



WARN, Furloughs, and RIFs:

Obligations and Best Practices when
considering COVID-19 Workforce Reductions

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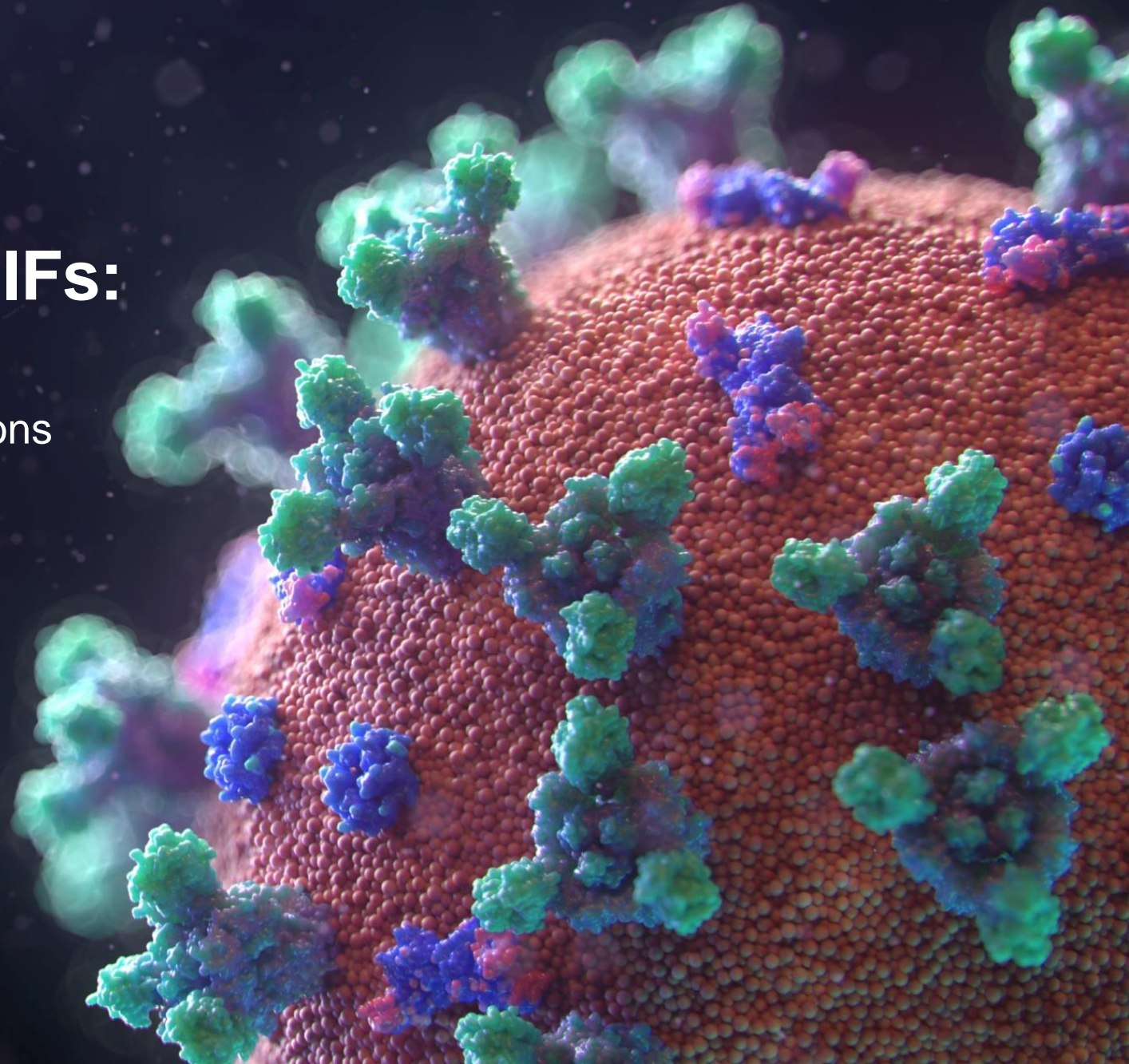
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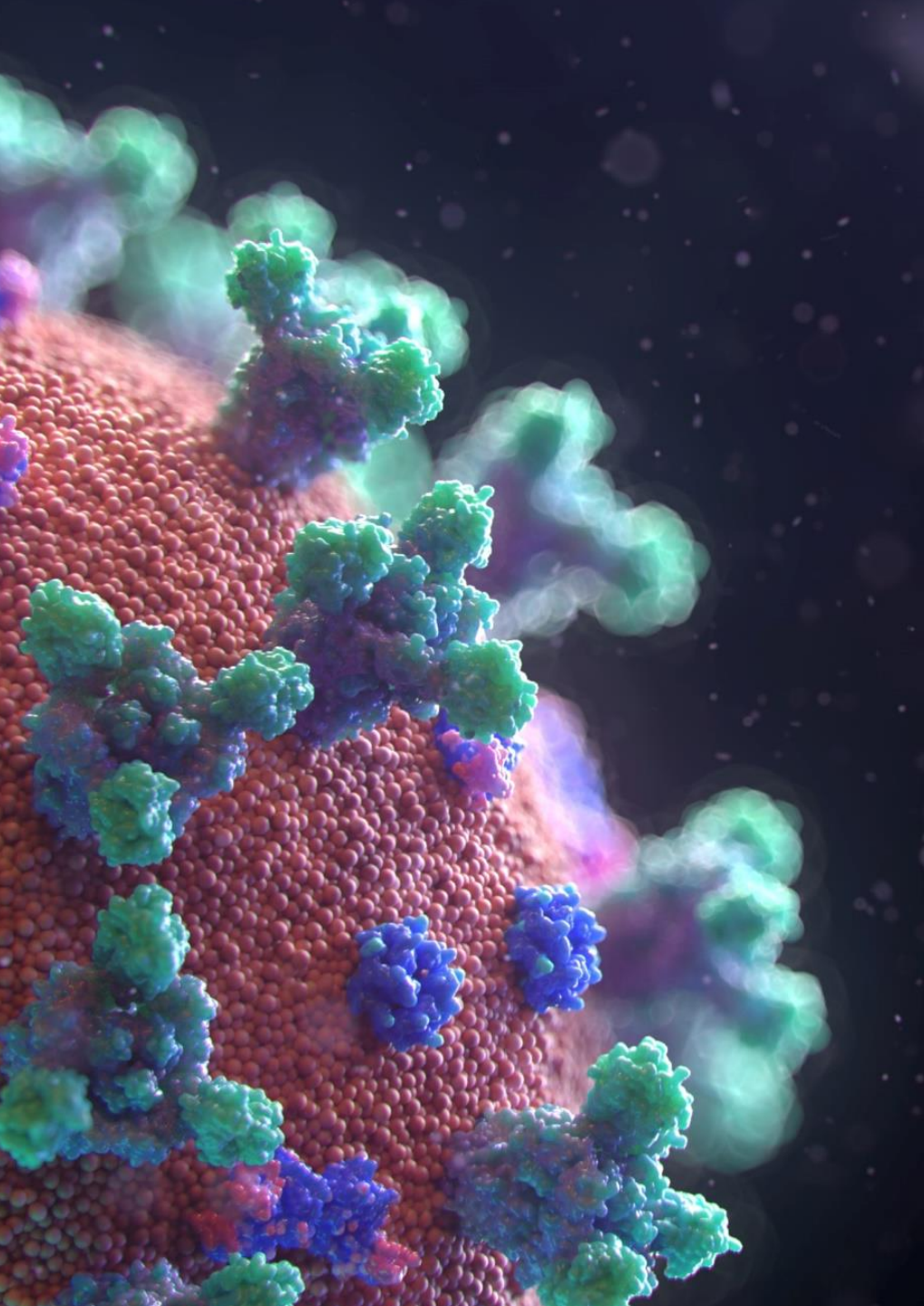
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Objectives

01 Furloughs

02 WARN

03 RIFs

04 Benefits

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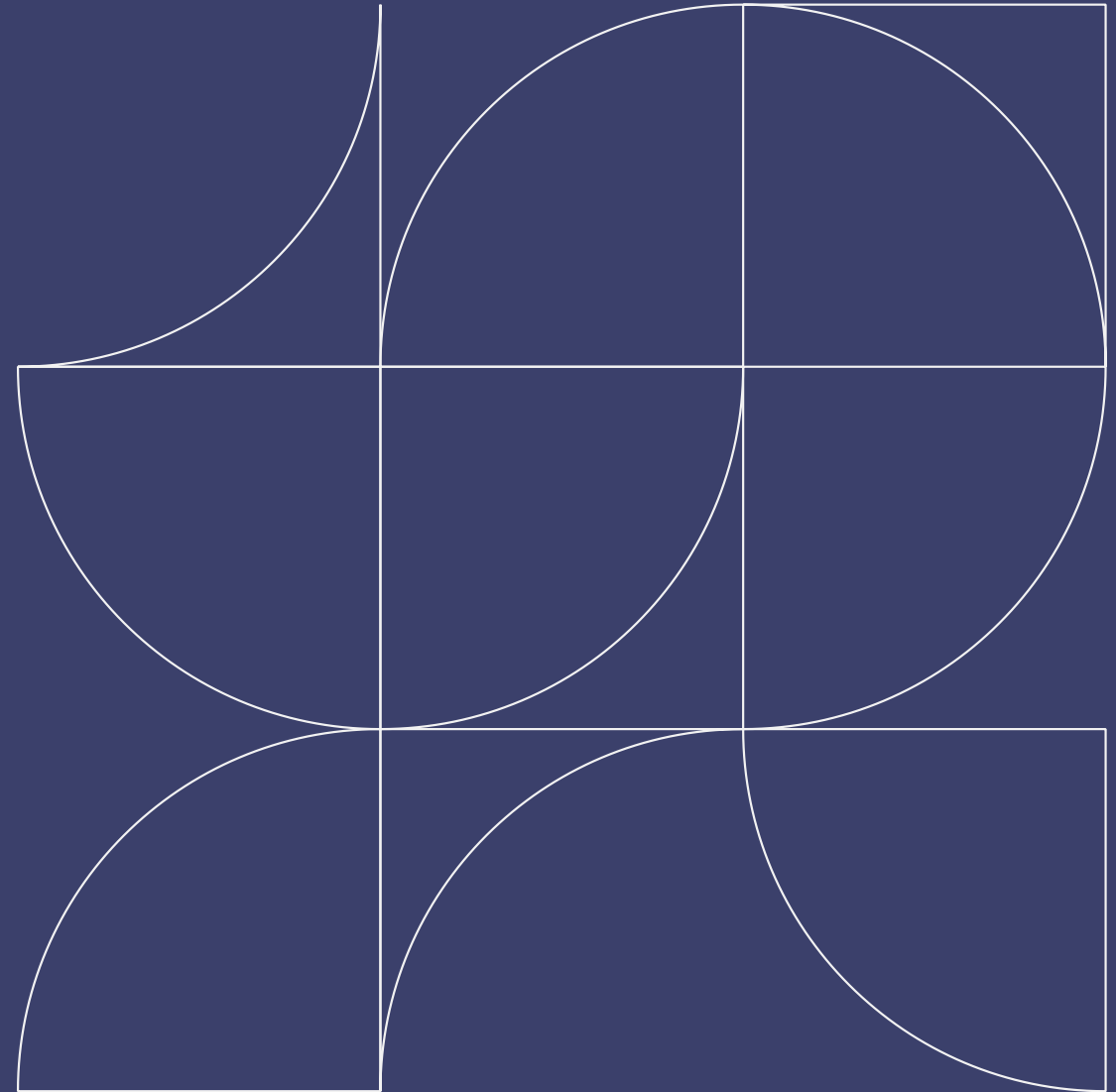


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Furloughs



What is a furlough?

- Involuntary, temporary period of:
 - time off from employment
 - or
 - reduced schedule
 - e.g., workweek reduced from 5 days to 4 days
- Furloughs can be for a defined period of time or for a more indefinite period
- The primary difference between a lay-off and a full furlough (i.e., employees are not working and not getting paid) is that they are temporary – at the time of the furlough, the employer expects employees to return to work once business conditions change.





Alternatives to RIFs

- “Furloughs” are on the rise
 - Seem to fit the current situation, a temporary fix to address a temporary set circumstances
- Salary reductions are also on the rise
- Why are employers pursuing alternatives to RIFs?
 - Avoids cutting into backbone
 - Employers want to retain trained employees who will be needed when the crisis is over
 - Immediate economic benefit versus a RIF
 - Does salary reduction boost morale through “shared sacrifice”?
 - Business Stimulus Incentives – CARES Act
 - Unemployment Benefits

What is a furlough?

- Most popular alternative to a RIF is a furlough (mandated time off without pay) or a reduced schedule
- The largest obstacle to a furlough is maintaining the salary basis of pay for exempt employees
 - Safest course is to implement full-week furloughs

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S	M	T	W	T	F	S
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8	9	10	11	12	13	14
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22	23	24	25	26	27	28
29	30	31				

The Salary Basis Test



Why does a furlough present a salary basis question?

- 29 C.F.R. § 541.602(a): “An employee will be considered to be paid on a ‘salary basis’ . . . if the employee regularly receives each pay period . . . a predetermined amount, . . . which . . . is not subject to reduction because of variations in the . . . quantity of the work performed.”
- 29 C.F.R. § 541.602(a): “An employee is not paid on a salary basis if deductions from the employee’s predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.”

Reduced Schedule/Salary



- 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



Other Considerations

- Check federal or state WARN laws
 - furloughs lasting less than 6 months generally won't trigger WARN obligations
 - check state law - particularly an issue in California
- Use of vacation and sick time
 - Families First Coronavirus Response Act includes paid sick time and leave for absences related to COVID-19
 - do not mandate use of statutory sick time
 - consider allowing/requiring use of vacation/PTO
- Final pay obligations may be triggered in some states (including pay-out of vacation time)
 - particularly an issue in CA, MA & OR
- Understand impact on employee benefits
 - do employees need to be actively at work
 - hours threshold for benefits

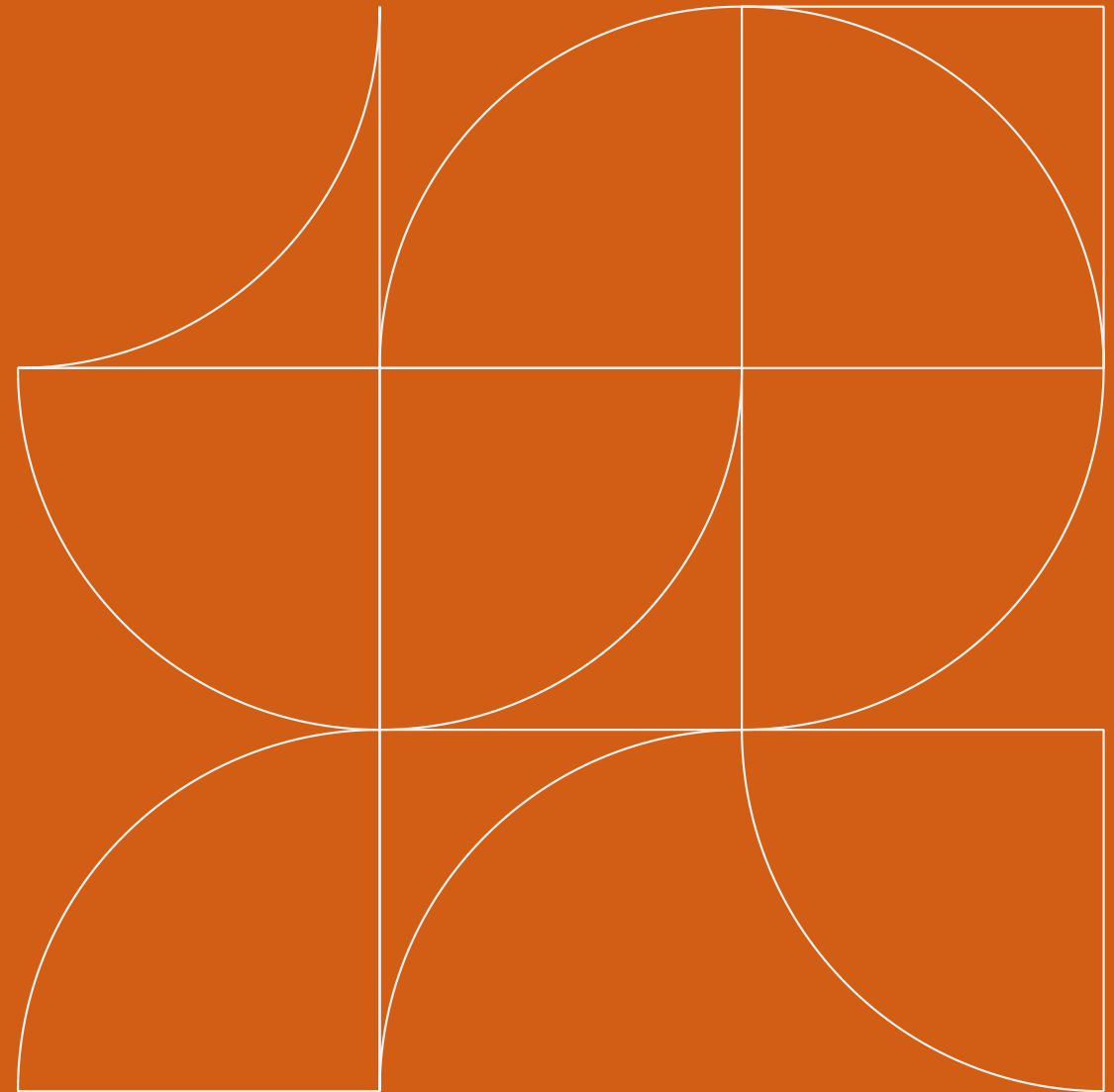
Other Considerations

(continued)



- Availability of unemployment benefits
 - partial unemployment for reduced schedule
 - additional benefits included in CARES Act
 - \$600 bump for 4 months
 - no waiting periods
 - extend time benefits available by 13 weeks (39 week max)
- Employee Retention Tax Credit
- Consider immigration issues
 - special rules apply to employees on work visas
- Review individual employment agreements
- Check severance plan to determine if furlough triggers severance benefits

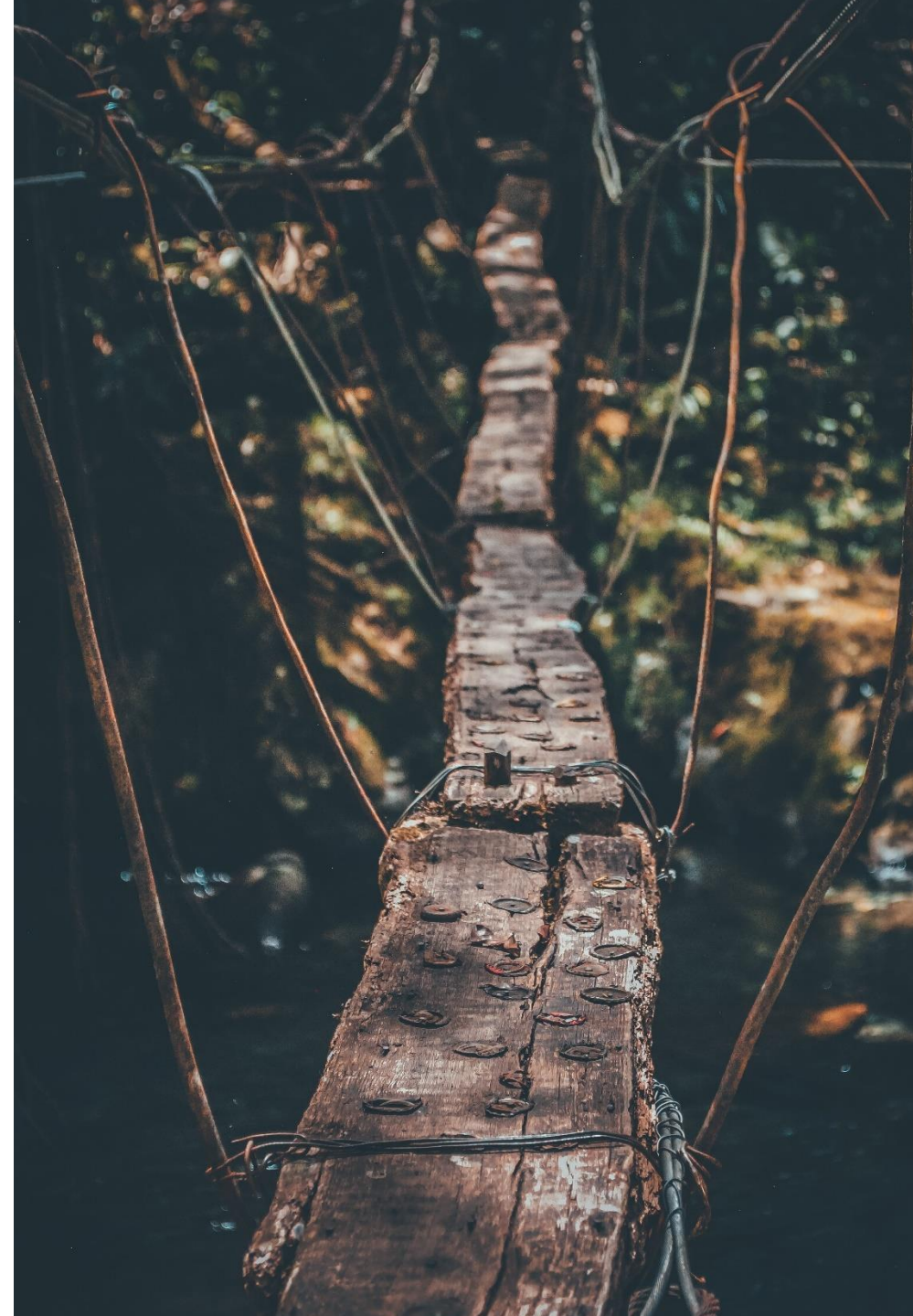
WARN



Does WARN apply in the COVID-19 pandemic

What are the penalties?

- Types of separations that can trigger WARN
 - terminations
 - layoffs
 - furloughs/hours reductions
 - closures of facilities or operating units
- Potential penalties
 - back pay
 - benefits
 - out-of-pocket medical expenses
 - civil fines



WARN's triggering thresholds



- Size of employer/facility
 - Truly small employers may be excluded
 - For large employers
 - number of FTE employment losses at a “single site”
- Two prong analysis
 - Mass layoff
 - Plant closing

Will a reduction in employee hours result in a WARN event?



- Under WARN, an hours reduction of at least 50% in each month of a 6-month period constitutes an employment loss.
- Some states may find an employment loss has occurred with a smaller or shorter hours reduction.

How do I treat employees who were discharged for cause?



- Under WARN, a discharge for “cause” is not an employment loss.
- Employer should be cautious in not counting such a termination because if it is scrutinized, the employer may need to show that the discharge was not an attempt to evade the purposes of WARN.

What information must a WARN notice contain?



What about state WARN-type statutes?

WARN requires employers to provide

- all affected non-union employees
- union representatives of affected employees
- the “dislocated workers unit” of the state in which the affected employment site is located
- the chief elected official of the municipality in which the affected employment site is located; and/or
- the chief elected official of the county in which the affected employment site is located
- with at least sixty (60) calendar days advance written notice prior to any covered “plant closing” or “mass layoff” occurring at a “single site of employment.”
- The same notice can be utilized to comply with most state WARN-type statutes. California, New Jersey, and New York are especially notable (but not the only) exceptions.

What if I don't know how long a layoff will last?



- If at the time of a layoff an employer -- based upon the best information available to it, and exercising commercially reasonable judgment -- reasonably concludes that a layoff will not last at least 6 months, it will not have to provide WARN notice at that time. As these are fact intensive considerations, there is risk.
- If, based upon circumstances reasonably unforeseeable at the time of the beginning of the layoff, the layoff is to be extended beyond 6 months, the employer then must give WARN notice as soon as possible, while presumably invoking the UBC notice reduction provision.
- Many but not all state WARN-type statutes include similar provisions.

What if I need to postpone employment separations previously announced in a WARN notice?

Supplemental notices may be required under WARN

- the postponement is for less than 60 days, the additional notice should be given as soon as possible and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement
- the postponement is for 60 days or more, the additional notice should be treated as new notice



What states have WARN-type statutes



What are some notable differences from federal WARN?

Some of the most notable are :

- California
- Illinois
- Iowa
- New Hampshire
- New Jersey
- New York
- Wisconsin

Does the COVID-19 pandemic qualify for one or more of the notice reduction provisions under WARN and/or state WARN-type statutes?

- 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.

- The DOL's "natural disaster" regulation does not explicitly reference pandemics; but, rather mentions floods, earthquakes, and other disasters. If a particular natural calamity qualifies, the employment losses must be the "direct result" of the disaster itself. If COVID-19 is a natural disaster under WARN, it is unclear what constitutes a "direct" causal result, e.g., employees themselves becoming infected, an employer's facility becoming unusable for health reasons, etc.
- Most -- but not all -- state WARN-type statutes also have some form of UBC and/or natural disaster-type notice reduction provisions.

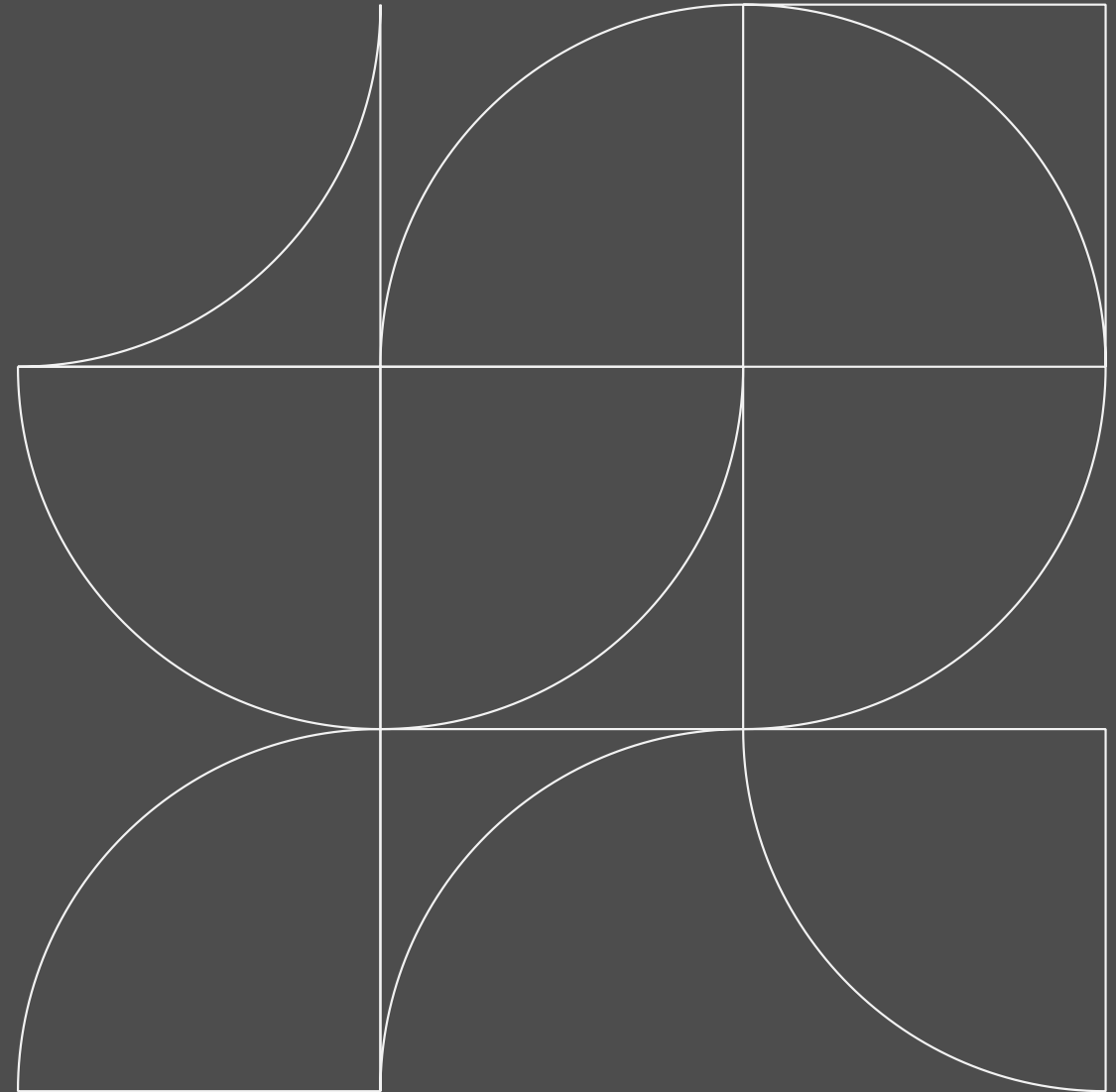


Other common WARN considerations



- part time employees
- temporary employees
- bona fide contractor employees
- voluntary WARN notice
- limitations on using severance to satisfy WARN liability

Reductions in Force (RIFs)



RIF Overview in this COVID-19 Era



Three stages of COVID-19 and employer staffing decisions

1. Furlough for now
2. Then deep lost cutting across many industries (as in 2009)
3. Other industries will slash and burn unless non-COVID trends are reversed

Fiscal & monetary measures

- Real across the board relief, or a temporary reprieve at best?
- For most employers, Stimulus Bill relief puts the ball in your court.

Can an employer do *something* post-furlough besides a RIF if revenue hasn't bounced back?

**5 steps beyond
WARN** towards a
compliant and
constructive reduction



1. Document the business case for RIF.
2. Conduct expedited 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.

The Business Case for RIF

- A big picture summary of the reasons for RIF, scope of the RIF, plus RIF monetary with costs and benefits. Should identify general time-frame of planning and selection decisions plus key decision-makers.
- Focus on positions, not people
- Think of this a “Exhibit A”
- Business leaders must buy in, approve, and (hopefully) engage
- HR should drive a privileged draft for Legal review



Disparate Impact Done Right



- Why run DIA
- When and how to run DIA
- Who gets and should discuss results?
- What are the possible uses and abuses?

Selecting Employees for RIF or Retention



- Pre-Covid reality often entailed *processes plural*
 - Informal and formal
 - Preliminary and final
 - 11th hour additions or other changes, sometimes beneath Legal's radar
- The official selection process:
 - Begins with roles and positions, not people
 - Contains definitions and instructions for managers
 - Systematically identifies single incumbent roles for elimination
 - Compares 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 not driven by recent performance, and aim for future success without red flags like "potential"
 - Gets applied consistently, especially among common decision-makers

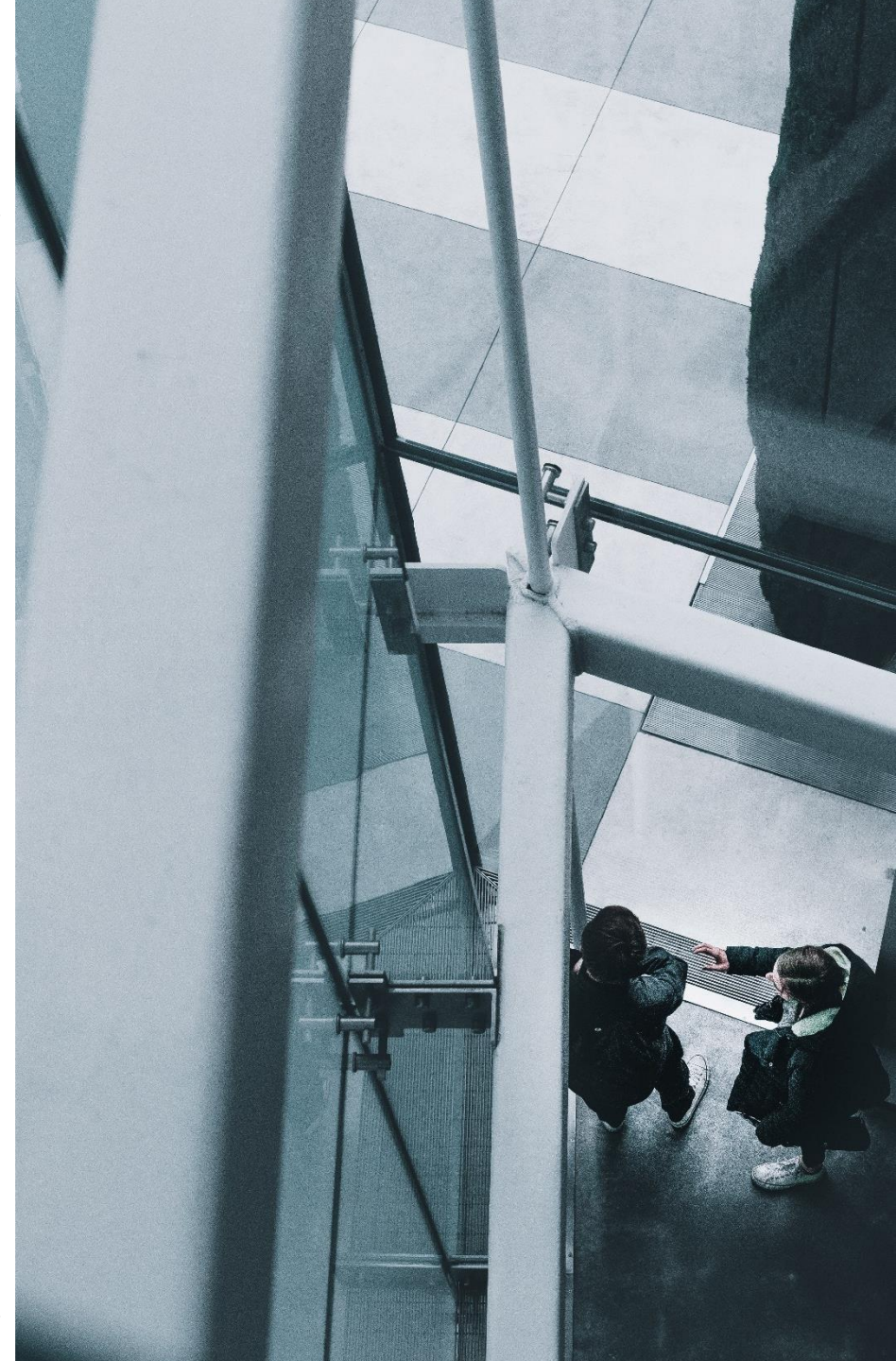
Selecting Employees for RIF or Retention (continued)



- Legal and HR must guard against unofficial selections and selection changes.
- 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).

Severance and Release Issues Generally

- Providing some severance to get a release still makes sense.
- Complying with ERISA and the Older Workers Benefit Protection Act (OWBPA) still makes sense.
- Costs of non-compliance include:
 - Potential exposure to class actions or multi-plaintiff suits
 - Potential enforcement actions by agencies
 - Costs incurred in refuting even baseless claims
 - Business time lost in defending litigation



Severance and Release Issues Generally



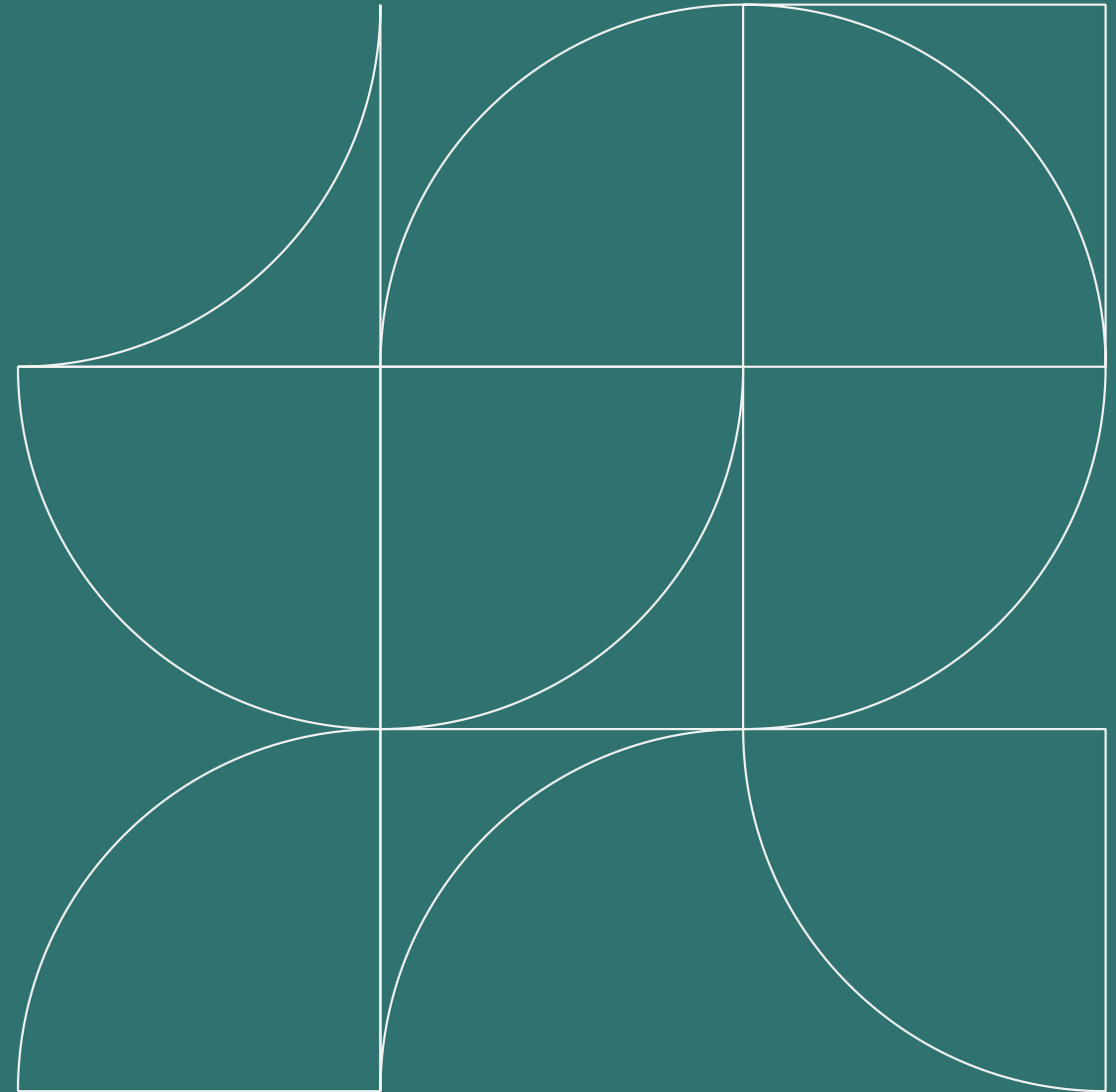
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Severance and Release Compliance Requirements



- Release must comply with numerous new state law requirements.
- For those age 40 or above, OWBPA disclosure must include not only necessary ages and titles minimum but also other material information.
- Incorporated agreements or policies must comply with other applicable law to be enforceable.
- All in plain English, so comply but don't over-lawyer it

Benefits



Welfare Benefits



- Consider status of impacted employees
- Plan terms govern eligibility:
 - Terminated
 - COBRA
 - Conversion rights for insured benefits
 - Furlough/Leave of Absence
 - Reduction in hours + loss of coverage = COBRA right
 - May not lose coverage:
 - ACA measurement and stability periods
 - Families First Coronavirus Response Act leave
 - Paid/unpaid leaves of absence

Severance/ Furlough – Health and Welfare Benefits

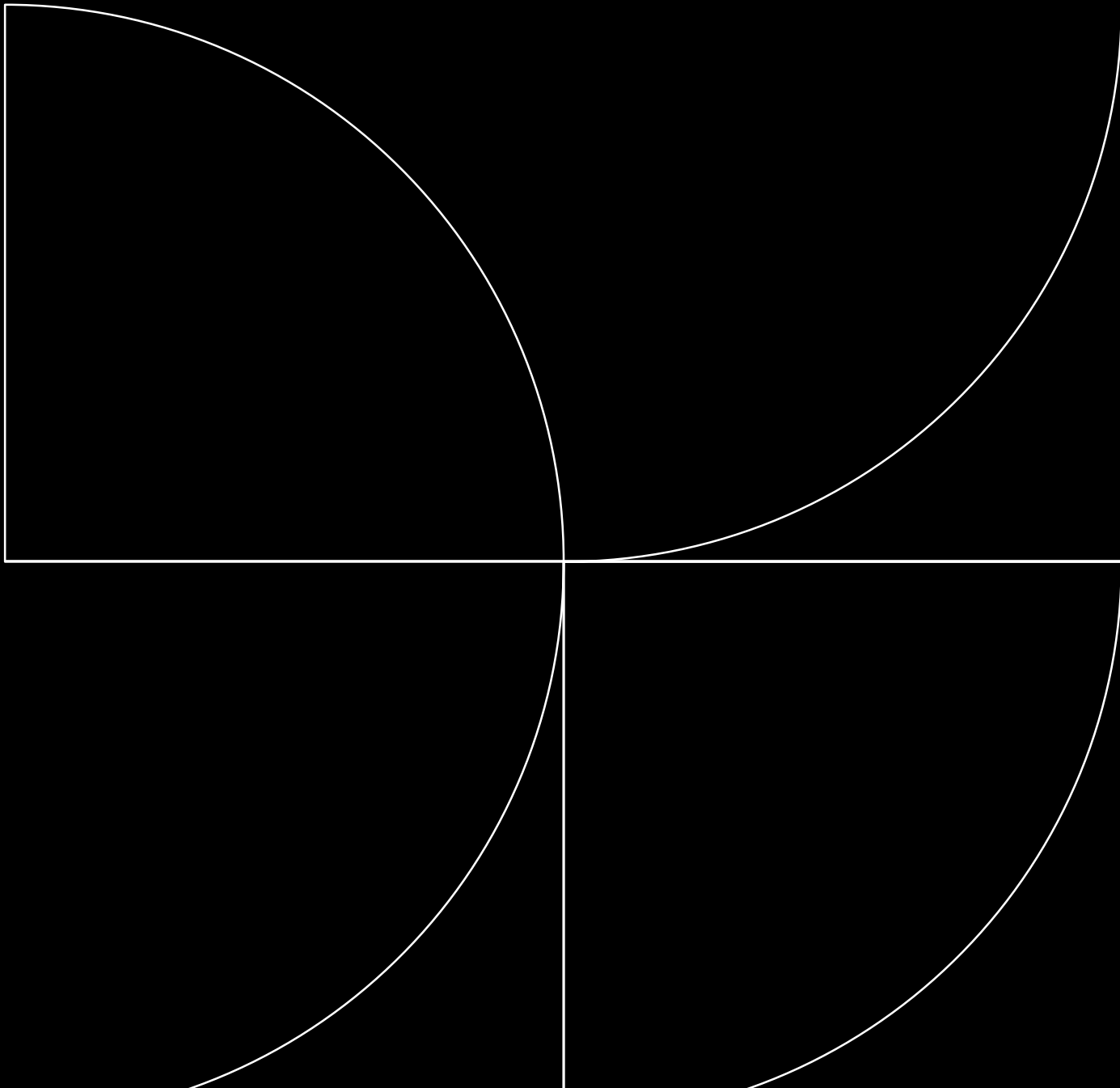


- Consider desire to bridge benefits:
 - Plan amendments
 - Coordination with insurance carriers (i.e., stop loss for self-funded medical; fully insured benefits)
 - Payment of premiums
 - COBRA subsidies
 - Portability/conversion rights
- Flexible Spending Account (FSA) considerations

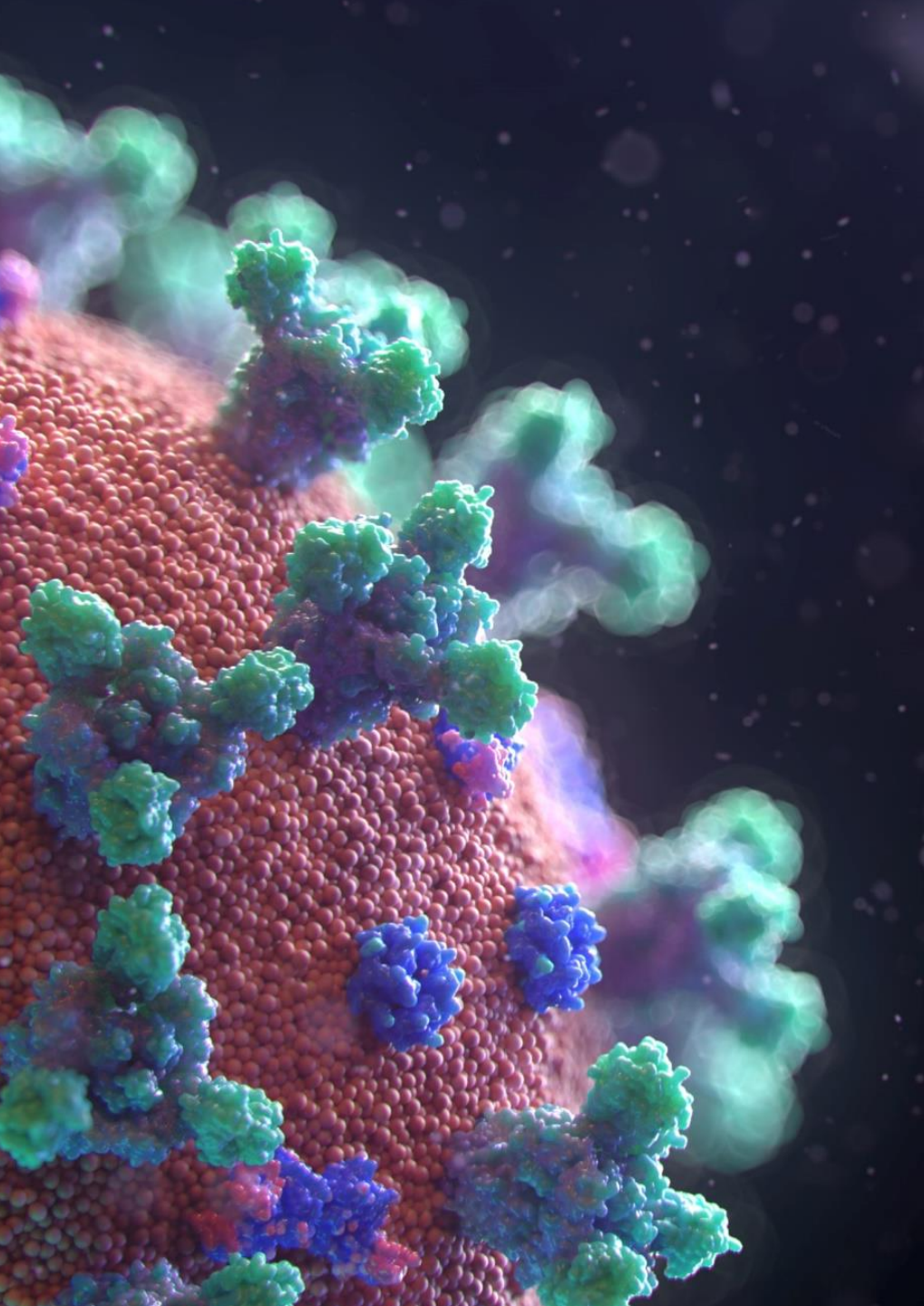
Severance Benefits



- Current severance plan
 - Review terms
 - Desired eligible group
 - Desired benefits
 - Possible amendment?
- If no severance plan in place, consider adopting ERISA severance plan
 - Desired eligible group
 - Desired benefits
- Consider WARN offset



Questions?



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