



Insights: Alerts

Layoffs, Furloughs, and Terminations: Practical Considerations for Employers in the Age of COVID-19

March 27, 2020

Written by **Susan W. Pangborn, Diane L. Prucino, Kathleen B. Dodd Barton and Kendra C. Chapman**

Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

The spread of the novel coronavirus and the numerous shelter-in-place or stay-at-home orders issued across the country in response have presented unique and challenging issues for employers. Significantly, many businesses who are experiencing a reduction in business operations as a result of the pandemic may have already implemented, or may be considering, a reduction to their workforce, layoffs, furloughs, or a reduction in [employee hours](#). Employers should consider whether [CARES Act tax breaks](#), [loan options](#), or other stimulus measures make any reductions or furloughs unnecessary. However, in the event that layoffs or reductions are needed, below are reminders regarding some of the legal requirements employers should take into account as they explore options and execute decisions affecting their workforce in response to COVID-19.

Remember Wage & Hour Laws When Reducing Employee Work Hours

Employers are generally permitted to reduce the working hours of hourly non-exempt employees without violating wage and hour laws, and employers are usually not required to pay non-exempt employees for time that is not worked (unless covered by separate contractual agreements, policies, collective bargaining agreement, or specific laws such as those governing “reporting time” pay). Employers should provide as much notice to employees as possible before implementing hours reductions. In addition, employers must continue to ensure that non-exempt employees track all time worked, are paid any required overtime, and are provided with legally-required meal and rest periods.

Employers may also seek to furlough exempt employees (those exempt from overtime pay requirements under the Fair Labor Standards Act); however, if an exempt employee performs **any work** during a workweek, even only briefly reading or responding to e-mails, the employee must be paid for the full week at their regular weekly salary. Employers who fail to pay exempt employees' full weekly salary risk forfeiting their exempt status. Thus, exempt employees should be furloughed for an entire workweek, and the employer should take steps to ensure

that they do absolutely no work. This would include, for instance, reviewing or responding to emails, taking calls (even calls to update others on project or task status), or performing other work duties during that workweek.

Avoid Discrimination Claims During Mass Layoffs or Furloughs

When an employer selects employees for a layoff or furlough, it should ensure that the decision of who will be laid off or furloughed is not motivated by any discriminatory animus (or hostility) towards employees who belong in a group protected under federal or state anti-discrimination laws. When employers are selecting among employees who will be laid off or furloughed, they should ensure that the criteria they are using (such as performance, skillset, etc.) does not have a disparate impact on any protected group, such as groups based on race, sex, or age. A disparate impact analysis will allow the employer to evaluate whether employees in protected groups are being laid off or furloughed at a higher rate than employees who do not belong to a protected class and whether the difference is statistically significant. This is important because, in the event of a lawsuit, a former employee can prove unlawful discrimination by establishing that the employer's neutral practices during a reduction in force or furlough had a disproportionate effect on employees in a protected class. Thus, if statistical analysis shows that the employer is laying off or furloughing a high percentage of employees in a protected class, it may be necessary to make changes to the list of those being laid off or furloughed.

Review Your Form Severance Agreements

If you plan to offer severance pay in exchange for a release of claims to employees who will be impacted by a reduction in force or layoff, you should review your form separation and release agreements to ensure that they comply with state and federal laws and that they release all known and unknown claims through the date of signature. Several states have specific criteria or requirements that must be met for employees to release existing and/or unknown claims against the employer, such as California. Employers should also review existing employment agreements and policies to determine whether there are agreements or policies in place which require the employer to offer severance to a terminated employee (with or without a release of claims in exchange).

If the employer intends to ask employees to release age discrimination claims in exchange for severance pay, the form severance agreement must comply with the Older Workers Benefit Protection Act (OWBPA) to effectively release claims for individuals age 40 and over under the Age Discrimination in Employment Act. The OWBPA has specific requirements for both individual and "group terminations." In addition to other requirements, in a group termination (when two or more workers are separated), the release for workers age 40 and over must identify the "decisional unit" (the group of employees from which the employer chose the employees selected for the reduction) and "eligibility factors" (the selection criteria used for the reduction) to comply with the OWBPA. Employers must also provide a list of the job titles and ages of individuals selected for the reduction, along with the job titles and ages of those in the same unit who were not selected, as part of the release for those age 40-plus. Some states also have specific requirements for a valid release of certain state law claims.

Check For New State and Local Agency Guidance

State and local governments have issued, and are continuing to issue, new employment laws and regulations in response to COVID-19. For example, many states, including New York and California, have taken steps to speed up or streamline the unemployment application process. In doing so, many states are issuing new model

forms or notices which the employer must provide to employees at the time of termination. Remember that employees who have their hours reduced (but not eliminated) may also qualify for partial unemployment benefits in certain states. Employers should check state and local agency websites before taking actions that significantly impact employees to determine whether there are new rules or guidelines related to layoffs, reduced hours, or unemployment benefits in response to the COVID-19 pandemic, and to ensure that employees are provided with the most up-to-date information.

Don't Forget Federal and State WARN Laws

Employers considering reductions in force, layoffs, furloughs, or a reduction in employee hours must determine whether any federal or state WARN laws apply. The federal Worker Adjustment and Retraining Notification (WARN) Act generally requires employers with 100 or more full-time employees to provide at least 60 days' advance notice to workers, government agencies, and any bargaining unit representatives where an employment loss occurs which impacts a requisite number of employees. An "employment loss" includes furloughs and temporary layoffs that last more than six months and also a significant reduction in employee hours. Thus, even a furlough of employees or a reduction of hours could trigger the WARN Act's advance-notice requirements if the change impacts enough employees. The federal WARN Act also covers employers of 50 to 499 employees where the employer is laying off at least one-third of the workforce. Failure to issue timely WARN notices can result in employer liability for back pay and benefits to each affected employee for each day of the violation, up to a maximum of 60 work days. Benefits include contributions to the employee's pension plan and maintenance of the employee's welfare benefit plan. In addition, the employer will be liable for the cost of any otherwise covered medical expense incurred during the employment loss.

The federal WARN Act contains an exception for "unforeseen business circumstances" – which may include coronavirus-related decisions if the employer had no plans to reduce its workforce before the coronavirus outbreak. Employers must still send out notices for layoffs covered by the unforeseen business circumstances exception as soon as practicable. Additionally, the further out the layoffs are from the onset of the coronavirus-related crisis, the less likely it is that the "unforeseen business circumstances" exception would apply.

More than 20 states have also enacted "mini-WARN Act" laws that employers must comply with in addition to the federal requirements. These state laws are often more protective of workers than the federal WARN Act, differing in the events or number of employees that trigger notice requirements, the amount of advance notice that the employer must provide to employees, and the information that must appear in the notice. In addition, some state WARN Acts do not contain an exception for short-term layoffs, which means that notice or severance may be triggered even if the employer's goal is to return the employees to work in less than six months. States with mini-WARN laws include California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin. For a discussion on Governor Newsom's executive order affecting the California WARN Act in light of COVID-19, see our recent [client alert](#).

Remember Best Practices for Terminations

Even in a challenging environment, handling a termination professionally and sympathetically may reduce potential anger and resentment from the employee. An in-person meeting is generally preferable, but with current realities, this will most likely be impracticable, if not impossible. The employer should find a way to

personally communicate the termination decision to the employee whenever possible, even if that communication has to take place by video or teleconference due to the current work environment.

The employer should ensure that it can collect any company-owned equipment (such as a laptop computer or mobile phone) from the exiting employee. If the employer cannot meet with the employee in person, it may wish to send a self-addressed, prepaid box to the employee, along with specific instructions on how to return the property. Employers should indicate that electronics should be returned without wiping, deleting, or otherwise destroying information on the devices. For critical employees, who likely have confidential company information on their devices, or those who are witnesses in pending litigation, do not immediately repurpose or wipe laptops or other devices returned in case there is a later need for a forensic review. If an employee does not cooperate in returning company-owned equipment, be mindful of state law before deducting from the employee's final paychecks; such "self-help" remedies are not permitted by some states.

In addition, the employer should take steps to ensure that the exiting employee's access to the company's information technology and equipment can be cut off immediately, to ensure that the employee does not transmit or delete any company information. The employer should work with IT and other relevant departments to ensure that access can be cut off remotely.

Employers should also ensure that they understand and adhere to state laws related to terminations, including any final pay laws. Some states require the employer to provide the employee with their final paycheck, which may include balances for unused paid time off or vacation, at or within a specified period after the termination. The employer may also wish to develop a separate document describing how [employee benefits](#) will be handled following the separation, keeping in mind that state law may impose specific requirements. Also, employers should ensure that any Employee Assistance Program (EAP) will remain available to impacted employees after termination and remind employees how to access the program.

Final Takeaways

In connection with any furlough, layoff, or reduction in force, care should be taken to ensure that the employer is acting in compliance with federal, state, and local laws – including anti-discrimination laws, the federal and state WARN Act laws, and applicable wage and hour laws. Employers should also review and abide by the terms of their separation pay policies, as well as the applicable best practices related to terminations.

Related People



Susan W. Pangborn

t 404.815.6305

spangborn@ktslaw.com



Diane L. Prucino

t 404.815.6479

dprucino@ktslaw.com



Kathleen B. Dodd Barton

t 404.815.6158

kbarton@ktslaw.com



Kendra C. Chapman

t 415.273.4386

kchapman@ktslaw.com