Legal Considerations for Layoffs, Furloughs, and Reduction of Workforce in the Wake of COVID-19

March 31, 2020

As the COVID-19 pandemic continues to unfold, the economic impact on businesses is evolving. In response to the significant additional pressures on employers in an unsettled economy, many businesses are continuing to consider or implement various forms of workforce reduction and factoring into their decision-making the scope of the federal relief available to them and their employees under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). For more detail on the CARES Act, please refer to our update available here.

Many companies are choosing from a menu of options to control labor costs, including layoffs, furloughs, or temporary reductions in work hours or wages, based on their current or future business needs. Layoffs are a means of permanently eliminating positions; furloughs may be best if the employer lacks the resources currently to pay its employees but intends to recall them after the current economic slowdown; and reducing work hours may be appropriate for employers who need to reduce costs while continuing their operations. Some employers may ultimately deploy a combination of these strategies depending on their business needs.

When evaluating the options, companies should stay mindful of certain legal requirements and risks applicable to layoffs, furloughs, and reducing hours for employees. Below is a summary of key federal and local laws and legislative developments (including recent laws), as well as practice points, to consider when contemplating layoffs, furloughs, or reductions of work hours. Employers will also want to consider the benefits that may be available to them and to their employees under the CARES Act when choosing which approach is best for their specific circumstances.

Anti-Discrimination Requirements. No matter how an employer decides to proceed with employment transition decisions in this uncertain time, under federal, state, and

local anti-discrimination laws, an employer must act without regard to any legally protected characteristic, such as race, ethnicity, national origin, age, religion, sex, gender, or disability. Therefore, employers should treat all similarly situated employees the same way or have a legitimate business reason for treating employees differently (i.e., performance criteria, salary grades, etc.). Employers need to examine carefully any potential criteria that may unintentionally have a disproportionate impact on any particular demographic group.

The WARN Act. The federal Worker Adjustment and Retraining Notification Act ("WARN Act") requires covered employers with 100 or more full-time employees to provide 60 days' advance notice (or pay in lieu of notice) to workers impacted, unions, and government officials prior to a plant closing (layoff of 50 or more full-time employees during any 30-day period at a single site of employment) or a mass layoff (layoff at a single site of employment of 500 or more employees during a 30-day period or layoff of 50-499 employees if they make up at least 33% of the employer's active workforce). For this purpose, a "layoff" occurs when a company temporarily suspends or permanently terminates a person's employment or if the company reduces an employee's work hours more than 50% in each month of any six-month period. WARN requirements may also be triggered if the layoff thresholds are met over a 90-day period as a result of a series of smaller layoffs.

Importantly, for those employers considering a furlough or temporary action, the federal WARN Act will not apply if employees are impacted for 6 months or less.

Although the federal WARN Act contains a force majeure clause, which may be interpreted to apply to the current pandemic, employers should be mindful that the clause does not explicitly address exceptions for epidemics and pandemics, and courts have not yet interpreted the clause to cover pandemics. However, the WARN Act permits shortened notice to impacted employees if terminations result from circumstances not reasonably anticipated 60 days before action was taken. Employers are still required to give written notice with as much advance warning as possible along with an explanation for the shortened notice. If an employer violates the WARN Act, it is liable to each employee for an amount equal to back pay and benefits for the period of violation up to 60 days and may face a fine of up to $500 per day of violation for failing to provide notice to the local government.

"Mini" WARN Acts. In addition to the federal WARN Act, several states have their own mini-WARN Acts with similar requirements, including California, Hawaii, Illinois, Iowa, Maine, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Wisconsin. Below are descriptions of a few examples from key states:

- **New York's** mini-WARN Act requires 90 days' advance notice to certain agencies and parties when there is a mass layoff or reduction in work hours. It also applies to a larger number of employers than the federal WARN Act, as it regulates notice to employers with as few as 50 employees. The notice requirement may be reduced if employment loss is caused by unforeseeable business circumstances such as an "unanticipated and dramatic economic downturn" or a "government ordered closing of an employment site without previous notice."

- **California's** Cal-WARN Act requires 60 days' advance written notice to employees affected by termination or mass layoff. On March 17, 2020, California's governor issued an executive order relieving employers of some of the notice requirements under the Cal-WARN act, on the condition that the employer gives as much written notice as is practicable.

Employers should note that, unlike the federal WARN Act, some state mini-WARN Acts do not have exceptions for temporary layoffs. Accordingly, notice would potentially be triggered even in the event of a temporary furlough. Employers are encouraged to seek counsel when assessing these various statutes, as WARN Act requirements are dependent on particular facts and circumstances.

Wage and Hour Law Compliance. Businesses considering temporary furloughs or reductions in hours should review the Fair Labor Standards Act ("FLSA") and analogous state labor laws to maintain compliance. Employees who are non-exempt under the FLSA must be paid only for time actually spent working. Exempt employees, however, are entitled to their full weekly salary for any work week in which they perform any work. Even answering an email or responding to a phone call could violate the "no work" rule. When implementing a furlough or hours reduction, employers should place exempt employees on furloughs in at least full-week increments. Additionally, employers should establish proper systems to ensure that exempt employees are not required to work, and do not work, during furlough. To the extent salary reductions are contemplated for exempt employees, employers should consider, among other things, any notice requirements under state or local law, and whether the salary reduction would cause an employee's wages to decline below the applicable threshold for exemption under FLSA requirements (currently $684 per week). The employer should also consider the impact, if any, of a salary reduction on the affected employee's entitlement to pension accrual or 401(k) plan matching contributions, or benefits under any applicable severance arrangements.

Management Employee and Employment Contract Considerations. For management-level employees, employers should consider employees' contractual rights under employment agreements or offer letters, severance, equity compensation, or similar plans before changing any positions or reducing compensation or benefits. In

particular, a "good reason" or similar constructive discharge definition in such a contract could limit the employer's right to reduce a covered employee's salary, bonus opportunities, or employee benefits, or to cause a diminution of duties (which is often included in these provisions). Further, in light of current business pressures, employers entering into any new management arrangements (especially if they include "good reason" arrangements) might wish to expressly allow across-the-board compensation or benefit reductions. Before taking any of these actions for employees with contractual rights, an employer should assess whether an employee's consent is required to avoid a breach of contract claim.

If an employer maintains a severance policy, the policy should be reviewed to confirm whether severance payments and benefits intended for a permanent reduction in force may also be triggered by a furlough. Further, if the employer has reserved the right to amend such policy, the employer might consider amending the policy before taking any employment actions that would trigger payment under the policy.

Unemployment Benefits. Businesses should review individual states' unemployment rules to determine how their policies may impact an employee's ability to obtain unemployment. For example, employees who are furloughed or have their hours reduced may be eligible for unemployment benefits. Many states including New York have waived the non-benefit period in light of the influx of potential claims resulting from the COVID-19 pandemic, and other states have been incentivized to do so by certain provisions of the CARES Act that shift the cost of the first week of benefits to the federal government. In addition, the CARES Act expands unemployment benefits for employees in several ways, including by providing employees who are otherwise eligible for unemployment benefits under state law with an additional $600 per week, through July 2020.

Medical Benefits. During a furlough, employees may be eligible to retain their medical benefits, depending on the terms of the employer's plans. Businesses must review their individual plan documents to determine any potential eligibility issues. Employers should also be mindful of Affordable Care Act ("ACA") implications of their options. For example, if employees are in a stability period, they must remain eligible for coverage as full-time employees even if on furlough and must be offered affordable coverage to avoid exposure under the employer mandate provisions of the ACA. Employees would still be responsible for paying their share of premiums. If the condition of a stability period does not apply, employees will generally lose eligibility under the plan due to reduction of hours, unless the plan documents provide otherwise. Depending on the action implemented, employees may be eligible for COBRA. For those considering a reduction in hours, review the applicable health plan documents to determine if a minimum number of hours is required to retain eligibility under the plan.

For those employees whose hours are reduced to below the minimum hours, they may be entitled to elect COBRA benefits.

Sick Leave Under Emergency Laws. The federal government recently passed the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, under which covered employers are required to provide paid sick and family leave to employees for certain reasons related to COVID-19. Many states have also passed similar laws. These laws generally do not require employers to provide paid leave to employees who have been furloughed; however, employers must be careful to ensure that any adverse employment decision (such as a furlough, reduction in hours, or layoff) is made without regard to an employee's use or anticipated use of paid leave, as such a decision would violate the anti-retaliation provisions of the laws.

Paid Time Off. Certain states may require employers to pay out unused vacation time or paid time ("PTO") at termination of employment or at the outset of a furlough. Employers should review applicable state law and their PTO policies to determine how to administer PTO upon a layoff or furlough period. Employers may also wish to consider freezing the use and accrual of PTO during a furlough period.

Other Benefits. Employers offering 401(k) plans should review the individual plan rules to determine any potential impact on eligibility, contributions, and notice requirements. Sufficiently larger reductions in the workforce could trigger a partial termination that would require accelerated vesting of employer contributions for the affected workers; whether a partial termination is triggered is based on facts and circumstances. Employers should expect an increase in the number of employees seeking to take loans from their 401(k) accounts, and be prepared to answer employee questions regarding loan repayment of existing loans during furlough or layoff periods. Businesses should also assess any potential impact on ERISA's non-discrimination testing provisions.

Moreover, employers should consider potential impacts on employees' flexible spending accounts and health savings accounts as well as disability and life insurance benefits. All of these considerations are fact-specific inquiries that should be reviewed with counsel.

Prior to implementing layoffs, furloughs, or reductions in force, employers should seek legal advice regarding the particular facts and circumstances of their business and the necessary employee notification requirements. Any of these decisions involve a myriad of federal and state laws, including the federal WARN Act, one or more state WARN Acts, federal and state antidiscrimination laws, COBRA, ERISA, ACA, FLSA and state unemployment insurance programs. Early consultation with legal and human resource professionals can ensure the design and implementation of the right program for the business.

* * *

For more information regarding the coronavirus, please visit our Coronavirus Resource Center.

Please do not hesitate to contact us with any questions.

New York

Lawrence K. Cagney
lkcagney@debevoise.com

Jyotin Hamid
jhamid@debevoise.com

Meir D. Katz
mdkatz@debevoise.com

Jonathan F. Lewis
jflewis@debevoise.com

Franklin L. Mitchell
flmitchell@debevoise.com

Tricia Bozyk Sherno
tbsherno@debevoise.com

Alison E. Buckley-Serfass
aebuckley@debevoise.com

J. Michael Snypes, Jr.
jmsnypes@debevoise.com