



SHORT TERM SOLUTIONS TO ECONOMIC CRISIS CARRY
POTENTIAL RISKS

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The current economic malaise is creating pressure on both legislators, who are being pressed to pass new laws to stem the devastating impact of the national crisis on the average family, and on businesses, who are trying to remain afloat while the nation struggles to find a solution.

Temporary layoffs and work “furloughs” have seen increasing use as tools for short term cost savings. Human Resource professionals need to implement such measures carefully to avoid legal exposures. Some of these issues that need to be addressed as part of contingency planning include the following:

FLSA Rules May Impact Layoffs of Less Than One Work Week. Although layoffs of less than one week can save payroll costs when customer demands fall for short periods, HR professionals need to be very careful to follow state and federal wage and hour laws in relation to such layoffs. For example, exempt employees must receive their whole weekly salary, even if there is a plant shutdown for part of the week. Failing to do so may destroy the “salary basis” test for those and other exempt employees.

COBRA Rules Relating to Reduction of Hours. Depending on the length of the layoff, a “reduction of hours” may occur which could trigger COBRA rules and benefit plan language. The failure to issue a COBRA notice in such cases could result in the employer being in breach of their contract with their insurer and result in the loss of insurance for the employee (even if the employer has maintained insurance premiums) as well as COBRA penalties. If your layoffs exceeds the plan language regarding “reduction of hours”, it may be possible to secure an amendment of your plan document to enable the furloughed employees to stay on the medical plan.

Warn Notices (State and Federal). HR professionals need to evaluate whether the layoff will require a 60 day “Warn” notice under either the state or federal plant closure laws. Under Wisconsin law, if a company with at least 50 employees engages in a mass layoff of 1) at least 25% of the company’s employees or 25 employees, whichever is greater, or 2) at 500 employees, the notice requirement may be triggered. Some exceptions apply, including layoffs less than 60 days in duration, but the rules should be reviewed to ensure that the notice is not required. The Federal WARN rules apply to employers with more than 100 employees. Under those rules, an “employment loss” of more than six months (or reduction of more than 50% of work hours over 6 months) which affect 1) at least 33% of employees and at least 50 employees, or 2) at least 500 employees can trigger a notice requirement. The rules for both state and federal laws are very complex and should be carefully considered prior to any action that might potential fall within the laws.

Collective Bargaining Agreements. Unionized employers need to take care that layoffs comply with applicable provisions of collective bargaining agreements. Various seniority and recall procedures generally govern layoffs when a labor agreement is in force. These procedures often vary according to the length of the layoff.

State and Federal Antidiscrimination Laws. If less than the entire workforce is being subject to layoffs, the selection criteria should be analyzed to ensure that no improper bias was used in the decision

process. Moreover, the final statistics relating to the layoff should be evaluated to avoid exposure to disparate impact claims.

“Working” During Furloughs. An employer who “allows” an employee to work when they are on non-paid time is still responsible for paying wages to that employee. In these days of home computers, laptops, blackberries, and other portable work devices, it is very easy for employees who are on layoffs to monitor their e-mails, receive and send communications for business purposes, and otherwise perform work duties. If this occurs, and the company receives the benefit or is aware of the services, employees need to be paid for their time. Exempt employees may be entitled to their entire weekly salaries for performing any work during the week.

Wage Reductions. One option that should not be overlooked is the potential to administer brief wage reductions in lieu of layoffs. Such reductions may be embraced by employees who would otherwise face the potential loss of employment or benefits. At the same time, state and federal wage and hour laws, particularly those governing exempt employees, must be reviewed to ensure that wage reductions do not result in a “sham” salary being paid to exempt employees. Wage reductions cannot be initiated retroactively, and if they vary from week to week depending on the hours worked, they could undermine the “salary basis” for your exempt employees.

Unemployment. Many employees on layoff and furlough will be able to draw on unemployment accounts which could have a resulting financial impact to your company.

Vacation Use. Some state laws may restrict employers from compelling employees to use vacation during short term layoffs or furloughs.

If you have any questions regarding the content of this article or would like to speak to an attorney regarding other employment law matters, please contact one of our employment team attorneys at (920) 437-0476 or via email at the following email addresses:

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