Stormy Weather: Cleaning Up State Tax Questions Before Disaster Strikes

by Billy Hamilton

As Hurricane Rita gathered force off the Texas Gulf Coast in 2005, my mother called to beg me to convince my brother, who lives near Houston, to evacuate his home ahead of the storm. Traffic flow had already been reversed on the major interstates leading out of the city, and with Hurricane Katrina fresh on their minds Houstonians were streaming out of town looking for higher ground.

My brother refused to budge. He feared looting of deserted houses more than the chance of high winds and rising water. What can I tell you? That's my brother.

At this point, the story could become a cautionary tale about ignoring Mother Nature's fury, but it's not. In the unpredictable way of Gulf hurricanes, the storm veered eastward, striking land far from my brother's home. A couple of days later as it raged ashore, he called me and asked if I could guess what he was doing. I said I couldn't. "Watering my yard," he informed me dryly.

Many thousands of others in Texas and Louisiana weren't so lucky, and every year we seem to be astonished anew by the damage that nature can cause, the most recent evidence being the devastation left by the tornadoes that tore through southern Indiana and Kentucky in early March and the tornadoes in the Dallas-Fort Worth area in April.

The problem isn't limited to people living along the coasts or in Tornado Alley. There are all sorts of disasters in addition to hurricanes and tornadoes — floods, ice storms, wildfires, winter storms, mudslides, and the less common varieties like volcanic eruptions (Mt. St. Helens).

Last year was an amazingly unruly year for weather-related devastation in the United States. The U.S. Federal Emergency Management Administration reports that 99 major disasters were declared nationwide, affecting 48 states, far surpassing the previous one-year record of 81 set in 2010.

When disasters strike, all sorts of agencies and businesses rush into the disaster zone to help people and businesses begin to recover — governments, nonprofits, companies, and individual volunteers all lend a hand. That's a good thing. Disasters sever the network that connects societies — power lines go down, cell towers are lost, pipelines are damaged, and water service fails. In the aftermath of disasters, businesses — and particularly the traditional utilities — often bring resources and personnel into the affected area from other parts of the state and also from out of state. Their goal is to help repair and restore damaged property and services, and to help citizens and business return to normal as quickly as possible. They shouldn't stumble across state tax laws on their way in, but they sometimes do.

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That probably strikes you as odd. It did me, too. When all hell breaks loose, tax agencies normally don't have a lot to contribute. I know that's true because I spent my career at a tax agency and have sat through many meetings devoted to planning our disaster response. That also sounds odd. It did to us, too, but life goes on, and much of our disaster response was devoted to keeping out of the way. It isn't your fondest desire as a tax administrator to send thousands of automatically generated delinquency notices to people who not only can't find their business records but also sometimes can't locate their businesses. One thing you should not want as a tax administrator or the head of any government agency, really, is to erect barriers — intentional or not — that hinder the people working on the actual disaster response.

Despite the agencies' best efforts, that sort of problem does happen from time to time, and the National Conference of State Legislatures has some ideas on how to fix it once and for all that they issued in the form of a resolution late last year.

The idea for the resolution actually began with a presentation by Deborah Bierbaum, who is the executive director of external tax policy for AT&T. I talked to her at a tax conference in Austin, Texas, recently, and she mentioned the issue while we were talking about the tornadoes in the Midwest. The glitch she described isn't the sort of problem you normally associate with a natural or man-made disaster, but it's one that complicates things for the volunteers who rush into an area to get basic services back on line — like phone service — which is where Bierbaum ran into the problem.

"Our network people who coordinate disaster response approached our government affairs staff because they kept running into problems bringing in workers from out of state," Bierbaum said. They were, for example, running into legal requirements that were set up for businesses operating normally in the state but were spilling over into disaster response, slowing down the response when time was critical.

Bierbaum said:

> There were all of these rules getting in the way. For example, a state might have a requirement that a technician be licensed in a state before they touch wires. That's reasonable enough most of the time, but if you need to bring in extra technicians to restore downed lines or restore cell service, it's a problem.

Tax problems also popped up, including questions about the employer having a presence in the state and being registered to withhold payroll taxes, a need to change the payroll state for employees who do not normally work in the disaster state, and the status of equipment temporarily brought into the state to support efforts. Because the historically regulated utilities — the phone companies, electric utilities, and pipelines — are often organized with different entities in different states, the problems are compounded. So if they bring crews from Ohio in to help Kentucky, for example, it can create a situation in which a company that has no other presence in the state suddenly is working there, however temporarily.

Bierbaum said the companies are familiar with the potential problems, so they take actions to address the concerns such as transferring the employees out of their home companies and temporarily into the company operating in the state where the disaster has occurred. Sounds simple enough, but it's time consuming. "The transfer takes time," she said, "and depending on the state, it can cause a change in withholding and tax responsibility for the employees."

It's an unnecessary hassle for the employees involved. They may wind up having to file tax returns in the state where they are performing emergency repairs. Because they are there for short periods, it is likely they wind up owing little to no tax in the state, and they'll get a refund of withheld taxes or a tax credit in their home state. For many it is a wash except for the cost of the software or tax preparation fees. Still, the question remains: Why should they be put through all the extra work because they tried to do a good turn?

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In disaster situations, many companies ask workers who would like to assist in restoring service. A surprising number of people are willing, but it is to everyone's benefit that assisting in a disaster be as easy as possible. Bierbaum said:

> We want our workers to be willing to go into disaster areas. As a company, we need them to restore service, and people affected by the disaster need their help to get back to something like normal. Barriers that make that harder for the workers and companies don't make sense.

Nexus problems are less common, though the potential is there. There have been reports of auditors setting up a company that brings employees and equipment into a state to help with a disaster but otherwise has no business in the state. There's no evidence I could find that that decision has ever made it past the top management at a tax agency — and I would hope it wouldn't — but in Bierbaum's way of thinking, it would be better not to worry about it at all, and not to have to go through the paperwork headache of transferring workers around to avoid a possible nexus issue.

Some of those issues are addressed by the federal Mobile Workforce Act, but there's still a worry over nexus and other regulatory requirements popping up. Even with that law, there are many remaining gray areas. It's not the sort of problem that anyone thinks of before an emergency and not the sort of question companies can spend time on during one.

Unfortunately, though, complications from providing disaster relief may be a growing irritant for companies for a couple of reasons. First, for whatever reason, there are more declared natural disasters these days. Maybe it's the unpredictability of the weather or the complexity of modern infrastructure or just politics — or the interaction of all three — but the record number of disasters declared last year was four or five times higher than the number common in the 1950s, when the "normal" number of declared disasters was more on the order of a dozen or maybe two dozen a year.[1] The totals have been slowly edging upward since then, and the pace seems to have accelerated in the past decade.

I'm proud to report that the most disaster-prone state in the nation is my home state, Texas, with 86 declared disasters since 1953, followed by California with 78 and New York with 65. Although Florida lies in the path of half the hurricanes spawned in the Atlantic Ocean, it is fourth. If you don't want to live life on the wild side, you should make your home in sedate, disaster-resistant states like Rhode Island and Wyoming, both of which have had just nine disasters in the past 60 years — or Utah with 10, or the District of Columbia with 11. Those of us in the danger zone laugh at your timidity.

A second reason that companies must import help during emergencies is the effects of competition. In a competitive environment, companies do not have the economic capability to keep extra technicians standing around just in case. Most of the time advances in technology like fiber optics have increased labor productivity to produce quality service and competitive price for consumers. But when extraordinary events happen, calling in help from affiliates and vendors is a must to restore service to consumers.

During disaster situations, companies normally bring in outside employees on average for around three weeks at a time, Bierbaum said, sometimes pre-deploying some workers and assets before a disaster, assuming there's any warning it's coming. Particularly since Hurricane Katrina, there's been an emphasis on pre-positioning needed equipment like generators before the storm hits. She said:

> Our goal is to position the equipment early because first responders depend on cell availability, and we need to make sure the service isn't out for the time it may take to restore electrical power. We set up temporary cell sites at an electric utility company staging area, to support the large influx of mutual aid line crews brought in, so you can see, little things can make a big difference in restoring service.

Bierbaum approached the NCSL's Neal Osten, director of the Washington office, who works with the NCSL Executive Committee Task Force on State and Local Taxation of Telecommunications and Electronic Commerce on the problem. She also talked about the problem with other affected companies. "We asked that the Task Force consider what could be done," she said. "They don't normally draft model legislation, but they asked for a presentation on the issue at a meeting late last year." At the meeting there was broad bipartisan support from the members to adopt a resolution that supports state efforts to address the problem following the concepts in a draft model bill that was shared with the task force.

Deborah Bierbaum, executive director of external tax policy for AT&T.

Central to the notion of coming up with a fix was the good idea of working out the problems between the companies and the states. Having heard the facts, the task force agreed to pass a resolution that contains provisions that address what they saw as the critical questions states needed to resolve and eventually posted model legislation on its website.[2] The process of coming up with a solution moved

[1]FEMA has a year-by-year list of declared disasters, plus emergency declarations and fire assistance declarations going all the way back to 1953, *available at* http://www.fema.gov/news/disaster_totals_annual.fema.

[2]National Conference of State Legislatures, Executive Committee Task Force on State and Local Taxation of Communications and Electronic Commerce, "NCSL Resolution on Response to Declared Disasters to Repair and Replace Damaged Infrastructure," adopted Dec. 8, 2011. Model legislation is available at http://www.ncsl.org/state-federal-committees/sccomfc/state-disaster-model-resolution.aspx.

rapidly, and draft model legislation is also available for states that are interested. Some are. In April, Maine became the first state to enact a version of the disaster relief act, which Gov. Paul LePage (R) signed on April 12.

Bierbaum said minor tweaks might be needed to meet the peculiarities of individual state laws in states that want to adopt the model legislation. However, the NCSL resolution coupled with the model legislation provides a framework to show how to fix the problem. Considering what actually is involved, the fiscal effect on states who adopt the change should be minor or nonexistent. Because of state de minimis rules and exemption thresholds, most affected employees will likely get a refund of some or all of their withholding, and nexus simply shouldn't be a question if a company is legitimately in a state to help with the disaster and has no plans of remaining. If all states follow the same principles, it all balances out. Everyone benefits from eliminating the paper shuffling.

Under the framework supported by the task force, the ideal state law would have several major features. First, it would provide that an out-of-state company entering a state temporarily to respond to a disaster or emergency does not trigger tax or regulatory requirements so long as it doesn't normally operate in the state and meets time and purpose limitations set in the legislation.

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The resolution provides that the disaster period begins within 10 days of a disaster or emergency being declared by a state's governor or the president and extends for 60 days. Opening that window allows companies to stage equipment, people, and supplies in a state in advance of an emergency like a hurricane. Bierbaum said:

> It's inevitable that as we prepare for a storm in advance, there are going to be truckloads of equipment coming into the affected states with out-of-state license plates. It wouldn't happen all that far ahead of the storm, obviously, but no one wants to get caught short when the time comes. We've learned a lot about disaster response in the last few years.

Bierbaum says AT&T is prepared. Recently it was the first company certified by the Department of Homeland Security (DHS) under its voluntary Private Sector Preparedness Program. The program assesses and validates organizations' business continuity and preparedness capabilities. By giving AT&T its stamp of approval, DHS has certified that in case of a disaster AT&T will be able to resume network traffic, field customer calls and queries, and service the communities where it operates, she said.

In helping smooth issues for the companies, the resolution and model legislation don't ignore state interests. A company that remains in the state for more than the 60-day disaster period as defined by the model law would be subject to business presence and residency standards that would normally apply to businesses that operate in the state.

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Also, the out-of-state companies and their employees aren't exempt from sales and other excise taxes during their stay in the state. The employees will pay sales, motor fuel, hotel, and other taxes. The model statute does provide that sales and use tax does not apply to equipment used or consumed by the covered out-of-state companies during the disaster periods. "Mobile cell towers are a good example," Bierbaum said. "At times, we have to bring in COWs — cellular towers on wheels — to help first responders, such as extending service to support FEMA basecamps with state and federal workers, or mining disaster, oil spills — there are so many cases."

A final provision says that exceptions in the model law apply only to businesses that enter a state to help restore critical infrastructure and services and not to businesses that come into the state for the purpose of soliciting repair and rebuilding work connected with the emergency. The distinction would be between utility workers who come in to restore utilities versus roofing contractors. Disasters attract many transient companies that offer homeowners repair services, and anyone who's ever lived through one knows. They aren't given any immunity from state or local taxes, or regulations. The model legislation is intended only for companies that come in to restore infrastructure that's already there and that's put out of commission by the disaster — phone lines, cell towers, electrical networks, pipelines. Fly-by-night roofers need not apply under the task force resolution.

I wanted to highlight that provision for a couple of reasons. First we're in the middle of tornado season, and hurricane season is fast approaching this summer. Also, I'm from Texas, and as I said, it is number one where disasters are concerned. We've averaged one-and-a-half disasters every year since I was born. Not only is Lady Luck not on our side, but Mother Nature seems to have some serious problems with Texans.

In Texas, with our current endless drought, we also face the possibility of another series of wildfires like the one that destroyed hundreds of acres of pine forest (yes, there are pine forests in Texas) in the area around Bastrop, a little town about 25 miles from Austin. Driving through that vast, sad moonscape of destruction makes you sensitive to the reality that disasters can strike unpredictably and remorselessly. When disaster strikes, government is critical to recovery. It shouldn't be part of the problem. That's certainly true here in disaster central. I suspect the same goes for California. Although Bierbaum didn't mention it, I imagine that if questions like nexus are a problem anywhere, it will be a problem there because of the state's regulatory framework and patchwork of local laws affecting telecommunication and other companies.

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What I also liked about the idea is that although it came from the business community, it was developed in cooperation with the NCSL, a state organization, and will be worked through state legislatures and tax agencies and not shoved onto states by Congress. It's a small question compared with some of the other problems that states and businesses sometimes face, such as remote sales and mobile workforce, but it demonstrates that it's possible to work cooperatively without having to rely on a *deus ex machina* in the form of our dysfunctional national legislative assembly.

I asked Bierbaum what happens next as far as the resolution and model legislation that have been drafted. She said that NCSL will make the resolution and model law available to state lawmakers and that the affected companies will probably take an active interest in getting it before legislators in various states. She said legislation based on the model statute had already been introduced in Maine and Rhode Island. She hopes other states will look into the question as well.

States should be interested in fixing the problem. It doesn't cost much money, and it clears up a nagging problem that's found in most states but isn't there intentionally. In the end, the companies are going to move the people and equipment as necessary to deal with the emergency. But why continue a practice that causes delays while companies jump through bureaucratic hoops? "The law change would only apply to people and companies who are in a state because of a disaster providing services that are only necessary because of the disaster," Bierbaum said. She also said some states might be able to make the change administratively, while others will need legislation. "It's a case-by-case issue, but legislation would provide the greatest clarity."

Finally, Bierbaum pointed out that the resolution is careful to say that the law should apply to "disasters" and not to "natural disasters," although the latter, obviously, are far more common. She's had experience with both. She lives in Morristown, N.J., and was stuck without power for a week after Hurricane Irene roared through the region last year, toppling power lines and stripping the trees around her house of their branches. But she also grew up just outside New York City. She said:

> I'm very sensitive to the fact that not all disasters are "natural" disasters. If a governor wants to declare a disaster in a state for whatever reason, we want the law to cover it. Last year was a crazy year. It's been a crazy decade. You don't know what's going to happen. Be prepared. Right? ✰

Billy Hamilton was the deputy comptroller for the Texas Office of the Comptroller of Public Accounts from 1990 until he retired in 2006. He is now a private consultant.