Seyfarth

WARN, Furloughs, and RIFs

Obligations and Best Practices When Considering COVID-19 Workforce Reductions

Is this the time to hold tightly to your current workforce or let some of them go? This remains the No. 1 question on nearly every US employer's mind. If employees must go, then how? By indefinite furlough? By a plainly announced RIF? With or without WARN notice? With or without severance? When the COVID-19 pandemic is over, US employers who acted without carefully evaluating their options will face years of legal challenges on top of economic ones. In this webinar, our panel discusses ways to reduce your legal exposure in these unprecedented times.

Please note that this is a summary only; please contact a Seyfarth attorney for any legal advice or guidance needed.

Furloughs

Definition of a furlough: An involuntary temporary period of a reduced schedule or time-off from employment, typically unpaid. At the time of a furlough, the employer expects employees to return to work once business conditions change. Furloughs can be for a defined period of time or a more indefinite period.

Furlough vs. RIF/Lay-Off: The primary difference between a RIF/layoff and a full furlough is that a furlough is temporary, while a lay-off is a permanent end to employment. **Furloughs allow employers to implement a temporary fix for a temporary set of circumstances that hopefully will turn around.**

Advantages of a furlough or salary reduction over a RIF:

- Avoids cutting into backbone
- Employers retain trained employees who will be needed when the crisis is over
- Immediate benefit vs. a RIF
- Salary reduction potentially boosts morale via "shared sacrifice"
- Business stimulus incentives - CARES Act tax credit
- Unemployment benefits

The largest obstacle to a furlough is maintaining the salary basis of pay for exempt employees. Safest course is to implement full-week furloughs, in which the employee performs NO WORK WHATSOEVER.

The Salary Basis Test: If an individual performs work of any kind during any work week, they must be paid their normal salary for that work week. If exempt employees are assigned different types of work/job duties during this time, you must ensure that these duties still meet the exempt status test.

Checklist: Reduced Schedule/Salary Scenarios

For exempt employees:

- ☐ Stay above salary threshold for applicable exemption
- ☐ Avoid fluctuation in salary (salary basis risk)
- ☐ Reaffirm with employees that reduced salary covers all hours worked

For all employees:

- ☐ Stay above minimum wage
- ☐ Watch prevailing wage laws (state & federal contractors)
- ☐ Don't do retroactive salary adjustments
- ☐ Comply with any requirement to provide advance notice of pay reduction

Also to consider when planning a furlough:

- Federal or state WARN laws
- Use of vacation and sick time
- Final pay obligations in certain states
- Impact on employee benefits
- Availability of unemployment benefits
- Employee Retention Tax Credit
- Immigration issues
- Obligation to pay severance benefits

Worker Adjustment and Retraining Notification ("WARN")

Furloughs, layoffs, mass employment separations, and/or facility closures resulting from COVID-19 can trigger obligations under the federal Worker Adjustment and Retraining Notification ("WARN") Act and/or state mini-WARN Acts.

Under federal WARN, an hours reduction of at least 50% in each month of a six-month period constitutes an employment loss.

Ordinarily, federal WARN liability exists for failure to provide at least 60 days' advance notice of covered mass layoffs and closures to designated government representatives, as well as to affected employees, and any labor unions representing the impacted employees. Note that many employment loss situations will not trigger WARN—either because they do not involve enough employees or temporary employment losses are not long enough.

However, note also that WARN penalties can include back pay, benefits, and out of pocket medical expenses for each affected employee for up to 60 days, as well as the possibility of a $30,000 civil fine. Liability is similar under most state WARN-type statutes. Prevailing employees in WARN-type litigation are entitled to attorney's fees. Such litigation is readily susceptible to class actions.

WARN has two prongs that must be analyzed separately: a "mass layoff" test and a "plant closing" test. These tests are well-defined by the statute, and should be carefully reviewed. NB: Webinar offers expanded explanation; employers should consult with counsel to ensure complete understanding.

Workforce reductions caused by sudden and dramatic business losses outside an employer's control due to COVID-19 likely constitute an "unforeseeable business circumstance" (UBC) under WARN. This includes employment losses resulting from government-ordered shutdowns.

Importantly, where WARN's UBC and/or natural disaster provisions are properly invoked in a situation where there is a WARN event, it does not mean that an employer need not give WARN notice. Rather, the employer still must provide as much advance notice as possible under the circumstances. If commercial reasonableness (e.g., following a rapid unforeseeable government shutdown) would not permit advance notice, notice after the reductions are implemented may be compliant.

Most—but not all—state WARN-type statutes also have some form of UBC and/or natural disaster-type notice reduction provisions. Notably, ordinarily California WARN does not contain a UBC provision. However, on March 17, 2020, California Governor Newsom issued an Executive Order (N-31-20) which essentially imported the federal UBC concept into California WARN for the duration of the current emergency.

Reductions in Force (RIFs)

Five steps beyond WARN towards a compliant and constructive reduction:

1. Document the business case for RIF
2. Conduct expedited, focused and privileged adverse impact analysis
3. Select employees for RIF based on specific, reasonably objective and forward-looking factors applied consistently
4. Pay SOME severance to get an enforceable release
5. Provide impacted employees all the free and low-cost assistance you can

Business case for the RIF: This is Exhibit A in any litigation that may arise. This written document should function as a big picture summary of the reasons for the RIF, scope of the RIF, plus monetary costs and savings, and the planning and selection process. You WILL have to defend this down the road. All drafts should be PRIVILEGED, and reviewed by inside and outside counsel. Focus on positions, not people.

To help avoid a costly class or collective action, do make time to run disparate impact analysis. A DIA done right examines whether you are disproportionately selecting employees from protected classes for RIF. You need not intentionally discriminate in order to be held liable for such disparities.

How to select employees for RIF

- Begin with roles and positions, not people
- Include definitions and instructions for managers
- Systematically identify single incumbent roles for elimination; cherry picking will be difficult to defend
- Apply selection criteria consistently, especially among common decision-makers
- Compare multiple incumbents based on selection factors that are current, account for but not driven by tenure, rate employees against each other based on reasonably objective skills and competencies, account for but aren't driven by most recent performance appraisal (because it's backwards-looking), and aim for future success without red flags like "potential." Recent performance matters, but you may not want it to be the predominant factor because you may need someone more versatile going forward.

AVOID 11th HOUR CHANGES! - Legal and HR must guard against this, and scrub those they can't stop

Legal and HR together must ensure that the finished product is a non-privileged record of why each impacted employee was selected for RIF (and why others were not).

To minimize exposure, you must get a release of all claims that can be released. For employees over 40, the release must comply with the OWBPA, which means you must provide an ages and titles disclosure. This is a must have to get a valid age waive in the RIF context.

Pay severance or something beyond what employees are owed to get a release. If you can't afford current severance, amend your severance plan or change your practice to pay what you can afford.

Benefits Considerations

If someone is terminated as a result of a RIF, COBRA rights will be initiated. For insured benefits like life insurance or long-term disability, there may be conversion rights available in those insurance policies through which an individual could convert that group policy into an individual policy for coverage post termination.

In the event of a furlough, if there is a reduction in hours that triggers a loss of coverage, COBRA rights are triggered.

However, if you rely on the ACA measurement and stability period, then that employee may need to continue to be eligible for medical coverage through the remainder of that stability period, even if their hours drop.

You may decide you want to amend the plan to provide coverage while people are furloughed. If you do, and your benefits are fully insured, you should work with your insurance carriers to make that change. If your benefits are self-insured, you have a little bit more flexibility, but you would still need to coordinate that type of amendment or change with your stop-loss insurance carrier to make sure that they would continue to cover any of those expanded groups.

With respect to dependent care flexible spending accounts (FSAs), IRS rules do permit mid-year changes in elections for dependent care in certain circumstances which may be coming into play here.

Finally, if you are going to a RIF route, start by reviewing your severance plan, if you have one in place. If you don't already have a severance plan in place, we recommend considering an ERISA severance plan. When a severance plan is subject to ERISA, it is advantageous for many reasons, including a mandatory internal claims and appeals process before proceeding to court and a deferential standard of review with litigation in federal court.

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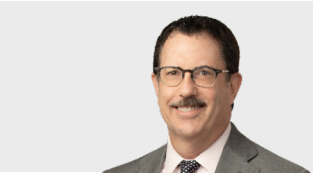

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