

JONES WALKER'S GUIDE TO FAQs ABOUT EMPLOYMENT ISSUES ARISING FROM THE HURRICANE KATRINA DISASTER

THESE MATERIALS ARE INTENDED FOR INFORMATIONAL PURPOSES ONLY. THEY ARE NOT INTENDED AND DO NOT CONSTITUTE LEGAL ADVICE AND ARE NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY OR OTHER PROFESSIONAL ADVISOR. IF YOU HAVE ANY QUESTIONS ABOUT YOUR SPECIFIC SITUATION OR SPECIFIC FACTS OR CIRCUMSTANCES, PLEASE CONSULT YOUR ATTORNEY FOR ADVICE.

Table of Contents

	Page
EMPLOYMENT ISSUES	
1. WHAT CAN EMPLOYERS DO TO HELP EMPLOYEES COPE WITH A CATASTROPHE LIKE HURRICANE KATRINA AND RESUME THEIR POSITION IN THE WORKFORCE?	3
2. ARE EMPLOYERS PRECLUDED FROM HIRING INDIVIDUALS WHO ARE UNABLE TO PROVIDE DOCUMENTATION BECAUSE OF HURRICANE KATRINA THAT IS ORDINARILY REQUIRED BY LAW?.....	4
3. WHAT ABOUT EMPLOYEES WHO HAVE APPLIED FOR AND ARE AWAITING WORK VISAS?.....	5
4. ARE FEDERAL CONTRACTORS AND SUBCONTRACTORS REQUIRED TO DEVELOP AFFIRMATIVE ACTION PLANS FOR DISASTER RELIEF WORK?.....	5
5. ARE THERE ANY PROGRAMS THAT PROVIDE UNEMPLOYMENT ASSISTANCE TO VICTIMS OF HURRICANE KATRINA?	5
6. ARE THERE ANY PROGRAMS THAT AID DISLOCATED WORKERS IN FINDING EMPLOYMENT AFTER HURRICANE KATRINA?.....	6
7. MUST EMPLOYERS CONTINUE TO PAY THEIR EMPLOYEES FOR THE TIME SPENT AWAY FROM WORK AFTER HURRICANE KATRINA?.....	6
8. WHAT CHOICES DO INDIVIDUALS HAVE IF THEY ARE NO LONGER WORKING AND ARE THUS INELIGIBLE FOR REGULAR HEALTH CARE COVERAGE?.....	7
9. ARE AN EMPLOYER’S DIRECT DONATIONS TO EMPLOYEES AFFECTED BY HURRICANE KATRINA TAXABLE TO THOSE EMPLOYEES?	7
10. DO EMPLOYERS HAVE TO PROVIDE NON-MEDICAL LEAVES OF ABSENCE TO EMPLOYEES AFTER HURRICANE KATRINA?.....	7
11. WHAT TYPES OF LEAVES OF ABSENCE MAY BE MANDATED BY LAW BECAUSE OF HURRICANE KATRINA?.....	7
12. WHAT ABOUT EMPLOYEES WHO ARE CALLED TO MILITARY DUTY AFTER HURRICANE KATRINA?.....	8

13.	ARE THERE ANY SAFETY GUIDELINES THAT EMPLOYEES PARTICIPATING IN HURRICANE KATRINA CLEAN-UP SHOULD FOLLOW?	9
14.	WHAT SHOULD EMPLOYERS KNOW ABOUT BUSINESS CLOSURES AND MASS LAYOFFS THAT ARE MADE NECESSARY BECAUSE OF HURRICANE KATRINA?	10
15.	WHAT ABOUT EMPLOYERS WHO HAVE ONGOING LITIGATION IN THE AREAS AFFECTED BY HURRICANE KATRINA?.....	11
16.	IS THERE ANYTHING EMPLOYERS CAN DO TO PREPARE IN CASE ANOTHER MAJOR NATURAL DISASTER OCCURS?.....	11

EMPLOYMENT ISSUES

1. **What can employers do to help employees cope with a catastrophe like Hurricane Katrina and resume their position in the workforce?**

- **Communicate with employees *as soon as possible*.** It is extremely important to regularly talk to employees to let them know what's going on in the company, advise them of major upcoming agendas or changes, give them instructions and feedback, and solicit their suggestions and ideas. When a disaster strikes, employees may suffer the loss of their personal possessions, homes, friends, and family. Even a temporary inability to return to work can compound any sense of loss or emotional trauma employees may experience. It is imperative for employers to locate and contact employees immediately following a disaster to inform them of the company's status and plans. If employees know what is expected of them, and what they can expect from the company, they can take the company's plans for them into consideration when rebuilding their personal lives. For example, employers should find a way to communicate to employees information regarding benefits, who to contact regarding benefits, and continuation of benefit programs.
- **Give employees a break, literally.** Employers should treat employees fairly and with compassion when it comes to getting things back on track in both their personal and professional lives. Employees likely need time to get their personal lives in order, whether they need time to grieve for loved ones, make housing or financial arrangements, or seek medical attention. Employers should review their leave policies and benefits to determine whether the nature of the crisis warrants a revision of extended leave or benefits. Applying all policies uniformly is crucial. Events like Hurricane Katrina can adversely affect all employees, even "superstar" employees, so employers should consider Employee Assistance Program (EAP) referrals or other benefits if an employee appears to be slipping in her performance or behavior. While standards do not need to be lowered, employers should understand that it may take some time and assistance for employees to fully recover.
- **Help employees tend to their personal affairs so they can regain their productivity.** Employees often have to spend a great deal of time during business hours to get their personal lives back in order after a disaster, like Hurricane Katrina. For example, employees may need to meet with or talk to benefits providers, claims representatives, bank officials, medical professionals, and attorneys. Employers should consider setting aside time during the day for employees to use the telephones for personal business matters, or consider inviting representatives and/or consultants from insurers, EAPs, legal aid organizations, crisis management services, etc., to meet with employees at scheduled times. Employers may even consider setting aside an office with a telephone and internet access to allow employees to take care of private, personal matters during breaks. The sooner employees get their personal lives in order after a crisis, the sooner they can get back to business as usual.
- **Give managers and supervisors the tools they need to help employees cope.** Because

managers and supervisors are the people who deal directly with employees, it is important that they be educated about the possible effects of a crisis or disaster on employees. They should be able to spot indicators of emotional or behavioral conditions that need attention. Employers may choose to hire a consultant to meet with managers and supervisors. Employers also may take advantage of free booklets and services provided by the government or private relief organizations. At a minimum, managers and supervisors should know to refer affected employees to an employee assistance program or to human resources for the identification of other sources of professional assistance.

- **Leadership should remain visible and firmly in charge.** Employers should let employees know who is in charge of what aspects of the company's response or recovery efforts, and what those efforts are. Employers run the risk of losing valuable and loyal employees if those employees sense the company is disorganized or lacks leadership and a plan for the future.
- **Think through all options before acting.** Calling for a facility closure or mass layoff may not be the most economical or practical response to a disaster. Rash decisions are discouraged. Restoring order and direction will give employees the confidence to stick with the company and work together while it responds to and recovers from disaster.
- **Get involved in community relief efforts and allow employees to participate.** If the disaster or crisis is one that affected others outside your workplace, employers may consider becoming involved in relief efforts and allowing employees to participate. Becoming productive again and helping others can be rewarding and therapeutic for employees and the economy. Employers may organize a blood drive, volunteer services after hours, or contribute to relief funds. Becoming part of a larger response and recovery effort will help employees put their personal losses into perspective.
- **Take care of insurance issues.** Employers should immediately review their insurance policies to determine the potential financial impact of the disaster of their business. Things like business interruption insurance can be a God-send in the wake of a natural disaster. Employers who did not have business interruption insurance should seriously consider purchasing it for future obstacles. Also, employers who lost employees to Hurricane Katrina should promptly review their applicable policy coverage, including life insurance and accidental death and dismemberment.

2. Are employers precluded from hiring individuals who are unable to provide documentation because of Hurricane Katrina that is ordinarily required by law?

No. On September 6th, 2005, the Department of Homeland Security announced that it will not sanction employers for the next 45 days for hiring victims of Hurricane Katrina who, **at this time**, are unable to provide documentation normally required by law.

Employers are responsible for completing and retaining Employment Verification (I-9) Forms for individuals they hire for employment. This form requires employers to verify

employment eligibility and establish identity through original documents presented by the employee.

Many victims of Hurricane Katrina lack the necessary documents due to evacuation or the loss of or damage to their homes. Additionally, due to the interruption of government functioning in the affected areas, many hurricane victims will be unable to apply for and receive new documents in the period of time required by the employment verification rules.

Employers should still complete I-9 forms to the greatest extent possible, but should indicate that required documentation is unavailable due to Hurricane Katrina and its aftermath, and follow-up with employees to obtain substitute or other documentation when it becomes available.

At the end of the 45 period, the Department of Homeland Security will review this policy and make further recommendations.

3. What post-disaster obligations apply regarding employees who have applied for and are awaiting work visas?

For those employers whose employees had applied for work visas before Hurricane Katrina, it should be noted that the United States Citizenship and Immigration Services (USCIS) has recognized the impact Hurricane Katrina had on immigrant communities along the Gulf Coast. The agency is currently reviewing processes that will allow for continuation of operations and assurance that immigrants will be capable of receiving benefits and services. When those services become available, they will be posted at www.uscis.gov.

4. Are federal contractors and subcontractors required to develop affirmative action plans for disaster relief work?

No. On September 9, the DOL waived the affirmative action requirements for federal contractors and subcontractors. However, while the DOL's Office of Federal Contract Compliance Programs (OFCCP) memo explaining the waiver does not specify which types of contracts or subcontracts fall under the waiver, the OFCCP's Director, Charles James, clarified that the waiver applies to "service and supply contracts" – not construction contracts. Federal contracts and subcontracts for construction work are still subject to affirmative action requirements. A copy of the OFCCP's memo containing the full terms of the waiver can be found at www.dol.gov/esa/ofccp.

5. Are there any programs that provide unemployment assistance to victims of Hurricane Katrina?

Yes. When the President declared several major disaster areas due to Hurricane Katrina, several programs of individual assistance became available. One such program is the Disaster Unemployment Assistance (DUA) program. DUA provides assistance to individuals whose employment or self-employment has been lost or interrupted as a direct result of a major disaster and who are NOT eligible for regular state unemployment insurance. DUA is funded by FEMA, but is administered by state unemployment agencies.

To apply in Louisiana, individuals may report in person to the nearest Job Center or may file over the internet at the Louisiana Department of Labor (LDOL) website at www.laworks.net or call at 1-866-783-5567. For more information on the DUA program, individuals may also call 1-866-4-USA-DOL (1-866-487-2365). Additionally, the LDOL and the Texas Workforce Commission have created a new toll-free number to be used only for people filing for regular unemployment benefits as a direct result of Hurricane Katrina. That number is 1-800-818-7811.

As for those individuals who are eligible for regular state unemployment compensation benefits, they can receive those benefits if they are unable to work due to Hurricane Katrina. Eligibility requirements vary from state to state, but, generally, qualifying employees are eligible for unemployment benefits if they are unemployed for reasons unrelated to their own misconduct. In Louisiana, there is a one-week waiting period for unemployment benefits, although the LDOL has stated that unemployment benefits claims will be processed as soon as possible. Incidentally, employees in Louisiana who are receiving accrued vacation pay from employers can also receive unemployment compensation benefits; however, those benefits can be reduced by the amount of vacation pay (or other wages) received by the individuals.

6. Are there any programs that provide reemployment assistance to victims of Hurricane Katrina?

Federal law authorizes the states to create reemployment assistance programs; however to date, Louisiana has not announced any such program. Dislocated workers can, however, access temporary job information at 1-866-4-USA-DOL (1-866-487-2365). The DOL's website also invites individuals who lost their jobs due to Hurricane Katrina to visit www.jobsearch.org/katrinajobs for employment information.

7. Must employers continue to pay their employees for the time spent away from work after Hurricane Katrina?

It depends. As all employers should know, employees are classified as either exempt or non-exempt depending on their positions and duties. Employers do not have to pay non-exempt workers for the time spent away from work after a natural disaster. Of course, employers who have the means may very well choose to do so, and many have. Exempt employees, on the other hand, must be paid their full salary for any work week in which they perform any amount of work – regardless of how little work is actually performed.

Employers can, however, make deductions from exempt employees' pay if they are absent from work for more than one day as a result of a sickness or disability only when those deductions are made in compliance with a plan, practice, or policy. Employers who make improper deductions from exempt employees' pay risk losing the exemption and thereby becoming obligated to pay overtime to those employees.

Unionized employers should check collective bargaining agreements or talk to the union directly before unilaterally delaying any wage payments. All employees should be kept abreast of all issues involving their wages; uncertainty in this area can cause key employees to seek other employment and can lead to morale problems.

8. What choices do individuals have if they are no longer working and, thus, are ineligible for regular health care coverage?

Employees who are no longer working and who are therefore ineligible for coverage under their regular health care plan may elect Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage. In those circumstances, the COBRA-covered plan should notify the plan administrator, who then should send COBRA information and election forms to employees. COBRA notices are timely when sent up to 45 days after the “COBRA-qualifying event,” and employees then have 60 days to elect COBRA coverage.

9. Are an employer’s direct donations to employees affected by Hurricane Katrina taxable to those employees?

No. An employer’s direct donation to affected employees is not taxable to them and, thus, employers are not obligated to withhold on the payment to the employees – as long as the payments qualify as “disaster relief payments” under Section 139 of the Internal Revenue Code and as long as they are paid to benefit employees for reasonable and necessary personal and living expenses. Direct payments like this to employees are not deductible for the employer unless the employer sets up a tax exempt organization to qualify the payments as charitable donations. If an employer chooses to set up a tax exempt organization, it may begin accepting donations before the IRS determines the charitable status. Similar to the program established after the September 11, 2001 attacks, the government has agreed to expedite applications for tax exempt status to aid victims of Hurricane Katrina and may grant tax exempt status within as few as ten (10) days.

10. Do employers have to provide non-medical leaves of absence to employees after Hurricane Katrina?

No, but it is probably a good idea to do so. Above and beyond whatever leaves of absence are required by state or federal law, employers may choose to provide their employees with other non-mandated leaves of absence like paid vacation time, paid personal leave, unpaid personal leave, sick leave, and bereavement leave. Employers who do not already have these types of leave policies available to their employees may consider instituting them to accommodate employees who were affected by Hurricane Katrina. Likewise, those employers that already have similar leave policies might choose to extend them for accommodation purposes. While strict adherence to leave policies is normally encouraged, a relaxed approach to company leave policies during a natural disaster will likely benefit the employer in the long-run – both by positively affecting employee morale and by strengthening the business’s community image. It is crucial, however, that all leave policies be applied uniformly among employees.

11. What types of leaves of absence may be mandated by law because of Hurricane Katrina?

Employers may be required to allow certain leaves of absence under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Employers covered by the FMLA are obligated to provide up to twelve weeks of leave to employees who

are eligible for FMLA leave and have an FMLA qualifying condition or other qualifying circumstance.

Also, employers may be required to extend leave to individuals impaired physically or emotionally by Hurricane Katrina if the injury constitutes a disability under the ADA, and if such leave would be considered a reasonable accommodation under the ADA. It should be noted that, unlike FMLA leave, leave as a reasonable accommodation under the ADA may not necessarily be limited to twelve weeks.

12. What obligations apply regarding employees who are called to military duty after Hurricane Katrina?

If an employee is called to military duty as a result of Hurricane Katrina, Louisiana's Military Service Relief Act (MSRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) will apply.

Louisiana's MSRA applies to any private or public employer in Louisiana. The MSRA was enacted to supplement the rights that persons called to military service have under federal statutes, including USERRA. Because Louisiana's MSRA was modeled after USERRA, the MSRA and USERRA contain virtually identical provisions. The MSRA is more protective of service members in certain respects and, to that extent, trumps USERRA so its key provisions are noted below.

The MSRA prohibits discrimination in employment against any person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform in a uniformed service. Uniformed service means the voluntary or involuntary performance of duty in the armed forces of the United States, including active duty, active duty for training, inactive duty training, full-time National Guard duty, and a period of absence due to a fitness for duty examination. The person in uniformed service may not be denied initial employment, reemployment, retention in employment, promotion, or a benefit of employment because of the person's uniformed service or obligation for uniformed service.

Any employee who leaves employment to perform service in uniformed services must be treated as being on a military leave of absence during the period of service, provided the person applies for reemployment. The MSRA does not require, but allows, employers to compensate employees who are on military leave. However, if an employer has a policy, pattern or practice of compensating an employee who takes military leave, the employer must compensate all employees who take military leave.

If an employee returning from military leave meets the following requirements, he is entitled to reemployment and other employment benefits within **ten days** following the employee's application for reemployment:

1. the employee, or an uniformed services officer, gave advanced written or verbal notice of service to the employer;
2. the employee's cumulative length of absence due to uniformed service does not exceed five years;

3. the person reports to, or submits an application for reemployment to such employer within the time allowed; and
4. the person was honorably discharged from uniformed service.

In order to return to work, if the employee's service was less than thirty-one days or if the employee was absent for any length for fitness for duty examination, he/she must notify the employer on the first full regularly scheduled work period on the first full calendar day following the completion of the period of service plus an eight hour period for the transport of the person to the employee's place of residence (or as soon as possible after the eight hour period if reporting during that period is impossible due to no fault of employee).

If the person's service was between thirty- one and one hundred eighty-one days, the employee must submit an application for reemployment not later than fourteen days after the period of service (or on the first calendar submission becomes possible if impossible due to no fault of employee).

If the person's service was more than one hundred eighty-one days, the employee must submit an application for reemployment not later than ninety days after the period of service. The MSRA is intentionally written broadly, such that an employer should consider the surrounding circumstances if the returning employee's application for reemployment is untimely.

Upon meeting the requirements of reemployment, the employee must be restored to the same position, seniority, status and benefits (including participation in any training program) he would have enjoyed if he had continued to work for the employer. This means if the employee would have achieved an increase in pay or benefits, such as increased vacation days, the employee should receive the greater benefits upon reemployment.

Once reemployed, the employee shall not be discharged without cause within one year of reinstatement of his position. Thus, in contrast with Louisiana's at-will employment relationship, an employee who returns to work from military leave has the equivalent of a one-year employment contract.

Unlike the MSRA, USERRA does not provide that an employee continues to accrue sick leave, annual leave, vacation leave, or military leave on his same basis of accrual as during active employment. However, because Louisiana's law is more generous, employers should continue to accrue such benefits for Louisiana employees on military leave.

13. Are there any safety guidelines that employees participating in Hurricane Katrina clean-up should follow?

Yes. The Occupational Safety and Health Administration (OSHA) has published fact sheets to aid employers who have employees participating in clean-up and recovery efforts. The Administration is urging individuals participating in this necessary but dangerous work to take the proper health and safety precautions to avoid sustaining injuries from downed power lines, falls, and other potential accidents. Employers are responsible for providing and maintaining a safe workplace for employees, and the Administration is responsible for setting and enforcing

certain safety standards. Facts sheets on natural disaster recovery addressing clean-up hazards, food clean-up, flooding, fungi, downed power lines, and potential injuries caused by falls, electrical mishaps, chainsaws, and tree trimmings are available at www.osha.gov. The Center for Disease Control also provides helpful information relating to numerous other risks associated with clean-up and recovery efforts at www.bt.cdc.gov/disasters/hurricanes/.

14. What should employers know about plant closures and mass layoffs that are made necessary because of Hurricane Katrina?

Employers should do their best to avoid “knee-jerk” reactions that call for plant closings and mass layoffs. However, if after careful consideration, it becomes clear that a closing or layoff is necessary and prudent, employers may want to consider taking volunteers who want to participate in the layoff. Again, unionized employers should remember to consider the requirements of any collective bargaining agreement before taking immediate action. Because these closure and layoff issues are always fact specific, employers should seek legal advice before making any major decision.

Ordinarily, the Worker Adjustment and Retraining Notification Act (WARN Act) requires that certain employers provide 60 days notice of a plant closure or mass layoff along with detailed information about certain benefits. However, there is an exception to the WARN Act that could under some circumstances apply as a result of Hurricane Katrina. Specifically, the WARN Act provides that the 60-day notice is not required if a plant closing or mass layoff is due to any form of natural disaster, but employers still must give “as much notice as is practicable” and shall at the time give “a brief statement of the basis for reducing the notification period.” However, because questions about WARN applicability are almost always fact-specific, all questions should be referred to legal counsel.

The WARN Act applies to employers who employ 100 or more employees, excluding part-time employees. A plant closing is defined as “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any thirty day period for 50 or more employees excluding any part-time employees.” On the other hand, a mass layoff is a little more complicated and involves a precise calculation of employment losses relating to the number or percentage of employees involved in the layoff.

The WARN Act also may become applicable during the sale of a business that results in employment losses, which unfortunately may become necessary after a natural disaster like Hurricane Katrina. When all or part of an employer’s business is being sold and the requisite number of employment losses occurs, the seller is responsible for providing notice up to and including the effective date of the sale. After the effective date of the sale, the purchaser shall be responsible for providing notice. An asset sale would generally be considered a sale of part or all of the employer’s business; therefore, if a seller closes the plant or lays off the workers the seller is responsible for the notice and if the buyer closes the plant or lays off the workers the buyer is responsible.

Ordinarily, if notice is not given to employees, employers can be liable for the pay the employees would have received during the 60 day notice period.

15. What happens to ongoing employment claims and litigation in the areas affected by Hurricane Katrina?

Employers who have ongoing litigation should be aware that state and federal courts and governments have taken action to preserve statutes of limitation and suspend deadlines where litigants are unable to pursue or defend matters due to the disaster. Please contact your attorney if you have any questions about deadlines in ongoing or potential legal matters.

16. Is there anything employers can do to prepare in case another major natural disaster occurs?

Absolutely. Employers should take the time to develop a disaster response and recovery plan if one is not already in place, or update current plans with any lessons learned from Hurricane Katrina. Employers should identify all critical or essential business functions, such as information technology, accounting, and personnel, and establish a plan for the preservation and continuation of those functions in the event of a disaster. Having a succession of management already named with at least one individual who can assume leadership immediately after the disaster can be critical for continued business operations.

Employers should specifically train employees on how to respond in emergencies. Having a written contingency plan for shutting down the business and taking care of employee needs is important in a crisis. Employers should prepare a list of tasks to accomplish at least three days before a storm's arrival. Communicating a pre-set shut-down time is helpful so employees know how much time they have to prepare at home. Employers may also consider setting up a telephone message hot line or internet contact page (provided by a third party out of the affected area) so that they can communicate important information to employees. Also, employers should evaluate how and where their critical files are stored and should back up those files and computer systems in advance. Taking video or still pictures before a storm can be helpful for insurance purposes. All power sources should be shut down and all loose materials should be tied down or brought inside away from windows. If an employer has the means and resources to do so, it might consider reserving hotel rooms for displaced employees in a safe location, outside of the storm's projected path. Maintaining up-to-date emergency contact information is helpful when trying to locate displaced employees or their next of kin.

The U.S. Department of Homeland Security offers several tips for businesses when developing or evaluating disaster recovery plans at www.ready.gov/business/index.html. The Red Cross offers its own tips to businesses in preparing a recovery plan at www.redcross.org/services/prepare/0,1082,0_64_,00.html. The Small Business Administration also has provided information relating to disaster recovery at www.sba.gov/disaster_recov/prepared/getready.html. Finally, FEMA has made available Emergency Management Guide For Business & Industry at www.fema.gov/library/bizindex.shtm.