Coronavirus: Employee furloughs, reductions-in-force and similar temporary cost-saving measures in the US - Part 1

Employment Alert

COVID-19 Alert

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The rapidly evolving coronavirus disease 2019 (COVID-19) pandemic is affecting employers in numerous ways, including critical challenges to businesses and supply chains. Among other things, COVID-19 has also forced certain employers with cash flow emergencies to consider furloughs, reductions in work schedules/pay and other cost-saving measures. This alert addresses key employment-related issues for US-based employers in relation to these and similar temporary measures for non-unionized workforces.

For purposes of this alert, we assume an “at-will” employment relationship, in which an employer is not prohibited by statute or contract/agreement from deciding to lay off employees or reduce working hours/pay unilaterally.

Furlough format

The most common furlough methods are one-time and rolling cycle furloughs. A one-time furlough is a situation where employees are essentially laid off for a period of time with a planned restart date or plan to reassess upon

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changing business circumstances. This type of furlough is most appropriate where revenue and demand have disappeared given current restrictions or market conditions. Rolling cycle furloughs are programs where each employee takes a one-week or longer furlough once in a fixed, rolling period of time (*eg*, every eight weeks). This type of furlough is helpful to businesses with reduced demand and cash-flow concerns, but with a steady need for active employees. Partial week furloughs, while permissible, present substantially more administrative difficulty.

Wage and hour considerations

As described below, employers are reminded to observe applicable federal and state wage and hour laws when considering a furlough or reduction in work schedules/pay.

Exempt employees

In most cases, an exempt employee must be paid a guaranteed salary equal to or greater than the minimum amount set by law (currently, at least $684 per week under federal law) for any week in which work is performed. In addition, typically an employer is expected to pay an exempt employee a predetermined amount during each pay period, to not reduce pay because of either the quality or quantity of the employee's work, and to not take impermissible deductions from the employee's salary. To meet the conditions of the salary basis test, in most circumstances, employers are encouraged to implement furloughs for exempt employees in full-week periods and make prospective changes in schedule and pay with advance written notice.

For full-week shutdowns, employers need not pay exempt employees for any week in which no work is performed. Employers are cautioned, however, to attempt to take appropriate measures so that affected exempt employees do not perform any work during these shutdown weeks. Many employers consider implementing procedures to restrict employees from working during these periods; for example, formally banning employees from performing any work during these weeks (and enforcing such bans) and eliminating access to work tools during shutdown weeks.

Employers are generally permitted to make prospective changes to exempt employees' schedules and pay. When doing so, however, employers are encouraged to consider clearly notifying employees before implementing the reduced schedule and/or salary, and providing reasonable advance written notice of the change. Some states may require certain minimum advance notice to be provided or may limit the ability to make changes to only certain types of compensation. Any reduced salary also must continue to satisfy the salary basis test.

Non-exempt employees

Fewer of the foregoing concerns generally apply to non-exempt employees. For non-exempt employees, employers are required to pay employees for hours actually worked. Otherwise, unless limited or restricted by state law or employee agreements, an employer generally may require hourly non-exempt employees to take unpaid days off. Some states and cities, however, may require compensation for sudden schedule changes (for example, under predictive scheduling laws in certain sectors). In any case, employers are expected to continue to pay non-exempt employees at least minimum wage and overtime under federal law and applicable state wage and hour laws for all hours worked.

Impact on employee benefits

Employers are encouraged to review employee benefit plans and policies to determine if and when coverage ends due to a furlough and/or reduced schedule. For many large employers, employee group health coverage will not be lost during a furlough.

Large employers (those with at least 50 full-time employees, including full-time equivalents) determine eligibility for coverage under the Affordable Care Act (ACA) rules on eligibility. These rules include using a "measurement period" and "stability period" for determining full-time status for benefits eligibility. The measurement period is a period of prior service over which average hours of service are tracked, often a 12-month period (the prior plan year). Those employees averaging at least 30 hours of service during the measurement period typically are considered full-time employees for coverage purposes during the following "stability period."

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The stability period is the period for which the employee is eligible for coverage, usually the plan year itself. Where an employee is considered full-time based on hours worked during the prior plan year (measurement period), the employee typically will then be entitled to plan coverage during the current plan year (stability period), regardless of reductions in hours that may occur due to furlough or other extended absence.

Nonetheless, if the employer uses a different method for determining coverage or is not subject to the ACA, and the employee's coverage ends under a health plan due to a layoff or reduction in hours, under the Consolidated Omnibus Budget Reconciliation Act (COBRA) (or state mini-COBRA statute if a small employer is not subject to COBRA), employers generally are expected to offer group health plan continuation coverage to covered employees and their spouses and dependent children. Although participants are required to pay for such coverage, an employer voluntarily may opt to reimburse or pay employees for such coverage (but need not do so). Failure to provide notice of COBRA rights may potentially result in penalties and excise taxes.

Advance notice requirements

An extended furlough or reduction in working time may trigger notice requirements under the Worker Adjustment and Retraining Notification Act (WARN) and/or similar state laws (sometimes referred to as "mini-WARN" statutes).

The federal WARN requires employers to provide employees 60 days' advance notice before a plant closing or a mass layoff. WARN applies to employers with 100 or more employees (excluding part-time employees), and to employers with 100 or more employees, including part-time employees, who collectively work at least 4,000 hours each week (excluding overtime). The WARN notice requirements are triggered when there is a plant closing, or when, over a period of 90 days at a single site of employment, at least 500 employees, or at least 50 employees who make up one-third of active employees, experience an "employment loss." A layoff exceeding six months or a reduction in work hours of more than 50% during each month of a six-month period would constitute an "employment loss" under WARN. Temporary layoffs of less than 6 months generally do not trigger the federal WARN requirement. If WARN is triggered, employers must provide notice to (i) affected employees or their representatives (*eg*, unions); (ii) the state dislocated worker unit, and (iii) the appropriate unit of local government.

Exceptions to the 60-day advance notice requirement

A reduction to the 60-day advance notice requirement may be allowed in certain, limited circumstances, which could be implicated by COVID-19, such as when a plant closing or mass layoff is caused by a natural disaster or unforeseeable business circumstances.

The exception for a natural disaster generally applies if a plant closing or mass layoff is caused by a natural disaster such as a flood, earthquake, drought, storm, or similar effects of nature. To qualify for this exception, an employer typically must be able to show that the plant closing or mass layoff is a direct result of the natural disaster.

The exception for unforeseeable business circumstances generally applies if a plant closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required. A business circumstance is generally not reasonably foreseeable if it is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. The test for determining when business circumstances are not reasonably foreseeable focuses on factors such as an employer's business judgment. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

It is unclear at present whether a plant closing or mass layoff due to COVID-19 would satisfy the natural disaster exception, but it may constitute an unforeseeable business circumstance. A reduced notice period may also provide employers some relief from any WARN issues caused by COVID-19, but typically, these exceptions may be construed narrowly by courts, and it remains unclear at present whether they would apply. An employer relying on these exceptions is therefore encouraged to still give as much notice as is practicable and be able to explain the basis for reducing the notification period.

State WARN requirements

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Employers may also have advance notice requirements under the “mini-WARN” statutes of certain states (even if federal WARN is not triggered). Some state mini-WARN statutes apply to smaller employers, require a longer advance notice period, or may be triggered by a shorter layoff period or when a smaller employee population is affected. Moreover, some state mini-WARN statutes do not include the unforeseeable business circumstances exception contained in the federal law.

In California, for example, the state mini-WARN would generally apply for employers with more than 75 employees who lay off at least 50 people or close a single site of employment. But in order to relieve employers of the California mini-WARN notice obligation, on March 17, 2020, Governor Gavin Newsom issued an Executive Order suspending the California WARN Act's 60-day notice requirement for all covered layoffs, terminations, and relocations occurring on or after March 4, 2020, if the employer:

> (i) Gives the written notices specified by Section 1401(a) – (b) of the California WARN Act to the employees and required government agencies;
>
> (ii) Gives as much notice as is practicable and, at the time the notice is given, provides a brief statement of the reason for reducing the notification period;
>
> (iii) Orders such a mass layoff, relocation or termination due to “COVID-19-related business circumstances that were not reasonably foreseeable as of the time that notice would have been required”; and
>
> (iv) For all notices on or after March 17, 2020, include (in addition to all other required language) the statement: “If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019.”

Paid time off and final pay rules

An employer potentially may consider suspending usage of paid time off (PTO) during a furlough. In certain situations, the use of PTO may also disqualify employees from unemployment insurance income during the period of PTO. An employer potentially may also consider suspending accrual of additional PTO (on a going-forward basis) during a furlough.

Additionally, some states have requirements governing the payment of accrued and unused PTO and final pay following a termination. Although a furlough is not intended as a “termination,” an indefinite or distant return to work date may potentially create risk that the furlough may be construed as a termination and, as such, that final pay should have been paid as such. Employers are encouraged to seek guidance on these issues, particularly in California, where potential penalties for wage and hour non-compliance may be substantial.

Potential discrimination issues

Employers are encouraged to carefully select employees included in any furlough or reduction to avoid a disparate impact on employees in a protected class (*ie,* when a greater proportion of employees in a protected class are selected than what would be statistically expected given the demographics of the selection pool). We encourage employers to consider using objective, consistently applied selection criteria, and documenting the decision-making and selection process.

Employment agreements

An employer implementing a furlough or reduction in pay/schedules is likewise encouraged to review all relevant agreements, policies, and practices to determine whether they limit or restrict the employer's ability to implement a furlough or a reduction in schedules/pay without creating additional obligations (*eg,* severance pay).

If you have any questions regarding these new requirements and their implications, please contact any member of the DLA Piper Employment group, or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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