What Employers Should Know About Furloughs, Layoffs, and WARN Act Obligations in Light of COVID-19

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Employers struggling with the challenges presented by the COVID-19 pandemic may be contemplating reductions in force or in hours. It is important that employers consider a wide range of factors when deciding whether to implement furloughs or layoffs during shutdowns or periods of significantly reduced business. Under many employment statutes, employees who are laid off or furloughed may be deemed to have been functionally terminated. Implementing layoffs or furloughs can trigger different obligations relating to advance notice, benefits, wages, paid time off (PTO), and unemployment insurance. Therefore, employers should consider carefully the costs and benefits of each approach.

Defining Layoffs and Furloughs

The term "layoff" is not functionally different from the term "furlough" for non-unionized workforces, except for any unique meaning an employer gives the term. Often, an employer prefers to call a layoff a furlough because of how it may be seen. While that is acceptable in most cases, employers should be clear about the specific action they are taking and the relationship they intend to establish with their employees.

Many employers are using the term "layoff" to convey to employees that their employment is terminated, or that they will not be working for an indefinite time given the uncertainty caused by the COVID-19 crisis and associated closure orders. On the other hand, the term "furlough" is often intended to convey that the employment relationship is not being severed and that employees will be returning to work within a short time.

However, the terms are equivalent under many employment statutes. When conducting a layoff or a furlough, employers should carefully consider whether state and local laws on issuing an employee's final paycheck and payout for accrued and unused PTO may be triggered. Final paychecks may be due on or even before the next regular payday, and employers may be required to pay out unused sick or vacation pay within that timeframe as well. COBRA notices should also be sent as needed. Employers are not required to pay severance to laid off employees, unless an agreement to the contrary or a severance plan or policy exists.

Implementing layoffs or furloughs may trigger the requirement to issue advance written notice to employees and certain government agencies under the federal Worker Adjustment and Retraining Notification Act (WARN Act). The WARN Act applies to employers with at least 100 employees (excluding part-time employees) who work an aggregate of at least 4,000 hours a week. It requires 60 days' advance written notice of a plant closing or mass layoff at a single site of employment to affected non-union employees, union representatives, and certain government officials if at least 50 full-time employees comprising at least one-third of the workforce at the site suffer an employment loss as defined by the WARN Act. The purpose of the law is to give employees a 60-day cushion to find a new job while maintaining pay and health insurance coverage. An exception to the notice requirement, under which an employer bears the burden of proof, is available for "unforeseeable business circumstances." For many businesses, the COVID-19 crisis may qualify as an unforeseeable business circumstance. Under this exception, notice is still required, but employers are only required to provide "as much notice as is practicable" (*i.e.,* employers are allowed to provide fewer than 60 days' notice). Employers may be liable for damages under the WARN Act for any period of unjustifiable delay in issuing the notices. (For more on this, see our article, Unforeseeable Business Circumstances Excused Employer's WARN Act 60-Day Layoff-Notice Requirement.)

The WARN Act defines an employment loss as an employment termination, a layoff for a period exceeding

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six months, or an hours reduction of more than 50 percent for each month of any six-month period. The WARN Act recognizes the concept of a "layoff," as distinguished from a "furlough," but it is the effect on employees (*i.e.,* how many employees will be affected and for how long) that determines the need to issue WARN Act notices.

Reliance on a WARN Act exception is not a guaranteed defense in WARN Act litigation. Employers should seek legal guidance before attempting to invoke an exception. Employers also should be mindful of any applicable state or local WARN Act notice requirements. Many states have their own "mini-WARN" acts that may be triggered by layoffs or furloughs, and employers should ensure compliance with state notice requirements as well. Many such mini-WARN acts require notice to be given in the case of smaller scale layoffs (for example, layoffs involving as few as 25 employees) and may require longer notice periods (up to 90 days in some states).

Issues Specific to Furloughs

Under many employment statutes, "furlough" is not defined. Webster's Dictionary defines a furlough as "a temporary leave from work that is not paid and is often for a set period of time." Many employers are using the term "furlough" to inform employees of temporary layoffs with set return dates. Even if the time the employee will not be working, and will not be paid, is brief, furloughs can also involve significant issues.

Under the Fair Labor Standards Act (FLSA), employers do not have to pay non-exempt employees who are furloughed. Additionally, employers do not have to pay exempt employees who are furloughed for a full workweek if the employee does not perform any work during that week (including responding to emails or calls). Any required payments must be provided to furloughed employees on the next regular payday, even if there is a gap in working days. Temporary furloughs also may be a qualifying event for medical plans, triggering COBRA. Therefore, an employer considering a furlough should check its plan document or consult with its insurance broker and issue COBRA notices if necessary.

The WARN Act's requirements generally do not apply to furloughs if employers communicate to employees that the furlough is temporary and that employees will return to their jobs within six months. If an employer's plans change and a temporary furlough extends beyond six months or becomes a permanent layoff, then the WARN Act's notice obligations can be triggered. In this situation, employers that did not provide the requisite 60 days' notice at the initiation of the furlough may be liable for 60 days of pay and benefits for each affected employee.

The WARN Act provides a limited exception if the extension of a temporary furlough beyond six months is caused by unforeseeable business circumstances and notice is given when it becomes reasonably foreseeable the extension will be required. While the current circumstances related to COVID-19 appear to fall under this exception for most employers that choose to issue a WARN Act notice now, this does not mean that the current circumstances alone will be an "unforeseen" event several months from now. Rather, a new unforeseen event may need to be relied upon to excuse the 60-day notice requirement. Employers should seek legal guidance before attempting to invoke an exception under the WARN Act.

Additionally, employers should consider how they will handle PTO during a furlough. Depending on the state, a furlough may be considered a termination of employment triggering the payment of accrued PTO.

A careful evaluation of employment policies, benefit plans, and applicable state and federal laws is essential to identifying the impact of a layoff or furlough and making the right decision during this difficult time. Jackson Lewis attorneys are committed to helping employers make the best business decisions.

Jackson Lewis has a dedicated team tracking and responding to the developing issues facing employers as a result of COVID-19. Please contact a team member or the Jackson Lewis attorney with whom you regularly work if you have questions or need assistance.

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