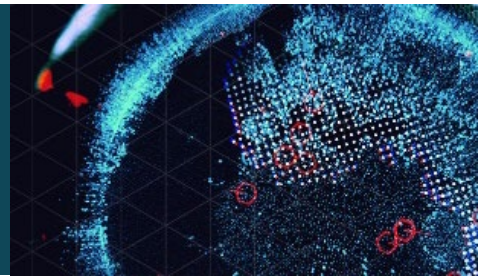


Coronavirus/COVID-19

Ten Ways for U.S. Employers to Avoid Layoffs During the COVID-19 Pandemic



March 24, 2020

As the COVID-19 public health crisis continues, U.S. businesses are dealing with unprecedented disruptions to operations and workforce stability. Most employers undoubtedly want to assist their employees during this uncertain time, but they are struggling to balance the cost of maintaining their workforce with shrinking profits. The frequent result of such a balancing act is a mass layoff. While such a reduction in workforce may be inevitable, below are options that employers can consider to try to avoid that outcome. For all of these alternatives, employers should be careful to apply any changes consistently across the workforce to avoid claims of inequity or discrimination.

1

Transfer Idle Employees

As a result of the COVID-19 pandemic, many employers have seen a dramatic shift in the need for certain functions. If certain employees are being paid to work in areas of the business with little activity, employers should consider transferring or redeploying them to perform another function that will provide the company with more equitable returns.

2

Reduce Employee Hours

Hourly workers can be placed on a reduced-time or part-time schedule, and overtime hours can be reduced or eliminated entirely. If the workforce is unionized, employers should confirm whether they are permitted to make these changes unilaterally under the collective bargaining agreement.

3

Apply for State-Sponsored Work-Share Programs

In the event employers decide to reduce employee hours as opposed to headcount (e.g., instead of laying off 20% of the workforce, an employer reduces hours for all employees by 20%), the employer may be able to provide relief to the impacted employees by applying for state-sponsored work-share programs. Work-share programs, also referred to as short-term compensation programs, allow employees to collect a reduced amount of unemployment income when their hours are reduced. Currently, approximately half of the states in the U.S. sponsor a work-share program (including California, New York, Florida, and Texas).

4

Reduce Compensation

Employers can reduce compensation for certain employees. Bonuses, commissions, grants, and other incentive payments may be subject to modification depending on the contract, or plan or program. The salaries of non-exempt employees without a contractual right to a certain level of compensation can be frozen or even temporarily reduced. Normally, a reduction to the predetermined salary of an exempt employee will cause a loss of the exemption. However, that rule is relaxed during a business or economic downturn so long as the reduction in salary is a bona fide decision not used to evade the salary basis requirements. The salary reduction must not be related to the quantity or quality of an employee's work, and it cannot be reduced below \$684 per week (or any higher state threshold for exempt minimum salaries). Additionally, pay reductions for exempt employees may not be modified by day-to-day or week-to-week decisions. Rather, courts have suggested that such salary fluctuations should happen no more than twice per year. Any salary reduction of an exempt employee during a business or economic downturn must be prospective, meaning the change cannot occur after the employee has already earned the salary, and changes must be clearly communicated to employees to avoid wage payment claims.

5

Halt Onboarding

While many employers have already implemented a hiring freeze due to the impact of COVID-19, many others may have outstanding job offers pending that could be withdrawn. When deciding whether to withdraw an offer, employers should be careful to avoid any discrimination claims in selecting which offers to revoke. To the extent an offer has been accepted, employers may still be able to rescind, but should consult with legal counsel to ensure that they are aware of all possible negative consequences, particularly if there is an argument that the offer was not for "at-will" employment.

6

Reduce Non-Employee Workforce

To the extent employers use independent contractors or leased employees, the employer may be able to terminate an existing arrangement. However, employers should carefully review the contracts to ensure they understand the termination requirements and procedures and the consequences of such a termination. Employers also should be cognizant of misclassification claims that may arise in the event affected individuals subsequently claim that they were in fact common-law employees and entitled to benefits as such.

7

Encourage Use of Paid Time Off

In the event the employer decides that a location needs to close, employers can encourage their employees to use accrued paid time off, to the extent the employer reasonably expects the closure to be temporary. This measure will not reduce wage costs, but it can reduce operational costs.

8

Allow Salaried Workers to Take Voluntary Unpaid Leave in Increments

Some employees may take an offer for voluntary unpaid leave (which can also be framed as a sabbatical or a career pause). Further, salaried employees could agree to take voluntary leave one day (or more) per week to reduce costs. However, employers should be mindful that the voluntary unpaid leave rules are strict for exempt employees. Voluntary leave for exempt employees can be unpaid if the employee takes the time off for a full day of work for personal reasons and the decision is completely voluntary.

9

Institute Mandatory Unpaid Leaves or Furloughs

Mandatory unpaid leave, also known as a furlough, is an option available to employers. Unlike layoffs, furloughs involve putting employees on a period of definite or indefinite unpaid leave with the expectation that they will at some point return to work. While a furlough is unpaid, employers should consult with counsel before discontinuing employee benefits. Employers should communicate with employees regularly if the furlough will last for an indefinite period of time. Employers may allow or prohibit employees from using accrued paid leave during a furlough period unless otherwise prohibited by state or local law. State laws differ on whether employers can require employees to use accrued paid leave during a furlough. Some states allow employers to require the use of paid leave, but others impose restrictions, such as California. If non-exempt employees do not work, they do not need to be paid. Exempt employees in the U.S. must be paid a full week's salary if they perform any work in a week, so they need to be furloughed in strict one-week increments that align with the employer's work week. Employers who choose to furlough large numbers of employees, or implement extended furloughs, should evaluate whether the action could implicate the federal WARN Act or state WARN Acts (for example, a furlough of six months or more would likely implicate the federal WARN Act). Employers should also look at any collective bargaining agreements or employment contracts before taking this step.

10

Offer a Voluntary Separation or Early Retirement Package

Employees may be incentivized to leave the workforce with a voluntary separation package. This allows the employer to reduce overhead costs associated with employing the individual and eliminates the employee's salary from future costs. Frequently, the highest paid employees are those that have been at the company for the longest and therefore are closer to retirement. While it may be difficult given liquidity issues, if employers can incentivize these employees (many of whom may have started contemplating retirement already) to retire early, cost savings can be realized. Certain job duties handled by departed employees can be transitioned to other workers with less on their plate due to the downturn. Employers considering an early retirement package should consult counsel to ensure compliance with applicable laws such as the Age Discrimination in Employment Act or the Older Workers' Benefit Protection Act.

Unfortunately, for some employers, the steps above will either be unavailable or insufficient to avoid a mass layoff. If a mass layoff is inevitable, employers should carefully consider how to select the employees who will be laid off and document their business reasons for the decisions, as well as the criteria used to determine who (or what categories of employees) will be included in the layoff. They should also be careful to limit future litigation risks. For example, employers can reduce the risk of discrimination and retaliation claims by conducting a disparate impact analysis, which assesses the proposed class of employees included in a layoff to determine whether there are a disproportionate number of individuals from a protected class or who have engaged in protected activity. Employers should be cognizant of any severance obligations in the event of layoffs, and should review any applicable collective bargaining agreements or other contracts that may be relevant. Employers should also evaluate whether their layoff invokes the federal WARN Act or any state WARN Acts.

In addition to covering legal risks, employers should also consider ways to preserve the goodwill that they have built with their employees. Employers can consider assisting terminated employees in applying for unemployment income benefits or helping cover certain outplacement costs.

While a layoff is never ideal, through careful consideration of their options and consultation with legal counsel, employers can navigate this difficult time.

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