Furloughs and Other Temporary Responses to COVID-19 Disruptions

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Among the many issues employers are facing in the wake of the spread of the novel coronavirus (COVID-19) is the possibility of furloughs, temporary office and location closings, and short-term layoffs.

A furlough involves reducing the days or weeks that an employee may work. A layoff can be temporary or permanent. Employers may also consider reducing the daily hours of some employees. This article will address these strategies in the context of COVID-19-related actions, which for most employers involve temporary rather than permanent responses.

A common concern that employers have for planning COVID-19 decisions is whether the employer has a notice obligation under the federal Worker Adjustment and Retraining Notification (WARN) Act and similar state mini-WARN Acts. Fed WARN requires employers to provide 60 days' advance notice to covered employees, unions, and government officials prior to a plant closing or mass layoff at a single site of employment. State mini-WARN laws contain separate and distinct requirements from Fed WARN that can be a trap to unwary employers. A WARN notice requirement can be a significant concern if a company is moving rapidly to address COVID-19 disruptions.

The following guidance is designed to help address some common questions that employers have and inform employers of different areas of concern involved with furloughs and temporary shutdowns and layoffs.

What is the effect of furloughs or reduced hours?

Employers generally can schedule non-exempt employees for fewer days or hours without liability concerns. Employers do not need to pay non-exempt employees for time not worked. Exempt employees involve a more difficult analysis when considering furloughs or reduce hours as an alternative to layoffs. Employers should be aware that exempt employees under federal law and most state laws must be paid the same minimum salary for each pay period. Moreover, if an exempt employee performs any work during a workweek, that exempt employee must receive their entire salary that week. Failure to compensate an exempt employee for a week where any work is performed jeopardizes that employee's exempt status. If an employer furloughs an exempt employee for an entire workweek, however, then no salary is owed for that full week and the employee's status is not affected. Certain types of furloughs may involve changes to pay practices. Generally, prospective changes are acceptable, but state law may require specific periods for advance notice and may limit changes to particular types of pay (e.g., PTO).

When employees are furloughed, employers should expect that they will not work, including checking email and voice-mail. An exempt employee is entitled to pay for any workweek in which they perform any work. Employers should therefore inform employees that work is not authorized during the furlough period without advance written approval. Employers also should notify non-exempt employees about the same issue as non-exempt employees generally are entitled to compensation for performing work when not in the office. A signed policy indicating the types of activities that require supervisor approval and the company's expectation for recording any time spent on such activities is something employers should seriously consider.

Are furloughed employees entitled to unemployment benefits?

Unemployment benefits will vary by state, and there may are also be waiting time periods in place before benefits are provided. Consider reviewing unemployment eligibility in the various states where operations will be impacted and including some sort of statement within the furlough notice. Employers should also consider whether "partial" unemployment claims are permitted where the workweek is changed for non-exempt employees. Employers may be able to structure furloughs to maximize unemployment benefits to employees. For example, some states have work-sharing programs that allow employees with reduced hours to receive unemployment benefits even if they do not meet the standard requirements for unemployment eligibility.

If the employer has to furlough or temporarily lay off employees, are there any notification requirements?

There may be. Fed WARN and state mini-WARN statutes require employers to provide advance notification (60 days or 90 days, depending on the jurisdiction) to employees and government officials of certain group employment terminations. Not all layoffs trigger these requirements, however, and exceptions may apply. Temporary layoffs of less than six months are not considered to be employment losses under Fed WARN, and the same is true under many, but not all, state mini-WARNs. The size of the layoff also matters. Fed WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period. State mini-WARNs can be triggered at lower levels.

Is there an exception to WARN for epidemics?

No. Although Fed WARN and most state mini-WARN statutes have provisions addressing terminations due to natural disasters or calamities, it is unlikely that these provisions could be used to cover an epidemic.

What level of layoffs will trigger notice under Fed WARN?

Generally, 60 days' specific written notice must be provided for a plant closing or a mass layoff. A plant closing is defined as 50 or more countable employment losses at a single site of employment in a 90-day period that results from ceasing operations in one or more operating units. A mass layoff is defined as 50 or more countable employment losses at a single site of employment in a 90-day period that also involves 33% of the active workforce at the site. Employees with less than 6 months of service in the prior 12 months, or who work less than 20 hours per week, are not countable. Notably, temporary layoffs of less than 6 months are not counted as an employment loss under Fed WARN.

If Fed WARN is triggered, are there any exceptions that apply?

Yes. Federal WARN permits shortened notice if terminations result from circumstances that were not reasonably anticipated 60 days before employees are terminated. However, shortened notice requires giving actual written notice, with as much advance notice as can be given. Some state mini-WARN statutes (e.g., CA WARN) do not include this defense. Shortened notice may be a good solution to Fed WARN issues created by this epidemic.

If we avoid Fed WARN, do employers still need to comply with state mini-WARN statutes?

Yes. Employers must comply with both the federal law and state laws, whichever is more favorable to their employees. The state mini-WARN statutes that perhaps offer the greatest challenges to COVID-19 temporary actions are CA WARN and NJ WARN. A recent decision from a California appellate court has applied CA WARN's 60-day notice requirement to a short-term layoff because CA WARN does not include the exception for layoffs of fewer than six months. It is not clear whether that decision would require notice for a COVID-19-related furlough or short-term layoff, but the risk must be considered. The State of New Jersey recently made sweeping changes to NJ WARN that take effect on July 19, 2020. Among other significant changes, the amendments eliminate the focus of the event on a single place of employment (now all employees in New Jersey must be counted) and count "part-time" employees towards the thresholds for notice obligations. Moreover, employers that trigger notice under NJ WARN must provide severance pay automatically and 90-days' (rather than 60-days') notice.

Employers must take these and all other state mini-WARN statutes into consideration when planning for furloughs, hours reductions, or short-term layoffs.