

Management Alert



After the Rain: Disaster Recovery and Employee Safety Following Hurricane Harvey

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Seyfarth Synopsis: It is imperative that employers develop and implement organized and clearly communicated procedures for responding to a disaster. A well-planned and executed emergency response program will provide orderly procedures and prevent panic, there by minimizing employee injuries and damage to property.

I. Introduction

The ongoing devastation from Hurricane Harvey, flooding in Houston, and ongoing rain in Texas and Louisiana are indicative how merciless and unpredictable Mother Nature can be. Climate scientists have warned higher sea levels and water temperatures in coming years, which are predicted to lead to more hurricanes and coastal flooding in the future. For employers, who are obligated to keep their employees safe during working hours, disaster preparedness is critical.

This article outlines employers' obligations to protect employees before, during, and after an emergency and offers recommendations to employers in the following areas: 1) preparing for an emergency; 2) taking action during an emergency; and 3) cleaning up and resuming business after an emergency.

II. Preparing for an Emergency

29 C.F.R. 1910.38 requires all workplaces with more than 10 employees to develop a written Emergency Action Plan (EAP), when required by an OSHA standard, to identify and coordinate necessary employer and employee actions during an emergency. At a minimum, the EAP must include the following elements:

- Means of reporting emergencies (fires, floods, etc.);
- Evacuation procedures and assigned exit routes;
- Procedures to account for all employees following an evacuation;
- Procedures to be followed by employees who must remain behind to attend to critical plant operations before evacuating;
- Rescue and/or medical duties for employees who are assigned and trained to perform them; and
- Names or job titles of people who can be contacted for more information about the plan.

29 C.F.R. § 1910.38. In addition to these required elements, it is recommended that employers also consider including the following in the EAP:

- The location of the nearest hospital or emergency medical center;
- The type of alarm system used to notify employees of an emergency;
- Procedures for protecting information including procedures for storing or maintaining critical documents and records;
- The location and permissible uses of protective equipment such as portable defibrillators, first aid kits, dust masks, fire extinguishers, etc.
- The location of televisions or radios for further information during a disaster.

Ensuring the development of an effective EAP also requires the employer to train employees to understand their roles and responsibilities under the plan. When conducting this training, the employer must address literacy, language, and cultural barriers to ensure that the training is effective. Employers also must document the training.

OSHA has posted links and recommendations on its website to help employers prepare for hurricanes: <https://www.osha.gov/dts/weather/hurricane/preparedness.html>. The website includes tips regarding how to create evacuation plans and assemble emergency supply kits. The Environmental Protection Agency also has provided tips related to hurricane preparedness on its website: <https://www.epa.gov/natural-disasters/hurricanes#recover>.

III. Responding to an Emergency

Communication during an emergency is critical to maintain organization and prevent panic and injuries. For example, not all emergencies require an evacuation of the workplace. In some cases, such as flooding, storms, or the release of biological or chemical agents, staying indoors is safer for employees. The first questions most people ask during an emergency is “should I stay or should I go?” Employers can guide employees as to the appropriate course of action by having an alarm system that emits a different signal for “evacuate” emergencies than for “stay put” emergencies. Alternatively, the alarm system could be programmed to give specific verbal instructions following the initial alert. Employers must consider the needs of disabled employees (e.g. those who are hearing or visually impaired) in selecting any alarm system.

Employers should have an effective means of communicating with employees about the following during an emergency:

- Whether to evacuate or stay put;
- How and where to get information about the emergency itself;
- What areas of the building to avoid;
- How and when it is safe to return to the work area; and
- How and when it is acceptable to contact family members and loved one.

IV. Picking Up the Pieces

Once the proverbial dust settles after an emergency, hazards to employees can still remain. For example, downed power lines in a flooded parking lot can injure or kill employees leaving the building after the storm passes. Hazards are even greater for employees who are tasked with cleaning up after an emergency. Employees who are actually performing clean-up work after a flood, storm, earthquake, or other disaster may be exposed to one or more of the following hazards:

- Exposure to hazardous materials such as asbestos, mold, lead, or chemicals;
- Downed power lines and trees;
- Heat illness;
- Confined spaces;
- Blood borne diseases or other contagions;

- Mosquito borne diseases such as Zika virus; and
- Structural destabilization¹.

OSHA has developed specific standards to address many of these hazards. For example, OSHA's Hazardous Waste Operations and Emergency Response standard, 29 C.F.R. § 1910.120, applies to employees who are performing clean-ups of hazardous waste or other hazardous materials. OSHA's asbestos and lead standards require employers to evaluate the level or exposure to employees, provide appropriate protective equipment, and, in some cases, conduct regular monitoring of air quality in the work area.

In addition to these specific standards, other more general requirements will also come into play. For example, OSHA's welding and cutting Lockout/Tagout, confined space entry, and fall protection programs may come into play, even if no OSHA standard specifically addresses the type of clean-up activity taking place. Finally, as always, OSHA's General Duty Clause requires employers to provide a workplace free from recognized hazards. Accordingly, even if no OSHA standard applies to a particular activity or hazard, employers may still face citation liability if the hazard is reasonably likely to cause serious injury or death and there is a feasible means of abatement to correct the hazard. Before allowing employees to commence any kind of clean-up work then, the employer must conduct a job hazard analysis (JHA) to identify and address potential hazards.

V. Multi-Employer Worksite Doctrine

It is important to note that even employers who hire outside contractors to clean up after a disaster must recognize their obligations for worker safety. OSHA's "multi-employer worksite" doctrine allows the agency to issue citations not only to the employer whose employees are actually performing the clean-up work, but also to other employers who either control the means and methods of work of the employees. Accordingly, employers may be liable for the safety precautions provided to employees who are brought onto their worksites following a natural disaster.

VI. Conclusion and Recommendations

It is imperative that employers develop and implement organized and clearly communicated procedures for responding to a disaster. A well-planned and executed emergency response program will help prevent panic, thereby minimizing employee injuries and damage to property. We recommend that employers consider the following:

- Develop an EAP that covers a wide variety of potential emergencies and gives employees clear guidance on what to do in each scenario;
- Be cognizant of hazards employees may face even after the immediate danger has passed;
- Train employees in evacuation plans and other emergency response procedures;
- Conduct a job hazard analysis and review applicable OSHA standards before assigning any employees to perform clean-up work;
- Evaluate the safety record of any independent contractor hired to perform clean-up work, including investigating the contractor's worker's compensation history, its OSHA logs, and its history of citations from OSHA.

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¹ OSHA's website provides a Hazard Exposure and Risk Assessment Matrix for Hurricane Response and Recovery Work, outlining the most commonly performed duties during hurricane response and recovery work, and the hazards employees could face. <https://www.osha.gov/dts/weather/hurricane/response.html>.

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