



## NEIGHBORHOOD ENTREPRENEUR LAW PROJECT'S

### DISASTER ASSISTANCE TRAINING FOR SMALL BUSINESSES

November 13<sup>th</sup>, 2012 | New York City Bar Association

#### **I. Overview of Program and Process**

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**Neighborhood Entrepreneur Law Project  
Disaster Assistance Training for Small Businesses  
November 13<sup>th</sup>, 2012 | New York City Bar Association**

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## HURRICANE SANDY SMALL BUSINESS LEGAL RELIEF

### FEMA ASSISTANCE

“Disaster assistance” can be financial or direct assistance to individuals and families whose property has been damaged or destroyed as a result of a federally declared disaster. This assistance will not cover losses that are covered by insurance. It is meant to help individuals and families with only critical expenses that cannot be covered in other ways. This assistance is not intended to restore the damaged property to its condition before the disaster. The Federal Emergency Management Agency (FEMA) is currently making housing assistance funds available through its Individuals and Households Program (IHP). It should be noted that for small business owners seeking assistance for their businesses, it is expected that this aid will come not from FEMA grants but from loans through the Small Business Administration (SBA). Eligibility for assistance can be very fact-dependent and also time-consuming. This primer is intended only as a general guide to processes and procedure.

### DESIGNATED DISASTER AREAS

**New York** - Bronx County, Kings County, Nassau County, New York County, Queens County, Richmond County and Suffolk County. **New Jersey** - Atlantic County, Cape May County, Essex County, Hudson County, Middlesex County, Monmouth County, Ocean County and Union County. **Connecticut** - Fairfield County, Mashantucket Pequot Indian Reservation, Middlesex County, New Haven County and New London County.

### CURRENT FEMA PROGRAMS

FEMA currently provides the following forms of assistance:

#### I. Housing Needs

A. Temporary Housing (a place to live for a limited time period): FEMA can provide financial assistance to rent a different place to live, or a government provided housing unit when rental properties are not available.

B. Repair: FEMA can provide financial assistance to homeowners to repair damage from the disaster to their primary residence that is not covered by insurance. *The goal is to make the damaged home safe, sanitary, and functional.*

C. Replacement: FEMA can provide financial assistance to homeowners to replace their home destroyed in the disaster that is not covered by insurance, with a goal to help the homeowner with the cost of replacing their destroyed home.

D. Permanent or Semi-Permanent Housing Construction: Direct assistance or money for the construction of a home. *This type of help occurs only in insular areas or other locations specified by FEMA, where no other type of housing assistance is possible.*

#### E. Eligibility for “Housing Needs” assistance

To receive money or help for “Housing Needs” that are the result of a disaster, all of the following must be true:

1. The applicant has losses in an area that has been declared a disaster by the President.

2. The applicant has filed for insurance benefits and the damage to his/her property is not covered by his/her insurance or the insurance settlement is insufficient to meet the losses incurred.
3. The applicant or someone who lives with him/her is a citizen of the United States, a non-citizen national, or a qualified alien.
4. The applicant has a valid Social Security Number.
5. The home in the disaster area is where the applicant usually lives and was living at the time of the disaster.
6. The applicant is unable to live in his/her home now, cannot get to his/her home or the home requires repairs because of damage from the disaster.

An applicant **MAY NOT BE ELIGIBLE** for “Housing Needs” assistance if:

1. The applicant has other adequate, rent-free housing that he/she can use (*e.g.*, unoccupied rental property).
2. The damaged home is a secondary or vacation residence.
3. The expenses resulted only from leaving the home as a precaution and the applicant was able to return immediately after the incident.
4. The applicant has refused assistance from their insurance provider(s).
5. The applicant’s only losses are business losses (including farm business other than the farmhouse and self-employment) or items not covered by this program.
6. The damaged home where the applicant lives is located in a designated flood hazard area and the applicant’s community is not participating in the National Flood Insurance Program. In this case, the flood damage to the applicant’s home would not be covered, but the applicant may qualify for rental assistance or items not covered by flood insurance, such as water wells or septic systems.

F. Amounts of Assistance

Housing Assistance provided under IHP can be financial or direct (providing accommodation in governmental units). Housing assistance under IHP is not SBA dependent. Individuals in the disaster area who have registered with FEMA can search hundreds of listings on the FEMA housing portal, at <http://asd.fema.gov/inter/hportal/home.htm>. The listings include rental units provided by federal agencies and private organizations and property owners. Financial Assistance is provided through grant funds and the amount varies with the type of assistance provided:<sup>1</sup>

1. Repair Assistance - up to \$5,000.00 (*CPI adjusted annually*).
2. Replacement Assistance - up to \$10,000.00 (*CPI adjusted annually*).
3. Permanent Housing Construction - mobile home or travel trailer. Assistance provided directly has no dollar limit, financial assistance is limited to the program maximum of \$25,000.00 (*CPI adjusted annually*).
4. Rental Assistance - up to the program limit of \$25,000.00 (*CPI adjusted annually*) or 18 months of assistance, whichever comes first.

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<sup>1</sup> See FEMA Training Manual, Unit 3 – Overview of Federal Disaster Assistance, pp 3-17, available at [http://training.fema.gov/emiweb/downloads/is7unit\\_3.pdf](http://training.fema.gov/emiweb/downloads/is7unit_3.pdf).

## II. Other than Housing Needs

### A. Expenses and needs covered

Financial assistance is available for necessary expenses and serious needs caused by the disaster, such as: (1) Disaster-related medical and dental expenses; (2) Disaster-related funeral and burial expenses; (3) Clothing; household items (room furnishings, appliances); tools (specialized or protective clothing and equipment) required for employment; necessary educational materials (computers, school books, supplies); (4) Fuels for primary heat source (heating oil, gas); (5) Clean-up items (wet/dry vacuum, dehumidifier); (6) Disaster-related damage to a vehicle; (7) Moving and storage expenses related to the disaster (moving and storing property to avoid additional disaster damage while disaster-related repairs are being made to the home); (8) Other necessary expenses or serious needs as determined by FEMA; (9) Other expenses authorized by law.

### B. Eligibility for “Other than Housing Needs”

To receive money for “Other than Housing Needs” that are the result of a disaster, all the following must be true:

1. The applicant has losses in an area that has been declared a disaster area by the President. See *DESIGNATED DISASTER AREAS* above.
2. The applicant has filed for insurance benefits and the damage to the property is not covered by insurance or the insurance settlement is insufficient to meet the losses.
3. The applicant or someone who lives with him/her is a citizen of the United States, a non-citizen national, or a qualified alien.
4. The applicant has necessary expenses or serious needs because of the disaster.
5. The applicant has accepted assistance from all other sources for which he/she is eligible, such as insurance proceeds or Small Business Administration disaster loans.

## III. Disaster Unemployment Assistance (DUA)

### A. Eligibility.

If the individual, including an individual who is self-employed, due to the disaster:

1. no longer has a job or a place to work; or
2. cannot reach the place of work; or
3. cannot work due to damage to the place of work; or
4. cannot work because of an injury caused by the disaster.

An individual who becomes the head of household and is seeking work because the former head of household died as a result of the disaster may also qualify for DUA benefits.

Eligibility requirements for DUA differ from regular unemployment insurance and an applicant may qualify if he/she is self-employed, even if he/she own and operate a farm. DUA eligibility and benefit amounts are decided on an individual, case-by-case basis. ***The primary factor is whether the self-employed person or farmer is performing less than his/her normal, full-time services and earning wages less than \$405 a week.***

Restorative or clean-up work, which is necessary because of the disaster, will not disqualify an individual for DUA.

1. Salvaging or other limited self-employment activity alone will not necessarily make someone ineligible for DUA as long as they work less than full time and their earnings do not exceed their maximum weekly benefit rate.
2. If salvaging results in a brief period of earnings of more than \$405 a week, then DUA would stop during that period, but resume after salvaging operations end. For *e.g.*, a farmer who was substantially impacted by the disaster may be able to harvest the residual crops that were not impacted by the disaster. During the period where salvaging occurred, the farmer may not be eligible for DUA, but could be eligible later on.

#### **IV. How to Apply for Assistance**

##### **A. Methods of applying**

1. Apply Online at [DisasterAssistance.gov](http://DisasterAssistance.gov).
2. Apply via a smartphone at [m.fema.gov](http://m.fema.gov).
3. Apply by Phone: Call (800) 621-3362 or Call TTY (800) 462-7585 for people with speech or hearing disabilities.

##### **B. Information needed to apply for assistance**

1. Applicant's Social Security number.
2. Current and pre-disaster address.
3. A telephone number where the applicant can be contacted.
4. Insurance information.
5. Total household annual income.
6. A routing and account number from the applicant's bank (only necessary if the applicant wants to have disaster assistance funds transferred directly into their bank account) (bank routing number).
7. A description of losses that were caused by the disaster. See *V. Post Application –Inspection* below.
8. Ownership documentation to support application, such as deed or official record, title number, mortgage payment book, real property insurance, tax receipts or properly tax bill (required for IHP)
9. Occupancy documentation, such as utility bill, merchant's statement, employer's statement, driver's license.<sup>2</sup>

The applicant should also keep the allotted FEMA application number for reference.

#### **V. Post-Application Inspection**

Within 10 days of the applicant's application to FEMA, if the applicant is uninsured or lacks the appropriate insurance coverage, a qualified inspector is expected to contact the applicant to see and

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<sup>2</sup> See Applicant's guide to the Individuals and Households Program, FEMA 545/July 2008, available at [www.fema.gov](http://www.fema.gov).

document the damage to property that was caused by the disaster. The losses will be recorded and submitted to the IHP, and within ten days thereafter, the applicant should expect to have a decision on whether he/she qualifies for IHP assistance.

## **VI. FEMA Appeals Process**

An applicant who does not qualify for a FEMA grant will receive a letter explaining why he/she was turned down and will be given a chance to appeal the decision. Typically, a applicant's appeal rights are described in such letter. Appeals must be in writing and mailed within 60 days of FEMA's decision. Appeals may relate to the applicant's eligibility, the amount or type of help provided, late applications, requests to return money, or denial of continued assistance.

### **A. Steps to appeal the decision:**

1. Applicant must explain in writing why he/she thinks that the decision about the amount or type of assistance received is not correct. The applicant, or someone who represents the applicant or his/her household, should sign the letter.<sup>3</sup>
2. FEMA registration number and disaster number (shown at the top of the decision letter) in the letter of appeal.
3. Appeal letter to be mailed to:

FEMA - Individuals & Households Program  
National Processing Service Center  
P.O. Box 10055  
Hyattsville, MD 20782-7055  
Fax : (800) 827-8112  
Attention: FEMA - Individuals & Households Program

To be considered, the applicant's appeal letter must be postmarked within 60 days of the date of the decision letter's date. Remember to date the letter! Decisions usually are made within 30 days of receiving the request. Applicants are notified by mail of the response to their appeal.

Information regarding an applicant's case, the applicant or someone from his/her household may request a copy of the information by writing to:<sup>4</sup>

FEMA - Records Management  
National Processing Service Center  
P.O. Box 10055  
Hyattsville, MD 20782-7055

## **VII. Remember...**

1. Grants to individual families or small businesses from charities may reduce the recipient's ability to receive relief funds from FEMA.
2. Insurance coverage limits the applicant's ability to receive relief funds from FEMA, to the extent insurance covers such losses. Failure to apply for insurance may limit applicant's ability to receive assistance.

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<sup>3</sup> If the person writing the letter is not a member of the applicant's household, there must be a signed statement saying that that person may act for the applicant.

<sup>4</sup> If someone outside of the applicant's household is submitting the request, then the request also must contain a statement signed by the applicant giving that person authorization to request this information.

3. Maximum period FEMA rental assistance is 20 months. Maximum hotel stays are 30 days (unless applicant receives an extension).
4. It is important that applicants keep copies of all of their records and submissions to FEMA.

### **VIII. For Additional Help**

City Bar Justice Center	<a href="http://www.citybarjusticecenter.org">www.citybarjusticecenter.org</a>
CBJC's, Neighborhood Entrepreneur Law Project (for Small Business assistance)	<a href="http://www.bit.ly/nelpcbjc">www.bit.ly/nelpcbjc</a>
Legal Services of NJ	<a href="http://lsnj.org">http://lsnj.org</a>
New York Legal Assistance Group	<a href="http://nylag.org">http://nylag.org</a>
NYS Dept of Financial Services Storm Hotline	1-800-339-1759
NYC Business Solutions	<a href="http://www.nyc.gov/html/sbs/nycbiz/html/contact/manager.shtml">http://www.nyc.gov/html/sbs/nycbiz/html/contact/manager.shtml</a>
NYC Comptroller	<a href="http://comptroller.nyc.gov/bureaus/bla/e-filingclaim.shtm">http://comptroller.nyc.gov/bureaus/bla/e-filingclaim.shtm</a>
New York Business Development Corporation	<a href="http://www.nybdc.com/HurricaneSandySmallBusinessReliefFund.html">http://www.nybdc.com/HurricaneSandySmallBusinessReliefFund.html</a>
NYC Economic Development Corporation	<a href="http://www.nycedc.com/backtobusiness">http://www.nycedc.com/backtobusiness</a>
Palisades Federal Credit Union	<a href="https://www.palisadesfcu.org/Credit-Union-Loans/hurricane-relief-loan">https://www.palisadesfcu.org/Credit-Union-Loans/hurricane-relief-loan</a>
The Legal Aid Society	<a href="http://www.legal-aid.org">www.legal-aid.org</a>
The United Way of NYC	<a href="http://action.unitedwaynyc.org/page/content/uwsandyrecovery">http://action.unitedwaynyc.org/page/content/uwsandyrecovery</a>
Touro Law Center - Hurricane Emergency Assistance & Referral Team	<a href="http://www.tourolaw.edu">http://www.tourolaw.edu</a>
Volunteers of Legal Service	<a href="http://www.volsprobono.org">http://www.volsprobono.org</a>

## **HURRICANE SANDY SMALL BUSINESS LEGAL RELIEF**

### **SMALL BUSINESS ADMINISTRATION**

The Small Business Administration's (SBA) determination of a loan applicant's eligibility can be very fact-dependent and also time-consuming. This primer is intended only as a general guide to processes and procedures.

- I. SBA Disaster Areas: NY – 5 Counties of New York City, Nassau, Suffolk, Rockland, Westchester; NJ – Atlantic, Cape May, Essex, Hudson, Middlesex, Monmouth, Ocean, Union, Bergen, Somerset, Burlington, Camden, Cumberland, Gloucester, Hunterdon, Mercer, Morris, Passaic, Salem, Sussex, Warren; CT – Fairfield, Middlesex, New Haven, New London
  - A. For purposes of Economic Injury Disaster Loans only – CT – Fairfield, Hartford, Litchfield, Tolland, Windham; NY – Orange, Putnam, Dutchess
- II. Customer Service: 1-800-659-2955 or [disastercustomerservice@sba.gov](mailto:disastercustomerservice@sba.gov)
- III. Apply Online: <https://disasterloan.sba.gov/ela/>
  - A. Please note that the SBA estimates that the application forms will take over 5 hours to complete. This may be an optimistic estimate as loan applicants may not have access to all of the required information.
- IV. Apply at the SBA Business Recovery Centers
  - A. Downtown Brooklyn – The NYC Business Solution Brooklyn Center, 9 Bond Street (between Livingston & Fulton Streets), 7th Floor, Brooklyn, NY 11201
  - B. College of Staten Island, (The City University of New York), Main Administration Building in Building 1A-102, 2800 Victory Boulevard, Staten Island, NY 10314
  - C. New Jersey
    1. Bergen County – Bergen Community College, Small Business Development Center, 355 Main Street, Room 121, Hackensack, NJ 07601
    2. Essex County – Rutgers University, Small Business Development Center, 25 James Street, Newark, NJ 07102
    3. Hudson County – Small Business Development Center, New Jersey City University, 285 West Side Avenue, Suites 189-191, Jersey City, NJ 07305

4. Middlesex County – John F. Kennedy Library, 500 Hoes Lane, Piscataway, NJ 08854
5. Monmouth County – Brookdale Community College, 765 Newman Springs Road, Bankier Library, Room 246 (SBDC), Lincroft, NJ 07738
6. Ocean County – Southern Ocean County Chamber of Commerce, Stafford Heritage Park Train Station and Rail Car, (Across from Manahawkin Lake between RT 9 and RT 72), West Bay Avenue, Manahawkin, NJ 08050

V. Physical Loss Loans from the SBA

A. Home Disaster – Loans to homeowners or renters to repair or replace disaster damaged real estate or personal property, including automobiles.

1. Must first register with FEMA
2. Up to \$200,000 for real estate and up to \$40,000 for personal property. The amount cannot exceed the verified uninsured disaster loss.
3. Second homes and other recreational personal property (such as boats) are ineligible. If the boat, for example, is used for a business purpose then it is eligible for SBA loans.
4. Interest Rates: Credit Unavailable Elsewhere 1.688%; Credit Available Elsewhere: 3.375%
  - a) Credit Available Elsewhere is a determination by the SBA as to whether the loan applicant has sufficient funds or other resources, or the ability to borrow from non-government sources, in order to provide for its own disaster recovery. Generally, the SBA determines that over 90 percent of loan applicants do not have sufficient financial resources to recover without the assistance of the Federal government.
5. Application: Form 5C (SBA Form), Form 8821 (Authorizing the SBA to Verify Reported Income with the IRS) and Insurance Verification

B. Business Physical Disaster – If a business or private, not-for-profit organization is located in a declared disaster area and has suffered physical damage as a result of a disaster.

1. Any size business or not-for-profit is eligible.
2. Loan proceeds may be used for the repair or replacement of: Real property; Machinery; Equipment; Fixtures; Inventory; Leasehold improvements

3. Up to \$2 million which can be waived if a business is a major source of employment (250 or more employees in the affected area). The amount cannot exceed the verified uninsured disaster loss.

4. Interest Rates for Businesses: Credit Unavailable Elsewhere 4%; Credit Available Elsewhere: 6%

5. Interest Rates for Not-For-Profits: Credit Unavailable Elsewhere 3%; Credit Available Elsewhere: 3.125%

6. Application: Form 5 (SBA Form), Form 8821 (Authorizing the SBA to Verify Reported Income with the IRS), Personal Financial Statement, and Schedule of Liabilities

7. The SBA must review a financial statement for each owner and one for each partner, officer, director and stockholder with 20% or more ownership. The SBA requires the principals of the business to personally guarantee repayment of the loan, and in some instances to secure the loan by pledging additional collateral.

C. Details regarding both types of Physical Loss Loans:

1. Application Deadline is December 31, 2012

2. Collateral required for loans over \$14,000 – The SBA will not decline a loan without collateral but requires the recipient to pledge what is available. The SBA takes real estate as collateral when it is available.

3. Mitigation Loans – Disaster loans to repair real estate and leasehold improvements may be increased by as much as 20 percent of the total amount of disaster damage to pay for improvements to protect the damaged property against possible future disasters of the same type.

4. The SBA can refinance all or part of prior mortgages that are evidenced by a recorded lien, when the applicant (1) does not have credit available elsewhere, (2) has suffered substantial uncompensated disaster damage (40 percent or more of the value of the property), and (3) intends to repair the damage.

5. The maximum term is 30 years but if a business has credit available elsewhere, the maximum term is 3 years.

VI. Economic Injury Disaster Loans – working capital loans to help small businesses, small agricultural cooperatives and most private, not-for-profit organizations of all sizes meet their financial obligations and operating expenses which could have been met had the disaster not occurred.

- A. Application deadline is July 31, 2013
- B. Recovery cannot be available from a non-governmental source, i.e., the loan applicant has sufficient funds or other resources, or the ability to borrow from non-government sources, in order to provide for its own disaster recovery.
- C. Up to \$2 million, however, the actual amount is limited to the economic injury determined by the SBA, less business interruption insurance.
- D. Interest rates are 3% for not-for-profits and 4% for businesses.
- E. Collateral required for loans over \$5,000
- F. Maximum term of 30 years
- G. Application: Form 5 (SBA Form), Form 8821 (Authorizing the SBA to Verify Reported Income with the IRS), Personal Financial Statement, Schedule of Liabilities and Monthly Sales Statement

It is important to remember that processing time can be slow and loan applicants need to expect delays. It is critical to keep copies of all filings and maintain your records as best you can. Keep a log of contacts with the SBA.



# U. S. Small Business Administration DISASTER BUSINESS LOAN APPLICATION

OMB No. : 3245-0017  
Expiration: 01/31/2015

FOR SBA INTERNAL USE ONLY

Date Received \_\_\_\_\_ Location \_\_\_\_\_ By \_\_\_\_\_

Physical Declaration Number   
Economic Injury Declaration Number   
FEMA Registration Number   
(if known)

Filing Deadline Date   
Filing Deadline Date   
SBA Application Number

## 1. ARE YOU APPLYING FOR:

- ☐ **Physical Damage** -- *Indicate type of damage*  
☐ Real Property ☐ Business Contents  
☐ **Economic Injury (EIDL)**

☐ **Military Reservist EIDL (MREIDL)**

(complete the following)

\* Name of Essential Employee \_\_\_\_\_

\* Employee's Social Security Number \_\_\_\_\_

**PLEASE PROVIDE ALL INFORMATION OR DOCUMENTATION REQUESTED IN THE ATTACHED FILING REQUIREMENTS.**

\* For information about these questions, see the attached Statements Required by Laws and Executive Orders.

**Apply online at <https://disasterloan.sba.gov/ela/> OR send completed applications to:**

**U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, Texas 76155**

## 2. ORGANIZATION TYPE

- ☐ Sole Proprietorship ☐ Partnership ☐ Limited Partnership ☐ Limited Liability Entity  
☐ Corporation ☐ Nonprofit Organization ☐ Trust ☐ Other: \_\_\_\_\_

## 3. APPLICANT'S LEGAL NAME

## 4. FEDERAL E.I.N. (if applicable)

## 5. TRADE NAME (if different from legal name)

## 6. BUSINESS PHONE NUMBER (including area code)

## 7. MAILING ADDRESS

☐ Business ☐ Home ☐ Temp ☐ Other: \_\_\_\_\_

Number, Street, and/or Post Office Box  City  County  State  Zip

## 8. DAMAGED PROPERTY ADDRESS(ES)

(If you need more space, attach additional sheets.)

☐ Same as mailing address

## BUSINESS PROPERTY IS:

☐ Owned ☐ Leased

Number and Street Name  City  County  State  Zip

## 9. PROVIDE THE NAME(S) OF THE INDIVIDUAL(S) TO CONTACT FOR:

### Loss Verification Inspection

### Information necessary to process the Application

Name

Name

Telephone Number

Telephone Number

## 10. ALTERNATE WAY TO CONTACT YOU

☐ Cell Number

☐ E-mail

☐ Fax Number

☐ Other

## 11. BUSINESS ACTIVITY:

## 12. NUMBER OF EMPLOYEES (pre-disaster):

## 13. DATE BUSINESS ESTABLISHED:

## 14. CURRENT MANAGEMENT SINCE:

## 15. AMOUNT OF ESTIMATED LOSS:

If unknown, enter a question mark

☐ Real Estate

☐ Inventory

☐ Machinery & Equipment

☐ Leasehold Improvements

## 16. INSURANCE COVERAGE (IF ANY)

(If you need more space, attach additional sheets.)

Coverage Type:

Name of Insurance Company and Agent

Phone Number of Insurance Agent

Policy Number

<b>17. OWNERS</b> (Individuals and businesses.) (If you need more space attach additional sheets.)		Complete for each: 1) proprietor, or 2) limited partner who owns 20% or more interest and each general partner, or 3) stockholder or entity owning 20% or more voting stock.			
Legal Name		Title/Office	% Owned	E-mail Address	
SSN/EIN*	Marital Status	Date of Birth*	Place of Birth*	Telephone Number (area code )	US Citizen <input type="checkbox"/> Yes <input type="checkbox"/> No
Mailing Address		City	State	Zip	
Legal Name		Title/Office	% Owned	E-mail Address	
SSN/EIN*	Marital Status	Date of Birth*	Place of Birth*	Telephone Number (area code )	US Citizen <input type="checkbox"/> Yes <input type="checkbox"/> No
Mailing Address		City	State	Zip	
* For information about these questions, see the attached Statements Required by Laws and Executive Orders.					
Business Entity Owner Name		EIN	Type of Business	% Ownership	
Mailing Address		City	State	Zip Code	
E-mail Address			Phone		
<b>18. For the applicant business and each owner listed in item 17, please respond to the following questions, providing dates and details on any question answered YES (Attach an additional sheet for detailed responses).</b>					
a. Has the business or a listed owner ever been involved in a bankruptcy or insolvency proceeding? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
b. Does the business or a listed owner have any outstanding judgments, tax liens, or pending lawsuits against them? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
c. Has the business or a listed owner ever been convicted of a criminal offense committed during and in connection with a riot or civil disorder or ever been engaged in the production or distribution of any product or service that has been determined to be obscene by a court of competent jurisdiction? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
d. Has the business or a listed owner ever had or guaranteed a Federal loan or a Federally guaranteed loan? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
e. Is the business or a listed owner delinquent on any Federal taxes, direct or guaranteed Federal loans (SBA, FHA, VA, student, etc.), Federal contracts, Federal grants, or any child support payments? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
f. Does any owner, owner's spouse, or household member work for SBA or serve as a member of SBA's SCORE, ACE, or Advisory Council? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
g. Is the applicant or any listed owner currently suspended or debarred from contracting with the Federal government or receiving Federal grants or loans? .....				<input type="checkbox"/> Yes	<input type="checkbox"/> No
<b>19. Regarding you or any joint applicant listed in Item 17:</b>					
a) have you ever been or are you presently, under indictment or subject to a criminal investigation or have you otherwise been charged through a judicial process of having committed a crime; b) have you been arrested or arraigned in the past six months; c) have you ever been convicted , plead guilty to a crime, plead nolo contendere to a crime, placed on pretrial diversion, or placed on any form of parole or probation -- including adjudication withheld pending probation -- for an criminal offense other than a minor vehicle violation? <div style="display: flex; justify-content: space-between; align-items: center;"> <input type="checkbox"/> Yes <input type="checkbox"/> No         <div style="margin-left: 20px;">If yes, Name: <span style="border: 1px solid black; display: inline-block; width: 150px; height: 1.2em; vertical-align: middle;"></span></div> </div>					
<b>20. PHYSICAL DAMAGE LOANS ONLY.</b> If your application is approved, you may be eligible for additional funds to cover the cost of mitigating measures (real property improvements or devices to minimize or protect against future damage from the same type of disaster event). It is not necessary for you to submit the description and cost estimates with the application. SBA must approve the mitigating measures before any loan increase. <b>By checking this box, I am interested in having SBA consider this increase.</b> <input type="checkbox"/>					
<b>21. If anyone assisted you in completing this application, whether you pay a fee for this service or not, that person must print and sign their name in the space below.</b>					
Name and Address of Representative (please include the individual name and their company)					
<div style="border-bottom: 1px solid black; width: 100%;"></div> <div style="text-align: center; font-size: small;">(Signature of Individual)</div>			<div style="border-bottom: 1px solid black; width: 100%;"></div> <div style="text-align: center; font-size: small;">(Print Individual Name)</div>		
<div style="border-bottom: 1px solid black; width: 100%;"></div> <div style="text-align: center; font-size: small;">(Name of Company)</div>			<div style="border-bottom: 1px solid black; width: 100%;"></div> <div style="text-align: center; font-size: small;">Phone Number (include Area Code)</div>		
<div style="border-bottom: 1px solid black; width: 100%;"></div> <div style="text-align: center; font-size: small;">Street Address, City, State, Zip</div>			<div style="border-bottom: 1px solid black; width: 100%;"></div> <div style="text-align: center; font-size: small;">Fee Charged or Agreed Upon</div>		
Unless the NO box is checked, I give permission for SBA to discuss any portion of this application with the representative listed above. <b>NO</b> <input type="checkbox"/>					
<b>AGREEMENTS AND CERTIFICATIONS</b>					
On behalf of the undersigned individually and for the applicant business:					
I/We authorize my/our insurance company, bank, financial institution, or other creditors to release to SBA all records and information necessary to process this application.					
If my/our loan is approved, additional information may be required prior to loan closing. I/We will be advised in writing what information will be required to obtain my/our loan funds.					
I/We hereby authorize the Small Business Administration to verify my/our past and present employment information and salary history as needed to process and service my disaster loan.					
I/We will not exclude from participating in or deny the benefits of, or otherwise subject to discrimination under any program or activity for which I/we receive Federal financial assistance from SBA, any person on grounds of age, color, handicap, marital status, national origin, race, religion, or sex.					
I/We will report to the SBA Office of the Inspector General, Washington, DC 20416, any Federal employee who offers, in return for compensation of any kind, to help get this loan approved. I/We have not paid anyone connected with the Federal government for help in getting this loan.					
CERTIFICATION AS TO TRUTHFUL INFORMATION: By signing this application, you certify that all information in your application and submitted with your application is true and correct to the best of your knowledge, and that you will submit truthful information in the future.					
WARNING: Submitting false information to the Government can lead to criminal penalties and/or civil and administrative remedies against you. If you are prosecuted for submitting false information, you may be imprisoned for up to 30 years and/or fined up to \$250,000 under 18 U.S.C. § 1040 and other Federal statutes. The Government may also pursue a civil fraud case against you for three times the amount of your loan, and may exclude you from participating in Federal programs and contracts for submitting false information in-- or with -- your application or if you do not use the proceeds of the loan for the purpose(s) stated in your application and SBA's loan authorization.					
<b>SIGNATURE</b>	<div style="border: 1px solid black; width: 100%; height: 20px;"></div> <div style="text-align: center; font-size: x-small;">Sign in Ink</div>		<b>TITLE</b>	<div style="border: 1px solid black; width: 100%; height: 20px;"></div>	
			<b>DATE</b>	<div style="border: 1px solid black; width: 100%; height: 20px;"></div>	

## **U. S. Small Business Administration DISASTER BUSINESS LOAN APPLICATION**

If you have questions about this application or problems providing the required information, please contact our Customer Service Center at 1-800-659-2955 or [disastercustomerservice@sba.gov](mailto:disastercustomerservice@sba.gov)

If more space is needed for any section of this application, please attach additional sheets.

SBA will contact you by phone or E-mail to discuss your loan request.

### **Filing Requirements**

#### **FOR ALL APPLICATIONS THE FOLLOWING ITEMS MUST BE SUBMITTED.**

- This application (SBA Form 5), completed and signed
- Tax Information Authorization (IRS Form 8821), completed and signed by each applicant, each principal owning 20 percent or more of the applicant business, each general partner or managing member, and each affiliate business. Affiliates include, but are not limited to, business parents, subsidiaries, and/or other businesses with common ownership or management
- Complete copies, including all schedules, of the most recent Federal income tax returns for the applicant business; an explanation if not available
- Personal Financial Statement (SBA Form 413) completed, signed, and dated by the applicant (if a sole proprietorship), each principal owning 20 percent or more of the applicant business, and each general partner or managing member
- Schedule of Liabilities listing all fixed debts (SBA Form 2202 may be used)

#### **ADDITIONAL REQUIREMENTS FOR MILITARY RESERVIST ECONOMIC INJURY (MREIDL);**

- A copy of the essential employee's notice of expected call-up to active duty, or official call-up orders, or release/discharge from active duty
- A written explanation and financial estimate of how the call-up of the essential employee has or will result in economic injury to your business, and the steps your business is taking to alleviate the economic injury
- MREIDL Certification Form P-0002, which includes:
  - Your statement that the reservist is essential to the successful day-to-day operations of the business
  - Your certification that the essential employee will be offered the same or a similar job upon the employee's return from active duty
  - The essential employee's concurrence with your statements

#### **ADDITIONAL INFORMATION MAY BE NECESSARY TO PROCESS YOUR APPLICATION. IF REQUESTED, PLEASE PROVIDE WITHIN 7 DAYS OF THE INFORMATION REQUEST;**

- Complete copy, including all schedules, of the most recent Federal income tax return for each principal owning 20 percent or more, each general partner or managing member, and each affiliate
- If the most recent Federal income tax return has not been filed, a year-end profit-and-loss statement and balance sheet for that tax year
- A current year-to-date profit-and-loss statement
- Additional Filing Requirements (SBA Form 1368) providing monthly sales figures

**NOTE: PLEASE READ, DETACH AND KEEP FOR YOUR RECORDS**  
**STATEMENTS REQUIRED BY LAWS AND EXECUTIVE ORDERS**

To comply with legislation passed by the Congress and Executive Orders issued by the President, Federal executive agencies, including the Small Business Administration (SBA), must notify you of certain information. You can find the regulations and policies implementing these laws and Executive Orders in Title 13, Code of Federal Regulations (CFR), Chapter 1, or our Standard Operating Procedures (SOPs). In order to provide the required notices, the following is a brief summary of the various laws and Executive Orders that affect SBA's Disaster Loan Programs.

**FREEDOM OF INFORMATION ACT (5 U.S.c. § 552)**

This law provides, with some exceptions, that we must make records or portions of records contained in our files available to persons requesting them. This generally includes aggregate statistical information on our disaster loan programs and other information such as names of borrowers (and their officers, directors, stockholders or partners), loan amounts at maturity, the collateral pledged, and the general purpose of loans. We do not routinely make available to third parties your proprietary data without first doing pre-notification, required by Executive Order 12600, or information that would cause competitive harm or constitute a clearly unwarranted invasion of personal privacy.

Send a request under this Act to the SBA office maintaining the records requested and identify it as a Freedom of Information Act (FOIA) request. The request must describe the specific records you want. For information about the FOIA, contact the Chief, FOI/PA Office, 409 3rd Street, SW, Suite 5900, Washington, DC 20416, or by e-mail at [foia@sba.gov](mailto:foia@sba.gov).

**PRIVACY ACT (5 U.S.C. § 552a)**

You can request to see or get copies of any personal information that we have in your file, when that file is retrieved by individual identifiers, such as name or social security number. Requests for information about another party may be denied unless we have the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Agreements and Certifications section of this form contains written permission for us to disclose the information resulting from this collection with state, local or private disaster relief services.

Under the provisions of the Privacy Act, you are not required to provide social security numbers. However, we use social security numbers to distinguish between people with a similar or the same name. Failure to provide this number may not affect any right, benefit or privilege to which you are entitled by law, but having the number makes it easier for us to more accurately identify to whom adverse credit information applies and to keep accurate loan records.

The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use for SBA's loan system of records is that when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature, SBA may refer it to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use of personal information is to assist in obtaining credit bureau reports, on the Disaster Loan Applicants and guarantors for purposes of originating, servicing, and liquidating Disaster loans. See, 69 F.R. 58598, 58617 (and as amended from time to time) for additional background and other routine uses.

Note: Any person concerned with the collection, use and disclosure of information, under the Privacy Act may contact the Chief, FOI/PA Office, 409 3rd Street, SW, Suite 5900, Washington, DC 20416 or by e-mail at [foia@sba.gov](mailto:foia@sba.gov) for information about the Agency's procedures relating to the Privacy Act and the Freedom of Information Act.

**RIGHT TO FINANCIAL PRIVACY ACT OF 1978 (12 U.S.C. § 3401 et seq.)**

This notifies you, as required by the Right to Financial Privacy Act of 1978 (Act), of our right to access financial records held by financial institutions that were or are doing business with you or your business. This includes financial institutions participating in loans or loan guaranties.

The law provides that we may access your financial records when considering or administering Government loan or loan guaranty assistance to you. We must give a financial institution a certificate of our compliance with the Act when we first request access to your financial records. No other certification is required for later access. Our access rights continue for the term of any approved loan or loan guaranty. We do not have to give you any additional notice of our access rights during the term of the loan or loan guaranty.

We may transfer to another Government authority any financial records included in a loan application or about an approved loan or loan guaranty as necessary to process, service, liquidate, or foreclose a loan or loan guaranty. We will not permit any transfer of your financial records to another Government authority except as required or permitted by law.

## DEBT COLLECTION ACT OF 1982 & DEFICIT REDUCTION ACT OF 1984 (31 U.S.c. 33701 et seq. & other titles)

These laws require us to aggressively collect any delinquent loan payments. You must give your taxpayer identification number to us when you apply for a loan. If you receive a loan and do not make payments when they become due, we may take one or more of the following actions (this list may not be exhaustive):

- \*Report the delinquency to credit reporting bureaus.
- \*Offset your income tax refunds or other amounts due to you from the Federal Government.
- \*Refer the account to a private collection agency or other agency operating a debt collection center.
- \*Suspend or debar you from doing business with the Federal Government.
- \*Refer your loan to the Department of Justice.
- \*Foreclose on collateral or take other actions permitted in the loan instruments.
- \*Garnish wages.
- \*Sell the debt.
- \*Litigate or foreclose.

## Paperwork Reduction Act (44 U.S.C. Chapter 35)

We are collecting the information on this form in order to make disaster loans available to qualified small businesses. The form is designed to collect the information necessary for us to make eligibility and credit decisions in order to fund or deny loan requests. We will also use the information collected on this form to produce summary reports for program and management analysis, as required by law.

PLEASE NOTE: The estimated burden for completing this form is 2 hours. Your responses to the requested information are required in order to obtain a benefit under SBA's Disaster Business Loan Programs. However, you are not required to respond to any collection of information unless it displays a currently valid OMB approval number. If you have any questions or comments concerning any aspects of this information collection, please contact the U.S. Small Business Administration Information Branch, 409 3rd St., SW, Washington, DC 20416 and Desk Officer for SBA, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW, Washington, DC 20503. (3245-0017) PLEASE DO NOT SEND FORMS TO OMB.

## Policy Concerning Representatives and Their Fees

When you apply for an SBA loan, you may use an attorney, accountant, engineer, appraiser or other representative to help prepare and present the application to us. You are not required to have representation. If an application is approved, you may need an attorney to help prepare closing documents.

There are no "authorized representatives" of SBA, other than our regular salaried employees. Payment of a fee or gratuity to our employees is illegal and will subject those involved to prosecution.

SBA Regulations prohibit representatives from proposing or charging any fee for services performed in connection with your loan unless we consider the services necessary and the amount reasonable. The Regulations also prohibit charging you any commitment, bonus, broker, commission, referral or similar fee. We will not approve the payment of any bonus, brokerage fee or commission. Also, we will not approve placement or finder's fees for using or trying to use influence in the SBA loan application process.

Fees to representatives must be reasonable for services provided in connection with the application or the closing and based upon the time and effort required, the qualifications of the representative, and the nature and extent of work performed. Representatives must execute a compensation agreement.

In the appropriate section of the application, you must state the names of everyone employed by you or on your behalf. You must also notify the SBA disaster office in writing of the names and fees of any representative you employ after you file your application.

If you have any questions concerning payment of fees or reasonableness of fees, contact the Field Office where you filed or will file your application.

## Occupational Safety and Health Act (29 U.S.c. 3651 et seq.)

This legislation authorizes the Occupational Safety and Health Administration (OSHA) in the Department of Labor to require businesses to modify facilities and procedures to protect employees when appropriate. If your business does not do so, you may be penalized, forced to close or prevented from starting operations in a new facility. Because of this, we may require information from you to determine whether your business complies with OSHA regulations and may continue operating after the loan is approved or disbursed. You must certify to us that OSHA requirements applying to your business have been determined and that you are, to the best of your knowledge, in compliance.

# **City Bar Justice Center's Neighborhood Entrepreneur Law Project**

Disaster Assistance Training for Small Businesses

## **INSURANCE**

By: Jamie Shookman, Esq.

Orrick, Herrington & Sutcliffe LLP

# Insurance-Recovery Sources

- Most important message:
  - Give Notice ASAP to Your Insurance Company that You May Have a Claim
    - This website has a list of contact info: [www.iii.org](http://www.iii.org) (Insurance Information Institute)
  - Document in every way the damage and costs
    - *Remember: Ultimately, You Want to Make It Easy for Your Insurance Company to Pay.*

# Potentially Involved Coverage 1

- *First-Party Property*: loss to property owned by insured.
- *Business Income/Interruption*: loss from the insured's inability to make productive use of the insured's property.
- *Extra Expense*: loss from the additional expenses incurred by the insured to maintain operations.

# Potentially Involved Coverage 2

- *Additional Expense*: for homeowners, rent for temporary housing
- *Cargo/Freight*: Loss to property damaged in transit
- *Automobile*: Loss from Damaged Automobiles
- *Fidelity/Crime*: Loss from Looting

# It's a "Superstorm," NOT a Hurricane 1

- Some policies impose deductibles that are greater for "hurricane" losses.
  - Hurricane deductibles are calculated as a percentage of *total insured value* (not the value of the claim)
    - So, a 5 percent hurricane deductible on a \$1 million property means that the *first \$50,000* of hurricane damage is not covered at all.

# It's a “Superstorm,” NOT a Hurricane 2

- Every affected state regulator has said that the storm was not a hurricane (at least for homeowners' coverage)
  - At 7 pm on Monday, October 29, the National Hurricane Center downgraded Sandy to a “post-tropical cyclone”

# Threshold Issue: Salvage – Don't Get Bitten

- Your insurance company now “owns” the damaged property, and salvage values offset the payment obligations of insurers or are to be remitted to insurers if full payment has been made.
  - May also affect the tax year that loss is realized

# Threshold Issue: Subrogation – Don't Get Bitten

- Your insurance company now “owns” your claims against others that produced covered loss to you. If there is loss caused by someone else's fault, your insurance company is to pay you and seek recover from the tortfeasor.
  - The *first* dollar of any recovery in subrogation must be refunded to you for any deductible you have incurred or other loss caused by the tortfeasor and not paid by the insurance company.

# How Does Your First-Party Property Damage Policy Apply?

- Property policies covered “insured property” at insured “premises” or “locations”
- Loss from physical damage to property
- The insured has the burden of proving that the loss arose from a covered “peril”
  - “Named Peril” policies
    - Loss only from specifically identified causes
  - “All Risk” or “Open Peril” policies
    - Loss from any cause is covered

# “Flood” Loss

- Be careful in characterizing how loss came about: policies restrict or eliminate coverage for “flood”
- “Flood” is bottom-up, rising water; water that begins on the ground in a large ( $> 2$  acre) area
- “Storm surge” – might be characterized as a flood
- Flood may have reduced policy benefits or limits and the loss reimbursement rate or method may differ from other losses

# How Are Losses Calculated?

- “Replacement Cost” – expressly purchased benefit, like-kind replacement including any newly required regulatory enhancements
  - Xactimate® software used in-house by many insurers
- “Actual Cash Value” – market value of pre-damaged item (roughly, purchase price minus depreciation)
- “Selling Price” for Finished Goods (by Endorsement), *i.e.*, cost-of-goods-sold plus profit

# Who Determines the Value?

- Policyholder has to monetize the loss in some defensible way
- Insurance Company Claims Adjuster
  - Should reimburse for any undisputed amounts, *i.e.*, pay pending resolution of disagreement

# Determining Value of Insured Loss Through “Appraisal” Process

- If no resolution reached, “appraisal” process can be invoked but only as to valuation, not to coverage
  - 1 + 1 + 1 Structure
  - Policyholder must first “do therapy” with claims adjuster to see if agreement can be reached; appraisal cannot be invoked until “agreement to disagree”
  - Appraisal Process DOES NOT determine amount of payment – only the amount of the insured’s loss. Insurer can still dispute whether it must pay, in whole or in part, for insured’s loss.

# Amounts Incurred to Protect or Safeguard Property

- Costs incurred to avoid imminent loss or reduce or mitigate loss
- Covered under “sue and labour” clause or “expense to reduce loss”, but may also be excluded
  - That the insurer should pay for protective steps rather than pay after damage does not mean that the contract *requires* it to do so.
  - Cost of Inspection of inventory to see what can be salvaged or still sold?

# Debris Removal, Downed Trees

- If debris hits your property, covered if from covered peril
- If debris ends of on your property but does not otherwise cause physical damage, coverage might not apply.
  - Separate, “Debris Removal” Coverage Enhancement, with separate pot of money
- A neighbor’s tree hitting your property may implicate the insurer’s subrogation right if the neighbor was negligent

# Different Categories of Property May Be Covered Differently

- Main building or “dwelling” and “other structures”
- “Personal Property”, including inventory and furnishings
  - One may be Replacement Cost, the other Actual Cash Value

# Filing a Lawsuit?

- 12 Months from Date of Loss – October 2013
- If in the midst of appraisal, have insurer agree in writing that any contract period for bringing suit is extended by 90 days after the final appraisal determination.

# “Flood” Insurance Policies

- If purchased by your lender or by you,
  - “Replacement Cost” up to policy limit for *dwelling*
  - “Actual Cash Value” for personal or other property
- Some debris-removal and preventive coverage
- “Storm surge” can be characterized as “flood”
- Claims handled by a private insurance company (“Write Your Own” program participants), but backed by FEMA

# Lost Profits/Business Interruption

- First-Party Property Damage covers repairs and replacement of property affected by Superstorm Sandy.
- Business-Income or Business Interruption Covers Profits Not Generated Due to Storm Damage

# Business-Interruption Basics

- There is antecedent property-damage from a covered “peril”
- Covers inability to generate profit due to that property damage
- May impose a “time element” deductible, *e.g.*, first 48 hours after loss not covered
- Eligible for coverage: (i) if suspension of operations and (ii) loss during the period necessary to replace (“period of restoration”)

# Documenting Lost Profits

- Must create a model to substantiate what net profits would have been earned during the “restoration” period
- Must back out variable expenses avoided; challenging to allocate fixed overhead
- Must try reasonably to recover during the restoration period
  - If larger events – e.g., inadequate supply of drywall because of mass demand – precludes restoration, inform insurer in writing and insurer might extend the coverage period (i.e., more money to you)

# Common Enhancements to Business-Income Coverage

- Even in the absence of actual physical damage to policyholder's property from covered peril, lost profits coverage may be available if the property could not be used because:
  - “Ingress” or “Egress” to Property Was Precluded Due to Covered Peril (e.g., elevators to 75<sup>th</sup> Floor didn't work and insured's offices on 75<sup>th</sup> floor were not damaged)
  - “Civil Authority” precluded access due to mandatory evacuation and the like

# “Extra Expense” or “Additional Operating Expense” Coverage

- Expenses incurred to maintain the operation of the business at alternate locations are separately covered.
- Cost of renting alternative offices, computers, phones, etc.
- In theory, “extra expenses” reduce “lost profits” since they preserve revenue stream
  - Not necessary to show 1:1 relationship between additional expenses and avoided “lost profits”

# Automobiles

- Loss including from “hurricane” is covered if “comprehensive” (i.e., not collision liability) coverage purchased by insured.

## **HURRICANE SANDY SMALL BUSINESS DISASTER RELIEF**

### **COMMERCIAL LEASES**

Commercial leases, whether for retail, office or industrial use, are regarded by courts as the primary means for resolving commercial landlord-tenant disputes. Because judges typically refrain from looking outside of the lease agreement itself, the first step in assisting a commercial tenant must be to ascertain the facts of their situation and review their lease agreement accordingly.

From a tenant's perspective, the most common Sandy-related commercial leasing issues fall within two categories, tenants with premises damaged by flooding or other casualty and tenants with premises that did not sustain damage but were otherwise unable to operate their businesses (or could only operate at a diminished capacity due to forces beyond the tenant's control).

#### **PREMISES DAMAGED OR CONDEMNED DUE TO FLOODING OR OTHER CASUALTY**

A "casualty" is a serious accident that results in damage to, or the destruction of, the premises. In the Sandy context, a "condemnation" is an official pronouncement that a building is unfit for occupancy. Commercial leases, the REBNY form leases included (see Articles 9 and 10), typically dedicate sections within the lease agreement to both casualty and condemnation and commonly differentiate between partial and complete casualty or condemnation.

#### **I. Casualty**

A. Notice The tenant is typically required to give the landlord immediate notice that a casualty has occurred but provide that the lease will continue in full force and effect.

B. Complete Destruction In the event of complete destruction or partial damage that renders the premises wholly unusable, the landlord typically has the option of terminating the lease or rebuilding and repairing the premises. Tenants should be reminded that landlords typically are given a limited time period to terminate the lease. Only in a minority of small business leases will the tenant have a right to terminate the lease, either following the casualty or in the event landlord's restoration would, or does, exceed a stated time limit for its substantial completion. If the lease is not terminated, the tenant is usually required to proportionately pay any fixed rent and additional rent due before the date of the casualty but the tenant is generally not obligated to pay rent after such date until the premises is restored or the tenant re-occupies any portion thereof. Tenants should be reminded that once they resume business in any portion of the damaged premises, then any rent abatement rights they may have under the lease may be reduced or rescinded.

C. Partial Destruction In the event of partial damage that renders the premises partially unusable, rent obligations are typically proportionately abated in accordance with the portion of the premises that was rendered unusable and the landlord is generally obligated to repair the damaged portion of the premises. Tenants should be reminded that the landlord's restoration obligation typically is with respect to the base premises only and excludes the tenant's improvements, trade fixtures and equipment.

D. Insurance Commercial leases, the REBNY form leases included (see Article 8), typically define specific insurance requirements for both the landlord and tenant. There will generally also be an allocation of restoration responsibilities within the insurance section or within the applicable casualty or condemnation section. Tenants should be reminded to immediately consult with their insurance agents and provide the agents with a copy of the lease to assist in determining the allocation of responsibility.

## **II. Condemnation**

If the building in which the premises is located is condemned, the tenant is typically required to proportionately pay any fixed rent and additional rent due before the date of the condemnation, on which date the lease automatically terminates. Tenants should be reminded that many condemnation provisions, including those in the REBNY form leases (see Article 10), are limited to eminent domain proceedings and would not be applicable to Sandy-related condemnations, in which case the casualty provisions with respect to complete destruction would apply.

## **III. New York Real Property Law Section 227**

Commercial leases, the REBNY form leases included (see Article 9), typically waive the provisions of New York Real Property Law Section 227, which provides as follows:

“Where any building, which is leased or occupied, is destroyed or so injured by the elements... as to be untenable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his/her fault or neglect, quit and surrender possession of the premises... and he or she is not liable to pay the lessor or owner rent for any time subsequent to the surrender. Any rent paid in advance or which may have been accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender.”

While it is considered against public policy and impermissible to waive this provision in a residential lease, it is permissible and customary to waive this provision in commercial leases.

## **PREMISES UNDAMAGED BUT TENANT UNABLE TO OPERATE BUSINESS**

Commercial leases typically do not provide a tenant with recourse against the landlord in the event that no casualty or condemnation has occurred with respect to the premises but the tenant is unable to operate its business due to Sandy-related causes. Examples include being unable to open or operate at full capacity due to (i) lack of electricity, gas, water or other utilities, (ii) the inability of employees to access the premises because of mandatory evacuations or transit shut-downs, or (iii) a lack of customers due to mandatory evacuations, transit shut-downs or credit card payment system failures.

## **I. Services**

Depending on the extent of services provided by the landlord, a lease will generally contain one or more sections setting forth the utilities or services (e.g., elevators, HVAC, refuse collection, janitorial or security services) provided to the tenant. An interruption of these services may provide the tenant with a fixed rent and/or additional rent abatement. Most small business leases, including the REBNY form leases (see Articles 12 and 26), exculpate the landlord from responsibility for electricity shut-downs or reductions that are outside of the landlord's control. Only a minority of small business leases will provide for a rent abatement right and will typically condition such right on the interruption lasting for an explicit duration of consecutive days. Tenants should be reminded that once they resume business, even if they lack some or all services and utilities, any such rent abatement rights may be reduced or rescinded.

## **II. Access to the Premises**

Where a retail or office premises is located within a building or structure without direct exterior access, leases will often contain a statement granting the tenant the right to access its premises on a 24/7 basis or during specified operating hours. In the absence of a landlord exculpation provision that is applicable to Sandy, the tenant may be entitled to a rent abatement or other remedy in the event that employees or customers are unable to access the premises because the building or structure through which the premises are accessed is closed or otherwise inaccessible.

Another scenario involving the access to the premises section in commercial leases is the landlord's right of entry. Perhaps a landlord will require entry into the premises in order to make repairs to building systems or a different tenant's premises, which entry prevents or diminishes your client from operating its business. Commercial leases, the REBNY form leases included (see Article 13), typically grant the landlord a right of entry to the premises in order to perform such repairs but explicitly disclaim any rent abatement rights. However, except in the case of emergency repairs, such provisions typically require the landlord to enter during reasonable times and require a good faith effort on the landlord's part to keep any interruption of the tenant's business to a minimum.

## **III. Business Interruption Insurance**

One of the first questions you should ask your client is whether their insurance coverage includes a business interruption policy. Though not required under typical small business leases, Tenants should be reminded to immediately consult with their insurance agents to determine whether business interruption coverage is in place.

## **LANDLORD-TENANT NEGOTIATION AND RESOLUTION**

In disasters, as in calmer times, facts and the terms of the lease are often only the beginning of a landlord-tenant discussion about a mutually acceptable resolution without litigation. Although fairness on its surface might seem to favor the tenant, counsel should be aware that many landlords in hard-hit areas may themselves be small business people. In addition, landlords are not without leverage under the law (and the lease). Tenants, on the other hand, often have a strong interest in a speedy resolution, which litigation does not usually provide. After 9/11, it was necessary to create a special docket in the Housing Part of the Civil Court to help resolve landlord-tenant disputes and avert evictions. Tenants and their counsel should of course be aware of the tenant's strongest case and best outcome. If a landlord is recalcitrant, these tenant's objectives should be tempered by her or his circumstances, including cash on hand, loss of business, need to get repairs done, and timing overall. Tenants and their counsel can be aided in striking this balance by educating themselves about the general condition of the local business community and real estate market as well as the landlord's circumstances (e.g., does the landlord own other properties, and if so, what are their conditions and who are the tenants?).



**City Bar Justice Center's Neighborhood Entrepreneur Law Project**

**Small Business Q&A**

**Employment and Employee Benefits FAQs**

These materials are distributed for informational purposes only and are not meant to nor should be construed as legal advice. In addition, the answers to each of the following questions are based on the assumption that the employees at issue are not covered by a collective bargaining agreement and do not have an employment contract with their employer. In the event that the employees at issue are covered by a collective bargaining agreement or an employment contract, the employer should consult the terms and conditions of those agreements and contracts. Similarly, if the employer has certain established employment policies, the employer should consult and comply with its policies.

**I. EMPLOYERS' OBLIGATIONS FOR ABSENCES DUE TO HURRICANE SANDY**

- A. *Question:* We closed our business for several days because of the storm. Does an employer have to pay its employees for the days that its business was closed as a result of Hurricane Sandy?**

***Short Answer:*** No, if the employee is a non-exempt employee for purposes of wage-and-hour law. However, an exempt employee should receive his or her full salary for any week in which he or she performs any work without regard to the number of days or hours worked.

***Answer:*** The answer to this question depends on whether the employee is considered an "exempt" employee or a "non-exempt" employee for purposes of federal and state wage-and-hour laws. If the employee is a non-exempt employee for purposes of wage-and-hour laws, the employer is not required to pay its employees for any days or hours that the employee did not work because the business was closed for Hurricane Sandy. If, on the other hand, the employee is an exempt employee, the employee should receive his or her full salary for any week in which he or she performs any work without regard to the number of days or hours worked. Thus, if an exempt employee worked on Thursday, November 1 or Friday, November 2, but worked no other days the week of October 29, 2012, the employer should pay an exempt employee his or her full salary for the week of October 29, 2012.

Every employee must be treated as either exempt (i.e., not entitled to premium pay for overtime hours worked) or non-exempt (i.e., entitled to premium pay for overtime hours worked) under federal and state wage and-hour laws. The determination of whether an employee is "exempt" or "non-exempt" is a complicated, fact-specific determination that must be made on a case-by-case



basis. To be considered an exempt employee an employee must be paid on a salary basis and must have certain job duties and responsibilities that can be classified as executive, administrative, or professional (among others) in nature under the applicable wage-and-hour laws.

- B. Question:** Once our business re-opened, not all employees were able to report to work. Does an employer have to pay its employees for the days that the employees were absent from work due to a transportation problem or some other obstacle that prevented them from reporting to work?

**Short Answer:** No, if the employee is considered a non-exempt employee for purposes of wage-and-hour law. However, an exempt employee should receive his or her full salary for any week in which he or she performs any work.

**Answer:** Like absences related to the actual storm, the determination as to whether an employer must compensate an employee for absences due to the transportation problems after Hurricane Sandy turn on whether the employee is an exempt or non-exempt employee. If the employee is considered a non-exempt employee for purposes of wage-and-hour law, the employer is not required to pay the employee for any days or hours that the employee was absent from work due to a transportation problem or some other obstacle that prevented him or her from reporting to work. If the employee is an exempt employee, the employee should receive his or her full salary for any week in which he or she performs any work.

- C. Question:** May an employer require its employees to use their accrued vacation or sick leave to cover their absences from work due to Hurricane Sandy?

**Short Answer:** Yes, provided that such use of accrued leave time is consistent with the employer's leave policies.

**Answer:** If an employee is unable to report to work due to Hurricane Sandy and its aftermath, the employer may require an employee to use his or her accrued vacation or sick leave to cover his or her absences, provided that such use of accrued leave time is consistent with the employer's leave policies and provided that the employee's absence from work does not qualify as leave pursuant to the Family Medical Leave Act ("FMLA").

- D. Question:** If an hourly employee reports to work for a short period of time, are there any minimum hours for which the employee must be paid?

**Short Answer:** Certain states have a minimum number of hours that a non-exempt, hourly employee must be paid when he or she reports to work.



**Answer:** If a business is closed or not operating at full capacity, such that an employee is expected to report to work but will only work for a short period of time (e.g. one hour), some states require that the employee receive additional compensation. In New York, for example, a non-exempt employee is entitled to at least four-hours compensation for any required shift. In other words, even if the employee only can work for one hour, New York law requires an employer to pay for at least four hours at the basic minimum hourly wage rate. Likewise, New Jersey requires reporting pay for non-exempt employees who actually report for work of at least one hour at the employee's applicable wage rate.

**E. Question:** If a non-exempt employee did not work during the week of October 29, 2012 because of Hurricane Sandy, but worked over 40 hours in the following week, does that employee need to be paid overtime?

**Short Answer:** Yes. A non-exempt employee must receive overtime pay for any week in which he or she works more than 40 hours.

**Answer:** An employer is generally not permitted to compensate an employee with compensatory time off instead of overtime pay. In other words, even if an employee did not work, or worked less than 40 hours in one week, he or she is entitled to overtime pay for any subsequent week in which he or she works more than 40 hours.

**F. Question:** Does an employer have to provide an employee with leave if the employee is unable to work as a result of an injury suffered from the Hurricane?

**Short Answer:** Possibly, if the employee is suffering from a serious health condition or if the employee is disabled.

**Answer:** An employer may be required to provide an employee with unpaid leave under (1) the Family Medical Leave Act if the employee or a member of the employee's immediate family is suffering from a serious health condition or (2) under the Americans with Disabilities Act ("ADA") and the New York Executive Law ("Executive Law") if the employee is disabled within the meaning of those statutes and if the granting of leave would serve as a reasonable accommodation to the employee. An employee also may be able to recover New York State disability benefits for injuries that are not work-related and that occurred away from the workplace.

*Leave under the FMLA.* The FMLA provides that a covered employee may take up to a total of 12 weeks unpaid leave during any 12-month period for certain



qualifying reasons. During the leave period, the employer must maintain the employee's health benefits and must guarantee the employee reinstatement to the same or an equivalent position.

The FMLA applies to only those employers that employ 50 or more employees for each working day in each of 20 or more calendar workweeks in the current or preceding calendar year. An employee is covered by the FMLA if the employee: (1) has been employed by the employer for at least 12 months; (2) has been employed for at least 1,2500 hours of services during the 12-month period immediately preceding the commencement of the leave; and (3) is employed at a work site where 50 or more employees are employed by the employer or within 75 miles of that work site. FMLA leave may be taken to care for the employee's spouse, child, or parent with a serious health condition or because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

The employer bears the responsibility of designating leave as FMLA leave. Upon receiving notice of the employee's reason for leave that would qualify for leave under the FMLA, the employer must promptly (within two business days absent extenuating circumstances) inform the employee that the leave has been designated and will count as FMLA leave. The employer may notify the employee orally or in writing, however, a verbal notice must be confirmed in writing no later than the following payday. In addition, if a covered employer does not have written policies describing employee benefits and leave provisions, the employer must provide written notice to the employee of his or her FMLA entitlements and obligations no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave. The employer may request that the employee provide a medical certification confirming that a serious health condition exists.

*Leave under the ADA and the Executive Law.* Under certain circumstances, an employer may be required to provide an employee with leave under the ADA or the Executive Law. The ADA and the Executive law require employers, in certain circumstances, to provide reasonable accommodations to employees who are suffering from a disability. Such a reasonable accommodation may include providing an employee with an unpaid or paid leave of absence.

The ADA applies to only those employers that employ 15 or more employees for each working day in each of 20 or more calendar workweeks in the current or preceding calendar year. An employee is "disabled" within the meaning of the ADA if the employee suffers from a physical or mental impairment that substantially limits a "major life activity" of an individual, including such activities as walking, seeing, hearing, speaking, breathing, learning, working,



sitting, standing, lifting, or reaching. Generally, temporary impairments are not protected disabilities under the ADA.

The Executive Law applies only to those employers who have at least four employees. Under the Executive Law, the definition of a disability includes: (1) a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function **or** is demonstrated by medically accepted clinical or laboratory diagnostic techniques. Unlike the ADA, a temporary condition could be considered a disability under New York law. The determination of whether an employee is disabled within the meaning of the ADA or the Executive Law is a complex determination that must be evaluated on a case-by-case basis.

If an employee is disabled within the meaning of the ADA or the Executive Law, the employer is required to offer the employee reasonable accommodations that would enable the employee to satisfactorily perform his or her job. In certain circumstances, permitting an employee to take leave to obtain necessary medical treatment or therapy may be considered a reasonable accommodation. However, an employer is not required to make an accommodation that constitutes an undue hardship to the employer. When considering whether an accommodation would constitute an undue hardship, the employer should consider the nature and overall cost of the accommodation balanced against the overall financial resources of the employer and other business needs. Thus, if an employee presents medical certification indicating that he or she is suffering from some type of physical or mental impairment, the employer should consider whether the ADA or the Executive Law would require the employer to consider offering an accommodation to the employee, including a leave of absence.

**G. *Question:* Does an employer have to provide an employee with either paid or unpaid leave so that the employee can care for children or family members injured from Hurricane Sandy?**

***Short Answer:*** Possibly, if the employee or a member of the employee's family is suffering from a serious medical condition.

***Answer:*** If the employee is entitled to FMLA leave as described above, the employer must allow the employee to take FMLA leave. This leave does not have to be paid leave. Also, if the employer has a specific policy providing for leave under such circumstances, the employer may be required to comply with its policy. If the employer provides paid leave, the employee may be able to use his or her accrued vacation or sick leave for the absence.



## II. DISPLACEMENT OF EMPLOYEES/WORKPLACE DESTRUCTION

- A. **Question:** Most of my records were destroyed. What basic payroll records do I need to try to recreate for New York?

**Short Answer:** Employers should look to recreate all of the weekly payroll records New York employers are required to maintain for 6 years under the law.

**Answer:** Employers generally must establish, maintain and preserve weekly payroll records for not less than 6 years, including the following information for each employee: (1) name and address; (2) Social Security number; (3) number of hours worked daily and weekly, including the time of arrival and departure for employees working a split shift or spread of hours exceeding 10; (4) the amount of gross wages, job classification and wage rate; (5) deductions from gross wages; (6) any allowances claimed as part of the minimum wage rate; (7) money paid in cash; (8) student classification and school statement; and (9) for individuals working in an executive, administrative or professional capacity, total wages and the value of any allowances for each payroll period. In addition, employers are expected to preserve signed acknowledgments from their employees that they were notified of their wage rate.

- B. **Question:** Our payroll records were destroyed. By when must I pay my workers?

**Short Answer:** As soon as possible.

**Answer:** Employees generally must be paid within 7 or 14 days of when the work is performed, depending on their position, e.g., manual laborer or clerical worker. If records are not available the employer should make a reasonable effort to determine the hours worked and make payment accordingly as promptly as possible.

- C. **Question:** Are employers required to reimburse their employees for the destruction or loss of any of the employees' personal items in the office that were destroyed by Hurricane Sandy?

**Short Answer:** Generally no.

**Answer:** While employers should consult any applicable insurance policies to determine whether losses of an employee's personal property are covered, there is generally no independent legal obligation to reimburse employees for their personal property destroyed by the storm.



- D. Question:** Since our offices were destroyed, some of my employees will be working at home. What do I need to know and how do I get the information I need?

**Short Answer:** Employees need to be compensated for work performed at home, including, base compensation and, as applicable, overtime.

**Answer:** There are a number of things to consider when employees work from home. For employees who are considered non-exempt under the wage hour laws, employers must still keep track and maintain records of the employee's hours of work for payroll purposes and determining whether any overtime pay is due. Non-exempt employees are also entitled to their 1/2 hour for lunch. Remote work by a non-exempt employee must be considered compensable time and entitles the employee to his or her hourly rate of pay for every hour worked and is subject to overtime. When an exempt employee works from home, the employee will be entitled to his or her weekly salary.

If the employer is requiring the employee to work from home, the employer should be responsible for paying related expenses, e.g, rental or purchase of computers, desks or other office equipment that may be needed by the employee, if he or she doesn't already have same. Finally, if an employee is injured while working at home, the employee would be eligible for workers compensation. Employers should do their best to ensure that an employee's home work environment is a safe place to work.

- E. Question:** Once some of my employees begin working at home, can I reclassify them as independent contractors?

**Answer:** No. If the employees are still acting as employees, performing their normal duties and working under the direction and control of the employer, the fact that they are working from home does not change their status from employee to independent contractor.

### **III. PROVIDING HEALTH AND WELFARE BENEFITS**

- A. Question:** Does an employee or the employee's family have any remedy against the employer if the employee is injured or killed while at work during Hurricane Sandy?

**Short Answer:** While in certain circumstances an employee might be entitled to workers' compensation if he or she was injured or killed on the job, an employer is generally not responsible for the injuries of their employees.

**Answer:** Generally, no. An employee who is injured or killed on the job is entitled to recover workers' compensation benefits if: (1) the employee was



injured while performing a service growing out of and incidental to his or her employment; (2) the employee is injured while acting within the course of his or her employment; (3) the injury is proximately caused by the employment. If the employee's injury or death is covered by the workers' compensation law, the employee and the employee's family cannot seek a remedy against the employer, unless the employer's deliberate and intentional tortious conduct caused the injury. An employee will generally not be eligible for workers' compensation for any injuries incurred while commuting to the employer's business

**B. *Question:* Are there going to be any sources beyond or in lieu of employers' own insurance policies to alleviate some of the financial burden that has been caused by this tragedy?**

***Short Answer:*** Perhaps.

***Answer:*** Certain individuals might be eligible for Disaster Unemployment Assistance ("DUA"). DUA is a federal program that provides payments to people in federally-declared disaster areas who have lost income or work due to a disaster. Some situations that might qualify for DUA include an individual who lost income because his or her workplace was damaged or destroyed, or an individual can't get to work because of the disaster. An individual could apply for DUA even if he or she is self-employed.

**C. *Question:* What should be done about COBRA coverage?**

***Short Answer:*** COBRA mandates providing notice of the right to a continued 18 months of health coverage paid by employee.

***Answer:*** Employers with 20 or more employees are required to offer continuation of health coverage ("COBRA") to qualified beneficiaries (employees and/or their dependents) who lose coverage due to a "qualifying event" (i.e., death of the employee or reduction in hours so as to cause employee to be ineligible for health insurance). Qualified beneficiaries must be informed of their right to continued health insurance coverage under COBRA within 44 days (the employer must notify plan administrator within 30 days, which must then notify eligible dependents within 14 days) of a "qualifying event," including loss of coverage due to the death of the covered employee, termination of his or her employment, or reduction of his or her hours sufficient to cause the loss of medical coverage. Once an affected employee loses coverage as a result of one of these events, the employer must take action to notify the plan administrator within the prescribed time period. All required notices regarding COBRA should be carefully documented and timely.



- D. **Question:** What are a plan sponsor's options and/or obligations in the event that plan participants or beneficiaries make requests for plan distributions in light of unexpected needs that have arisen as a result of Hurricane Sandy?

**Short Answer:** A plan sponsor has an obligation to honor the participant's request. This event may qualify as a hardship under the terms of the plan. It would be best for the plan sponsor or administrator to inform the participant of the consequences of a non-hardship early withdrawal (penalties apply).

**Answer:** Distributions under a tax qualified retirement plan can generally occur only upon the occurrence of certain events, including an employee-participant's death, disability, termination of service or attainment of age 59 1/2. Limited exceptions to the general rule in connection with a 401(k) plan are available for distributions on account of certain "hardships" and/or plan loans. An additional exception is permissible in a non-401(k) plan for certain in-service distributions. However, any hardship or in-service distributions prior to the attainment of age 59 1/2 will be subject to an additional 10% "early" withdrawal penalty.

#### Death

In the event a participant passed away due to Hurricane Sandy, a distribution may be made to his or her designated beneficiary. The timing of the plan distribution depends upon the specific terms of the plan. Some plans provide for distributions as soon as practicable following the occurrence of the distribution event while others provide for distributions at some point in the future (e.g., as soon as practicable following the end of the plan year during which the distribution event occurs). To the extent a plan that has a significant number of plan participants and/or beneficiaries that have been affected by Hurricane Sandy currently provides for a future, as opposed to current, plan distribution, the plan sponsor may wish to consider amending the plan to speed assistance to the families of disaster victims.

#### Disability

In the event a participant incurred a disability (as defined in the relevant plan document) in Hurricane Sandy that resulted in his or her termination of employment, he or she may be entitled to plan distribution. The same timing and related plan amendment issues that are present with respect to death benefits apply in the event of disability benefits.

#### Hardship Distributions and Loans

In the event that Hurricane Sandy created a financial strain on a 401(k) plan participant who had not attained age 59 1/2, he or she might qualify for a "hardship" distributions if it was necessary to purchase a primary residence or



prevent eviction from a principle residence. In the alternative, and to the extent permitted by the specific plan terms, a participant might be able to take a plan loan.

Tax qualified plans other than 401(k) plans (or the portion of a 401(k) plan other than elective or matching contribution accounts) may permit certain "in-service" distributions. Specifically, current law allows such plans/accounts to distribute with respect to plan funds that have accumulated within the plan for at least two years or with respect to participants who have been plan participants for at least five years.

- E. ***Question:*** Will a plan participant who either passed away or whose job was displaced as a result of Hurricane Sandy be entitled to an employer contribution or benefit accrual with respect to the 2012 plan year?

***Short Answer:*** Generally, it depends upon the plan terms.

***Answer:*** The answer to this question depends, initially, upon the terms of the plan. Many plans require a participant to complete a specific number of hours during the plan year (usually 1,000) in order to be entitled to receive employer contributions or benefit accruals for such year, others require a participant to be employed on the last day of the plan, and some require both. To the extent an employer's plan requires a participant be employed on the last day of the year, any participant who died in the disaster or whose job was displaced as a result of Sandy would not be entitled to a contribution or benefit accrual for 2012.

#### IV. DISASTER UNEMPLOYMENT ASSISTANCE

- A. ***Question:*** What government benefits are available for employees or self-employed individuals who are victims of Hurricane Sandy?

***Short Answer:*** Employees and self-employed individuals might be available to Disaster Unemployment Assistance ("DUA").

***Answer:*** DUA is a federal program that provides financial assistance to individuals unemployed as a result of a major disaster. Due to Hurricane Sandy, the following counties have been declared federal disaster areas by FEMA:

Connecticut: Fairfield, Middlesex, New Haven, and New London and the Mashantucket Pequot Tribal Nation and Mohegan Tribal Nation;

New Jersey: All counties in New Jersey;



New York: Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester.

An individual can qualify for DUA if he or she is out of work as a “direct result” of Hurricane Sandy and the individual does not qualify for regular unemployment insurance for any state. Notably, while a self-employed individual who loses his or her income due to Hurricane Sandy will be unable to qualify for unemployment benefits, he or she may qualify for DUA.

A DUA recipient must actively look for work and accept suitable work if offered. For a self-employed individual, DUA requires that the individual is working to get his or her business up and running. DUA benefits are paid weekly or biweekly and are generally equivalent to what the individual would have received from unemployment insurance had he or she qualified. The maximum duration of DUA benefits is generally 26 weeks, but benefits cannot extend beyond six months from when the disaster was declared. Once a DUA recipient returns to work, benefits will end.

An individual might qualify for DUA if the individual: was injured in the disaster and is unable to work; transportation to work is not available because of the disaster; or most of the individual’s income came from areas affected by the disaster and business is down as a direct result of the disaster.

Applications for DUA must be made to the applicable state department of labor by December 3, 2012.

## **V. EMPLOYMENT RELATED TAXES IN THE AFTERMATH OF SANDY**

### **A. *Question:* What are employers’ tax obligations in the aftermath of Hurricane Sandy?**

***Short Answer:*** Employers remain obligated to pay all employment-related taxes after the storm. However, the IRS and state tax agencies have extended the deadlines for paying such taxes and waived penalties for failing to file certain tax payments in the days and weeks following Hurricane Sandy.

***Answer:*** Tax deadlines have been extended by the IRS and state tax agencies.

#### **IRS**

The IRS has extended the deadline for tax filing and payment deadlines that occurred starting in late October. Importantly, the payroll tax returns and accompanying payments for the third and fourth quarters of 2012, normally due



on October 31, 2012 and January 31, 2013, are now due by February 1, 2013 for any business in the FEMA-designated disaster counties. The February 1, 2013 deadline is also applicable to the filing of Form 5500 series tax returns. In addition, the IRS is waiving the failure-to-deposit penalties for employment tax deposits due on or after October 27 and on or before November 26, so long as the deposits are made by November 26, 2012. The postponement of time to file until February 1, 2013 *does not* apply to information return in the W-2, 1098, 1099 series or to Forms 1042-S or 8027.

The following localities have been designated as federal disaster areas thereby entitling the individuals and businesses in those areas to the above-described tax relief:

In Connecticut: Fairfield, Middlesex, New Haven, and New London and the Mashantucket Pequot Tribal Nation and Mohegan Tribal Nation;

In New Jersey: All counties;

In New York: Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester.

Additional counties could be added to this list as FEMA and the various government agencies continue to evaluate the affected areas.

#### New York

Governor Cuomo has declared a State Disaster Emergency for the entire state of New York. In turn, the New York State Tax Commissioner has postponed certain tax filing and payment deadlines from October 26, 2012 to November 14, 2012. (See Important Notice N-12-11.) This includes postponing the deadlines for the filing of any corporate taxes, the paying of any taxes, and the filing of any requests for extensions or additional time to file taxes. For any taxes filed in paper (rather than electronically) that would otherwise have been late but are filed by November 14, 2012, should state ***Hurricane Sandy*** on the top center of the front page. Notably, however, the deadline was not extended for remittance of income tax withheld by employers required to be made using Form NYS-1. The NYS-1 is the form that an employer must complete to submit personal income taxes that were withheld from an employee's paycheck. Form NYS-1 must be filed and taxes must be remitted after each payroll that causes the total accumulated tax required to be withheld to equal or exceed \$700. If it is less than \$700, the employer is required to remit with Form NYS-45 at the end of the quarter.

#### New Jersey

Governor Christie extended the tax filing and payment deadlines for businesses located in New Jersey, out-of-state businesses with operations in the New Jersey



and those whose tax records are located in the state. For returns or tax payments that would have been due on October 30 and 31, the deadlines were extended to November 7, 2012. The extension applies to employers' quarterly tax reports (Form NJ-927) that otherwise would have been due at the end of October.

#### Connecticut

Recognizing that businesses were likely impacted by Hurricane Sandy, the Connecticut Department of Revenue Services created a form to be completed by any Connecticut taxpayer that was unable to comply with its Connecticut tax payment and/or filing obligations because of the storm. The 2012 Storm Sandy Relief Request form is available at: <http://www.ct.gov/drs/cwp/view.asp?Q=513626&A=1436>. In addition, Connecticut extended the state tax deadlines from October 31, 2012 to November 7, 2012 for a variety of deadlines, including income tax withholdings.

## **VI. FAILING BUSINESSES, CLOSING LOCATIONS OR LAYOFF OF EMPLOYEES**

- A. Question:** Does an employer have to provide its employees with any prior notice of termination if the employer determines that it is necessary to lay off employees?

**Short Answer:** Generally, no.

**Answer:** No, provided that: (1) the employer does not have an established policy requiring that prior notice be given; or (2) the employer has less than 100 employees (or 50 employees in New York). Those employers with more than 100 full-time employees (or 50 full-time employees in New York) may have an obligation to provide certain notice to its employees pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109. Those employers with established policies requiring that prior notice be given may be required to comply with their policy.

- B. Question:** Does an employer have an obligation to provide its employees with severance pay if the employer determines it must lay off employees?

**Short Answer:** Generally no.

**Answer:** There is no statutory requirement for employers to provide severance benefits to terminated employees. Nevertheless, employers are obligated to abide by any policy providing for the payment of severance benefits, to the extent they exist.



**C.    *Question:*     Can employees who are laid off as a result of Hurricane Sandy receive unemployment insurance benefits?**

***Short Answer:***     Yes.  Alternatively, individuals who are not eligible for unemployment insurance might qualify for Disaster Unemployment Assistance (“DUA”).

***Answer:***           Generally, a terminated employee can received unemployment insurance benefits.  For those individuals in a federally-declared disaster area who don’t qualify for unemployment but who lost income because his or her workplace was damaged or destroyed or who can’t get to work because of the disaster might qualify for federal payments.  An individual could apply for DUA even if he or she is self-employed

**D.    *Question:*     I have to cease operations and go out of business. What do I have to do to close out my employment tax accounts?**

***Answer:***           Generally, an employer must file Form 941 by the last day of the month following the quarter in which you ceased doing business.  In addition, Forms W-2 should be submitted to the Social Security Administration by the same date, and employees should be given their copies at the same time.

## **HURRICANE SANDY SMALL BUSINESS LEGAL RELIEF**

### **CONTRACT ISSUES**

In the wake of large-scale disasters, many contract-based issues can arise for small business owners. This primer is intended to identify expected contract-related issues as well as related basic contract principles. Of course, the most critical piece is the contract itself. While we can predict general challenges and principles, these issues also tend to be very idiosyncratic and can vary greatly upon the individual business and its circumstances. Resolution will be dependent upon the agreement, the facts and the parties.

#### **1. Potential Issues**

- Inability to receive or deliver goods
- Inability to perform contract obligations, whether initial, additional, or ongoing
- Inability to operate business when other contracting parties fail to perform their obligations
- Destruction/loss of the physical contract (courts may look at parol evidence or past performance)
- Questions regarding whether a valid and binding agreement was made
- Damage Claims – how to assert and support
- Construction contracts for works in progress
- Artist and a merchant disputes (relationship is that of consignor, consignee)

#### **2. Was a valid contract formed?**

- Generally, a valid contract must include (i) an offer (ii) acceptance and (iii) consideration.
- **Offer:** a manifestation of a willingness or intent to enter into a contract and be bound by its terms. proposals, inquiries, negotiations, and advertisements are generally not offers
- **Acceptance:** must be made while the offer is still open and must not change the material terms of the contract (then it is a counter-offer)
- **Consideration:** something of value that is given in exchange for a performance or a promise to perform
- **Statute of Frauds:** defense to formation and therefore the enforcement of a contract requires that certain contracts to be enforceable be placed in a writing and signed by the party to be charged with the breach (meaning, the defendant).

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Examples of contracts that must be in writing include:

- (i) contracts incapable of complete performance within one year from date of execution (not date of performance)
- (ii) Surety contracts –when a guarantor or a co-signor, promising to pay the debt of another to a third party. The contract that must be in writing is the one existing between the surety and the creditor, not necessarily surety and debtor.
- (iii) Real estate contracts, including land sale agreements and lease for a year or more
- (iv) Sales of goods worth \$500 or more

### **3. Key Contract Language**

- An Act of God Clause (force majeure)
  - a legal term for events outside the control of the parties to a contract
- Indemnification Clause
  - protects a party from various legal issues relating to a contract
  - may contain language that shifts risk or liability damage from one party to another in light of injury, damage, or a wide variety of other circumstances
- Impossibility
  - where there has been an objective change in circumstances that renders a contract incapable of performance (e.g. destruction of the subject matter when a builder is in the process of adding to a structure, death or incapacity of a necessary or performing party)
- Frustration of purpose
  - the contracts can still be performed, but due to some unforeseen event, the purpose known by both parties is moot. If after entering a real property contract, the zoning law changes, this does not render title unmarketable but allows the buyer to rescind in equity based on frustration of purpose
- Impracticability (commercial and financial):
  - the contract can be performed but has become economically unrealistic due to some unforeseen event (very much a U.C.C. defense)
- U.C.C. Issues; U.C.C. Article 2 governs sale of goods contracts
  - a good is any movable tangible item
  - special rules in the U.C.C. for merchants and merchants are parties who regularly deal in goods of that kind or hold themselves out as doing so.
  - Shipment v. Destination contract
- Governing law

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*Neighborhood Entrepreneur Law Project*  
**DISASTER ASSISTANCE FOR SMALL BUSINESSES**  
**RESOURCE SHEET**

**FINANCIAL ASSISTANCE**

**I. SMALL BUSINESS ADMINISTRATION (SBA)**

*Business Physical Disaster Loans:* for businesses or private, not-for-profit organizations located in a declared disaster area that has suffered physical damage as a result of a disaster.

*Economic Injury Disaster Loans:* are working capital loans to help small businesses, small agricultural cooperatives and most private, not-for-profit organizations of all sizes meet their financial obligations and operating expenses which could have been met had the disaster not occurred.

**For More Information:**

- Applicants may apply online using the Electronic Loan Application (ELA) via SBA's secure website at: <https://disasterloan.sba.gov/ela>.
- Call SBA at: 1-800-659-2955, or New York City Regional Office at: 212-264-4354.
- Email: [disastercustomerservice@sba.gov](mailto:disastercustomerservice@sba.gov).

**II. BUSINESS OUTREACH CENTER NETWORK | BOC CAPITAL**

Special BOC Microloans for Business Recovery are available in amounts from \$500 to \$10,000 for loss of perishable inventory and extended business interruption and loss of equipment. Loan terms vary by loan type.

**For More Information:**

- Retail and Service Businesses: [loans@bocnet.org](mailto:loans@bocnet.org).
- Industrial Businesses (Manufacturing, Wholesale, Transportation, Construction): [industrial@bocnet.org](mailto:industrial@bocnet.org).

### **III. NYC BUSINESS EMERGENCY LOAN**

Emergency loans of up to \$25,000 are available for small to mid-sized businesses. The application can be found online at:

<http://nybdc.com/documents/LDCSandyDisasterLoanApplication11-05-12AM.pdf>.

#### **For More Information:**

- Visit: <http://www.nyc.gov/html/sbs/nycbiz/html/home/home.shtml>.
- Call 311 and ask for NYC Business Emergency Loan.

### **IV. NEW YORK BUSINESS DEVELOPMENT CORPORATION (NYBDC)**

NYBDC is providing disaster loans to businesses suffering storm or flood damage resulting from storm. Working capital loans in amounts ranging from \$5,000 to \$25,000 will be available on an expedited application basis and favorable terms to qualifying businesses that qualify for the program.

#### **For More Information:**

- Visit: <http://www.nybdc.com>.

### **V. NEW YORK STATE SMALL BUSINESS DEVELOPMENT CENTER (SBDC)**

The business advisors of the NYS SBDC are experienced at helping small business owners navigate the aftermath of natural disasters. They provide information on SBA and other disaster loans, and assist in completing them. SBDC may also be helpful with re-creating lost financial records, locating replacement facilities, creating post-disaster business plans, and other vital services.

#### **For More Information:**

- The SBDC has dozens of locations throughout the areas affected by Hurricane Sandy with specialized outreach. Please contact (800) 732-SBDC, or visit [www.nyssbdc.org/locations/locations.html](http://www.nyssbdc.org/locations/locations.html).

## **TAX RELIEF**

### **I. INTERNAL REVENUE SERVICE (IRS)**

Business owners in a federally declared disaster area may be able to deduct the loss or partial loss of personal and business use property on their individual federal income tax return for the year the loss was incurred.

Individuals and businesses in a federally declared disaster area may be able to receive a faster refund by claiming losses related to the disaster on the tax return for the previous year, usually by filing an amended return. Individuals and businesses in declared areas that paid taxes in 2011 can elect to deduct their losses on a Form 1040x for the prior year instead of waiting to file their current year return. This will allow them to receive a refund of some or all of the taxes paid on the prior year return.

The IRS will waive the usual fees and expedite requests for copies of previously filed tax returns for affected taxpayers who need them to apply for benefits or to file amended returns claiming casualty losses. Such taxpayers should put the assigned Disaster Designation in red ink at the top of Form 4506, "Request for Copy or Transcript of Tax Form," and submit it to the IRS.

**For More Information:**

- Call 1-866-562-5227.
- Go to: <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Disaster-Assistance-and-Emergency-Relief-for-Individuals-and-Businesses-1>.

## **II. NEW YORK CITY INDUSTRIAL DEVELOPMENT AUTHORITY (IDA)**

**Tax exemption letters for rebuilding projects for more than \$500,000:** An emergency sales tax letter from New York City Industrial Development Authority (IDA) will be available allowing businesses to avoid payment of New York City and New York State sales taxes on materials purchased for rebuilding. IDA will also waive all fees and, while following State law, look to streamline its normal procedure. This program is expected to offer economic benefits to reconstruction projects costing \$500,000 or more.

**For More Information:**

- Contact Shin Mitsugi at: [smitsugi@nycedc.com](mailto:smitsugi@nycedc.com).

## **OTHER**

### **I. NEW YORK TECH MEETUP**

NY Tech Meetup (NYTM) is reaching out to its 28,000-strong community of New York-based technology professionals to help get the city back online in the wake of Hurricane Sandy. Those who are in need of help can sign up at <http://bit.ly/hurricanetechhelp> or phone in or text their request to 646-392-7353.

**For More Information:**

- Visit: [www.nytm.org](http://www.nytm.org).

## **II. TEMPORARY OFFICE SPACE**

Short-term "swing" office space at **Brooklyn Army Terminal** available free of charge for the next 30 days. NYCEDC has approximately 40,000 square feet of warehouse space at the Terminal that can be used for this purpose. A complete list of locations can be found here: <http://www.nycedc.com/donations>.

### **III. ADDITIONAL RESOURCES**

Additional information on New York City business recovery resources can be found on the New York City's Economic Development Corporation's website at: <http://www.nycedc.com/backtobusiness>.