Lawyers Alliance FOR NEW YORK
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Program Preservation, Evolution, and Financial Change: Employee Management

Understanding Furloughs

Many employers are considering ways to reduce their labor costs without actually having to lay off any employees. Unless an employee is covered by a collective bargaining agreement or an employment agreement,[1] an employer may prospectively change the employee's hours and/or wages, ideally on 30 days' written notice but at a minimum prior to the start of a new pay period. Any such changes should be made either for the entire organization or for entire units thereof, based on organizational needs. Making wage and/or hour reductions only for some individuals creates the risk of discrimination and other types of legal claims, as well as creating poor morale.

If your organization is thinking about changing wages and hours to avoid lay-offs, you should be aware of the legal issues that may arise in doing so, particularly with respect to exempt employees, legally required notice, and benefits. This memo will give you a brief overview of these legal issues, so that your organization can avoid common pitfalls and fulfill the legal obligations that you have to your employees.

Salary Reductions

Subject to the restrictions mentioned above, an employer may reduce compensation, as long as hourly employees earn at least minimum wage ($16.00 per hour in New York City), and exempt employees earn the minimum salary needed to maintain exempt status ($1,200 per week in New York City). However, asking employees to do the same amount of work for less money can create morale problems. One way to deal with this is to increase the number of paid vacation days or holidays. Remember that increasing the number of vacation days also potentially increases the number of accrued, unpaid vacation days owed to any departing employee. Limiting vacation carry-over can help reduce this risk.

Furloughs

Because salary reductions may not be practical or desirable, many organizations are considering the use of furloughs as a way to reduce costs during a downturn without laying-off employees. A furlough is an unpaid leave of absence, in this case in response to temporary downturn. Furloughs can be voluntary or mandatory, and occur during a defined, temporary period of time. Furloughs may be taken in full weeks, or on one or more days per week. All or some of your employees may be included in the furlough. A furlough and salary reduction will have the same net effect on employees, i.e. a reduced paycheck, but in a furlough scenario the employee's base salary remains the same so that when the furlough ends the employee will automatically revert to the ordinary salary level.

[1] Note that an offer letter may create contractual obligations.

Mandatory Selective Furloughs

In some cases, you may choose to furlough only some of your employees. As with selecting employees for a layoff, make sure that there is a sound business reason for choosing to furlough only some of your employees (for instance, funding for a particular program is cut), as well as for selecting the particular employees who are being furloughed (for instance, all employees who provided program services as well as those who indirectly supported the program).

Furloughing Exempt Employees May Cause Loss of Exemption from Overtime Requirements

As noted above, federal and state laws impose mandatory minimum wage requirements and overtime requirements for most employees. As long as your organization continues to pay nonexempt hourly employees the minimum hourly wage, it generally may reduce those employee's hours at its discretion. Consider applying for the New York State Shared Work Program, which provides for partial unemployment insurance for full-time employees whose weekly hours have been reduced.[2]

Reducing the hours and wages of salaried exempt employees, however, creates a more complicated situation. This is because under the Fair Labor Standards Act (FLSA), an exempt salaried employee must receive the same amount of compensation *regardless* of the amount of hours they work. This requirement is commonly known as the salary-basis test. To put it another way, an exempt employee's salary is not subject to reduction because of variation in the number of hours worked or in the quantity or quality of work performed during the pay period. This means that if an exempt employee performs *any* work - no matter how little - during the workweek, the full salary must be paid.

Exempt employees can be furloughed without pay in week-long increments (for instance, one week per month for the next four months) without running afoul of the salary-basis test.[3] As long the employee performs no work for an entire week, there is no legal obligation to pay the employee for that week. During the furlough period, however, the performance of even a minimum amount of work, such as checking emails or receiving phone calls, could require payment of the employee's full weekly salary. For this reason, it is critical to ensure that furloughed employees are not performing any work during the furlough period. At a minimum, employees should sign a statement that they will perform no work while on furlough. You should also consider disallowing email access or taking possession of company laptops or cell phones.

Organizations may also be able to reduce an exempt employee's salary on a weekly basis if the salary reduction reflects a reduction in the normal scheduled work week. An example would be to reduce the employee's normally scheduled work week from 40-hours per week to 35-hours per week, and correspondingly reducing their salary by 12.5 percent. In order to maintain the employee's exempt status, the weekly salary cannot be reduced below $1,200 in New York City. US Department of Labor regulations provide that making deductions from an exempt employee's salary due to absences caused by the employer or by the employer's fluctuating business needs flunks the salary basis test. For this

[2] For more information, see https://www.labor.ny.gov/ui/employerinfo/shared-work-program.shtm.

[3] This is the least risky way of furloughing exempt employees, but will preclude exempt employees from participating in a Shared Work program, which requires that hours be reduced on a weekly basis by no more than 60 percent. Affected employees may still qualify for regular unemployment benefits for the week in which they are furloughed.

reason, the reduction in hours and wages should be made prospectively only, and should be made on a long-term basis. Frequently changing an employee's work schedule may result in a denial of exempt status.

Contact Lawyers Alliance for specific guidance regarding furloughing your organization's exempt employees.

WARN Acts May Require Giving 90-Days Notice to Employees

Organizations that employ 50 or more people should consult with Lawyers Alliance attorneys well in advance of imposing mandatory furloughs or layoffs in order to determine if the federal and New York State Worker Adjustment and Retraining Notification Acts (WARN Acts) apply. Failing to comply with the WARN Acts can expose your organization to liability for back wages and lost benefits, as well as civil penalties.

The federal and state WARN Acts require covered employers to give written notice if at least 25 employees will experience certain types of "employment losses," including a reduction in hours of more than 50 percent for each month of a six-month period or a layoff lasting more than six months. The state law requires 90 days' written notice.[4] Notice must also be given to the affected employees' representatives, the Department of Labor, and the Local Workforce Investment Board.

The New York State WARN Act does not apply if the furlough or reduction in hours is carried out as part of a Shared Work plan through the NY Department of Labor, in which the employees receive unemployment benefits to partially compensate for their reduced wages. However, be aware that the WARN Act will apply if the wage reductions persist after the Shared Work program ends.

There is also a limited exception to the notice requirement for "unforeseeable business circumstances." An unforeseeable circumstance must have been not reasonably foreseeable when the ninety-day notice would have been required—your organization's major funding source collapses suddenly and without warning, for instance. Even in these cases, however, employers are still required to provide as much notice as practicable.

A Reduction in Hours May Affect Benefits and Trigger COBRA Continuation Coverage

Many employers' benefits plans cover only full-time employees. For these organizations, reducing an employee's hours to less than full-time will trigger a loss of benefits. To avoid this, you may consider amending the plans to include part-time employees.

Loss of group health insurance due to a reduction in hours is considered a "qualifying event" under the Consolidated Omnibus Budget Reconciliation Act (COBRA), requiring affected employees to receive notice of their right to elect continuation coverage. Remember that employers participating in the New York State Shared Work Program may not reduce employee benefits.

[4] The federal law, which covers employers with at least 100 employees, requires only 60 days' written notice. However, employers must comply with the most stringent requirements of both statutes.

You should also review the effect that a reduction in hours may have on an employee's participation in other welfare plans, as well as your pension plan. Review your employment policies, such as vacation, to see whether a reduction in hours will affect employees on furlough.

Contact Lawyers Alliance to speak with an attorney regarding your options and to ensure you meet all your legal obligations.

This alert is meant to provide general information only, not legal advice. Please contact Jonal Hendrickson at Lawyers Alliance for New York at (212) 219-1800 ext. 250 or visit our website www.lawyersalliance.org for further information. Representatives of nonprofit organizations who would like information on becoming a client should contact Client Relations Associate Lauren Hayden for assistance at lhayden@lawyersalliance.org or (212) 219-1800 ext. 278. Information about becoming a client is also available at https://lawyersalliance.org/becoming-a-client.

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