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**TEXAS EMPLOYEES, EVACUATION-RELATED ABSENCES, AND POSSIBLE
INSURANCE COVERAGE FOR LOST WORK DAYS:
FAQS IN THE WAKE OF HURRICANE RITA**

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1. Does Texas law address an employee's right to continued employment following an absence due to an emergency evacuation? Yes.

Texas Labor Code Chapter 22, entitled "Employment Discrimination for Participating in Emergency Evacuation," states:

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.

Texas Labor Code § 22.002 (1995).

Chapter 22 broadly defines an "emergency evacuation order" to include orders that "recommend" evacuation as well as orders that mandate evacuation. Under this standard, orders issued by authorities in connection with last week's Hurricane Rita constitute "emergency evacuation" orders within the meaning of § 22.002.

The City of Houston's website, at <http://www.houstontx.gov/mayor/press/20050921a.html>, reflects that local authorities issued mandatory evacuation orders for persons in Flood Zones A-C in Harris, Galveston, and Brazoria counties.² The website further indicates that mandatory evacuation orders were issued for persons living in mobile homes as well as for "Houstonians...living in areas that typically flood." This latter language is vague enough that it might arguably include any location in the City of Houston. Furthermore, this same website notes that a "request has been issued for voluntary evacuation of those living in flood-prone areas."

An employer that violates § 22.002 is liable for lost wages and employer-provided benefits and may also be required to reinstate the terminated employee to the same or an equivalent position

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² For a description of evacuation orders in Galveston and Brazoria Counties, see <http://www.chron.com/cs/CDA/ssistory.mpl/topstory2/3361432>. For a description of other mandatory or voluntary evacuation orders issued in the Texas Gulf Coast area, see <http://www.chron.com/cs/CDA/ssistory.mpl/metropolitan/3366176>

with “commensurate pay.” Texas Labor Code § 22.003. Because an employer that fires an employee in violation of Chapter 22 may be liable for lost benefits, such an employer may face hundreds of thousands of dollars in liability. Such liability may arise, for example, when a terminated employee loses medical coverage and then the employee or a family member suffers a serious accident before new medical coverage is obtained.

Chapter 22 does not apply to: (1) “emergency services personnel” for whom the employer provides adequate emergency shelter, and (2) employees necessary for public safety, including those necessary for restoration of vital services. Texas Labor Code § 22.004.

2. Is there a “small employer” exception to Texas Labor Code Chapter 22? No.

Chapter 22 applies even if an employer has only one employee. Under § 22.001(5), “employer” means “a person who employs one or more employees.”

3. Under Texas Labor Code Chapter 22, how long must an employer hold open the job of an employee who fails to return after Hurricane Rita? This depends on what is reasonable in the employee’s particular circumstances.

This question can be answered only on a case-by-case basis after consideration of the facts concerning a particular employee. As to employees in the Houston area who evacuated to distant locations and whose homes were not seriously damaged by Hurricane Rita, the employer in many cases would probably be justified in expecting the employee to return to work within one or two days after the day that state and local authorities designated as the return day for evacuees within the employee’s area.³ But any special circumstances, such as further road congestion, new fuel crises, or a traffic accident suffered by the employee on the return trip, would also need to be considered. Furthermore, if the employee had a medical problem that made it difficult to return within a day after the designated return day, this condition might need to be taken into account either under Texas Labor Code Chapter 22 or federal or state disability laws.

As to employees residing in the hard-hit Port Arthur area who are not being allowed to return to their homes or who have no homes to which to return, the job protections of Chapter 22 may extend for weeks rather than days. Of course, Chapter 22 does not prevent an employer, in appropriate cases, from requiring employees to follow the employer’s published procedures for calling in to report absences (assuming that employees have been given working phone numbers to which they may call in and assuming that they have access to telephones).

4. Does Texas law protect employees who remained in their homes during and after Hurricane Rita but who offer hurricane-related reasons for not returning to work in the week following the hurricane? Possibly.

Although there are no cases construing Chapter 22, by its literal language this statute applies only to employees who leave work to “participate in a general public evacuation...” Nevertheless, absent the employee’s witnessed admissions that he stayed at home during the storm and never intended to evacuate, the conservative approach would be to assume that

³ For information concerning designated return dates, see <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-09-24.0648>.

Chapter 22 applies to all employees in counties covered by evacuation orders, including those orders that merely “recommend” evacuation. This conservative approach is recommended due to:

- (1) the difficulties of controverting an employee’s claim that he or she evacuated,
- (2) ambiguities about what constitutes an “evacuation” (*i.e.*, seeking shelter at a neighbor’s house on higher ground could arguably constitute an “evacuation”), and
- (3) the possibility that Chapter 22 might apply if the employee left work to participate in the Hurricane Rita evacuation but was prohibited from evacuating due to the traffic nightmare created as over 2 million people attempted to escape from the Houston area, despite the general unavailability of gasoline.

5. Does Chapter 22 of the Texas Labor Code protect employees who have returned home but claim that they cannot come to work during the week after Hurricane Rita because they say they cannot find gasoline for their vehicles? Only in limited circumstances.

An employee who burned up all the gasoline in his or her vehicle attempting to evacuate (or return from the evacuation) and then, despite a diligent effort, could not find fuel to drive to work on Monday, September 26, *might*, in limited circumstances, be able to state a case under Chapter 22. But any employees living in the Houston metropolitan area who offer this excuse could be quizzed about what efforts they have made to use the public transportation to come to work. Furthermore, with *The Houston Chronicle* reporting in its September 25 edition that “[d]rivers scouting for gasoline today are reporting success after a little persistence...,” employers might wish to respond to “no gas” excuses for Rita-related absenteeism on September 26 or later with helpful advice that will enable the employee to find gas and report to work immediately. For example, the employer might wish to question a Houston employee about his or her current address and the location of his or her vehicle, perform a “Google” search for gasoline stations within the employee’s zip code, make calls to some of those stations to see whether they have gas, and then inform the employee about the availability of gas. It might be appropriate to view with less skepticism “no gas” excuses from employees who live in certain rural areas and to accept, absent proof to the contrary, “no gas” excuses received early in the week from employees in Jefferson and Orange counties.

6. Does Chapter 22 require that employees be paid for Rita-related absences? No, but the Fair Labor Standards Act requires that overtime-exempt employees be paid for such absences in most cases.

Texas Labor Code Chapter 22 does not require that employees be paid for Rita-related absences. But, based on other applicable laws, the issue of which employees must be paid for such absences is many-faceted. Is the employee a unionized employee covered by a collective bargaining agreement that requires the employer to pay for weather-related absences? Does the employer have an employee handbook or other written policy that calls for such payment? Does the employee have a contract requiring the employer to pay him for weather-related absences? If the answer to these three questions is “no,” then the question of whether the employee must be paid for the Rita-related absence will probably depend on whether he or she is classified as an

overtime-eligible employee or an overtime-exempt employee under the federal wage and hour law known as the Fair Labor Standards Act. If the employee is overtime-eligible, the employee generally does **not have** to be paid for weather-related absences unless he or she chooses to use vacation days or personal leave days for such absences. But an employee who is overtime-exempt generally **does** have to be paid for weather-mandated absences during any workweek in which he or she performs even a single hour of work.

For overtime-eligible employees, the employer has many payment options for Rita-related employee absences, including:

- Pay overtime-eligible employees for all Rita-related absences in order to maintain employee morale.
- “Dock” overtime-eligible employees for Rita-related absences unless they elect to use their paid vacation or personal leave days to cover such absences.
- “Dock” overtime-eligible employees for such absences but allow (or require) them to make up the time during the same pay week (*i.e.*, don’t pay for the days of Rita-related absence but allow or require the employee to work extra hours during that same pay week to make up the time).
- Pay half of the Rita-related absence days and “dock” the employee for the other days but allow him or her to make up the days during the same pay week.

Employers (other than government employers) that elect the “make-up” time option must ensure that the time is “made up” during the same pay week in which it was missed. Thus, if a private⁴ employer’s “pay week” begins on Monday, it is already too late to “make up” Rita-related absences on Thursday, September 22 and Friday, September 23. Assuming, however, a “pay week” beginning on Monday, Rita-related absences on September 26 could be “made up” through Sunday, October 2.

As to overtime-exempt employees, the employer will in most cases be required to pay the employee for any absences attributable to the closing of the employer’s offices for Rita. Arguably, any full-day absences of overtime-exempt employees beyond the days on which the office was closed due to Rita could be treated as noncompensable days on which the employee was voluntarily absent for personal reasons. Nevertheless, in these days of email, personal digital assistants, and cell phones, it is likely that even if the exempt employee were absent from the office, he or she would still be performing some work that could trigger the requirement of payment for the entire day. Therefore, absent other advice from counsel based on an employee’s specific circumstances, the best approach is probably to pay the overtime-exempt employee for evacuation-necessitated absences on September 26 and 27, bearing in mind that the employer is, of course, free to require the employee to work as necessary in the coming weeks to complete any projects that were delayed due to evacuation-necessitated absences.

While the employer should not seek to impose upon overtime-exempt employees “make-up” work that results in an hour-for-hour replacement of the exempt employee’s time lost due to the

⁴ In this context, “private” means nongovernment.

hurricane, the employer is nevertheless free to ask the employee to take steps to get back on schedule after any hurricane-related absences. As always, employers should exercise extreme care not to wrongfully “dock” overtime-exempt employees or to require them to make up the time hour-for-hour because doing so could convert the overtime-exempt employee into an overtime-eligible employee to whom the employer might then owe thousands of dollars in overtime pay. Of course, in many cases, the professionals, managers, and administrators within the overtime-exempt ranks will be so busy trying to “catch up” after Hurricane Rita that the “make up” hours they impose upon themselves will far exceed their employers’ expectations.

7. Do insurance policies sometimes cover damages that employers suffer when hurricanes prevent employees from reporting to work? Yes, in certain cases.

Evacuation-affected employers should immediately **check their insurance policies** to see if they are insured for business interruptions caused by hurricanes or by orders of civil authorities in connection with hurricanes. Business interruption coverage may apply to a company’s on-going payroll expenses as well as its lost net income and temporary relocation expenses. Indeed, some business interruption policies begin covering payroll expenses after only five days. Business interruption coverage is usually included as a clause in a comprehensive general liability policy but is sometimes found in a stand-alone “business interruption” policy. A company might have separate coverage for acts of civil authorities through a clause in its comprehensive general liability policy or a clause in some other policy. **IT IS IMPERATIVE THAT RITA-AFFECTED EMPLOYERS CAREFULLY REVIEW ALL THEIR INSURANCE POLICIES IMMEDIATELY FOR COVERED LOSSES AND THAT THEY NOTIFY THEIR INSURERS WITHIN THE NEXT FEW DAYS IF THEY MAY HAVE SUSTAINED A COVERED LOSS.**

In addition to requiring businesses to notify their insurers almost immediately after the loss, many insurance policies require businesses, after the initial notice, to submit a detailed proof of loss within as few as 30 days. Employers should precisely follow the notice provisions of all applicable insurance policies and should obtain proof of delivery of all notices sent to insurers. Employers should give notice of the loss to their insurer in accordance with the notice provisions of the policy and not just to their insurance broker.

8. Are there other employment-related issues that employers may wish to consider in connection with Hurricane Rita? Yes.

- Employers with employees in areas hard-hit by Rita may wish to consider establishing a private charitable foundation to assist their employees in coping with this disaster. If certain conditions are met, payments that such foundations make to affected employees are tax-free to the employees and may be treated by employers and other contributors as charitable deductions. IRS Publication 557 provides additional information about charitable foundations, including employer-sponsored foundations. Even if the employer does not establish a foundation, in certain circumstances the employer may still be able to make tax-free payments to employees who suffer catastrophic losses within a federally declared disaster area.
- The federal law known as WARN (the Worker Adjustment and Retraining Notification Act) often still applies—although only to a limited extent—when a hurricane causes an

employer with 100 or more employees to lay off 50 or more employees at a “single site of employment” (as that term is defined by WARN). See 29 USC § 2102b(2)(B) & (3) and 20 CFR § 639.9.

- Under the Katrina Emergency Tax Relief Act of 2005, which has been passed by Congress and sent to President Bush for his expected signature, certain employers with 200 or fewer employees whose businesses were rendered temporarily inoperable by Hurricane Katrina may receive employee retention tax credits of up to \$2400 per employee for certain employees that they retain despite the hurricane. It is possible that Congress may extend similar tax relief to employers whose businesses are rendered temporarily inoperable by Hurricane Rita.

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