Alert

March 20, 2020

COZEN O'CONNOR

Layoffs, Furloughs, and the Impact of WARN Acts on Reorganizations

What is the difference between a layoff and a furlough?

A layoff occurs when an employer temporarily removes all employees from payroll for lack of work. The employer, however, believes that this condition will change and intends to recall employees when work again becomes available. Employees are typically able to collect unemployment benefits while on an unpaid layoff, and frequently an employer can take steps to possibly allow employees to maintain benefit coverage for a defined period of time as an incentive to remain available for recall.

A furlough is considered to be an alternative to layoff in which case an employer requires employees to work fewer hours or to take a certain amount of unpaid time off. For example, an employer may furlough its non-exempt employees one day a week for the remainder of the year and pay them for only 32 hours instead of their normal 40 hours each week. Alternatively, the employer may require all employees to take a week or two of unpaid leave sometime during the year. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services.

What decisions do employers have to make as part of a layoff or furlough?

The following is a typical decision-making tree for employers, regardless of whether it is considering a furlough or layoff:

- Will any of the time off be paid or unpaid?
- Will it be voluntarily or involuntary?
- Who is eligible for the layoff/furlough (e.g., all employees, particular departments, or particular levels of employees)?
- If it is voluntary, is there a limit to how many employees can elect to be furloughed/laid off and does the employer retain discretion to refuse to allow someone to take a voluntary layoff/furlough?
- If the employer can refuse to allow someone to leave, are the criteria for that decision identified in advance?
- If involuntarily, will objective criteria be used to select candidates (e.g., seniority)? If not, are the criteria identified in advance, who is making the individual decisions and does the evidence support the manager's decisions based on the criteria selected?
- Can the employer anticipate how long the furlough/lay off will last? If so, give some guidance to affected employees and consider whether federal or state WARN laws apply. (See below)
- If the employer anticipates that the reductions could be permanent and is seeking to have employees sign releases in return for certain benefits, then the employer must comply with the Older Workers Benefit Protection Act.

Is your organization covered under the WARN Act?

The Federal Worker Adjustment and Retraining Notification Act (WARN Act) applies to employers with 100 or more employees. That count does not include: (1) employees who have worked less than six months in the last 12 months; (2) employees who work an average of fewer than 20 hours per week.

Part time employees count towards the 100 count if part-time employees collectively work at least 4,000 hours each week excluding overtime.

Peter J. Ennis

Member

pennis@cozen.com
Phone: (412) 620-6512
Fax: (412) 275-2390

Arielle Eisenberg

Member

aeisenberg@cozen.com
Phone: (786) 871-3953
Fax: (305) 704-5955

Nandini Sane

Member

nsane@cozen.com
Phone: (832) 214-3962
Fax: (832) 214-3905

Related Practice Areas

- Labor & Employment

How long is the requisite notice period?

A mass layoff or plant closing requires 60 days' notice to employees effected under the federal WARN Act.

What type of events trigger WARN Act notice?

Plant Closing: A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. This does not count employees who have worked less than six months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice (discussed later).

Mass Layoff: A covered employer must give notice if there is to be a mass layoff that does not result from a plant closing, but that will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50–499 employees if they make up at least 33 percent of the employer's active workforce. Again, this does not count employees who have worked less than six months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice. An employer also must give notice if the number of employment losses that occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for two or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period will count together toward WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

What is a covered employment loss?

The term employment loss means: (1) An employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in an employee's hours of work of more than 50 percent in each month of any six-month period.

Exceptions: An employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a six month break in employment, and the new job must not be deemed a constructive discharge. These transfer exceptions from the employment loss definition apply only if the closing or layoff results from the relocation or consolidation of part or all of the employer's business.

Who counts in employment loss?

Aggregate the number of employees affected by plant closings or mass layoffs in a 90-day period by looking 90 days back and 90 days ahead from the expected date of the employment loss to take into account both planned and completed losses.

Including all other employment losses that occur within 30 days of the WARN-triggering event, even if those losses are not the result of a mass layoff or plant closing.

Are there exceptions to the 60-day notice period?

Unforeseeable business circumstance applies to plant closings and mass layoffs caused by business circumstances not reasonably foreseeable when a 60-day notice should have been required.

A sudden, dramatic, and unexpected action or condition outside employer's control like an unanticipated and dramatic economic downturn or a government-ordered closing of an employment site that occurs without prior notice.

No definitive regulations currently exist to evaluate whether COVID-19 qualifies as either a natural

disaster or unforeseen business circumstances.

Employers in these circumstances must still give as much notice as possible.

Can employers provide employees with pay/benefits instead of notice?

Employers can consider paying employees and maintaining benefits for the 60 days the employees would have been retained instead of providing 60 days advance notice. This means the employer must pay employees what they would have earned and maintain benefits for the remainder of the 60-day period if notice was for less than 60 days.

An employer may not count severance payments as part of the payment for any part of the WARN Act notice period for which there was no notice. However, employers may reduce severance by the amount of any WARN damages or benefits paid in place of notice.

What is required when an employer furloughs instead of terminates employees?

The WARN Act is not triggered for employers who furlough employees for less than six months. However, employers should still give furloughed employees as much notice as possible. A furlough may also implicate other employment laws such as the Fair Labor Standards Act, which, amongst other things, provides for the circumstances where employees may be exempt from overtime pay.

Additionally, if a furlough is to last more than six months, employers will have to follow WARN Act requirements. In this current situation, we understand it is very difficult to estimate how long these layoffs might last. However, if employers anticipate that the layoffs will be permanent (and would otherwise meet the 50 or more threshold), employers simply comply with the WARN Act notice procedures. Employers should carefully consider whether it is likely that temporary layoffs will extend beyond six months. For example, if at this point employers reasonably think that the temporary layoffs will extend beyond six months, employers should give notice as required by the WARN Act. However, if it is unclear how long the temporary layoffs might be at this point, employers should create a tickler system and reassess the situation at the three or four month mark. Employers can then make the decision on whether leave is likely to extend beyond six months, and give the WARN Act notice at that time (i.e., “as soon as practicable,” as required by the Act).

How to handle severance payments

If providing severance to reduction in force (RIF’d) employees in exchange for a release of claims, the Older Worker’s Benefit Protection Act (OWBPA) requires employees 40 years of age and older receive at least 45 days to consider the release before signing and seven days to revoke acceptance of the terms. This is triggered if two or more employees are terminated. Employers also must provide certain disclosures to employees along with the release of claims that includes the following information:

- the class, unit, or group of individuals included in the exit incentive or employment termination program;
- any eligibility factors for the exit incentive or employment termination program;
- any time limits applicable to the exit incentive or employment termination program;
- the job titles and ages of all individuals eligible or selected for the exit incentive or employment termination program; and
- the ages of all individuals in the same job classification or organizational unit who are not eligible or were not selected for the exit incentive or employment termination program.

How could employee benefits be impacted in the event of a furlough or layoff?

In the event of a layoff or furlough, employers must be sure to consider all of the implications for every one of their employee benefit plans and programs. There can be important considerations under health/medical, disability, life insurance, and severance pay programs, as well as for bonus/incentive arrangements and retirement or other deferred compensation plans.

Among other things, it is critical to review the eligibility rules for all types of benefits to determine

whether they can be continued during periods of unpaid layoff or for those in furlough who have reduced hours. Particularly for insured benefits (such as health/medical, disability, or life insurance), there can be actively-at-work or minimum paid hours restrictions or limitations under the terms of the applicable insurance contracts that can preclude ongoing eligibility for any affected employees.

Of course, in the case of a loss of health/medical benefits due to layoff or reduction in hours, an offer of COBRA continuation coverage could be triggered and employers could have to decide whether to subsidize some or all of COBRA coverage costs. For some other types of insured benefits, there can be an obligation to notify affected employees of conversion rights (to individual coverage) that arise under applicable state insurance law.

Layoffs and furlough events also mean that affected employees may no longer have sufficient (or any) wages and funds to afford the employee cost portion of benefit programs. Employers may be faced with deciding how best to deal with changes or modifications to the terms of payment for employee cost share.

Some other employee obligations, or rights, can be tied to ongoing employment. For instance, terminated employees could be faced with having to repay loans granted from retirement plans (or suffer taxable distributions of retirement benefits to offset the unpaid loan amount). Unless timely plan amendments are adopted, terminated or reduced hours employees might also forego employer retirement contributions that are conditioned on year-end employment or minimum paid hours requirements. Unless changed, similar requirements for year-end (or date of payment) employment may be applicable under bonus or incentive arrangements.

Be aware that if employers have ever paid severance benefits in past situations, there could be a question of whether the same level of severance pay is now due for current layoffs. The best practice toward minimizing potential confusion is to take formal steps to adopt a current severance plan and document what is intended in these particular circumstances. In the absence of such action, a prior pattern or practice of paying severance could result in a challenge based on a claim that past history shows there was an established severance plan.

A more in-depth summary of specific employee benefits and compensation matters for layoffs and furloughs will be found in a separate future Alert that is devoted to that particular topic.

Are there applicable state/local mini-WARN laws?

The following states have their own state-specific “mini-WARN” laws. If employers are considering a layoff or plant closing in any of the listed states, be sure to check the state laws for any requirements separate from the federal WARN act requirements.

1. California
2. Connecticut
3. Hawaii
4. Illinois
5. Iowa
6. Maine
7. Minnesota
8. New Hampshire
9. New Jersey
10. New York
11. North Dakota
12. Philadelphia, Pennsylvania has a city law
13. Puerto Rico
14. Tennessee
15. Vermont
16. Wisconsin