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Planning for Economic Downturn Related to COVID-19

With the new restrictions being imposed by state and city officials across the nation, including the closing of schools, restaurants, bars, retail stores, and other establishments where people gather en masse, many companies are preparing for a resulting economic decline that may require laying off, furloughing and terminating employees, or, in some cases, closing down their business entirely.

NOTICE REQUIREMENTS PRIOR TO LAYOFFS

What advance notice does the WARN Act require?

- In the event of a mass layoff or closing of an employment site, the Worker Adjustment Retraining Notification ("WARN") Act may require prior notice depending on whether the Act applies to your business and whether the proposed action meets the definition of a "plant closing" or "mass layoff."

- The WARN Act applies to all businesses with 100 or more employees. It generally requires 60 days' notice of lay-off/termination in the event of a: (i) plant closing (involving a single employment site or one or more facilities or operating units within an employment site) causing employment loss for 50 or more employees during any 30-day period; or (ii) mass layoff (other than a plant closing) that will result in an employment loss of six months or more at the employment site during any 30-day period for 500 employees, or for 50-499 employees if they make up at least 33 percent of the employer's active workforce.

- The term "employment loss" is defined in the Act, and determining whether an employment loss has occurred is a technical exercise.

- Many states have their own form of WARN Act that apply to businesses with as few as 50 employees. Check your state to see if they have stricter WARN statutes.

Are there any exceptions that may be applicable to the present situation?

- An exception to the WARN Act's requirement to provide advance notice includes the "Unforeseeable Business Circumstances" exception, which applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable *at the time that the 60-day notice would otherwise have been required*.

- An important indicator that a circumstance is not reasonably foreseeable is that it is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A dramatic economic downturn caused by the restrictions being imposed by governments across the nation potentially could provide employers with a defense to giving the requisite warning under the statute.

- The unforeseen business exception is not available in various states' versions of the WARN Act, including those enacted by California and New Jersey.

- ***Practical considerations:*** Even if the exception applies, the statute still requires employers to provide "as much notice as is practicable" to employees of the terminations/layoffs, in addition to "a brief statement of the basis for reducing the notification period." While this notice may be as soon as a day before termination of employment, it still must be provided in order for the exception to apply.

CONSIDERATIONS PRIOR TO IMPLEMENTING SALARY REDUCTIONS

What are the limitations under wage and hour laws?

- **Reduction in pay**: Before reducing the salary of exempt employees, employers should consider that if an exempt employee's salary falls under the threshold ($684/week under the FLSA), they will no longer be exempt and need to be paid hourly and receive 1.5 times their regular hourly rate if they work more than 40 hours in any given week. Many states have their own minimum salary threshold that is far greater than that under the federal statute.

- **Reduced schedule:** If an employer is considering reducing the schedule of an exempt employee but keeping their pay above the minimum threshold, certain requirements still need to be followed to preserve the employee's exempt status notwithstanding a part-time schedule:

    - The employee's pay cannot vary based on the hours worked in any week. So, for example, if the position is considered "half-time" and the employee nonetheless works 35 hours in a particular week, the employer should not pay the employee for the additional hours. Similarly, if the half-time exempt employee works only 10 hours in a particular week, the employer should not dock their pay for the hours not worked.

    - The part time exempt employee should not have a specifically defined number of hours they are expected to work each week, although they could have a specific number of days. Defining a specific number of hours per week is inconsistent with the concept of being paid on a salary basis.

- **Short Furlough:** If an exempt employee is furloughed for a short period of time and not expected to work, do not ask them to perform work. If they do, employers are required to pay them for the entire week.

UNEMPLOYMENT BENEFITS

Are unemployment benefits available for furloughed employees?

- States vary as to whether unemployment insurance is available for a furlough and what is the maximum amount a person can receive to still qualify for unemployment benefits.

Updates regarding unemployment benefits relating to the current Coronavirus situation?

- **Waiver of one-week waiting period in some states**: While most states have a one-week waiting period before someone can apply for unemployment, many states are waiving that time period for unemployment benefits for those out of work due to Coronavirus infections, closures or quarantines.

- **Stimulus package**: In addition, the Senate passed on March 18, the *Families First Coronavirus Response Act*, which provides one billion dollars in additional funding to state unemployment insurance programs. It also waives certain restrictions, including work search requirements and waiting periods for Americans who are either diagnosed with COVID-19 or who have lost their jobs due to the spread of the virus.

OTHER PLANNING CONSIDERATIONS

When considering layoffs, reduced hours, or furloughs, are there other issues an employer should consider?

- Health coverage: For those employees who have employer-sponsored health insurance, a termination or lay-off constitutes a COBRA- qualifying event, ***i.e.,*** reduction in hours. As a result, in most cases the employer will have to offer COBRA, but can agree to allow the furloughed employee to maintain the same health coverage under the same terms and conditions regarding payments of premium as if the employee was an active employee.

- ***Practical considerations:*** Given the timeframes involved with offering COBRA—including a period of at least 60 days in which to elect COBRA and a 45-day period in which to make the first premium payment—qualified beneficiaries can adopt a wait-and-see approach and elect coverage only if medical care is required before the election is due. Thus, in the event of a one-month furlough, employees can wait to see if they incur any medical expenses during the one-month furlough period and then decide whether to elect COBRA.

- **PTO benefits:** Most employers have policies that no PTO time accrues during a leave. In those cases, because a furlough is akin to a leave, it should be made clear to the employee that no PTO is accruing while on furlough. Employees in those states that require accrued PTO to be paid upon termination should pay accrued PTO to furloughed employees who are not given a designated return date. There is no federal law requirement that furloughed employees with a return to work date be allowed to use their accrued vacation. As mentioned, however, some state laws may impose more stringent requirements.

- ***Practical considerations:*** To ease the burden placed on employees being furloughed, employers may want to consider allowing employees to use their accrued PTO, or a percentage of their accrued PTO, to engender loyalty.

- **Severance pay:** Employers who are considering giving severance, remember that state laws vary with respect to receiving unemployment while collecting severance. For example, in New York, an employee cannot receive unemployment if severance is paid within 30 days of termination.

- **Avoiding bias in termination/layoff selection of employees:** When identifying who is to be terminated or laid off, make sure your decisions are based on criteria that is not discriminatory or causes a disparate impact to employees in a protected category.

    - Once an employer has determined that a layoff is necessary, it should identify the supervisors who will facilitate the layoff. These supervisors should be directed to select employees for layoff on the basis of nondiscriminatory criteria such as job performance, employee skills, or seniority.

    - Note that the EEOC has stated that if productivity is a layoff criterion, employees with disabilities cannot be penalized if their productivity has been negatively affected as a result of an accommodation.

    - Once employees have been selected for layoff, a statistical analysis should be done to determine if the layoff would have a disparate impact on employees within a protected group (race, gender, national origin, workers over the age of 40, etc.).

    - An employer may lay off an employee who is out of work on ADA leave, short-term disability, and even in cases when the leave is qualified under the Family and Medical Leave Act ("FMLA"). The test is whether the employee would have been selected for layoff if he or she was not out of work on disability. Therefore, the employer should make sure the reasons for selecting this employee are job-related and well documented.

    - ***Practical considerations:*** If an employee on leave is the only employee selected for layoff in a unit or at a facility or the only person on a particular type of leave (i.e., paternity leave) and there are others in similar jobs or on different leaves not being laid off, the employer is vulnerable to a claim that this employee was selected because he or she was on leave.

What other alternatives are available to layoffs and furloughs?

- **Work sharing programs:** In some cases, employers can avoid termination, layoffs, or furloughs by instituting other cost-cutting measures so that the financial burden of an economic downturn is shared among employees. About 30 states and the District of Columbia have work-sharing programs, also referred to as short-time compensation ("STC") programs that enables enable employers contemplating layoffs to temporarily reduce work hours for a group of employees as an alternative during hard economic times.
    - STC should not be confused with job sharing, which allows two part-time employees to share one full-time job. Instead, STC allows a full-time employee's hours to be reduced, in lieu of laying off the employee. Under most approved STC programs, employees qualify for a percentage of unemployment benefits, equal to the percentage by which their hours have been reduced.
    - STC cushions the adverse effect of the reduction in business activity on workers by averting layoffs and ensures that these workers will be available to resume prior employment levels when business demand increases.

Blank Rome's Coronavirus ("COVID-19") Task Force is continuing to monitor the COVID-19 crisis and will provide further updates for employers as they become available.

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