COVID-19 RESPONSE SERIES - BUSINESS RESTRUCTURING
April 16, 2020
Agenda

• Business Restructuring Options
• Layoff Checklist
• Notice requirements
• Risk analysis
• Final pay requirements
Business Restructuring Options

- Reduction in pay
- Reduction in hours
- Furlough
- Layoff
Business Restructuring

- What is the difference between a furlough and a layoff?
Business Restructuring

- A *furlough* involves reducing the days or weeks that an employee may work.
- A *layoff* can be temporary or permanent.
Where Do We Even Start?

• Planning
  – Who should be involved?
    – Upper management
    – HR
    – Legal
    – Finance
    – Department/Site Managers
Planning

• How should team communications be handled?
Planning

- Protect any applicable privilege
- Avoid rumors and leaks
Planning

• What should we consider in developing a plan?
Planning

- Furlough versus layoff
- Define the business justification
Planning

• Determine
  – who the decision maker(s) will be for each location
  – Needs of organization in short run/future
  – locations and the number/types of positions at each location impacted
Planning

• Determine
  − Selection criteria
  − Leave of manager discretion
  − Forced ranking
• **Selection criteria**
  - Different organizations within company can choose different selection criteria
  - KEY: HR and legal must act as gatekeepers to ensure criteria applied consistently
Planning

• Create a schedule
  – Timing of furlough/layoff
  – Timing of notification
Planning

• Create a schedule
  ‒ Drafting of documentation
  ‒ WARN/OWBPA notices
  ‒ Scripts for internal and external communications
Planning

- Create checks/balances
  - Exceptions to plan should require high level approval
Communications with Employees

- What should we consider in notifying employees of furlough/layoff?
Employee Communications

- Reasons for furlough/layoff
- Schedule
- Information v. rumor
- Honesty
Layoff Notice

• When is Federal WARN notice required?
• Worker Adjustment and Retraining Act (Federal Law) requires a 60 day notice of certain plant closings and mass layoffs
Layoff Notice

• When is Federal WARN notice required?
Layoff Notice

• When a covered employer initiates a layoff that meets WARN criteria:
  - Facility or unit closing that affects at least 50 EEs
  - Layoff of 500+ at single site
  - Layoff 50-499 if = 33% of workforce at single site
Notice Requirements

• Federal WARN does not apply to a job loss of less than 6 months
• Be aware of state law mini-WARNs
Layoff Notice

- Reduces the hours of work for 50+ workers by 50% or more for each month in any 6 month period
Layoff Notice

• What is a “covered employer?”
Layoff Notice

- Business with 100 or > full time workers laying off at least 50 people
  - Doesn’t count workers with less than 6 months on the job
  - Doesn’t count workers who work less than 20 hours per week
Layoff Notice

OR . . . .

• Business with 100 or > workers who work at least a combined 4,000 per week
UBC Exception

• What about the exception for unforeseeable business circumstances?
UBC Exception

- Applies when a closing or layoff is caused by business circumstances that were not reasonably foreseeable as of the time the notice would have been required.
  - No UBC exception in some state mini-WARN acts
Layoff Release of Claims

• What are the requirements under the OWBPA?
Layoff Notice

• For employees 40 and over if offering severance in exchange for a release of claims
• Specific language in release
• Form with decisional unit data
• Seek legal guidance
Risk Analysis

- What should we do to ensure fairness and assess litigation risk?
Disparate Treatment/Impact Analysis

- Analyze composition of selected group(s):
  - Disparate treatment (e.g. intentional discrimination)
  - Disparate impact (e.g. disproportionate impact on a protected group, even if the selection criteria are neutral)
Risk Analysis

• Clearly communicate selection criteria to decision makers
• Ensure checks/balances are in place to prevent unapproved selections, etc.
• Legal review of notices, disparate impact analysis, severance agreements, etc.
Final Pay

- Texas – wages due within 6 days of discharge
- Sections 207.049(1) and (2) of the Texas Unemployment Compensation Act state that a claimant will be disqualified from receiving unemployment benefits for any benefit period in which he is receiving wages in lieu of notice or severance pay.
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