Legal and HR Issues in Developing and Implementing a Disaster Plan

JOHN A. FOLEY, ESQ.
Hurricane Specific Plans
The Recovery Task Force

- Include internal and external staff
  - Public and private partnerships work best.
  - Determine how you will fit into the County’s preparedness and recovery plan (PBC EOC and Disaster Recovery Coalition).
- Develop some overarching strategies now.
  - Who will stay, who will go?
  - How will we feed, water, and house ourselves?
  - What client-based roles will we serve?
  - What will take priority during our rebuilding phase?
- Assign responsible parties now!
Your Biggest HR Challenge Will Be Employee Apathy
Once a Storm is Approaching
Supervisor Action – Key Elements

- Appoint an alternate who will be responsible if you are not able to report for work following the storm.
- Make sure all of your subordinates contact information is up to date.
- Provide each employee with a list of co-worker contact information.
- Supervisor’s should schedule employee’s time off for pre-storm preparation.
- Supervisor’s should review preparation and recovery plans with their subordinates.
- Make sure all computer files are backed up and paper files are properly secured – disaster related losses are no exception to records retention, HIPAA and data breach laws.
Individual Action – Key Elements

- Back up of critical files.
- Protect paper files to the extent possible.
- Lock file cabinets and desk drawers, if possible.
- Supervisors should be informed of status of employee’s evacuation plan.
Post Disaster Response Steps

- Determine who is responsible for verifying the status of each employee.
- Determine who is responsible for assessing the extent of damage, if any, to their work areas.
- Determine what information is necessary in order to establish a claim for damaged or destroyed equipment.
- Develop a means for documentation of claims information.
Document Prep (Insurance/FEMA Claims)

- Designate an individual responsible for preparation of insurance and FEMA claims.
- Become familiar with claims procedure before the storm.
- The importance of proper and accurate documentation cannot be overemphasized.
- Provide employees with the means necessary to record damage as soon as possible following the storm
  - Digital or disposable cameras
Sample Plan
# HURRICANE PREPAREDNESS PLAN HUMAN RESOURCES 2005

## Phase H  Beginning of Hurricane Season

### Phase 1  72 hours out
- **Task:** Review First aid and emergency supplies, batteries, caution tape, etc.
- **Responsible Person:** Lee and Rick

### Phase 2  48 hours out
- **Task:** Schedule Department meetings for awareness, hang hot line banners and posters
- **Responsible Person:** Lee and Rick

### Phase 3  36 hours out
- **Task:** Central Kitchens availability assessment
- **Responsible Person:** Rose

### Phase 4  24 hours out
- **Task:** Contact water and fuel Sales coordinators
- **Responsible Person:** Lee and Rick

### Phase R  Recovery
- **Task:** Contact City and County agencies for updated emergency contact information
- **Responsible Person:** Lee and Rick

## Phase 1

<table>
<thead>
<tr>
<th>ITEM</th>
<th>TASK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Contact City and County agencies for updated emergency contact information</td>
</tr>
<tr>
<td>2</td>
<td>Contact employment agencies for possible post storm assistance</td>
</tr>
<tr>
<td>3</td>
<td>Conduct Safety equipment check of all vehicles</td>
</tr>
<tr>
<td>4</td>
<td>Review First aid and emergency supplies</td>
</tr>
<tr>
<td>5</td>
<td>Contact Suppliers to ensure products will be available upon request</td>
</tr>
<tr>
<td>6</td>
<td>Contact Central Kitchens for availability of food</td>
</tr>
<tr>
<td>7</td>
<td>Contact Ice supplier</td>
</tr>
<tr>
<td>8</td>
<td>Safety inspection of exterior of facility, chemical containers, material not tied down, etc.</td>
</tr>
<tr>
<td>9</td>
<td>Contact staffing agencies</td>
</tr>
<tr>
<td>10</td>
<td>Contact TV and Radio stations with emergency messages</td>
</tr>
</tbody>
</table>

## Phase 2

<table>
<thead>
<tr>
<th>ITEM</th>
<th>TASK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Secure all files</td>
</tr>
<tr>
<td>2</td>
<td>Cover Computers, printer, etc; unplug battery backup (could cause fire)</td>
</tr>
<tr>
<td>3</td>
<td>Print employee disaster report</td>
</tr>
<tr>
<td>4</td>
<td>Secure all first aid supplies and batteries</td>
</tr>
<tr>
<td>5</td>
<td>Verify emergency phone numbers for city and county</td>
</tr>
<tr>
<td>6</td>
<td>Secure curfew passes from City</td>
</tr>
<tr>
<td>7</td>
<td>All recovery supplies secured</td>
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</table>

## Phase R

<table>
<thead>
<tr>
<th>ITEM</th>
<th>TASK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Contact all Department personnel to assess personal status</td>
</tr>
<tr>
<td>2</td>
<td>Plant and property hazard analysis with Operations Manager</td>
</tr>
<tr>
<td>3</td>
<td>Assess damage to HR office and files</td>
</tr>
<tr>
<td>4</td>
<td>Assess need for additional PPE and First aid supplies</td>
</tr>
<tr>
<td>5</td>
<td>Central Kitchens contacted with food needs</td>
</tr>
<tr>
<td>6</td>
<td>Assess need for Water, Food, Ice, Port-a-Kets, Freezer space</td>
</tr>
<tr>
<td>7</td>
<td>Document employees concerns, home and property damage</td>
</tr>
<tr>
<td>8</td>
<td>Assess needs of the community, contact local agencies and FEMA</td>
</tr>
<tr>
<td>9</td>
<td>Assess need for use of outside staffing agencies</td>
</tr>
<tr>
<td>10</td>
<td>Assess need for use of additional (outside) PAS personnel</td>
</tr>
</tbody>
</table>
Human Resources Issues
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.
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.
- 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.
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.
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. 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

- Your employees are classified under the Fair Labor Standards Act (FLSA) as either
  - exempt from the minimum wage and overtime requirements
  - 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.
Overtime and the Workweek

- Overtime is calculated based on one and one-half times the non-exempt employee’s regular rate of pay.
- An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods.
- The workweek need not coincide with the calendar week, and may begin on any day and at any hour of the day.
- The workweek is not in any way affected by the pay period.
- FLSA, however, does not require overtime pay for work on Saturdays, Sundays, holidays, nights, or regular days of rest, unless work time exceeds 40 hours in a workweek.
Overtime

- All non-exempt employees – those paid hourly or on a salary basis – must receive overtime at the rate of 1 and ½ times their regular rate for all hours worked over 40 in a workweek.
- Overtime must be paid in cash and you cannot substitute paid vacation or sick time.
- And unless you are a government employer, you cannot substitute “comp. time” or time added to an employee’s leave bank.
Payment of Non-Exempt Employees
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.
Non-Exempt – Paid a Salary

- If a non-exempt employee is paid a fixed salary for a fixed number of hours, you can make a pro rata deduction for hours missed because of bad weather.
- If an employee is paid a fixed salary for a variable workweek, you can't deduct for time missed because of bad weather or hurricane closures.
- When an employee is paid a fixed salary for a workweek of variable hours, the understanding is that the salary is owed to the employee in short workweeks as well as longer ones and deductions can't be made for items such as time missed because of hurricanes.
Defining “Hours Worked”

- Work not requested but suffered or permitted is work time.
- The reason for the work is immaterial.
- It is enough that the employer knows or has reason to believe that the employee is working or continuing to work and the time is working time.
De Minimis Work

- De minimis work may not have to be counted (i.e., calling in regarding return to work arrangements.
- In recording working time, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.
- This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.

See, 29 Code of Federal Regulations, Section 785.47
De Minimis Work

- An employer, however, may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

- However, a court has ruled that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis.

See, 29 Code of Federal Regulations, Section 785.47
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.
Payment of Exempt Employees
“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.
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.

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.
Deductions from Pay

- Improper deductions from the pay of an exempt employee can result in the employee’s loss of the exemption.
- Which means the employer may owe the employee for overtime (at the rate of 1 and ½ times their regular rate) retroactively for 2 or 3 years, depending on the circumstances.
Deductions from Pay

- If an exempt employee misses a full day because they can't get to work before or after the storm, then you may deduct from their salary or accrued personal days for that absence.
- However, if your agency shuts down for the day and the employee is available and ready to work, then you may not make such a deduction.
- Work from home or remote locations counts as work.
Deductions from Pay

- If an exempt employee misses only part of a day because of an approaching storm or following a storm, you may not deduct from their salary for the time missed.
- However, if your agency provides a certain number of paid personal days (i.e., vacation days, PTO, etc.) you may deduct from those personal days for the time missed - even if they are absent for only part of a day.
- Once personal leave days are exhausted, you may not deduct from the exempt employee's salary for a partial-day absence.
- The key point is that the exempt employee’s paycheck should never vary based on hours of work.
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.
Exceptions must be fair, equitable and non-discriminatory
How Other Organizations Handle Closings
Closures or Delays Due to Inclement Weather

- Employees are paid and are not required to use their own leave time if the organization decides to close its offices (even if either local, state or Federal government(s) is not closed): 63%
- Employees are required to use their own leave time/liberal leave (holiday, personal day, etc.): 11%
- Employees are paid and are not required to use their own leave time if either the local, state or Federal government(s) is closed: 10%
- Employees are paid, but are required to make up time off: 8%
- Employees are not paid, but they are allowed to take the time off without using their own leave time: 5%

Nonexempt employees: Exempt employees

0% 10% 20% 30% 40% 50% 60% 70%
## Closures or Delays Due to Inclement Weather

<table>
<thead>
<tr>
<th>Description</th>
<th>Exempt Employees</th>
<th>Nonexempt Employees</th>
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<tbody>
<tr>
<td>Employees are paid and are not required to use their own leave time if the organization decides to close its offices (even if either local, state or Federal government(s) is not closed)</td>
<td>201</td>
<td>151</td>
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<tr>
<td>Employees are required to use their own leave time/liberal leave (holiday, personal day, etc.)</td>
<td>36</td>
<td>51</td>
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<tr>
<td>Employees are paid and are not required to use their own leave time if either the local, state or Federal government(s) is closed</td>
<td>31</td>
<td>26</td>
</tr>
<tr>
<td>Employees are paid, but are required to make up time off</td>
<td>24</td>
<td>10</td>
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<tr>
<td>Employees are not paid, but they are allowed to take the time off without using their own leave time</td>
<td>17</td>
<td>64</td>
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Navigating the Insurance Buying Process
Property Insurance

ADEQUATE INSURANCE LIMITS
Adequate Insurance Limits

- Fiduciary Responsibility
  - Financial Risk to Entity.
  - Fiduciary Liability of Board Members.
  - Executive Officer performance standard.
  - Expectations of funding sources.
Adequate Insurance Limits

- Replacement cost of buildings and personal property
  - Replacement cost not market value.
  - Replacement cost at today’s building codes.
    - (Ordinance and law Insurance)
  - Appraisals may be required/prudent.
  - Coinsurance provisions of property insurance policies.
    - Insurance contracts require insurance ‘to value’.
  - If insurance at any value other than replacement cost – inform appropriate parties and obtain approval.
Adequate Insurance Limits

- Alternatives to Replacement Cost
  - Self insured.
  - Actual cash value (depreciated value).
- Both acceptable if part of approved Risk Management Plan.
- How do you justify saving premium when you have an uninsured claim?
Risk Management Issues
Risk Management Issues

- Concurrent / consistent policy limits
  - Property (non-windstorm) policies and wind policies.
  - Citizens?
    - Should have concurrent policy limits.

- Wind deductibles may be substantial – plan financially for wind deductibles.
Risk Management - Lease Issues

- Rental income from tenants.
- **Citizens does not offer Business Income.**
- Increased costs if you need to relocate.
- Responsibility for repairs.
- Location factors.
Risk Management - Income Issues

- Is income stream based on:
  - Work product?
  - Service?
  - Guaranteed?
- How to protect business income?
Risk Management – Flood Insurance

- Required? Advisable? Prudent?
- Everything is in a flood zone.
- Relationship between coverage and flood and wind.
How to Buy Property Insurance
Limited insurance markets

1. Specialty non profit programs.
   - Philadelphia – Siegel, etc.
   - Unlikely.
3. Non-admitted insurance companies.
4. Citizen’s (Wind).
Agent Access to # 1, 3, 4 Above is Widespread

- Critical to designate specific insurance markets to specific agents.
- Multiple submissions to carriers are counter productive.
- Either you or the salesperson controls the marketing process – which do you want?
- Underwriter / Carrier will (generally) only quote to the 1st submission received.
Agent Access to # 1, 3, 4 Above is Widespread

- Premium pricing is non discriminatory. Quality of submission does affect pricing.

- Marketplace is very limited. One agent should be designated for all requested markets. Interview and select agent – let them do their job.

- Assume 7-10% commission. Commission income is adequate to serve and advise client or to quote accounts with 25% ‘hit ratio’. Not both.
  - You can choose quotes or service.
Questions/Comments

Lee Burke, CIC
Questions/Discussion