 541.118.

## Discharge and Discipline

While the Texas evacuation statute appears to be limited to an employee who leaves work for an evacuation, it seems prudent to treat employees who did not report to work because of the evacuation in the same way. The statute appears to cover the voluntary, as well as mandatory, evacuations that covered much of the Eastern part of Texas because the statute refers to an official statement **recommending** evacuation. In some circumstances, the reason for the employee absence may not be clear, and an employer may ask the reason for the absence. An employee may admit that he or she did not evacuate and missed work for another reason (e.g., staying home to protect property). An employer, however, should not terminate or otherwise discipline an employee who missed work during the Hurricane Rita evacuation, absent specific information provided by the employee that the absence was not *because of* the evacuation.

## Compensation

The issue of compensation during an evacuation is more complicated. In general, employers may decline to pay **non-exempt** employees who did not work, or require those employees to use paid time off (vacation, sick time, etc.) as a result of missed work if the employer does not discriminate in the application of this policy or practice. One discrimination concern might be raised if the employer has paid non-exempt workers during a facility shutdown because of maintenance or other inclement weather issues. If the employer does not pay the non-exempt employees because of an evacuation and has paid non-exempt workers for other facility closings, the evacuated employees potentially could assert unlawful discrimination under the state statute.

As to exempt employees, an employer is well advised to pay exempt employees for time missed because of the evacuation, if less than a regular work week. Docking employees for complete days may compromise the employee's exempt status under the FLSA unless the employer can establish that the employee missed work for a personal reason, sickness or disability. It is not clear whether missing work because of a voluntary or mandatory evacuation could be considered a "personal" reason for missing work, but if it is not, then an employer would not be able to withhold compensation for missed days of work and maintain the employee's exempt

status. If an exempt employee misses an **entire regular** work week, their employer can always withhold pay. Employers also may want to consider whether paying exempt employees compensation for missed work creates a morale problem with non-exempt employees who may not be paid.

Some employers also may consider requiring exempt employees to use paid time off for time missed during the evacuation. Although DOL officials informally have approved the idea of substitution of paid time off for time missed because of the Hurricane Rita evacuation, this is not an advisable approach due to the risk of possible claims under the FLSA or state law. As mentioned above, an employer must pay exempt employees their weekly salary unless it can establish that the employee missed work for personal reasons. If the employer requires the employee to use paid time off rather than paying the employee full compensation and the employer cannot demonstrate that the employee's missing work because of the evacuation was a personal reason for missing work, the employee may have a claim for lost paid time off. In addition, and as referenced above regarding non-exempt employees, an employee may have a claim under the state evacuation statute if an employer has compensated exempt employees for other involuntary facility closings (inclement weather, maintenance issues), but refused to compensate exempt employees similarly in the Hurricane Rita evacuation.

## Recommendation

As a general approach, employers should pay exempt workers for any time missed as a result of the Hurricane Rita evacuation (if they worked any time during a regular work week) and not require them to use paid time off for missed work. Unless the employer's policy or practice during other facility closings dictates otherwise, an employer permissibly can withhold pay from non-exempt workers who did not work or require them to use paid time off. Employers should not discharge or discipline employees for absences associated with the Hurricane Rita evacuation absent special and very limited circumstances.

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