

NOW +

NEXT

EMPLOYMENT LAW ALERT | NIXON PEABODY LLP

MARCH 17, 2020



Workforce management in response to COVID-19 business interruptions and closures: Voluntary leaves, hours reductions, furloughs and layoffs

By Tara E. Daub, Alicia Anderson, Hillary Baca, Andrew Prescott, Brian Alcala, and Yelena Gray

Employers in most industries are carefully considering their options and response to the national state of emergency and implications of the COVID-19 pandemic. While some employers can continue operations through remote work arrangements, many employers face business interruptions that cannot be avoided. Employers are considering temporary options to sustain their businesses depending on a range of short-term and longer-term scenarios. In an effort to avoid layoffs and retain their key talent for the longer term, employers have a range of options, from voluntary programs to hours reductions and temporary furloughs. This alert will discuss potential options including both layoffs and alternatives to layoffs, focusing on legal compliance issues and pitfalls. This alert also discusses employee benefit plan issues.

In addition, other recent alerts are available that focus on employment issues such as OSHA, travel restrictions, and paid leave:

- [“What employers need to know now about the impending U.S. House of Representatives COVID-19 paid leave bill,”](#) March 17, 2020
- [“Key group health plan administration considerations in response to coronavirus,”](#) March 12, 2020
- [“COVID-19: Occupational safety and health update,”](#) March 04, 2020
- [“Public health emergency: Managing global workforce during Coronavirus outbreak,”](#) February 03, 2020
- [“Employers have responsibilities as coronavirus exposure and transmission-related fears grow,”](#) January 29, 2020
- [“Paid parental leave for federal workers,”](#) December 20, 2019
- [“Homeland Security issues additional travel restrictions, screening procedures,”](#) March 16, 2020
- [“Immigration update — Covid 19 travel ban,”](#) March 12, 2020

Alternatives to layoffs

The coronavirus pandemic is forcing businesses to adapt in various ways such as work from home arrangements, reductions in hours, reductions in salary or other compensation, and temporary layoffs or furloughs.

Voluntary leaves and exit packages

Employers may take an initial step of offering non-essential employees voluntary unpaid leaves of absence, during which they would temporarily cease working but the employer may offer incentives such as continuation of certain benefits or incentives to return promptly when business ramps back up at the end of the business slow down or interruption.

Employers may also offer voluntary exit incentive plans, normally subject to a written separation and release agreement. When structuring eligibility and benefits under such a plan, employers should keep in mind the requirements and procedures of the Older Workers Benefit Protection Act (“OWBPA”).

Reduction of hours and compensation

Employees who are “exempt” from the Fair Labor Standards Act (“FLSA”) and similar state laws do not have to be paid overtime. To be classified as exempt, an employee must generally be paid on a “salary basis,” which means that the employee must regularly receive a predetermined amount that is not subject to reduction because of variations in the quality or quantity of work performed. Under federal law, exempt employees must generally receive a salary of at least \$684 per week (which amounts to \$35,568 on an annualized basis). States such as California and New York have higher minimum salary thresholds that must also be met.

Under the FLSA, deductions may not be taken from an exempt employee’s salary for absences of less than a week due to the fault of the employer or the operating requirements of the employer, including the inability of the employer to provide work. With limited exceptions, employers may take deductions from an exempt employee’s pay only where the employee performs no work at all (anything beyond *de minimis*) during an entire workweek. As a result, to achieve cost savings in this type of emergency, an employer would need to formally reduce the weekly salary level for an exempt employee, while either maintaining at least the minimum required salary level or converting the employee to hourly pay.

As for salary reductions, employers may reduce the salaries of exempt employees for business reasons. Reducing employees’ hours of work or the amount of required work does not excuse compliance with the federal or any applicable state law minimum salary. But employers may lawfully lower salaries on a temporary basis for reasons such as drops in revenue or demand for services relating to the coronavirus pandemic. When conditions improve, employers may restore such salaries to their pre-pandemic level or any other level of at least the federal or state law minimum.

With respect to non-exempt employees, administration of furloughs is less complicated. Since such employees are generally paid based on actual hours worked, reduced hours will translate directly into reduced pay. Employees may also reduce the daily hours of hourly-paid, non-exempt employees to achieve cost savings.

Care should also be taken when non-exempt (i.e., overtime eligible) employees work from home; an employer must make certain to continue to comply with the FLSA mandate to keep records of actual hours worked on a daily basis. Methods include apps for time entry or more basic electronic communication from employees about the amount of hours they are working while home. When employees check and respond to email, answer calls while away from work, or perform other tasks using technology, they are working. Employers must track such working time and be sure to pay at least the federal minimum wage and time and a half the regular rate of pay for all hours worked in excess of forty hours in a workweek.

However, employers considering implementing hours reductions for cost savings should be aware of state or local laws impacting an employer's ability to implement these changes without advance notice to employees. For example, some states require that employees be paid a certain minimum number of hours if they show up as scheduled for a work shift. In California, for example, the employee must be paid "reporting time" for at least half of a scheduled shift, and not less than two hours and not more than four hours if an employee reports for their regularly scheduled shift but is required to work fewer hours or is sent home. Local jurisdictions may also have advance notice requirements; Chicago and other large municipalities recently passed a sweeping law requiring employers of certain sizes to provide employees with advance notice of their work schedules (see our alert, "[Chicago passes Employee Predictive Scheduling Law and it's the most expansive law of its kind](#)," July 26, 2019). While some jurisdictions may loosen these requirements where business operations are ordered to be discontinued by civil authorities, recommended guidelines to cease operations may not be sufficient.

Employers should also be mindful of employee benefit plan issues when reducing an employee's scheduled hours. Most employee benefit plans, including health insurance plans, have eligibility requirements that require that part-time employees be scheduled to work a minimum number of hours. If an employee no longer meets these minimum requirements, the employee's eligibility for benefits could be impaired. Other benefit plan implications are further discussed below.

Temporary layoffs and furloughs

Furloughs offer some significant advantages over alternatives, such as reductions-in-force, as they enable companies to keep key talent, thereby reducing the time and expense required to "ramp up" when staffing needs increase. However, the Fair Labor Standards Act ("FLSA") and comparable state laws create traps for unwary employers, who may unwittingly endanger the exempt status of their exempt salaried employees by furloughing them for periods of less than one full week.

If an employer temporarily lays-off or furloughs exempt employees, the rule regarding paying an exempt employee a full week's salary in any week in which he or she performs any work applies absent a specific exception. For example, when an employer lays-off exempt employees temporarily on a Wednesday, the employer must pay those employees for the entire week. In contrast, exceptions to the rule against deductions may apply when an exempt employee is absent because he or she has COVID-19 or chooses to stay home from work for personal reasons such as taking care of children forced to be home from school. Generally speaking, the FLSA prohibits partial day deductions from exempt employees' salaries, but an employer may require the employee to use accrued but unused paid time off benefits. Improperly deducting pay from an exempt employee's salary can have serious consequences.

Employers considering furloughs or temporary closures should also consider potential notice requirements. Generally, the federal WARN Act's notice requirements are only triggered by layoffs

or business closures exceeding six months. However, they can also be triggered by a reduction in 50 or more employees' hours of work by more than 50% in each month in any six-month period (more on this below). Thus, a plant closing or mass layoff need not be permanent to trigger WARN obligations. Many states have their own versions of the WARN Act with different requirements. Employers should familiarize themselves with both federal and state WARN Acts before moving forward with a temporary layoff or furlough. These notice requirements are further discussed in the section below on permanent layoffs and closures.

Additionally, different states may treat temporary layoffs differently, particularly with respect to temporary layoffs without a fixed return date. It is important to understand what an employer's obligations are to employees on a furlough or mandatory leave in connection with the continuation of employment benefits, the payout of accrued and unused vacation or PTO, and the timing of delivery of final pay checks. Potential employee benefit plan implications are further discussed below.

Luckily, many states recognize a reduction of hours or temporary furlough as qualifying for unemployment insurance, providing at least some partial wage replacement for employees. In California, for example, workers whose hours have been reduced or whose employers have shut down operations because of the coronavirus qualify for unemployment insurance benefits. Various states also provide state disability and paid family leave benefits for employees who become ill or have to take care of a sick family member. Federal legislation on emergency benefits is currently pending and many states are considering state legislation.

Layoffs

Many employers have seen a drastic decline in business due to coronavirus that may ultimately make permanent layoffs or business closures unavoidable. These layoffs and business closures can trigger obligations under the federal WARN Act and state equivalents. Here are the basics.

The WARN Act requires advance notice of mass layoffs. Employers with 100 or more employees (generally not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week) must provide at least 60 calendar days' advance written notice of a plant closing or mass layoff affecting 50 or more employees at a single site of employment.

Federal WARN triggering events

There are a number of circumstances that can trigger an employer's WARN Act obligations. Generally, the WARN Act is triggered when a covered employer:

- Closes a facility permanently or temporarily, affecting at least 50 employees at a single site of employment. A plant closing also occurs when an employer closes an operating unit that has fewer than 50 workers but that closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more;
- Lays off 500 or more workers at a single site of employment during a 30-day period; or lays off 50–499 workers, and these layoffs constitute 33% of the employer's total active workforce at a single site of employment;
- Announces a temporary layoff of less than six (6) months that meets either of the two criteria above and then decides to extend the layoff for more than six months. If the

extension occurs for reasons that were not reasonably foreseeable at the time the layoff was originally announced, notice need only be given when the need for the extension becomes known. Any other case is treated as if notice was required for the original layoff; or

- Reduces the hours of work for 50 or more workers by 50% or more for each month in any six-month period.

Calculating the timeframe to determine whether WARN Act notice is required

The WARN Act looks at the employment losses that occur over a 30-day period. For example, if an employer closes a plant that employs 50 workers and lays off 40 workers immediately, and then lays off the remaining 10 workers 25 days later, that is a covered plant closing.

The WARN Act also looks at the employment losses that occur over a 90-day period. An employer is required to give advance notice if it has a series of small terminations or layoffs, none of which individually would be covered under WARN but which add up to numbers that would require WARN notice. An employer is not required to give notice if it can show that the individual events occurred as a result of separate and distinct actions and causes and are not an attempt to evade WARN.

Penalties for failing to provide WARN notice

Employers who violate WARN are liable to each affected employee for an amount equal to back pay and benefits for the period of violation, up to a maximum of 60 days. An employer who fails to provide notice as required to a unit of local government may also be subject to a civil penalty not to exceed \$500 for each day of violation.

Exceptions to WARN notice

Fortunately, there are three exceptions to the WARN Notice requirement. However, even if one of these exceptions applies, WARN notice must still be provided as soon as practicable. The exceptions are:

- **Faltering company:** When, before a plant closing, a company is actively seeking capital or business and reasonably in good faith believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period;
- **Unforeseeable business circumstances:** When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required; or
- **Natural disaster:** When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

It is not clear whether the Coronavirus pandemic will trigger the second or third exceptions. There is an argument that if a business experienced a significant financial loss because of the virus (which was obviously unforeseeable), that the second exception would apply and provide employers with some relief from the WARN Act's notice requirements. Whether the third exception for natural disasters applies would depend on whether a court found the virus to be similar enough in nature to a flood, earthquake, or other natural disaster listed in the statute. Even if the exception does apply, employers are still required to provide notice as soon as practicable. It is also an open question

whether the WARN Act will be strictly enforced by the Department of Labor following the resolution of the Coronavirus outbreak, but for now, there has been no indication to suggest otherwise.

State mini-WARN acts

Many states have their own versions of the WARN Act, which impose their own restrictions on employers who undertake layoffs and business closures. Illinois, for example, has its own WARN Act, which defines notice-triggering events differently than the federal WARN Act. Illinois WARN defines a mass layoff as a reduction in force at a single site of employment that is not the result of a plant closing and results in employment losses during any 30-day period (or, in some cases, during any 90-day period) of 25 or more full-time employees if they constitute one-third or more of full-time employees at the site, or 250 or more full-time employees.

California's WARN Act also differs from the federal WARN. It applies to establishments with only 75 or more employees (including part-time employees). It also has been interpreted to apply to plant closures affecting any amount of employees (even just one). Notably, California's WARN Act does not have an exception for unforeseen business circumstances, but it does have an exception for a "physical calamity." A "physical calamity" is in turn defined as "fire, flood, or other natural disaster." As discussed above, it is not yet decided but possible that the exception for natural disasters could apply in the context of a worldwide pandemic.

It is important for employers to understand the obligations under both federal and state WARN Acts before contemplating a layoff or business closure.

Offering separation packages

When moving forward with layoffs or a plant closure, many employers consider offering employees severance packages in exchange for terms of agreement including a general release of all claims against the employer. If employers are subject to the Age Discrimination in Employment Act ("ADEA") and they ask employees who are 40-years old or older to release ADEA claims in exchange for severance as part of an exit incentive or group termination program, then they must make certain disclosures and abide by certain rules that are set forth in the OWBPA. Under such circumstances and among other requirements, an employer must give each employee who is 40-years old or older at least 45 days to consider the agreement (and seven (7) days to revoke the agreement after signing it). The employer must also provide the employees with notice regarding the group from which the employer chose persons to be offered severance in exchange for a waiver and the job titles and ages of all individuals eligible for the program. Failure to comply with all of the requirements set forth in the OWBPA will render the ADEA release unenforceable, so it is important that employers review the requirements and ensure that the severance agreements they use are carefully drafted.

Considering other state law implications of layoffs

Employers should also be aware of any state-specific laws that can be triggered when employees are terminated. If the terminations are not handled correctly, employers can easily subject themselves to statutory penalties and other liabilities. For example, California has different requirements upon termination than many other states, including the requirement that final paychecks be paid on the last day of employment and the requirement that any accrued but unused vacation needs to be paid out on the last day of work. Maine has a unique law that requires severance pay to employees in the

event of a “mass layoff”—requiring employers to pay severance for certain eligible employees at the rate of one week’s pay for each year.

Employers should also be careful to review their employee handbooks and employment agreements. Some employers provide for severance programs as a matter of policy or contract. Agreements may also have mandatory notice periods in the event of termination. Although many employment agreements have some variation of a force majeure clause, employer’s need to be aware of their contractual obligations and their obligations under any severance plan they have in place.

State unemployment laws

Employers should be clear with their employees whether the layoff is truly temporary or whether they are terminating the employment relationship. Different states may require different job search activity from employees depending on whether the layoff is considered temporary or is a full termination. For example, in California, workers who are temporarily unemployed and are expected to return to work with their employer within a few weeks are not required to actively seek work each week while collecting unemployment. Other state rules may vary. In Illinois, employees who are laid off generally qualify for benefits as long as the employee is able and available for and actively seeking work. These requirements may be relaxed under emergency rules put in place as states react to the coronavirus issue. For example, under emergency rules recently adopted in Illinois, an employee facing temporary unemployment because of the coronavirus would not have to register with the state employment job search service so long as the employee is “prepared to return to his or her job as soon as the employer reopened.”

Since unemployment benefits are administered by the states, employer’s should review the requirements for the state agency that administers the state’s unemployment benefits for eligibility information and any required termination notice.

Implications for employee benefit plans

Layoffs and furloughs may affect employees’ benefits under various benefit plans and programs. Employers should carefully consider the specific impact on each plan, program, or policy. Here are few examples.

- Recent hires may need to work longer to become eligible for participation in the employer’s 401(k) plan or to qualify for health and welfare benefits.
- Retirement plans (such as 401(k) or 403(b) plans) may require employees to complete a service requirement (e.g., 1,000 hours) and/or be employed on the last day of the year to receive a matching or profit sharing contribution. A layoff may affect employees’ eligibility for those contributions. Reduced earnings would also cut down on contributions that are determined as a percentage of pay.
- Group health and other insurance programs often do not provide for continuing coverage during periods of layoffs and furloughs. The plans may also impose a new waiting period on returning employees. Some of these requirements could be waived or relaxed. However, for fully insured plans, this may not be an option.
- Employees who lose coverage under group health plans (e.g., medical, dental, and vision) because of a layoff would become eligible for COBRA. Employers should remember to send

COBRA notices and election forms to the employees and arrange for premium payments during the periods of absence. Penalties may apply for untimely and inadequate COBRA notices. Employers may also find themselves on the hook for coverage if notices were untimely. Another question for employers is whether and to what extent to subsidize COBRA premiums. Collection of COBRA premiums is an important issue as well. If the employer advances funds to cover the employees' share during the period of absence, the employer might not be able to recoup the funds from the employees.

- Note also that a drop in coverage (sometimes as low as 10%) may affect pricing of administrative services for certain plans, premium rates for others, or may trigger a termination of insurance policies.
- Layoffs may affect employees' status under the Affordable Care Act. Many employers use lookback periods to determine whether employees are full time and, therefore, would be eligible for coverage under a group medical plan. Typically, those periods are of 12 months in duration and end shortly before a new plan year. New hires working part-time or variable schedules often also have to work for a period of typically 12 months before they can become eligible for coverage and must average at least 30 hours per week during that period. The employees who experience temporary layoffs of less than 13 weeks would have to be treated as if they had never left, although their hours would definitely suffer and may result in the loss of coverage. Those absent longer can be treated as new hires and may have a new waiting period. Employers may want to take into consideration how temporary absences would affect employees and whether employers would want to bridge the gap for purposes of eligibility for health coverage. If so, employers would need to work with their insurance carriers, claims administrators, and/or stop-loss carriers to make this work.
- The ACA is a consideration for employees with reduced hours (e.g., due to a furlough). Under the ACA policies for identifying full-time employees, the employer may be required to treat these employees as full-time through the end of the coverage period. If the employer instead offers employees unsubsidized COBRA coverage, the employer might be at risk for incurring penalties under the ACA for not offering affordable coverage to all of its full-time employees. To date, the IRS has not issued any guidance that would provide relief from the penalties due to the COVID-19 employment disruptions.

The list above is not exhaustive, but it illustrates how intertwined layoffs and furloughs could be with the employer's entire benefits system.

Employers are currently faced with the need to make these decisions more quickly than in normal circumstances. However, employers must manage these responsive workforce decisions carefully to avoid creating unintended problems. It is best to consult with your company's labor attorney to assure that the process is managed correctly.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

- Tara E. Daub at tdaub@nixonpeabody.com, 516-832-7613 or 212-940-3046
- Alicia Anderson at acanderson@nixonpeabody.com or 213-629-6073
- Hillary Baca at hbaca@nixonpeabody.com or 415-984-8393

- Andrew Prescott at aprescott@nixonpeabody.com or 401-454-1016
- Brian Alcala at bvalcala@nixonpeabody.com or 312-977-4366
- Yelena Gray at yfgray@nixonpeabody.com or 312-977-4158