

Evacuation Discrimination? Yes, you can be sued for this.

Employment Law / September 26, 2017 / Demetri J. Economou

It's been one month since Hurricane Harvey made landfall in Rockport, but most companies are just now fully appreciating the after-effects. Some companies still haven't reopened, and many more have had to make tough decisions about their workforce.

Here are 3 Texas initiatives that HR leaders will be dealing with as work resumes:

1. Emergency Evacuation Discrimination

A cause of action most HR practitioners have never heard of – evacuation discrimination is real and has real consequences. Under Texas Labor Code Chapter 22:

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.

Mandatory evacuations were ordered up and down the coast, for wind and (more commonly) flooding – so there are a lot of potential plaintiffs here. Possible relief includes monetary damages, loss of wages, employer-provided benefits lost as a result of the violation, and job reinstatement.

There are a couple nuances here which are untested in Court:

- The definition of “emergency evacuation order” includes any evacuation that the government may “recommend” during a disaster. Does that include voluntary evacuations? My sense is that it does not, but the language used by the government in ordering the evacuation would be key in the analysis – is it “leave if you feel like it,” or “we recommend you get out, but aren't going to force you”? The latter could indeed be covered.
- The element of “leav[ing] the place of employment” – a plain reading suggests the employee must actually walk off the job, rather than simply fail to appear for work when the business reopens. Again, this is untested.

2. Disaster Unemployment Assistance (DUA)

Disaster Unemployment Assistance is government assistance for employees who have lost their jobs, but are not eligible for regular unemployment benefits (or, their regular unemployment benefits have ended). Because many workforces were cut for a number of reasons following Harvey, there are plenty of people requesting DUA.

Ex-employees who may apply for DUA include those who:

- lost their job, which was more than 50% total income;
- live in, work in, or travel through the disaster area (includes 17 counties in Texas);
- place of employment was damaged or closed;
- scheduled to start work but the job no longer exists or can no longer reach the new job;
- suffered injury or incapacitation; or
- became the breadwinner or major support of the household due to the death of the head of household.

While DUA applications are due from the ex-employee on September 27, 2017, there is a 21-day grace period in which those people may file their required documents with the TWC. So, HR departments will still be receiving requests from those employees for proof of employment, among other things.

3. Total and Partial Unemployment

As stated above, regular benefits must be paid prior to opening up DUA funds. Therefore, each DUA applicant is subject to an eligibility review for regular benefits. Ex-employees who are eligible for regular benefits (including full and partial unemployment) will go through normal TWC channels, which will include involvement from the employer.

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