Chamberlain Hrdlicka
Attorneys at Law

Contact

Houston
1200 Smith Street, Suite 1400
Houston, Texas 77002-4310
Tel: 713.658.1818
Fax: 713.658.2553

Atlanta
191 Peachtree Street, N.E.,
Forty-Sixth Floor
Atlanta, Georgia 30303
Tel: 404.659.1410
Fax: 404.659.1852

Philadelphia
300 Conshohocken State Road
Suite 570
West Conshohocken, PA 19428
Tel: 610.772.2300
Fax: 610.772.2305

San Antonio
112 East Pecan Street, Suite
1450
San Antonio, Texas 78205
Tel: 210.253.8383
Fax: 210.253.8384

www.chamberlainlaw.com

Layoff vs. Furlough: Legal and Practical Ramifications

Chamberlain L&E Update - Layoff vs. Furlough: Legal and Practical Ramifications

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In light of the significant impact of the COVID-19 pandemic, this Memorandum advises on the differences between layoffs and furloughs and the legal and practical ramifications for employers and certain employee protections in connection with the reduction of employee headcount. In addition, this Memorandum addresses other considerations in connection with a possible reduction in force.

FURLOUGHS

The term 'furlough' is generally defined as a temporary leave of absence from employment duties without pay typically caused by exigent circumstances, such as a lack of funds or work, or in this case, the COVID-19 pandemic. Furloughed employees are not paid for time not worked, but remain employed and maintain benefit eligibility subject to the terms of the employer's benefit plans.

Compensating Furloughed Employees:

Legal and practical ramifications for furloughed employees depend on whether the employees are non-exempt (i.e. employees who are entitled to overtime) or exempt (i.e. employees who are not subject to federal and state overtime requirements).

Non-exempt employees: Generally, employers can furlough non-exempt employees by reducing hours, days, or weeks worked without violating wage and hours laws. Furloughed employees are not paid during this period for time not worked, but are otherwise compensated for actual work performed (including overtime, if applicable). Actual time worked includes any work-related communications, such as monitoring or responding to emails or voicemails.

Exempt employees: Generally, employers can furlough exempt employees; however, under federal law and most state laws, an exempt employee is entitled to their same weekly salary for any workweek in which they perform any work, regardless of the number of hours worked. In other words, employers may not prorate an employee's salary based on a reduced workweek schedule. However, because an employer is not required to pay an employee for any week in which no work is performed, a furlough for an exempt employee may consist of an arrangement where the employee works during alternating workweeks-one workweek on, one workweek off, for example. In such instances, employees must be paid for the workweeks that they are on, but will not be paid for the workweeks they are off. Employees must be told that they cannot work at all during the workweek in which they are off. If this occurs, even without the

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employer's consent, the employee must be paid for the entire week to maintain the exempt status. Employee salary deductions are generally not permissible if the employee works less than a full day. Except for certain limited exceptions found in 29 C.F.R. 541.602(b)-which does include furloughs-salary deductions result in loss of the exemption status. Therefore, failure to pay the full salary places the exemption at risk.

An employer, however, is not prohibited from prospectively reducing an employee's regular salary during a furlough, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such salary reductions, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee's reduced salary still satisfies the minimum salary requirements under federal and state law for exempt employees. However, salary deductions occasioned by day-to-day or week-to-week determinations constitutes impermissible deductions and would result in loss of the exemption. [1].

Employers also have the option to change an employee's status to non-exempt during the furlough wherein the employee would be paid hourly.

If an employer decides to furlough employees, it is advisable that the employer implement a policy acknowledged by each employee that clearly sets out expectations during the furlough. In addition, employers should consider requiring employees to obtain written supervisor approval in advance of any work-related activities and to keep detailed records of all work-related activities and the time spent on such activities.

Duration of the Furlough:

If an employer decides to furlough employees, the employer should consider the duration of the furlough. Some states and government entities may consider an extended or indefinite furlough a termination. Therefore, if an indefinite or extended furlough (more than three weeks, for example) is contemplated, employers should consider treating it as a layoff, which is addressed below.

The distinction between a furlough and a layoff might be critical in states requiring the payout of accrued vacation or personal time off on termination. In addition to state law, employers should be mindful of and abide by the terms of their own pay policies and collective bargaining agreements, if applicable. An extended furlough that is likely viewed as a termination will require paying the employee for accrued unused vacation or personal time off time upon termination. Similarly, if an employer initially decides on a definite, short duration furlough, and then after evaluating the situation decides on extending the furlough, the employer should consider treating it as a layoff and should meet any final pay obligations.

For example, in California, the Division of Labor Standards Enforcement ("DLSE") opined that a furlough without a specific return date that extended beyond the normal pay period in which the furlough begins may be construed as a termination, triggering the requirement to pay final wages in accordance with California Labor Code Section 201. [2]. In another Opinion, the DLSE opined that a furlough with a definite date given to return to work within 10 days is not a termination. [3].

In Texas and Georgia, it is not clear what duration, if any, would be considered a layoff or would otherwise trigger obligations to pay final wages. In Georgia, "employees may be furloughed no more than 30 workdays within any 12-month period." However, that rule only applies to "Executive Branch employers, local departments of Public Health, and Community Service Boards." [4].

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In addition, maintaining benefit eligibility is subject to the terms of the employer's benefit plans. As such, employers should review the details of their benefit plans to determine whether the duration of the furlough in question may jeopardize eligibility.

Unemployment Benefits During the Furlough or Layoff:

Unemployment benefits for furloughed employees (and laid off employees) will vary by state. Some states may require a waiting period before benefits are provided. For example, in Texas an employee cannot receive benefits for the first week of unemployment (also known as the "waiting week") until the employee has received at least two weeks' worth of unemployment benefits and has either returned to full-time work or exhausted their unemployment benefits. However, because of the COVID-19 pandemic, some states, including Texas, have suspended the waiting period allowing workers to receive benefits immediately after their unemployment benefit applications are approved. [5]. In addition, some states may provide benefits to employees that are "partially unemployed". Generally, employees with reduced hours during a furlough may be eligible for benefits depending on the amount of the employee's wages payable for that benefit period.

In Texas, the weekly benefit amount ("WBA") is the amount the worker received for weeks they are eligible for benefits. The worker's WBA will be between $69 and $521 (minimum and maximum weekly benefit amounts) depending on the worker's past wages. A worker's maximum benefit amount (MBA) is the total amount the worker can receive during their benefit year. The worker's MBA is 26 times their WBA or 27 percent of all their wages in the base period, whichever is less. [6].

In Georgia, the worker's WBA will be between $55 and $365 (minimum and maximum weekly benefit amounts). [7]. More information on Georgia Unemployment Insurance Benefits, is available at https://www.chamberlainlaw.com/labor-employment/georgia-department-of-labor-mandate-for-georgia_employers_on_unemployment_insurance_

Based on the foregoing, employers may want to consider reviewing unemployment eligibility requirements in the various states in which they operate in order to structure furloughs to maximize unemployment benefits for employees impacted by the furlough.

Employer Obligations:

An employer may have filing obligations with their state unemployment office on behalf of employees. For example, due to the threat posed by COVID-19, the Georgia Department of Labor ("GDOL") has recently mandated that Georgia employers must file partial unemployment insurance claims on behalf of their eligible employees whenever it is necessary to temporarily reduce work hours or when there is no work available for a short period. Any employer found to be in violation of this rule will be required to reimburse GDOL for the full amount of unemployment insurance benefits paid to the employee. More information on Georgia Department of Labor mandate for Georgia Employers is available at https://www.chamberlainlaw.com/labor-employment/georgia-department-of-labor-mandate-for-georgia_employers_on_unemployment_insurance_

In Texas, an employer laying off employees may be able to submit a mass claim for unemployment benefits on behalf of its employees. The Mass Claims program streamlines the unemployment benefit claims process for employers faced with either temporary or permanent layoffs. Employers can submit basic worker information on behalf of their employees to initiate claims for unemployment benefits. Alternatively, an employer may be able to avoid laying off employees by submitting a shared work plan, which allows employers

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to: (i) supplement their employees' wages lost because of reduced work hours with partial unemployment benefits, and (ii) reduce normal weekly work hours for employees in an affected unit by at least 10 percent but not more than 40 percent. [8]. In addition, the Workforce Commission may request job separation and past wage information related to a worker's unemployment claim. It is important that the employer respond promptly to notices such as the Notice of Application for Unemployment Benefits (for a new claim) or Request for Work Separation Information (for an existing claim), to help ensure that benefit claims are paid correctly and employer charges are accurate.

LAYOFFS

A 'layoff' is the termination of employment - either temporary (i.e., with the intent of rehiring at some point in the future) or permanent - at the employer's instigation typically caused by exigent circumstances, such as a lack of funds or work, or in this case, the COVID-19 pandemic. Laid off employees are not paid, and unlike furloughed employees, no longer remain employed and typically lose eligibility under employer benefit plans.

Any proposed furlough or layoff may trigger notice obligations under the federal Worker Adjustment and Retraining Notification (WARN) Act and states that have their own legislation similar to WARN.

What is the WARN Act?

WARN protects workers and their families by requiring covered employers to provide at least 60 calendar days' advance written notice of a plant closing and mass layoff affecting 50 or more employees at a single site. A covered employer is an employer that employs at least 100 employees, excluding employees who worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week. Therefore, if the employer furloughs or lays off fewer than 50 employees or if the layoff or reduction in hours lasts six months or less, WARN is not triggered. Additionally, notice is generally not required if a layoff is for 6 months or less, or if work hours are not reduced 50% in each month of any six-month period.

A mass layoff means a reduction in force, which was not the result of a plant closing, that results in an employment loss at a single site of employment during any 30-day period that is expected to exceed at least 6 months (i) of more than 500 full time workers or (ii) at least 33% of the workforce when the layoff affects between 50-499 workers.

A plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees.

Are there any exceptions to the 60-day notice requirement?

WARN provides certain exceptions to the 60-day notice requirement: (1) unforeseeable business circumstances, (2) natural disaster, and (3) faltering business. An unforeseeable business circumstance is caused by some sudden, dramatic and unexpected action or condition outside the employer's control. Examples of unforeseeable business circumstances are dramatic major economic downturn or government ordered closing of an employment site that occurs without prior notice. The Department of Labor regulations provide an

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extensive list of natural disasters, including flood, earthquake and drought. Currently, the regulations do not include the spread of infectious diseases such as COVID-19. The faltering business exception applies if a site of employment closes after a faltering company fails to obtain capital or business necessary to maintain operations.

Is the COVID-19 pandemic covered under any exception?

The unforeseeable business circumstances exception may possibly apply to the COVID-19 crisis at hand. The pandemic was clearly not foreseeable. Furthermore, as employers have been forced to shut down, currently temporarily, due to state or local orders, and have been forced to limit their operations, employers may claim that the government effectively ordered any reduction in force, such as mass layoffs or plant closings. However, how the Department of Labor will interpret these exceptions is not clear yet. In addition, the Act provides for a private cause of action in federal court for an employee to sue the employer. Therefore, we advise that employers evaluate their current situations and needs carefully before they implement a plant closing or mass layoff and consequently triggering the Act.

WARN sets forth the specific information that must be contained in the notices to employees, unions and certain government entities. Employers in Texas can submit WARN notices to the Texas Workforce Commission. Furthermore, in addition to the federal WARN, seven states have their own legislation similar to WARN. These states are New Jersey, New York, California, Illinois, Maryland, Tennessee and Wisconsin. The best approach to prepare compliant notices and not trigger any violations is to work with your counsel.

OTHER CONSIDERATIONS

- Employers may also consider alternatives to furloughs or layoffs. For example, employers may consider:
  - **Mandatory use of accrued unused vacation / PTO.** Mandatory use of accrued unused vacation or personal time paid at the employee's regular pay rate. However, when the employee runs out of their accrued vacation or personal time off, the employer is required to continue paying the employee at their regular pay rate for any work performed. Moreover, pursuant to the Families First Coronavirus Response Act, employers cannot require use of vacation or personal time off if the employee is taking leave pursuant to the Act. The Act prohibits employers from requiring an employee to take other employer-provided sick leave before using the paid sick leave provided under the Act.
  - **Temporary reduction in compensation.** Discuss with your employees about the possibility of a temporary reduction in pay while continuing to guarantee employee benefits and employment. However, as discussed above, employers should be mindful of compliance with federal and state wage laws. Moreover, employers should review any applicable employment agreements, collective bargaining agreements, policies and employee handbooks, and retirement plans.
  - **Voluntary unpaid leave.**

Whatever course of action an employer ultimately decides, if the decision impacts only a subset of employees, the employer should consider whether such a decision disproportionately affects members of a certain protected class, which could subject the employer to state and federal claims.

- As highlighted above, employers should be aware of their benefit plans, which generally dictate eligibility requirements. Employees that lose eligibility potentially triggers Consolidated Omnibus Budget Reconciliation Act (COBRA) and/or state law requirements. Moreover, an employer may be subject to Affordable Care Act (ACA) penalties. Under ACA, employers with 50 or more full-time employees are required to offer coverage to at least 95% of their full-time workforce.

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- Small businesses required to provide pay leave under the Families First Coronavirus Response Act (H.R. 6201), which includes the Emergency Family and Medical Leave Emergency Act and Emergency Paid Sick Leave Act, may want to consider encouraging eligible employees that qualify to take advantage of the benefits under these Acts. Employers are entitled to a refundable tax credit equal to 100% of the family leave wages that the employer is required to pay under the Acts. **Note:** Under current Department of Labor guidance, employees furloughed on or after April 1, 2020 are not entitled to then take paid sick leave or expanded family and medical leave under the Acts. More information on H.R. 6201 and the Acts is available at https://www.chamberlainlaw.com/labor-employment/paid-leave-under-the-families-first-coronavirus-act.
- Employers may want to consider the effect of layoffs on eligibility for payroll tax credits and business loans under the provisions in the new stimulus package, since eligibility requires that an employer maintain a certain percentage of their workforce. More information on SBA loans under the Coronavirus Aid, Relief and Economic Securities Acts is available at https://www.chamberlainlaw.com/news-news-sba_loans_under_cares_act.html.
- Finally, employers that sponsor foreign workers for visas or green cards may have obligations to notify the Department of Labor and/or U.S. Citizenship and Immigration Services about changes in work status.

[1] U.S. Department of Labor Wage and Hour Division, Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues, available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs70.pdf.

[2] Division of Labor Standards Enforcement Op. 1993.05.04.

[3] Division of Labor Standards Enforcement Op. 1996-05-3.

[4] Ga. Comp. R. & Regs. 478-1-.04.

[5] Texas Workforce Commission, COVID-19 Resources Employers, available at https://www.twc.texas.gov/news/covid-19-resources-employers.

[6] Texas Workforce Commission, Eligibility & Benefit Amounts, available at https://www.twc.texas.gov/jobseekers/eligibility-benefit-amounts.

[7] Georgia Department of Labor, Unemployment Insurance Claimant Handbook, available at https://dol.georgia.gov/document/unemployment-benefits/ui-claimant-handbook/download.

[8] Texas Workforce Commission, COVID-19 Resources Employers, available at https://www.twc.texas.gov/news/covid-19-resources-employers.

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document may be considered attorney advertising in some jurisdictions.