

# Preparing Your HR Department for a Weather Emergency

Presented By:

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# Today's Presenters



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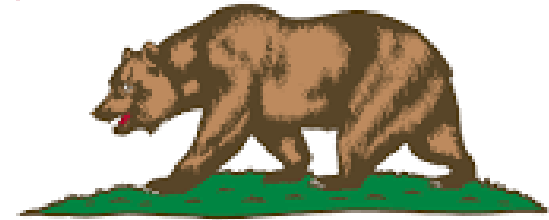


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# State and Local Weather Emergency Employment Laws

# Cal. Lab. Code § 1139 – Right to Refuse Unsafe Work

- California Labor Code section 1139 prohibits employers from taking or threatening retaliatory action against any eligible employee who leaves or refuses to report to a workplace during an emergency condition if:
  - a) the workplace is in an emergency-affected area and the employee has a reasonable belief that the workplace or worksite is unsafe, or
  - b) the employee has been ordered to evacuate their home, workplace or worksite or their child's school has been ordered to evacuate due to natural disaster or a criminal act.



CALIFORNIA REPUBLIC

# Cal. Lab. Code § 1139 – Right to Refuse Unsafe Work

- **Emergency conditions can include the conditions themselves, or orders to evacuate due to either natural disaster or criminal act (e.g., bomb threat, mass shooting).**
- **Also prohibits employers from preventing employees from accessing their mobile devices or other communications devices to seek emergency assistance, assess the safety of the situation or communicate with others to confirm their safety.**
- **Not intended to apply once emergency conditions posing imminent and ongoing risk of harm to the workplace, worksite, worker or worker's home have ceased.**

# Texas Labor Code 22.002 – Job Protections for Evacuating Employees

- **“An employer may not discharge or in any other manner 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.”**
- **Tex. Labor Code Sec. 22.002**





# Texas Labor Code 22.002 – Job Protections for Evacuating Employees

- “Evacuation Orders” are defined to include not only mandatory evacuations, but *recommended* evacuations as well.
- Section 22.002 does not apply to individuals employed as emergency services personnel if the employer provides adequate emergency shelter for those individuals. This chapter does not apply to a person who is necessary to provide for the safety and well-being of the general public, including a person necessary for the restoration of vital services.
- Emergency services personnel includes fire fighters, police officers and other peace officers, emergency medical technicians, and other individuals who are required, in the course and scope of their employment, to provide services for the benefit of the general public during emergency situations.



# Colorado Family and Medical Leave Act § 8-13.3-404

## Job Protected Leave Related to Natural Disasters

- **“An employer shall allow an employee to use the employee’s accrued paid sick leave to be absent from work when . . . the employee needs to care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected occurrence or event that results in the closure of the family member's school or place of care; or needs to evacuate the employee's place of residence due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected occurrence or event that results in the need to evacuate the employee's residence.”**
- **Colo. Rev. Stat. § 8-13.3-404**



# Pennsylvania Statutes Title 43 P.S. Labor § 1482.

## Termination or discipline of employees

- **An employer may not terminate or discipline an employee for failing to report to work due to a closure of the roads in the county of the employer's place of business or the county of the employee's residence resulting from a state of emergency declared by the Governor.**



# Takeaways

- Before discharging, demoting, disciplining, or taking other action against an employee for participating in evacuations, employers should gather specific information related to the employee's reason for absence to determine if the employee falls under the protections of the statute
- Be proactive in searching for evacuation orders to determine if employees are covered under the statute



# Wage & Hour Issues

# Wage & Hour Common Questions

- If a work site is closed because of weather, or unable to reopen because of damage and/or loss of utilities, is an employer required to pay affected employees?
  - An employer who is closed due to a natural disaster does not have to pay its non-exempt employees for this time because no work is available.
  - A “weather day” with pay for a non-exempt employee is not hours worked for overtime purposes.
  - For exempt employees, generally an employer will be required to pay the employee’s full salary if ANY work was performed during the workweek, even though the worksite is subsequently closed or unable to reopen due to weather or other disasters.
    - Note: an employer may require exempt employees to use allowed leave for this time off or make up lost time in another work week.

# Wage & Hour Common Questions

- **Is it lawful to dock the salaries of exempt employees who do not return to work when needed after an Emergency or disaster?**
  - If the business is closed due to weather or disaster, then those absences should not count against employees, and you should not dock salary.
  - If the employer is open for business, the Department of Labor considers an absence caused by transportation or other difficulties experienced during weather emergencies to be an absence for personal reasons.
  - We recommend caution because partial day deductions are not allowed, and most employees will perform some work (e.g., checking emails)

# Wage & Hour Common Questions

- What are other wage and hour pitfalls that employers should be aware of following a hurricane or other natural disaster?
  - **Volunteer Time**: The FLSA does not allow employees to “volunteer” to perform their job (or other productive work) for an employer in the wake of a natural disaster.
  - **On Call or Waiting Time**: An employee who is required to remain on call or wait for an event (i.e., power to be restored) is considered working and the employer may be required to pay that employee for all of the time.
  - **Time Records**: In the event a natural disaster destroys or temporarily interferes with an employer’s timekeeping records or system, it should attempt to recreate the records using the most accurate means available. Ask employees to review and sign their re-created timecards to ensure the records are as accurate as possible.



# Employee Leave and Accommodation Issues

# Leave Following an Emergency

- **Can employees affected by a weather-related event seek protected leave under the Family and Medical Leave Act (“FMLA”)?**
  - **Yes, employees affected by a natural disaster are entitled to leave under the FMLA for a serious health condition caused by the disaster. Additionally, employees affected by a natural disaster who must care for a child, spouse, or parent with a serious health condition may also be entitled to leave under the FMLA. Some examples of storm related issues might include absences caused by an employee’s need to care for a family member who requires refrigerated medicine or medical equipment not operating because of a power outage.**

# Leave Under USERRA

- **For those employees who are also part of an emergency services organization (such as the National Guard or a Reserve unit), USERRA prohibits discharging, denying initial employment, denying promotion or denying any benefit of employment because of a person's membership, performance of service or obligation to perform service in uniformed service.**
- **While USERRA does require advance notice of military service, there is no time limit within which notice must be given; notice must simply be "timely." In the event of a hurricane or other natural disaster, there will be short notice. The notice may be written or oral and it may be provided by the employee or an appropriate officer of the military branch in which the employee is providing uniformed service.**

# Use of PTO/Sick Time

- Employees may use accrued PTO or sick leave as provided by the employer's policies.
- Employers should also be mindful of state-specific laws that may apply. Some states have expanded the reasons employees may take paid or unpaid leave to include closures of an employee's business or their child's place of care, which could be due to adverse weather or public health or safety-related reasons.
  - For example, in California, employees generally may choose to take vacation or other PTO time but could not be required to use such time unless reasonable notice is provided and stated in an employment agreement.
- Consider whether other unpaid leaves or permitting employees to donate leave to leave banks may be appropriate.

# Remote Work as a Reasonable Accommodation

- The ADA does not require an employer to offer a telecommuting program to all employees, but:
  - Employers that do must allow employees with disabilities an equal opportunity to participate;
  - Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telecommute; and
  - Employers may be required to modify workplace policies for a new employee with a disability seeking to work at home where the job can be performed at home (e.g., by waiving a one-year eligibility requirement)



# OSHA Obligations

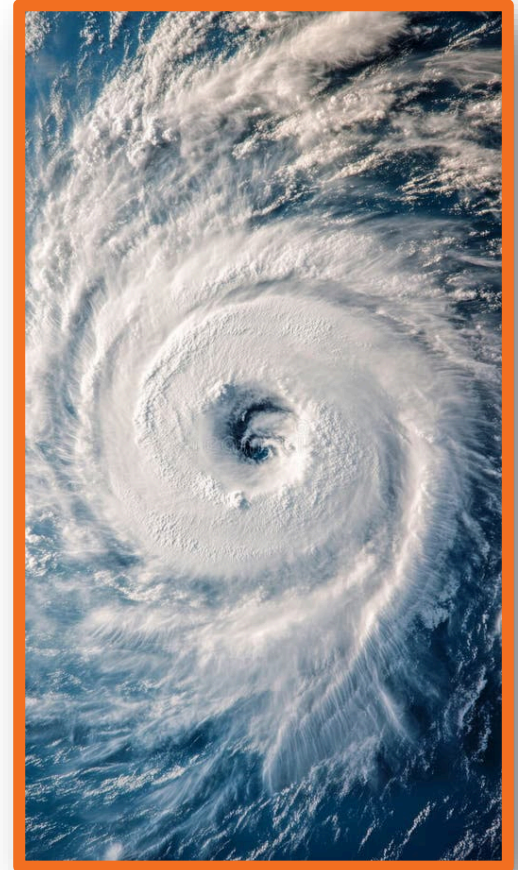


# Extreme Weather and OSHA

- **Federal OSHA does not have a specific standard covering weather-related hazards**
- **General Duty Clause**
- **There are specific standards that generally protect workers during response and recovery efforts including:**
  - **PPE**
  - **Hazardous Waste Operations and Emergency Response**
  - **Hazard Communication**
  - **Structured Safety**
  - **Respiratory Protection**
  - **Fall protection / Scaffolding**

# OSHA Weather Guidance

- ***Hurricane Preparedness and Response***
  - <https://www.osha.gov/hurricane>
  - Most employers are required to have an Emergency Action Plan
- **Planning:**
  - Conditions that will activate the plan
  - Conditions under which it may be better to shelter-in-place
  - Chain of command
  - Emergency functions and who will perform them
  - Specific evacuation procedures, including routes and exits
  - Procedures for accounting of personnel
  - Designation of who, if anyone, should remain after the evacuation alarm to shut down critical operations or perform other duties before evacuating
  - Special equipment for personnel



# Evacuation Wardens

- **Generally, OSHA recommends a ratio of 1 evacuation warden for every 20 employees during workplace emergencies like hurricanes**
- **While 1:20 is a general guideline, some workplaces may need more or less wardens based on factors like risk level**
- **Appropriate number of wardens should be available during all working hours**
- **Evacuation wardens assist in guiding employees to safety, helping disabled individuals and ensuring accountability at check-in points**
- **Wardens should be well-trained on the workplace layout and alternative escape routes**

# Additional OSHA Weather Guidance

- **Tornadoes**
  - <https://www.osha.gov/tornado>
- **Earthquakes**
  - <https://www.osha.gov/earthquakes>
- **Floods**
  - <https://www.osha.gov/flood>
- **Wildfires**
  - <https://www.osha.gov/flood>
- **Winter Weather**
  - <https://www.osha.gov/winter-weather>

<https://www.vox.com/climate/2023/7/11/23791452/nyc-flooding-brooklyn-weather-climate-change>



<https://en.wikipedia.org/wiki/Wildfire>

# OSHA Enforcement During Hurricanes

- **No specific exemption for OSHA compliance during and/or after hurricanes**
- **Historically OSHA focused on compliance assistance as opposed to issuing citations**

# Retaliation

- **Section 11(c)**
- **OSHA instructs employees to speak with their employers first when they believe that working conditions are unsafe or unhealthy**
- **Employees are generally protected if they refuse to do a job due to a good-faith belief they are exposed to imminent danger**
- **NLRA – engaged in concerted protected activity**



# OSHA Proposed Heat Illness Prevention Standard

- *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings*
- Released on July 2, 2024
- OSHA has been working on the proposal since 2021
- OSHA holding virtual public hearings now
- Fate is questionable – most likely won't move forward or will move forward in a materially different form
- Currently includes 80 and 90 degree triggers
- Requires a heat injury and illness prevention plan for most employers
- Heat safety coordinator
- Recordkeeping and training
- Paid breaks
- Heat acclimatization



# Open Issues and What's Next?

- No definition of breaks, e.g., consider driving from one site to another or sedentary time in the heat listening to job instructions or similar duties
- Staffing issues associated with acclimatization
- Emergency response terms are vague and place significant responsibilities on frontline supervisors, e.g., when is body temperature “excessive” and what steps must be taken to reduce body temperature?
- Individualized differences in working in the heat not taken into account
- Legal challenges (more occupational deaths on average due to animal attacks than heat stress) – *Loper Bright Enterprises*
- General Duty Clause / National Emphasis Program for Heat
- <https://www.osha.gov/sites/default/files/publications/heat-rulemaking-factsheet.pdf>
- Individual State Action

# EMERGENCY PLANNING BEFORE, DURING & AFTER EVENT

# INCIDENT RESPONSE CHALLENGES

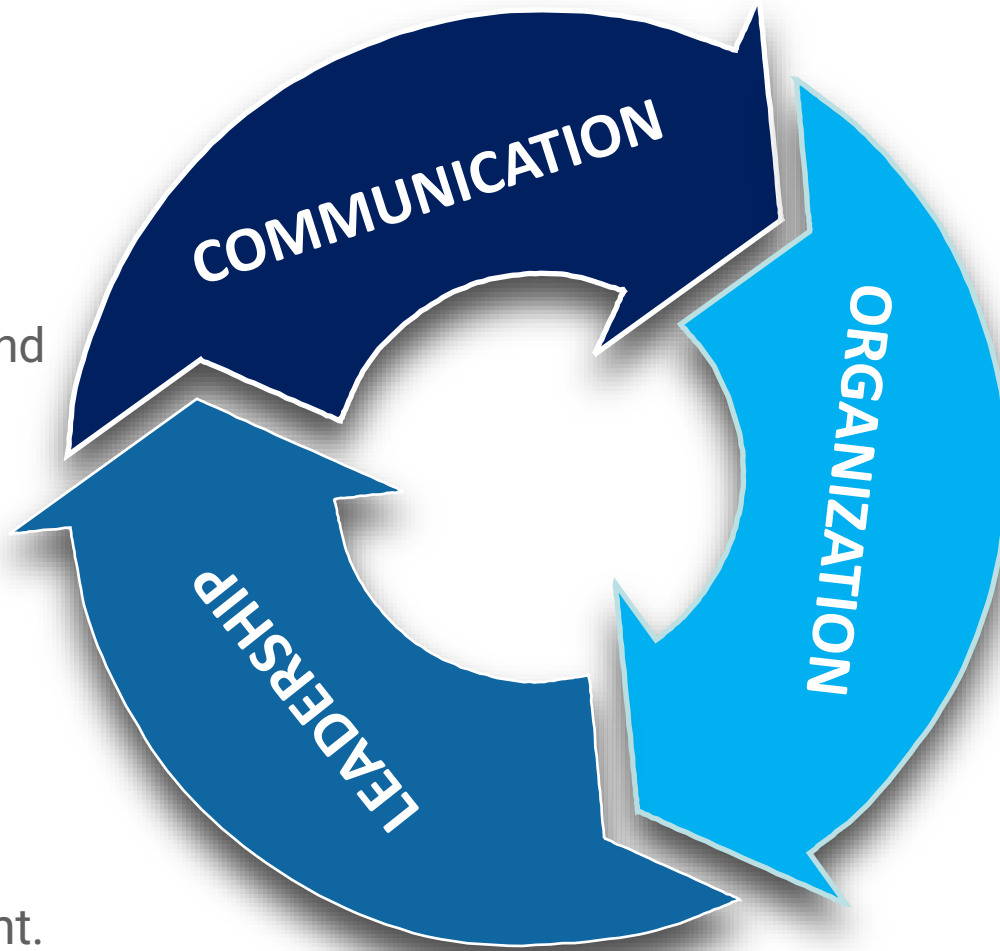
## *The Tragic Trio*

### COMMUNICATION

Failure of bidirectional communication, horizontally and vertically prohibits organization and undermines leadership.

### LEADERSHIP

Failures of leadership produce disorganization, miscommunication, and ineffective incident management.



### ORGANIZATION

Failures of interdepartmental organization can confuse communications and can indicate a conflict within leadership.

# Before a Storm

- **Assign roles & responsibilities.**
- **Identify critical functions necessary for Business Continuity**
- **Identify evacuation and reunification locations & communicate to team**
- **Conduct Training**
- **Determine and notify all employees of communication plans and methods: before, during and after the storm.**
- **Consider on-hand supplies**
- **Prepare/Harden Facility**

# During a Storm

- **Continuously monitor official alerts and guidance**
- **Employees working may need to shelter in place**
- **Conduct frequent accountability check ins with team**
- **Explore emergency communication options**



# After the Storm: Recovery

- **Activate Business Continuity Plan**
- **Prioritize Employee Safety**
- **Support Employees**
- **Document Damages**
- **Bring Services and employees back based on risk and priority**

# Post Event - Lessons Learned

- **How to conduct an AAR (without getting all FEMA on you!)**
  - Describe the event in detail
  - Analyze the difference
  - Identify the lessons learned
  - Develop Action Items
- **Successful After-Action Review Tips**
  - Be timely. Conduct as soon as reasonably possible post event
  - Be open and honest about the good (and the not so good)
  - Emphasize how you did as a team rather than assign individual blame
  - Don't just talk – go beyond analyzing to determine steps for improvement
  - Record the key takeaways
  - Share the results with key stakeholders
  - Track the implementation of recommendations and improvements

Questions?