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Considering Layoffs Due to COVID-19? Keep These Things in Mind

by Meghan E. Tepas

A FREEBORN & PETERS LLP CLIENT ALERT

ABOUT THIS CLIENT ALERT

This Client Alert details what employers should keep in mind should they be considering layoffs in response to COVID-19, including different employment reduction options available to companies.

If COVID-19 is causing you to considering layoffs for your workforce, below, please find several things to keep in mind:

1. **Employment reduction options—furlough, layoff, or RIF.**
   - While the terms furlough, layoff, and RIF are often used interchangeably, they are in fact different:
     - **A furlough is an alternative to layoff and requires employees to work fewer hours or to take a temporary forced leave.** Generally, a furlough does not terminate company benefits for the employee. Employers are not required to pay exempt employees as long as the employee does not in fact do any work during the furlough period. However, employers considering furloughing exempt employees must take care to ensure exempt employees do not dip below the salary threshold under the Fair Labor Standards Act. Additionally, employers considering furloughing any employees should contact their insurance brokers to determine whether their policy requires a certain number of hours worked in order to continue coverage. Furloughed employees may be eligible for unemployment benefits.
     - **A layoff is a temporary or permanent separation without cause.** An employee is laid off because there is not enough work. The employer, however, may believe that conditions may change and may recall the person when more work becomes available. A layoff will trigger COBRA, state unemployment benefits, and the termination of salary and other company benefits.
     - **A Reduction in Force** occurs when a position is eliminated without the intention of replacing it. An intended temporary layoff may turn into a permanent RIF.

2. **Federal and Illinois WARN notice requirements.**
   - **Both the Federal WARN Act and Illinois WARN Act require certain employers to provide advance notice prior to initiating any mass layoffs.** The required notice must contain specific information and must be provided to the employees, unions, and certain government entities. Any deviation from the required notice could result in substantial financial penalty.
   - **Federal WARN Act.** The Federal WARN Act will apply if the Company employs at least 100 full-time employees and is planning to lay off 1/3 or more or at least 50 employees. If the Federal Act applies, the Company must provide 60 days advance notice to the employees, the union, and the State Rapid Response Dislocated Worker Unit and the local chief elected official.

- **Illinois WARN Act.** The Illinois WARN Act will apply if the Company employs at least 75 or more employees (excluding part-time employees) or 75 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime). Companies subject to the Illinois WARN Act may not order a mass layoff, relocation, or employment loss unless 60 days before the order takes effect, the Company provides written notice to the employees, unions, the Department of Commerce and Economic Opportunity, the chief elected official of each municipal and county government where the layoff is set to occur, and the Illinois Department of Labor.
- **Exceptions to WARN notice requirements:** While both the Federal and Illinois WARN Acts provide an exception when the layoff is due to unforeseeable circumstances or the result of a natural disaster, it is unclear whether a pandemic would qualify and excuse WARN obligations. Additionally, temporary layoffs of less than 6 months do not trigger either Federal or Illinois WARN requirements. (Note, however, it is often to difficult to know in advance how long a temporary layoff may last so best practice would be to provide notice).

3. **How to determine which employees to let go.**
   - With respect to employees who are at-will and not subject to employment agreements, companies are free to make any selection of employees to layoff, barring however any employment decisions based on illegal forms of discrimination. Under best practices companies should conduct an adverse impact analysis before implementing a planned mass layoff to make sure the selection criterion does not adversely impact employees in a protected group.
   - Companies with union employees should consult the operative collective bargaining agreement.

4. **Required compensation.**
   - At the time of termination, or at least no later than the next regularly-scheduled pay-date, the Company must provide the laid-off employees final compensation, including wages through the date of the termination, commissions and in some circumstances, bonus payments. The Company must also compensate laid-off employees accrued and unused vacation and/or PTO. Failure to timely pay these wages and vacation payments will subject the Company to hefty damages and penalties.

5. **How to notify employees.**
   - You may provide lay-off notice via correspondence if in-person is not feasible at this time.

6. **Collection of Company property.**
   - Remember to collect all Company property at the time of termination or if that is not feasible, make a plan for collection as soon as possible. This may include laptop computers, telephones, identification, keys, keycards, etc. If the employees primarily work out of their homes, make arrangements to collect Company property and settle related issues such as discontinuation of Company-paid telephone lines or credit cards and access to the Company's computer system.

7. **Insurance coverage and benefits.**
   - At the time of termination, provide each laid-off employee a COBRA notice regarding the continuation of medical insurance benefits and provide employees with information regarding 401(k) rollover options.

COVID-19 is a rapidly evolving situation for the forseeable future.
Visit Freeborn's COVID-19 webpage for updates as the situation develops. If you have any questions, please contact Meghan E. Tepas or another member of the Freeborn & Peters LLP Labor & Employment Practice Group.

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Meghan is passionate about litigation and takes a thoughtful and creative approach to each of her cases. She focuses on general breach of contract disputes and employment disputes including those involving breach of non-compete and non-solicit agreements. She has extensive experience representing clients facing claims of negligent hiring and breach of fiduciary duty relating to allegations of employee sexual harassment and sexual misconduct.

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