

POST HURRICANE HARVEY

Answers to frequently asked questions about FEMA, insurance, and more.

BY BILL KROGER, KERI BROWN, AND LOUIE LAYRISSON

Hurricane Harvey proved to be one of the worst natural disasters in U.S. history, with 52 inches of rain and winds in some areas of more than 130 miles per hour. FEMA reports that nearly 80,000 homes had at least 18 inches of floodwater, and 23,000 of those had more than five feet. Through the end of September, nearly 800,000 households applied for FEMA assistance.

Baker Botts helped staff legal aid booths at some of the first shelters opened in Houston. Office phones were set to host a legal hotline (answering 175 calls), and members of the firm participated in many LegalLines hosted by the Houston Bar Association in September. The firm also hosted disaster legal aid training for over 700 lawyers.

This article answers some of the most commonly asked questions that we heard through our outreach.

FEMA

How does the FEMA process work?

Apply. The first step is to apply, which may be done online at www.disasterassistance.gov, by phone at (800) 621-3362, or in person at a FEMA Disaster Recovery Center. There is a 60-day deadline to apply, unless extended. FEMA will determine the applicant's eligibility for assistance and may refer the applicant to other community partners.

The inspection. An inspector will schedule a visit. Appointments may take 30-40 minutes. The applicant must provide proof of identity with a photo ID, proof of occupancy (e.g., lease, utility bill), and proof of ownership (e.g., deed, title, mortgage payment book, tax receipts). The inspector will not determine eligibility or request any money or credit card information. This inspection does not take the place of any insurance inspection.

FEMA's decision. If approved, the applicant receives payment and instructions on how the funds must be used. The applicant must retain receipts that show how the funds were used. If denied, the applicant will receive appeal instructions.

Appeal. An applicant has the right to appeal an adverse decision. Appeals may relate to the initial eligibility decisions, the amount or type of assistance provided, late applications, requests to return money, or a denial of continued temporary housing assistance.

(A) The applicant should request a copy of the file from FEMA at (800) 621-3362 to understand how FEMA made the decision.

(B) The applicant should submit any appeal within 60 days of the denial letter.

(1) The applicant should explain why the decision is incorrect and must sign the letter.

(2) The applicant should provide all requested information, including supporting documents, such as contractor estimates. All appeals are reviewed. FEMA may request additional information. Decisions are usually made within 30 days of receipt.

Will FEMA cover the deductible on an insured's car insurance?

No.

If a homeowner's house flooded in previous years, will the house be part of a buyout?

Probably not, because buyouts are rare. FEMA will sometimes do a buyout if a property has repeatedly flooded. The process generally involves the city requesting relief to the county, then to the state, and then to FEMA. The city buys the property through a grant and the houses are usually torn down to be made into green space. Properties usually have to be designated as "severe repetitive loss" properties.

INSURANCE

An insured only had collision coverage on a flooded car. Will the insurance company pay?

It depends. The insured should file a claim even if the auto policy doesn't cover flood damage. If the insured was operating the vehicle, and it had to be abandoned or suffered damage from flooding or hazardous roads, collision coverage might apply.

Does flood insurance or FEMA cover work tools damaged but not inside the covered property?

If a person's work tools were not in the covered property, flood insurance would not cover the damage. FEMA provides assistance in some instances to help survivors replace damaged or destroyed personal belongings.

Can a person whose home was damaged clean out the damage before the adjuster arrives?

The best course of action is to ask the insurance agent. In many instances, cleanup has to start immediately.

Can a person whose home was damaged make repairs before the insurance adjuster arrives?

The homeowner should wait to make most repairs until after the adjuster comes to the home and is able to review the damage. If certain repairs must be made to address safety issues, the damage must be carefully documented and all receipts should be kept.

How should someone document flood damage?

Take photos and video of the damage before making repairs or cleaning the property or items. Photos and video should show the water damage, the brand of the item, and, if possible, the model or serial number. Make a list of damaged or lost property and keep receipts for any expenses.

How does a homeowner show the value of the damaged property?

Photo and video documentation, lists and descriptions of damaged items, and receipts are the best evidence. If the homeowner disagrees with the insurance company's offer on the property, the homeowner may be able to dispute the amount by providing receipts or appraisals, or by providing additional estimates for repairs. The amount of a claim awarded will depend upon whether the policy provides for replacement cost or actual cash value.

Does cashing a check from the insurance company for damages sustained cut off an insured's ability to receive a higher payout for the damages?

Possibly. The insured should read the check and any document accompanying the check carefully. If the check or letter says that it is a "full" or "final" payment of the claim or that accepting the check will release the insurance company from further liability (or anything similar), accepting and cashing the check may cut off an insured's ability to recover additional amounts for damages.

LANDLORD/TENANT

Does a tenant have to pay rent if his or her residence flooded?

Generally, yes. There are limited circumstances when a tenant would not have to pay rent for the flooded residence, including: (1) the lease says so, (2) the landlord agrees (if such an agreement is reached, it should be in writing), and (3) the conditions of Texas Property Code § 92.056 are met.

What is the standard for when the condition of a residence justifies breaking a lease?

The condition must materially affect the physical health and safety of an ordinary tenant. The tenant must first give written notice of the condition to the landlord, be current on rent, and give the landlord a reasonable time (seven days) to repair or remedy the condition.

Once the landlord has received notice and a reasonable time to repair the condition but has failed to do so, the tenant may be able to terminate the lease.

What does a landlord need to do if a tenant's residence flooded?

Landlords have an obligation to provide safe and sanitary housing. A tenant must notify the landlord in writing of the damage to the residence to trigger the tenant's legal rights. For damage related to an event like Hurricane Harvey, the landlord does not have to make repairs until insurance proceeds are received.

The landlord is not obligated to make repairs if the tenant has not paid his rent, and the landlord could evict the tenant. Tenants can find more information at www.texasattorneygeneral.gov/cpd/tenant-rights.

UNEMPLOYMENT INSURANCE

An employee lost his or her job, or his or her place of employment was damaged or closed because of the hurricane. Can the employee receive unemployment insurance?

Disaster unemployment assistance, or DUA, is administered by the Texas Workforce Commission, not FEMA. In several counties, the last day to apply for DUA was October 31, 2017. An employee must first apply for regular unemployment benefits if the employee is otherwise eligible.

If an employee is not eligible for regular unemployment benefits (or once the employee's regular unemployment benefits are paid out), the employee may apply for DUA. The employee will have to send TWC proof that his or her employment was affected by the disaster within 21 days of applying. The employee should request payment of DUA using the payment request form from TWC and make sure that TWC has a mailing address for the employee (it can be a relative or friend's house if the employee cannot receive mail at home).

A person may also be eligible for DUA if he or she was self-employed or starting a business at the time of Harvey and suffered injury or incapacity as a result of Harvey, or became the breadwin-

ner of the household due to the death of the head of the household. A person denied DUA may appeal in writing within 60 days from the date TWC mailed the denial to the person.

RETIREMENT BENEFITS

Can a hurricane victim withdraw funds from his or her 401(k) plan without penalty?

There will be a penalty. Whether the employee can take a withdrawal depends on the terms of his or her employer's 401(k) plan and whether it allows "hardship withdrawals" or "hardship distributions." If so, he or she may be able to withdraw an amount from his or her retirement account for financial needs, including certain medical needs, rent or mortgage money to prevent eviction or foreclosure, and repair of damage to his principal residence. Additionally, if his or her employer's plan has implemented special Harvey-related rules, he or she may withdraw an amount from his or her retirement account for a wider range of expenses. The amount an employee withdraws from his or her retirement account will be subject to income taxes (unless they were Roth contributions) and may be subject to a 10 percent penalty if he or she is younger than 59½.

PRIVATE FUNDRAISERS

Do GoFundMe accounts affect FEMA eligibility?

It is unlikely that eligibility for FEMA or other government benefits would be affected by funds raised through a GoFundMe campaign or other private fundraising. FEMA will usually look to more traditional sources of income (such as private insurance, other government agencies, and not-for-profits) and will likely request information from the prior year, such as tax returns and W-2s.

GoFundMe donations are taxable as income to the recipient, and the donor does not receive a tax deduction. As a best practice, the GoFundMe page should make clear that the funds sought are for non-FEMA reimbursed expenses.

FEDERAL TAX

How are casualty losses from the hurricane calculated?

Casualty losses can be claimed on a 2016 or 2017 federal income tax return. The rules for claiming casualty losses are complex, and a taxpayer should consult with his or her tax advisor.

Step 1: Subtract his or her casualty loss from the tax basis in his or her property that suffered a casualty. See IRS Publication 551, <https://www.irs.gov/forms-pubs/about-publication-551>, for rules on how to compute tax basis. Casualty loss equals the reduction in the fair market value of property as a result of Harvey.

Step 2: From the amount in Step 1, subtract the amount of insurance proceeds or other type of reimbursement received for loss.

Step 3: From the amount in Step 3, subtract another \$100.

Step 4: From the amount in Step 4, subtract 10 percent of adjusted gross income. **TBJ**

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