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Cost-Saving Alternatives to Layoffs During the COVID-19 Pandemic

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Due to the sudden economic turbulence resulting from the COVID-19 pandemic, employers have been exploring ways to temporarily reduce operating costs. Many employers are seeking alternatives to layoffs. Such alternatives may include reductions in pay and hours of work, furloughs and shutdowns of operations, and work share programs. The following identifies the legal and practical considerations associated with the alternatives available to employers.

Reductions in Pay and Hours

An employer is generally free to prospectively change an employee's rate of pay and scheduled hours. This can be accomplished by reducing employees' hours and pay by a proportionate amount. Employers should consider the following issues and risks before altering work hours and compensation:

Employment Agreements. Employers must determine whether any employment contracts or offer letters guarantee a level of compensation or set schedule to the affected employees. Employees with contracts setting forth their level of compensation and work schedule should be notified in writing of the proposed changes. Employers should be prepared to engage in negotiation on the changes terms in order to minimize the risk of breach of contract disputes.

Fair Labor Standards Act. Employers need to be mindful of their obligations under the Fair Labor Standards Act ("FLSA").

- **Non-Exempt Employees.** For non-exempt hourly employees, reducing pay rates prospectively generally does not pose any issues, provided that the employee is paid at least the minimum hourly wage and overtime when due. If a non-exempt employee performs any work during a day, even if he or she is not scheduled to work, he or she must be paid for that time worked. Changing non-exempt workers' schedules can present issues in light of restrictive state laws requiring varying amounts of notice.

- **Exempt Employees.** Multiple changes in an employee's schedule and resulting salary throughout the year may risk a denial of the exemption. Generally, toqualify as exempt under the FLSA, an employee must perform exempt duties and be paid on a salary basis, meaning he or she must receive the same amount of compensation each week, regardless of the number of hours or days he or she has worked. Exempt employees must receive a weekly salary of a particular amount, depending on the state, in order to meet the salary threshold and qualify for the exemption that week. Exempt employees' schedules and resulting salary may be changed based on a broader-based business or economic slowdown, though the employees must continue to perform exempt duties to maintain the exemption.

State Laws. Employers may need to provide employees with advanced notice of changes in pay and hours depending on the applicable state law. Additionally, local city laws may impose requirements on employers (*e.g.*, notice requirements) beyond obligations under state and federal law. While most states have wage-and-hour laws that generally follow the FLSA with respect to furloughs of exempt employees and/or wage-and-hour reductions, some states—*e.g.*, California—have interpreted their wage-and-hour laws in a different manner than the U.S. Department of Labor ("DOL"). For non-exempt workers, employers must also be mindful of any applicable state predictive scheduling laws, which may require advance notice of a change in an employee's schedule and impose penalties for non-compliance. Also, some states have minimum hours of pay requirements for employees who are "called in" to work but do not work a full shift.

Temporary Furloughs and Shutdowns

In addition to or in place of pay cuts and schedule changes, employers may wish to institute temporary furloughs or a shutdown of operations for certain days or weeks of the year.

If a company furloughs its employees, or shuts down its operations (or just the operations of a particular department), it is not obligated to pay its employees, so long as they perform no work during that period. Because the regulations to the FLSA require that exempt employees receive their full salary for any week in which they perform *any* work (*i.e.*, a workweek), many employers will temporarily shutter operations on a workweek basis (conceivably covering both exempt and non-exempt employees). If it is not feasible for a company to furlough employees or cease operations for workweek-long periods of time, it may be possible for a company to reduce employee hours or pay, or structure its furloughs and shutdowns for a period of less than a week. For example, amidst an economic downturn, a company could prospectively reduce its employees' schedules to four days per week, which would result in a 20% salary reduction. If the company takes this approach, it must ensure that:

- Reduction decisions are made indefinitely or on a long-term basis (e.g., for a three-month or six-month period), rather than a short-term (e.g., re-evaluating day-by-day or week-by-week) basis;
- Reduction decisions are made on a company-wide, division-wide, or department-wide basis, rather than on an employee-specific basis;
- Reduction decisions are occasional, rather than frequent;
- Changes in hours or work schedules are established and announced well in advance of implementation; and
- Employees are paid according to work performed. That means, for example, that exempt employees must receive a weekly salary of at least $684 (or higher under the laws of certain states, *g.* New York) to preserve the exemption for that week.

Work Share Programs

In some states, rather than laying off a percentage of the workforce to cut costs, employers can submit a plan to their state DOL (or unemployment insurance division) to reduce the hours and wages of all or a particular group of employees, who will then "share" the remaining work. Those employees will then be eligible to receive partial unemployment benefits to supplement their lost wages—typically a percentage of unemployment benefits equal to the same percentage that wages were reduced for that week (*e.g.,* an employee whose hours are reduced by 25% would typically be entitled to 25% of the weekly unemployment benefits to which they would be entitled had they been laid off). Such programs, referred to as "Work Share Programs," are often a win-win for employers who are able to retain their skilled workforce, and for employees who will be compensated at a higher rate than if they had been laid off and were collecting only unemployment benefits. Keep in mind that employers may have to pay higher unemployment benefit premiums, so the ultimate cost of such a program must be considered in the context of achieving cost-savings goals.

General Word of Caution for Employers with Unionized Workers

The National Labor Relations Act ("NLRA") requires unionized employers to bargain in good faith with their union over mandatory subjects of bargaining, which generally include hours, wages and other terms and conditions of employment. Before implementing any of these layoff alternatives, employers with unionized workforces should first review the applicable collective bargaining agreement to assess whether they have the ability to unilaterally implement potential cost saving layoff alternatives based on exigent or unforeseen changed circumstances. In particular, employers should review their agreements for a *force majeure* and/or management rights provision that could (1) apply to the current COVID-19 pandemic, and (2) allow the employer to modify the terms of the collective bargaining agreement and implement a change to employee pay or hours. If the terms of the collective bargaining agreement do not permit employers to make unilateral changes, employers can consider requesting bargaining over such terms. Depending on the language in particular collective bargaining agreements, bargaining may be required not only over the decision to implement the change, but also the effects related to that change.

Additional Alternatives

In addition to the steps discussed above, there are a range of other cost-saving measures that could serve to help employers avoid layoffs. These include: (i) freezing wages; (ii) establishing a hiring freeze so that no new employees are hired, and no positions are filled when employees leave through natural attrition or termination; (iii) implementing alternative compensation arrangements such as deferred compensation, or increased incentive pay or productivity bonuses in conjunction with salary reductions or freezes; (iv) reducing benefit contributions to health plans, eliminating 401(k) matching programs, and decreasing fringe benefits; (v) initiating better control over employees' work hours to ensure that employees are working full days and/or are not working unnecessary overtime; (vi) setting caps or implementing "use it or lose it" policies for vacation pay or paid time off (except in certain states such as California); (vii) offering a voluntary retirement or separation program to encourage employees to leave without having to resort to an involuntary reduction in force; and (viii) offering a voluntary sabbatical program or unpaid time off.

Employee Benefits

Employers also must be sure to coordinate planned furloughs, reduced schedules and pay cuts with their employee benefit plans and policies, including medical or dental insurance plans, 401(k) plans, and leave and other fringe benefits policies. Reduced workweeks may affect the level of benefit contributions to a 401(k) plan, particularly if the employee had planned to spread out the maximum annual contribution over the course of the year. If an employee is furloughed for an entire week, he or she may need to make additional premium payments in other weeks to ensure health or dental coverage for the month.

The WARN Act

Depending upon the extent to which hours are reduced, the length of any planned furloughs and the number of employees affected, employers may trigger notice requirements under the federal Worker Adjustment and Retraining Notification Act ("WARN") and similar state plant closing/mass layoff advance-notification statutes. Under WARN, employers generally are required notice when a temporary layoff extends beyond six months (*i.e.*, to a period that becomes a statutory "loss of employment"). Note that some states' "mini" WARN laws may be more onerous for employers than the federal statute. (See our recent post here for greater detail on COVID-19-related WARN developments.)

There are various exceptions to WARN to be mindful of as well, such as the unforeseen business circumstances exception, which may provide justification and protection to an employer issuing an untimely notice. In light of COVID-19, some states have issued guidance on WARN exceptions to their mini-WARN laws. For example, the governor of California recently issued an Executive Order that allows California employers conducting layoffs due to the COVID-19 pandemic to use the "unforeseen business circumstances" exception, which otherwise did not exist in that state prior to the pandemic. Similarly, New Jersey amended the definition of "mass layoff" under its WARN law to exclude layoffs resulting from national emergencies, among other events (*i.e.*, fire, flood, natural disaster, act of war, civil disorder or industrial sabotage, decertification from participation in federal Medicare or Medicaid programs). As a result, mass layoffs resulting from the COVID-19 pandemic do not trigger the notice requirements of the New Jersey WARN Act. By contrast, the New York Department of Labor has issued guidance stating that the New York WARN Act requirement to provide 90 days' notice has not been suspended due to the COVID-19pandemic.

Unemployment Benefits

Employers should keep in mind that employees whose hours are reduced (such as under a Work Share Program) or who are furloughed for extended periods of time may qualify for unemployment or partial unemployment benefits from their state, depending on state law, the employee's past earnings, and the extent to which wages or hours are reduced. As with Work Share Programs, this could increase the cost of the employer's unemployment benefit tax burden and should be factored carefully into any decision to reduce hours or implement a furlough plan. In light of COVID-19, many states have altered their eligibility requirements for unemployment benefits and/or have waived waiting periods or any job-searching obligations for individuals while out of work due to COVID-19. The Coronavirus Aid, Relief, and Economic Security ("CARES") Act, incentivizes states that ordinarily have a one-week waiting period to waive that requirement by providing that the federal government will reimburse 100% of the benefits paid during the first week of an individual's unemployment if a state waives its waiting period. In addition, the Federal Pandemic Unemployment Compensation provision of the CARES Act provides that individuals who are eligible for unemployment benefits will receive an extra $600 weekly benefit for all weeks of unemployment between April 5, 2020 and July 31, 2020, in addition to the amount the individual otherwise would be entitled to receive under state law. Finally, the Pandemic Emergency Unemployment Compensation provision of the CARES Act also provides for an additional 13 weeks of unemployment benefits for individuals who have exhausted benefits they are otherwise entitled to under state law (regular unemployment benefits are capped by many states at 26 weeks). (See our recent post here for greater detail on COVID-19-related unemployment benefits developments.)

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