

## **Disaster Planning and Recovery<sup>1</sup>**

### **Employment Roundtable**

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#### **I. Preparing for Disaster and Recovery**

##### **A. What Could Happen**

The events of September 11, 2001, and the increase in the number of incidents of workplace violence, natural disasters, and epidemics have increased awareness of the need for disaster planning. According to FEMA, the number of declared major disasters has more than doubled, with 529 major disasters occurring from 1995 – 2004.<sup>2</sup> Even those lucky enough to survive unscathed until now are unlikely to remain immune going forward – by all accounts, the bird flu is going to have a significant impact worldwide as early as next year. In the face of such a crisis, whether natural or manmade, thoughtful planning can significantly reduce losses and help prepare a company for long-term continuity.

The aftermath of hurricanes Katrina and Wilma in 2005 served as examples of the significant problems that occur with inadequate disaster and recovery planning. Those tragedies have elevated the need for planning to save lives and help minimize business disruption.<sup>3</sup> Potential disasters run the gamut from a fire to a biochemical terrorist attack, so planning does require a fairly significant fact-based analysis for each potential emergency. Major categories of disasters include pandemics, natural and man-made disasters, terrorist attacks, and violence.<sup>4</sup>

- **Pandemics (e.g., Avian or Bird Flu)**

A pandemic is an outbreak of an infectious disease that spreads worldwide, or at least across a large region.<sup>5</sup> Pandemic flu is virulent human flu that causes a global outbreak of serious illness

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<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

<sup>2</sup> Federal Emergency Management Agency (FEMA), <http://www.fema.gov/news/disasters.fema>.

<sup>3</sup> The Disaster News Network, <http://www.disasternews.net>, provides an overview of current disasters, as well as responses to past disasters.

<sup>4</sup> The Red Cross Prepare Oregon Program's website provides general preparation issues for various types of disasters. <http://www.redcross-pdx.org/prepareforlife/index.html>.

<sup>5</sup> <http://en.wikipedia.org/wiki/Pandemic>.

that can spread easily from person to person because there is little natural immunity.<sup>6</sup> Although there is no pandemic flu at this time, there is widespread concern about the possibility of a pandemic avian flu H5N1 outbreak.<sup>7</sup> “Avian (or bird) flu is caused by influenza viruses that occur naturally among wild birds. The H5N1 variant is deadly to domestic fowl and can be transmitted from birds to humans. There is no human immunity and no vaccine is available.”<sup>8</sup> The H5N1 is one of the few avian influenza viruses that have crossed the species barrier to infect humans. More than half of those infected with the virus in Asia since 2003 have died.<sup>9</sup>

- **Natural and Man-Made Disasters**

Examples of these disasters include floods, tornadoes, hurricanes, volcanoes, earthquakes, tsunamis, fires, explosions, and transportation disasters. Since 1980, Oregonians have experienced all of these disasters except for tsunamis, and even those are a relatively likely occurrence here.<sup>10</sup>

- **Terrorist Threats,<sup>11</sup> Attacks, and Violence<sup>12</sup>**

In the last decade we have all heard reports of bombings, anthrax in the mail, employees “going postal,” cyber-terrorism, and domestic violence invading the workplace. Portland has not been immune from the terrorist attacks and violence that seem so commonplace elsewhere. For example, in 1996, a gunman entered the KOIN building from the loading docks, shot and wounded two men, and then barricaded himself and four hostages in the Charles Schwab brokerage offices for several hours before surrendering to police.<sup>13</sup> That same year, an employee

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<sup>6</sup> See <http://www.pandemicflu.gov> (see “flu terms defined”).

<sup>7</sup> See Center for Disease Control, *Key Facts About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus*, <http://www.cdc.gov/flu/avian/gen-info/facts.htm>. According to Oregon health officials, “in the worst of cases a pandemic could kill 20,000 Oregonians but that a more likely moderate one could sicken a third of the state, put 12,000 in the hospital and claim about 3,000 lives, probably over a period of several months. See “Bird flu fears in Oregon spurs plan to combat outbreak,” <http://www.katu.com/printstory.asp?ID=85618> (May 4, 2006). Nationwide, “[a]s many as 200 million infected \* \* \* economic losses ranging from \$71 billion to \$166 billion; a death toll as high as 100,000; entire cities quarantined, emergency rooms overloaded and mass absenteeism from work.” Josh Goodman, “Not business as usual,” *Seattle Times*, [http://seattletimes.nwsources.com/html/business/technology/2002656953\\_flubiz01.html](http://seattletimes.nwsources.com/html/business/technology/2002656953_flubiz01.html); see also, Oregon’s Pandemic Flu Plan, <http://www.oregon.gov/DHS/ph/acd/flu/oregonfluplan.pdf>.

<sup>8</sup> See footnote 6, *supra*.

<sup>9</sup> See World Health Organization, *Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to WHO*, [http://www.who.int/csr/disease/avian\\_influenza/country/cases\\_table\\_2006\\_06\\_06/en/index.html](http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_06_06/en/index.html).

<sup>10</sup> See Tsunamis in Oregon, [http://www.redcross-pdx.org/Tsunami\\_TWPO\\_2004\\_Information.pdf](http://www.redcross-pdx.org/Tsunami_TWPO_2004_Information.pdf).

<sup>11</sup> See generally Homeland Security information at <http://www.dhs.gov/dhspublic/display?theme=14&content=446> and the DOL’s information regarding anthrax at <http://www.osha.gov/SLTC/etools/anthrax/>.

<sup>12</sup> Oregon OSHA has developed a publication entitled *Violence in the workplace: Creating a workplace violence-prevention program*, which is available at <http://www.cbs.state.or.us/external/osha/pdf/pubs/2857.pdf>.

<sup>13</sup> Steck Macko, “Hostage Situation Resolved In Portland . . .”, <http://www.emergency.com/prtlidsht.htm>

shot and killed his co-worker and former girlfriend and then shot himself at the recycling plant in Portland, where they both worked.<sup>14</sup>

## **B. Workplace Preparation Guidance**

Human Resources typically plays a significant role in formulating disaster-related procedures and plans,<sup>15</sup> which may include everything from fire drills to contingency business plans.

### **1. During the Disaster: Emergency Response and Evacuation Planning**

FEMA, among others,<sup>16</sup> has prepared an overview of major considerations for businesses in its Emergency Management Guide for Business & Industry: A Step-by-Step Approach to Emergency Planning, Response and Recovery for Companies of All Sizes (FEMA 141).<sup>17</sup> These steps include:

- **Identify and include in disaster and emergency planning the key players who will be involved in responding to incidents**

Key players include human resources, accounting, information technology, and those with OSHA/health and safety responsibility, among others. It is also important to have alternates (like understudies) in place who are aware of procedures in case key personnel become unavailable (*e.g.*, due to illness, injury, etc.).

- **Identify and facilitate relationships with fire, police, and other local safety agencies**

Local agencies, which generally have disaster plans of their own, can help identify potential issues in a disaster and help employers prepare. They can also explain their own disaster plans, show how to best utilize their resources in case of an actual emergency or disaster, and may provide special training.<sup>18</sup>

- **Identify hazards and possible disasters and their potential impact**

Although all disasters raise many of the same concerns, different disasters create different issues. In Oregon, for example, hurricanes and tornadoes are unlikely, volcanoes and earthquakes are more likely, and some believe we are even more likely to be affected by an avian flu pandemic.

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<sup>14</sup> *Panpat v. Owens-Brockway Glass Container*, 172 Or App 470, 21 P3d 97 (2001), 334 Or 342, 352, 49 P3d 773 (2002).

<sup>15</sup> Kathy Gurchiek, "Survey: Disaster preparedness is a full-time job," SHRM HR News (11/22/05) (more than three-fourths of survey respondents indicated that Human Resources participated in developing disaster plans).

<sup>16</sup> See Resources, *infra*.

<sup>17</sup> FEMA, *Emergency Management Guide for Business & Industry*, <http://www.fema.gov/business/guide/index.shtm>.

<sup>18</sup> For example, the local Red Cross chapter in Portland, Oregon, is offering a Disaster Leadership Institute from June 24 - July 2, 2006, [http://www.redcross-pdx.org/services/Disaster\\_Leadership\\_Institute.shtml](http://www.redcross-pdx.org/services/Disaster_Leadership_Institute.shtml).

The likelihood of the event and its impact on specific areas of a business (including impacts on employees, clients, and customers) should guide disaster planning.

- **Develop a method to communicate disaster or emergency information to all employees during and after the disaster, as well as a method for employees to report in**

Communication alternatives are one of the keys to all types of disaster planning and recovery.<sup>19</sup> Key issues are “[c]ommunicating the organization’s status to employees in the event of a disaster, accounting for employees, setting up an alternate location where employees can meet, and having an emergency number for employees to call \* \* \* \*.”<sup>20</sup> Alternative communication resources may include web site communications, alternate out-of-town or 800 numbers that employees can call in the event local landlines go down, ham radio, and Internet protocol (IP) telephony. Employers may want to distribute wallet cards that provide instructions on communication procedures in an emergency situation. Phone trees or other methods for employers to contact employees should be developed well in advance. Employers with multiple locations might consider establishing alternative points of contact in other locations.

- **Make sure contact information for all employees is continuously updated**

Employees may be changing locations or even moving out of state during an emergency. Regardless of whether or not your employees continue to work, your obligations to provide information to them, pay them, and report information about them continue, so maintaining current contact information and employment status is critical.

- **Plan evacuation routes and procedures and a safe meeting place and/or method**

Employers should obtain, inspect, and maintain any needed emergency preparedness or evacuation equipment, and establish replacement and inspection schedules. You may also want to consider a “shelter-in-place” plan in the event employees are instructed during an emergency to stay at work until it is safe to exit. This should be kept in mind when considering what supplies to have on hand (water, food, first aid supplies, flashlights, radios, batteries, various communication devices, spare clothing).

- **Develop a process for identifying special needs/ accommodations needed for both employees and visitors**

Employers should be aware of and prepared to assist any employees or visitors who have special needs that must be addressed in an emergency (*see* section II.A. Disability Laws, *infra*).

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<sup>19</sup> Kathy Gurchiek, “Survey: Disaster preparedness is a full-time job.” SHRM (11/22/05).

<sup>20</sup> *Id.*

- **Consider an emergency cash management plan**

In addition to redundant systems for payment obligations, employers may want to consider a plan for securing emergency funds, lines of credit, petty cash, cash advances for employees, and alternative access to bank accounts.

- **Plan for a safe and secure shut-down**

Determine what needs to be turned off, secured, removed, or otherwise addressed and who is responsible for seeing that the task is completed. Consider options for addressing theft or looting in the event the location must be temporarily abandoned. There should be a procedure in place for protecting confidential records and other valuables.

- **Action items necessary for all plans**

No matter what your disaster plan entails, you should commit the plan to writing, periodically review and update it, and distribute the current version of the plan to all employees. Disaster plans are useless if employees do not know about them and take them seriously. Also, develop a system for identifying new hazards and potential disasters. If it is not the bird flu (or SARS or anthrax), there will be some other threat you have not considered. Preparedness includes staying aware of and adapting to new potential hazards.

- **Conduct periodic drills**

Practice drills may reveal flaws in your plan and help you avert a further disaster. Create backup systems that can take over if your computer network and landlines go down and, if possible, try them out along with your evacuation drill. The more varied your drills, the more prepared you will be.

## **2. Ensuring Long-term Recovery**

In addition to surviving the disaster itself, employers need to think about what they will need to do to survive the aftermath.<sup>21</sup> “[S]ome 40 percent of businesses that undergo a disaster will go out of business within five years. Much of the risk \* \* \* stems from firms’ inability to retrieve lost data.”<sup>22</sup> The lost data includes payroll and benefit information, time and cost records, as well as all other relevant human resource data. Generally, Human Resource compliance obligations are not relaxed in the event of a disaster – employers must keep the same records, pay employees on time, and file required reports.

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<sup>21</sup> A SHRM survey found that 55 percent of small employers and 60 percent of medium sized employers had business contingency plans, compared with 80 percent of large employers. Forty-one percent of those with such plans said their companies could continue essential operations indefinitely. Kathy Gurchiek, “Survey: Disaster preparedness is a full-time job,” (SHRM HR News 11/22/05).

<sup>22</sup> Rita Zeidner, “HR is Critical for Planning for the Unexpected, Disaster Recovery Pro Expert Says,” (SHRM HR Technology News Nov. 2005).

The essence of continuity planning is to ensure that you have alternatives in place that will allow you to operate and recover from a disaster. Such planning requires an assessment of the information, functions, staff, procedures, and equipment necessary to keep your business operating and/or quickly recover. It also includes planning for what to do if your facility is not accessible. The following are some key points for business continuity planning.<sup>23</sup>

- **Employee Training**

In the event of a disaster, your workplace will inevitably be disrupted. Key employees and the normal chain of command may not be available, either in the short- or long-term. Therefore, it is important that employees are cross-trained on essential duties and alternative chains of authority are established.

- **Communication Plans for Displaced Workers, Customers, Key Suppliers, and Other Essential Parties**

Within a short period of time, employers need to communicate the company's status and contact information to employees, clients, and suppliers; account for employees; set up alternative meeting locations; and communicate work plans and special needs. As discussed above, communication plans should take into account the possibility that telephone lines and computer access may go down.<sup>24</sup> Communicating with non-English speaking employees or those who need accommodations with respect to communications should also be considered.

Employers should also consider how to supply information about key benefits to scattered employees. For example, employees may need information on how to use their medical insurance outside their home state or coverage area.<sup>25</sup> Information about Employee Assistance Programs may also be useful to help employees cope with the disaster and its aftermath.

Communicating with suppliers, clients, and other key third parties is also important, as is determining whether adjustments to accounts payable and receivable procedures are necessary. Customers may wonder whether you are operating; the easier it is for them to find out you are, the more likely they are to believe you are going to be able to meet their needs.

Key numbers and other contact information should include state and local emergency management agencies, major clients, contractors, suppliers, financial institutions, insurance

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<sup>23</sup> See U.S. Department of Homeland Security, "Sample Business Continuity and Disaster Preparedness Plan," website, <http://www.ready.gov/>; see also, FEMA's Emergency Management Guide for Business & Industry: A Step-by-Step Approach to Emergency Planning, Response and Recovery for Companies of All Sizes (FEMA 141), <http://www.fema.gov/business/guide/index.shtm>.

<sup>24</sup> During hurricanes Rita and Katrina, amateur radio operators provided emergency communication for the American Red Cross, Salvation Army, police, and firefighters. Another employer indicated planned use of IP telephony if land-based lines becomes overburdened. Kathy Gurchiek, "Survey: Disaster preparedness is a full-time job," (SHRM HR News 11/22/05).

<sup>25</sup> David L. Barron, Victoria M. Phipps and Peter A. Steinmeyer, "After the Disaster: 10 Issues for Employers," <http://workforce.com/section/09/article/24/21/98.html>

agents, and insurance company claim representatives. This information should be easily accessible to key personnel.

- **Safety**

Occupational Safety and Health regulations apply in the event of a disaster. Both the Occupational Safety and Health Act (OSHA) and comparable state laws require employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm (often referred to as the “General Duty” clause). Employers who fail to take reasonable steps to abate or address a recognized hazard may be cited for violating the General Duty clause. Continuing hazards in the aftermath of a disaster should be addressed as soon as possible.

- **Data and Records**

All of your essential data must be accessible if the phone lines go down, the records in your facility are destroyed, or the computer network crashes. Back-up systems and/or off-site storage are essential to protect key assets, documents, and information, which includes financial data, databases, any custom software, Human Resource records, emergency contact lists, customer/client records, inventory information and insurance files (including copies of signed contracts and proof of ownership or proof of loss).

In addition, whatever records you do have need to be secure. Identity theft is often an issue after a disaster. Personnel and client records may be vulnerable if they are not adequately protected.

- **Compensation and Payroll**

If your business operations are interrupted, insurance or government aid may or may not be available. If it is available, there will likely be a delay. Nevertheless, regular payroll must be provided on time to those employees who continue to work. Employers must also provide timely final pay to terminating employees as required by any applicable final pay law.<sup>26</sup> You may also choose to pay employees even if they are unable to work.<sup>27</sup> Whatever you do, access to your timekeeping and payroll records is essential.

Another consideration is how to pay employees who may be scattered. It is important to establish a good faith effort to pay employees whatever they are owed by the normal pay dates. If pay is accomplished by check and the workplace is not accessible, it may be necessary to

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<sup>26</sup> In Oregon, *see* ORS 652.140 and 652.150.

<sup>27</sup> During the 2005 hurricanes, for example, some employers continued to pay their employees, while others made one-time fixed payments. *See* David L. Barron, Victoria M. Phipps and Peter A. Steinmeyer, “After the Disaster: 10 Issues for Employers,”

<http://workforce.com/section/09/article/24/21/98.html>. If you pay your employees for non-work time, you must clearly communicate and document the nature of the payment to avoid any misunderstandings. For example, if you provide an advance on wages, as opposed to a one-time gift or bonus, you may want to arrange for recovery of the advance by payroll deduction, which would require a written authorization from the employee.

establish an alternate payment location. If payments are made electronically or through alternative means, such as direct deposit or debit cards, you must be able to authorize the payments and arrange for payment in a timely manner.

- **Leave Plans**

Most leave plans do not address disasters. Exceptions to usual requirements may be beneficial, but employers also need to be aware of family medical leave laws, disability laws, and contractual obligations when making exceptions. Such exceptions are best addressed, if possible, in advance through written policies, rather than *ad hoc* when the emergency arises.

- **Business Partners**

If you can't do business without them, you'll need a communication plan for dealing with customers, clients, vendors, and other important third parties, and alternate sources of supplies and services. If vendors cannot provide supplies or supplies need to be rerouted, the information needs to go through proper channels as quickly as possible so that the company can react appropriately to the change in circumstances.

- **Alternative Working Arrangements**

Employees' work sites and schedules may be disrupted. Even if the work site is operational, transportation may be unavailable or unreliable. Alternative working arrangements may be desirable and should be taken into consideration during the planning process.

- **Telecommuting/Telework**

Many companies provide for telecommuting as part of their business continuity plans. For example, approximately 40% of JPMorgan Chase's investment banking staff can telecommute in the event of a disaster.<sup>28</sup> During the 9/11 attacks, employees at The Wall Street Journal were evacuated from One World Financial Center across the street from the Twin Towers. Editors were ordered to meet at a back-up facility, while reporters were ordered to work and e-mail stories from home. The newspaper did not miss an issue.<sup>29</sup>

Telecommuting may provide significant benefits during an emergency and recovery period. Telecommuters work at remote locations using the telephone, the internet, and the employer's computer network. If the employer's regular work site is closed or damaged (or transportation becomes impossible or difficult), telecommuting may enable essential work to take place. It also may, in some instances, constitute a reasonable accommodation required under the ADA.<sup>30</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> International Telework Association and Council, Exploring Telework as a Business Continuity Strategy: A Guide To Getting Started, <http://workingfromanywhere.org/>.

<sup>30</sup> See generally, EEOC's Work At Home/Telework as a Reasonable Accommodation Fact Sheet at <http://www.eeoc.gov/facts/telework.html>.

Employers may want to consider telecommuting as an option in advance, particularly for key employees, and ensure that adequate preparations are made for remote access to back-up data. Even if telephone lines go down locally, key employees may be able to telecommute from remote locations. Telecommuting trials may be useful for eliminating any flaws in the system.

Employees who telecommute remain subject to laws pertaining to overtime,<sup>31</sup> workers compensation, and at least some OSHA requirements,<sup>32</sup> which should all be considered before implementing a telecommuting program. It is also useful to decide in advance who pays for equipment, services, repairs, supplies, and related insurance, and to resolve issues relating to use, access, intellectual property, privacy, and security. Employees telecommuting from outside the state may, in some instances, subject the employer to the other states' jurisdiction.<sup>33</sup> Employers should make sure they are taking all these considerations into account whenever workers are telecommuting from an outside facility or home office.<sup>34</sup>

➤ **Reassignments, Reduction in Hours, Alternative Schedules and Locations**

After a disaster, many work sites may either be shut down or relocated. If employees have valuable skills and experience, employers may want to consider reassignments or alternative work arrangements to avoid losing them permanently.

➤ **Replacement Workers**

Another consideration following a disaster is how long you will wait before terminating employees who do not report to work. If you hire new employees only temporarily, make sure they understand their temporary status may reduce or eliminate your obligations under the Worker Adjustment and Retraining Notification Act (WARN Act). The same obligations (I-9, W-4, new hire reporting, etc.) and restrictions that apply to regular employees apply for temporary and permanent replacement workers. If new employees require training, you need to consider how the training will be accomplished. If there is a collective bargaining agreement in place, you must comply with any provisions relating to the hiring and training of replacement workers.

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<sup>31</sup> 29 CFR §785.12 (work performed away from the premises or job site): “The rule [regarding the meaning of ‘hours worked’] is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” This means that employers should communicate the need to accurately record and communicate non-exempt employee work time even if the work is performed at home.

<sup>32</sup> See OSHA Directive CPL 02-00-125 - CPL 2-0.125 - Home-Based Worksites, [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=225](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=225).

<sup>33</sup> See, e.g., *Sheets v. Integrated Information Utility Systems, Inc.*, 1999 WL 417274 (D Or 1999) (California employer subjected itself to jurisdiction of Oregon courts by agreeing employee could telecommute from Oregon).

<sup>34</sup> See footnote 29, *supra*, see also Oregon Department of Energy, “Steps for Managing a Successful Telework Program, <http://www.oregon.gov/ENERGY/TRANS/Telework/intro.shtml>.

- **Benefits and Special Programs**
  - **Employee Assistance Programs**

An employee assistance program (EAP) may be invaluable following a disaster. Dione Heusel, the vice president of Human Resources for Ruth's Chris Steak House, cited EAPs as particularly helpful in coping with Hurricane Katrina, which shut down three of the company's restaurants:

Having an employee assistance program (EAP) in place before a crisis occurs is another way for an organization to remove distractions during emergencies \* \* \* \*. "After the fact you're scrambling because everybody wants them, and employees really need a lot of different things from an EAP," she said. That includes information on where to seek shelter, how to access benefits from groups such as the American Red Cross and federal government agencies, and what to do for your pets. "It's not simply counseling, although that's a tremendous benefit," Heusel said. "They're prepared to step in and act on your behalf."<sup>35</sup>

If you don't already have one in place, you may want to consider engaging an EAP. If you have an EAP already, you should communicate its availability to employees in the event of a disaster. You may also want to explore with your provider how the EAP can be leveraged in the event of a major disaster.

- **Other Assistance: Outplacement, Living, and Transportation Arrangements, Death Benefits**

Life insurance, death benefits, bereavement policies, alternative transportation arrangements, outplacement programs, and living arrangements may need to be handled quickly in an emergency. If you want to provide special benefits in case of disaster, you should consider them in your planning process.

- **Employee Volunteer and Charity Efforts**

Employees may wish to volunteer or contribute to charitable efforts or organizations. You may want to assist or contribute to those efforts, but need to be mindful on limitations applicable to "volunteer" work. Employees can rarely perform work as a "volunteer" for their regular employer, even if the work is outside the employees' regular job description and for a good cause.<sup>36</sup> However, sometimes the government makes it easier to help. For example, in

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<sup>35</sup> Kathy Gurchiek, Ruth's Chris provides a lesson in disaster planning (SHRM 1/5/06).

<sup>36</sup> See ORS 653.010(2); OAR 839-020-0046(3) ("Time spent in work for public or charitable purposes at the employer's request, or under its direction or control, or while the employee is required to be on the premises, is working time. Time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked"); *In the Matter of Laverne Springer, dba Thumbs Up! Extra Casting* (BOLI Case No. 33-95 April 8, 1996), [http://www.oregon.gov/BOLI/LEGAL/H\\_FO-Springer.shtml](http://www.oregon.gov/BOLI/LEGAL/H_FO-Springer.shtml) ("With the exception of training programs registered with the Agency and certain religious, governmental, or non-profit organizations, no employer in Oregon may accept the volunteer services of an employee"); see also, Oregon Bureau of Labor and Industries FAQ on Volunteers, [http://www.boli.state.or.us/BOLI/TA/T\\_FAQ\\_Tawaitim.shtml#volunteers](http://www.boli.state.or.us/BOLI/TA/T_FAQ_Tawaitim.shtml#volunteers).

September 2005, the IRS issued Notice 2005-68, which allows employees to donate unused paid leave in exchange for employer cash payments to qualified charities assisting Hurricane Katrina victims.

## **II. Legal Issues**

### **A. Disability Laws**

The Americans with Disabilities Act (“ADA”) and state disability laws prohibit discrimination on the basis of disability in employment. Providing a reasonable accommodation to an individual with a disability is a central concept under those laws. While employers are not required to have disaster plans, an employer subject to the disability laws must consider the needs of people with disabilities in the event of a disaster.<sup>37</sup> As a result of government attention<sup>38</sup> to this issue and the problems that surfaced in 9/11 and subsequent disasters, there is now an abundance of materials and resources to assist in planning for the needs of the disabled.<sup>39</sup>

#### **1. Disability Related Inquiries for the Purpose of Providing Accommodation**

Although disability laws limit the circumstances in which disability-related inquiries are permissible, employers may ask employees to self-identify if they will require assistance in a disaster or emergency situation due to a disability or medical condition.<sup>40</sup> It is important to ask the employee what he or she needs, as opposed to presuming whether or not there is a need or unilaterally deciding on the best solution to any existing or anticipated need. The DOL has indicated that the following types of inquiries are acceptable under the ADA:

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<sup>37</sup> Employers should be careful not to discriminate against applicants or employees who do need a reasonable accommodation to safely evacuate. In 2004, a jury awarded \$1.29 million to a DuPont employee whose employment ended because the employer felt she could not safely evacuate the workplace. Elizabeth Agnvall, “Emergency Preparedness and Disabilities: Getting All Employees Out Safely,” (SHRM Technology Focus Area Nov. 2005).

<sup>38</sup> In 2004, President Bush issued Executive Order 13347, *Individuals with Disabilities in Emergency Preparedness*, which applies to the federal government. While it does not apply to private employers, it has brought further attention to the need to ensure that individuals with disabilities are considered in disaster and emergency planning.

<sup>39</sup> See Resources, *infra*.

<sup>40</sup> EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures, <http://www.eeoc.gov/facts/evacuation.html>.

- After making a job offer, but before employment begins, an employer may ask all individuals whether they will need assistance during an emergency.
- An employer may periodically survey all of its current employees to determine whether they will require assistance in an emergency, as long as the employer explains the purpose for requesting the information and makes it clear that self-identification is voluntary.
- An employer may ask employees with known disabilities if they will require assistance in the event of an emergency. An employer should not assume, however, that everyone with an obvious disability will need assistance during an evacuation. For example, individuals who are blind may prefer to walk down stairs unassisted. People with disabilities are generally in the best position to assess their particular needs.<sup>41</sup>

In addition to determining employee needs during the emergency itself, employers should recognize that the recovery phase of an emergency may cause extra difficulties for people with disabilities due to disruption of public services, infrastructure, and the normal business environment. For example, after 9/11, iCan News Service reported that many people with disabilities living in Lower Manhattan experienced significant difficulties related to transportation and business interruptions. Suspensions and limitations in paratransit service made it difficult for some disabled individuals to attend critical health care appointments or even leave home. They had difficulties or delays filling prescriptions and obtaining wheelchair and other equipment repairs because shops were closed. People with sight impairments had to learn how to navigate the rearranged city, on foot, and by re-routed public transportation.<sup>42</sup>

## 2. Rescue and Assistance Preparation

At the moment of disaster, it is generally too late to figure out how to escape or to help disabled individuals escape. Preparation pays off:

After the 1993 World Trade Center bombing, at the suggestion of the local emergency management office, The Associated Blind (a local service provider for low- and no-vision clients) worked with the New York City Fire Department to develop a building evacuation plan and drill for their staff, most of whom have limited or no vision. The Associated Blind wanted a plan for their staff members covering the range of problems that could occur during a disaster. On September 11, their efforts paid off. The entire staff calmly and safely evacuated their building's 9th floor, a success they attribute directly to the customized advance planning and drills.

Also on September 11, a wheelchair user who worked on the 68th floor of the World Trade Center was safely carried from the building, thanks to a specialized

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<sup>41</sup> *Id.*

<sup>42</sup> EPI Guide for Emergency Managers, Planners & Responders, <http://www.nod.org/resources/PDFs/epiguide2005.pdf>.

chair purchased after the 1993 World Trade Center bombing. A Port Authority of New York and New Jersey employee escaped from the 70th floor because his prosthetic leg allowed him to keep pace with non-disabled workers on the emergency stairs – and, he says, because of experience gained in the building's frequent fire drills since 1993.

During the attack on the Pentagon, equipment previously installed to help employees and visitors with low or no vision evacuate the facility in the event of an emergency also made it possible for dozens of sighted individuals to flee the smoke-filled corridors.<sup>43</sup>

In contrast, a wheelchair user who was left stranded in a mall during a fire alarm brought an ADA public accommodation claim against the mall.<sup>44</sup> She and several other persons with disabilities were trapped for approximately an hour because the escalator and elevator had been shut down and there were no other accessible exits. Apparently, no mall employee went through to check to see if everyone was evacuated or offer assistance.

These examples point out the importance of communication, training, and practice of evacuation plans. During a disaster, employees need to know what to do, where to meet, where to go or who to talk to for help, and have enough practice that they know what to do without looking the information up. Only through practice can you determine whether your plan will work for accommodating disabled employees in an evacuation.

### 3. Confidentiality

Disability laws require employers to protect the confidentiality of medical information collected about employees.<sup>45</sup> However, limited disclosure of information is permissible for the purpose of providing emergency assistance.<sup>46</sup>

An employer should inform all individuals who are asked about their need for emergency assistance that the information they provide will be kept confidential and shared only with those who have responsibilities under the emergency evacuation plan.<sup>47</sup>

Employers are permitted to share medical information with first aid and safety personnel, including emergency coordinators, floor captains, colleagues who have volunteered to act as "buddies," building security officers who need to confirm that everyone has been evacuated, and

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<sup>43</sup> EPI Guide for Emergency Managers, Planners & Responders, <http://www.nod.org/resources/PDFs/epiguide2005.pdf>.

<sup>44</sup> Allen Smith, "Mall Sued for Failure to Evacuate - Better Plans Urged," (April 1, 2003), <http://www.nod.org/index.cfm?fuseaction=page.viewPage&pageID=1430&nodeID=1&FeatureID=1115&redirected=1&CFID=7625911&CFTOKEN=86597339>.

<sup>45</sup> *See, e.g.*, 29 CFR §1630.14.

<sup>46</sup> *Id.*

<sup>47</sup> EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures, <http://www.eeoc.gov/facts/evacuation.html>.

other personnel who are responsible for ensuring safe evacuation as necessary to fulfill the employer's responsibilities under its emergency evacuation plan.

## **B. Flexible Leave Policies**

Emergencies often result in a need for a leave of absence. However, most company handbooks do not address the impact of disasters, making it necessary for employers to improvise. Unfortunately, *ad hoc* decision making often leads to inconsistency and unanticipated consequences.

In addition to difficulties communicating with and reporting to work, employees may find it difficult to access medical care and provide medical documentation following a disaster. Post-traumatic stress, depression, and other potentially qualifying illnesses under family medical leave laws may be more common. Therefore, you may want to establish procedures for processing emergency leave requests and/or modifications to your leave policies that may be desirable under certain disaster scenarios.

Some suggest that OSHA violations could result if employees are exposed to the avian flu at work.<sup>48</sup> Consequently, you may want to consider what steps you will take in the event of a bird flu pandemic or other outbreak of infectious disease to prevent employees from reporting work when they are contagious.

## **C. OSHA**

While neither the federal nor Oregon OSHA statutes require that *all* employers have disaster or emergency plans, they do require employers in particular industries to maintain specified emergency plans. You should check applicable industry codes to see if plans are required in your industry and, if so, what elements are specified.<sup>49</sup> OSHA recommends establishing emergency procedures that include: (1) escape procedures and escape route assignments; (2) special procedures for employees who perform or shut down critical operations; (3) systems to account for all employees after evacuation and for information about further plans; (4) rescue and medical duties for employees who perform them; (5) means for reporting fires and other emergencies; and (6) establishing a chain of command, including a backup emergency coordinator.<sup>50</sup>

## **D. WARN Act**

The federal WARN Act requires employers to notify employees 60 days in advance of certain layoffs and plant closures.<sup>51</sup> While no notice or a shorter notice period is sometimes permissible

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<sup>48</sup> "Are U.S. employers prepared for Bird Flu?" (The Charlotte Observer 1/17/2006), <http://hr.blr.com/display.cfm/id/17691>.

<sup>49</sup> See "Principal Emergency Response and Preparedness. Requirements and Guidance" (OSHA 3122), <http://www.osha.gov/Publications/osha3122.pdf>.

<sup>50</sup> See Planning and Responding to Workplace Emergencies, [http://www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-workplaceemergencies.pdf](http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplaceemergencies.pdf).

<sup>51</sup> 29 USC § 2101, *et seq.*; 20 CFR Part 639.

in the case of natural disasters<sup>52</sup> and unforeseeable business circumstances,<sup>53</sup> it is sometimes difficult to determine whether these exceptions will apply in specific circumstances.

Whether or not WARN obligations apply, the DOL's Dislocated Worker Assistance/Rapid Response Program, as well as the applicable state programs, may provide assistance in the case of a large scale layoff. The purpose of the program is to:

\* \* \* respond to layoffs and plant closings by quickly coordinating services and providing immediate aid to companies and their affected workers. Rapid Response teams will work with employers and any employee representative(s) to quickly maximize public and private resources to minimize the disruptions on companies, affected workers, and communities that are associated with job loss. Rapid Response can provide customized services on-site at an affected company, accommodate any work schedules, and assist companies and workers through the painful transitions associated with job loss.<sup>54</sup>

#### **E. Workers' Compensation**

Workers compensation may be available to employees injured in the scope of their employment during a disaster. For example, employees could be exposed to avian flu in the workplace or on assignment outside the country. While no state specifically refers to avian flu in its workers compensation law and it is not clear workers compensation is available for such illnesses, claims are a possibility.<sup>55</sup>

#### **F. Union Contracts and Related Issues**

Collective bargaining agreements may address issues such as transfer between work sites, reduction of hours, temporary workers, and layoffs. Employers must be aware of any such restrictions in developing their disaster and recovery plans and should consider negotiating with the representative union for possible disaster-related exceptions to any limitations.<sup>56</sup>

#### **G. Federal Disaster Unemployment Assistance (DUA)**

The Disaster Unemployment Assistance (DUA), also referred to as Disaster Relief and Emergency Assistance, is a federal program that provides temporary financial assistance to individuals unemployed as result of a major disaster (as declared by the President). Before an individual can become eligible for DUA, it must be established that the individual is not eligible

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<sup>52</sup> 29 USC § 2102(b)(2)(B); 29 CFR § 639.9(3) (no notice required).

<sup>53</sup> 29 CFR 639.9(2).

<sup>54</sup> <http://www.doleta.gov/layoff/employers.cfm>.

<sup>55</sup> Marsh Risk Alert: Avian Flu: Preparing for a Pandemic (January 2006), <http://solutions.marsh.com/pandemic/documents/avianflu20051228.pdf>.

<sup>56</sup> See David L. Barron, Victoria M. Phipps, and Peter A. Steinmeyer, "After the Disaster: 10 Issues for Employers," <http://workforce.com/section/09/article/24/21/98.html>.

for regular unemployment insurance benefits. The program is administered by states as agents of the federal government.<sup>57</sup>

## **H. Insurance**

According to the Insurance Information Institute,<sup>58</sup> the \$11 billion in business disruption caused by the September 11 terrorist attacks exceeded the amount of property damage by \$1 billion. Inadequate insurance coverage can lead to major financial loss if the business is damaged, destroyed, or interrupted for a period of time. In addition to understanding current coverage, it is important to identify what records your insurance provider requires for coverage after an emergency and to store those records in a safe place. Videotape or photographs may be helpful.

## **I. Records & Reporting Obligations**

Many statutes and regulations impose recordkeeping and reporting obligations. While some obligations may be relaxed temporarily following a disaster,<sup>59</sup> employers should not count on it. Maintaining back-up data in alternative locations is essential.

## **J. Wage and Hour Issues**

### **1. Overtime**

In general, compensable “hours worked” include all time an employee is on duty or at any prescribed place of work and any time an employee is “suffered” or permitted to work. This generally includes work performed at home, travel time, waiting time, and during training and probationary periods. In an emergency situation, employees who can work may be working more hours for a variety of reasons. They may feel charitable or lucky to be around to work and not their personal losses. Even if an employee “volunteers” to help out, employers must keep track of and pay for all hours worked at the appropriate regular and overtime rates.

### **2. Advances and Deductions**

Treatment of advances and other special compensation arrangements should be spelled out and documented. Otherwise, it may be unclear whether money was an advance against future pay, regular compensation, or a discretionary gift or bonus, all of which can affect the lawfulness of any deductions as well as compliance with minimum wage and overtime laws.

### **3. Regular Paydates and Final Paychecks**

State laws typically limit the time in which employees must be paid their final pay upon termination of employment.<sup>60</sup> In Oregon, an employee's final pay must be made available at the

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<sup>57</sup> See DOL's website at <http://workforcesecurity.doleta.gov/unemploy/disaster.asp>.

<sup>58</sup> See <http://www.iii.org>.

<sup>59</sup> For example, Form I-9 requirements were temporarily relaxed after Hurricane Katrina by the Department of Homeland Security. See David L. Barron, Victoria M. Phipps, and Peter A. Steinmeyer, After the Disaster: 10 Issues for Employers, <http://workforce.com/section/09/article/24/21/98.html>.

<sup>60</sup> See, e.g., ORS 652.140.

employee's place of employment, unless the parties agree that it shall be paid by direct deposit, or the employee requests that the final pay be forwarded by mail.<sup>61</sup> However, post-disaster, it may be unclear whether employees have terminated employment, the workplace may be inaccessible or relocated, or the means of communicating payroll data may be non-operational.

Notwithstanding such obstacles, it remains the employer's duty to ensure that employees get paid on time.

### **III. Conclusion**

Employer preparedness should be a priority and part of the overall business strategy to ensure long-term survival. A well-developed plan for responding to and recovering from a disaster can help you protect your assets, continue to operate and/or recover quickly if you are struck by the unthinkable.

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<sup>61</sup> OAR 839-001-0450.

## RESOURCES

### Pandemic Flu

- PandemicFlu.gov, <http://www.pandemicflu.gov>
- Business Pandemic Influenza Planning Checklist, <http://www.pandemicflu.gov/plan/businesschecklist.html>
- Center for Disease Control's Business Pandemic Influenza Planning Checklist, <http://www.pandemicflu.gov/plan/businesschecklist.html>
- OSHA's Guidance for Protecting Workers Against Avian Flu, <http://www.osha.gov/dsg/guidance/avian-flu.html>
- The World Health Organization's Avian Flu Section, [http://www.who.int/csr/disease/avian\\_influenza/en/](http://www.who.int/csr/disease/avian_influenza/en/)
- Oregon's Pandemic Flu Plan, <http://www.oregon.gov/DHS/ph/acd/flu/oregonfluplan.pdf>
- Center for Disease Control, *Key Facts About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus*, <http://www.cdc.gov/flu/avian/gen-info/facts.htm>
- Center for Disease Control, *Stopping the Spread of Germs at Home, Work & School*; <http://www.cdc.gov/flu/protect/stopgerms.htm#Work>

### Natural Disasters

- FEMA, *Emergency Management Guide for Business & Industry*, <http://www.fema.gov/business/guide/index.shtm>
- American Red Cross, *Prepare at Work*, [http://www.redcross.org/services/prepare/0,1082,0\\_57\\_,00.html](http://www.redcross.org/services/prepare/0,1082,0_57_,00.html)

### Terrorism and Violence

- Homeland Security, *Emergencies and Disasters*, <http://www.dhs.gov/dhspublic/display?theme=14&content=446>
- OR-OSHA, *Creating A Workplace Violence-Prevention Program*, <http://www.cbs.state.or.us/external/osha/pdf/pubs/2857.pdf>
- OSHA/Department of Labor, *Workplace Violence*, <http://www.osha-slc.gov/SLTC/workplaceviolence/index.html>
- UC Davis, *Preventing and Responding to Disruptive, Threatening, or Violent Behavior*, <http://www.hr.ucdavis.edu/Elr/Er/Violence/Brochure>
- Office of Personnel Management, *Dealing with Workplace Violence: A Guide for Agency Planners*, [http://www.opm.gov/Employment\\_and\\_Benefits/WorkLife/OfficialDocuments/handbooksguides/WorkplaceViolence/index.asp](http://www.opm.gov/Employment_and_Benefits/WorkLife/OfficialDocuments/handbooksguides/WorkplaceViolence/index.asp)

### Disability Assistance

- Department of Labor, *Effective Emergency Preparedness Planning: Addressing the Needs of Employees with Disabilities*, <http://www.dol.gov/odep/pubs/fact/effective.htm>

- FEMA, *Preparing for Disaster for People with Disabilities and other Special Needs*, [http://www.fema.gov/pdf/library/pfd\\_all.pdf](http://www.fema.gov/pdf/library/pfd_all.pdf)
- Job Accommodation Network, Linda Carter Batiste and Beth Loy, *Employers' Guide to Including Employees with Disabilities in Emergency Evacuation Plans*, <http://www.jan.wvu.edu/media/emergency.htm>
- EPI Guide for Emergency Managers, Planners & Responders, <http://www.nod.org/resources/PDFs/epiguide2005.pdf>
- The National Business & Disability Council, <http://nbdc.com/>
- Emergency Plans That Include Workers With Disabilities, <http://www.esight.org/View.cfm?x=364>
- EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures, <http://www.eeoc.gov/facts/evacuation.html>
- Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities Subcommittee on Emergency Preparedness in the Workplace, *Preparing the Workplace for Everyone: Accounting for the Needs of People with Disabilities*, <http://www.dol.gov/odep/pubs/ep/preparing.htm>