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COVID-19: Layoff and Furlough Considerations for Employers

In light of the significant economic impact of the COVID-19 pandemic on businesses, this Client Memorandum addresses the legal considerations for employers and certain employee protections in connection with reductions of employee headcount and/or services.¹

In connection with the COVID-19 pandemic, many employers are considering, or have already been, reducing their workforce due to the interruption of business operations as a direct or indirect result of quarantines, governmental shutdowns and the general downturn in business. Although initial reductions may be intended to be temporary, the situation can change. Given the uncertainty of the economic forecast, for many companies, it may be unclear whether current layoffs will be temporary or permanent, which in turn may impact whether or not the federal Worker Adjustment and Retraining Notification (“WARN”) Act and/or similar state and local laws apply.

Companies whose business has been significantly interrupted also have implemented or are considering implementing furloughs – a reduction in the number of hours, days or weeks that an employee can work, or a temporary suspension of work – which can implicate the federal Fair Labor Standards Act (“FLSA”).

WARN

The WARN Act, which was adopted in 1988 as a worker protection statute, requires employers with 100 or more full-time employees to provide 60 days’ advance notice to impacted workers, local governmental agencies and applicable bargaining unit representatives where an “employment loss” occurs due to a plant closing (i.e., shutting down a facility or operating unit where at least 50 employees, excluding part-time employees, at such location are terminated) or a mass layoff (i.e., employment loss of 500 employees, or one-third of the workforce, with a minimum of 50 employees, excluding part-time employees), all as determined in accordance with the WARN Act regulations. Although not explicitly covered by the WARN Act, some companies pay employees in lieu of providing the 60 days’ required notice for employee terminations. Notably, temporary layoffs of less than six months are not considered to result in an employment loss that would otherwise trigger the WARN Act. If a company is only engaging in a temporary layoff not to exceed six months, then the WARN Act notice is not required. However, it would be prudent for an employer that is currently contemplating only a temporary layoff to communicate to employees that the layoff is expected to be less than six months.

¹ For additional guidance in navigating this crisis, visit our [Coronavirus \(COVID-19\) Resource Center](#).

Under the WARN Act, the determination of whether there has been a plant closing or mass layoff is generally determined taking into account worker terminations over a 90-day period. Initially, the determination is based on a 30-day period but may also be determined based on aggregate employment losses during a rolling 90-day period. If the required 60 days' advance notice is not provided, an employer is required to compensate the affected employees with 60 days' pay and benefits.

There are three general exceptions to the 60-day advance notice requirement: (i) natural disasters, (ii) unforeseeable business circumstances and (iii) a faltering company (which only applies in the context of plant closings). Each of these three exceptions is very fact specific and it is not clear whether a court would treat the COVID-19 pandemic as a natural disaster or an unforeseeable business circumstance. Even if an employer qualifies under an exception, the employer should give as much notice as reasonably possible, including a statement for the basis of reducing the required notice.

It is important for employers to be aware that in addition to the federal WARN Act, employers may also be subject to state WARN Acts. Many states, including New York, New Jersey and California have state WARN Acts that are significantly more restrictive, including employers who may employ less than 100 employees, and requiring additional advance notice as well as a lower threshold of employment losses triggering application of the advance notice requirement.

For example, the New York WARN Act applies to employers with as few as 50 employees and its advance notice requirement is triggered by a plant closing affecting only 25 employees or a mass layoff affecting either 250 employees, or 25 employees or more employees if those employees constitute one-third of the workforce. Under the New York WARN Act, 90, rather than 60, days' advance notice is required. Other states have even more restrictive requirements. The New Jersey WARN Act will require mandatory severance as of July 19, 2020 and will require one week of severance per year of service.²

Some state WARN Acts do not have exceptions for temporary layoffs, which means that notice or severance will be triggered even if the goal is to have the employees return to work when quarantine and required shutdowns are relaxed. Although many state WARN Acts have similar exceptions to those in the federal WARN Act for natural disasters and calamities, not all state WARN Acts include all of these exceptions from the requirements to provide advance notice. For the state WARN Acts that do have these exceptions, there may be variations of interpretation as well.

The analysis of whether WARN Act notice is required is extremely dependent on particular facts and circumstances.

² See our recent alert on the New Jersey WARN Act: <https://www.paulweiss.com/practices/transactional/employee-benefits-executive-compensation/publications/warning-in-new-jersey?id=30648>

FLSA

Companies that are considering a reduction in worker hours or a temporary suspension of work will need to ensure compliance with FLSA worker protections.

Under the federal FLSA, employees are categorized as either exempt or nonexempt. Nonexempt employees are subject to governmental rules regarding wages and hours, including mandatory overtime pay. However, in general, employers are permitted to cut back the working hours for nonexempt employees to fewer hours or days than would otherwise apply on their regular schedule without incurring liability and are not required to pay nonexempt employees for time not actually worked (unless covered by separate contractual arrangements, employer policies or collective bargaining agreements). Note that applicable state laws may nonetheless require compensation when a nonexempt employee reports for work despite an instruction from an employer to the contrary.

By contrast, exempt employees are not subject to the FLSA wage, hour and overtime rules. To qualify as an exempt employee, among other things, an employer is generally required to pay the employee the same base salary per week, regardless of the amount of time worked during such week. Thus, if an exempt employee performs any work for the week, the employer will likely need to compensate the exempt employee for the full week. So, if an employee works for two hours on Monday and there is a furlough for the rest of the week, the employer will likely need to compensate the employee for the entire week. It is generally possible to prospectively reduce the exempt employees' pay or place them on furlough, but employers must consider all applicable state laws in doing so (e.g., some states may require specific prior notice). Similarly, while employees are on furlough, they are not actively working and therefore they should not be expected to monitor email or voicemail. If a furloughed employee actually does do such work, then the employer may be required to compensate the employee.

For a discussion of other employment law considerations, please see [our March 10 memo on Employment Law Considerations and Practical Guidance for Employers](#), [our updated March 17 memo](#) and [our March 18 memo on Families First Coronavirus Response Act](#).

Other Considerations

To the extent that an employer sponsors foreign workers for green cards or visas, there may be obligations to notify the United States Citizenship and Immigration Services or Department of Labor about the change in work status.

New York and some other states are waiving the waiting periods for Unemployment Insurance benefits for employees who are out of work due to COVID-19 related closures or quarantines.

We recommend that employers seek legal advice regarding their particular facts and circumstances prior to implementing any furloughs, layoffs or reductions in force. Prior to implementing any furlough, layoff or reduction in force, care should be taken to ensure that compliance with all federal, state and local laws is observed, including but not limited to antidiscrimination laws, the federal WARN Act, any state WARN Acts, federal COBRA and any state healthcare continuation coverage requirements and laws relating to payment of wages and accrued vacation (which vary by state and may require payment of accrued vacation within specified periods following termination of employment). Employers should also review and abide by the terms of their own separation pay policies, as well as applicable collective bargaining agreements in the case of unionized workforces.

As the situation with the COVID-19 pandemic is rapidly changing, we recommend that companies seek legal advice to stay abreast of additional developments. We will continue to monitor developments and keep clients apprised of pertinent information.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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