

DIFFICULT TIMES, TOUGH DECISIONS: DOWNSIZING AND RELATED EMPLOYMENT ISSUES

Today's economy is challenging for employers of all sizes, in nearly all industries. The economic downturn has caused many employers to re-evaluate their business plans and expenses. Some have reduced payroll by freezing or cutting salaries, reducing schedules, laying off employees, or closing all or part of a plant. Any or all of these measures can trigger significant legal challenges and potential liabilities for the employer. The following are some laws and issues that can impact employers in North and South Carolina when downsizing or otherwise reducing payroll or schedules.

The WARN Act. The Worker Adjustment and Retraining Notification (WARN) Act is a federal law that applies to businesses with 100 or more full-time employees. It requires covered employers to provide at least 60 days written notice before "an employment loss" due to a "mass layoff" or "plant closing," as those terms are used in the WARN Act. This notice must be provided to four different individuals, groups of individuals, or organizations:

- Affected employees who are not represented by a union;
- Any union representing affected employees;
- The State Dislocated Worker Unit for the location in which the employment action is taken; and
- The chief elected official of the local government unit within which the plant closing or mass layoff will occur.

When timely notice is not provided, an employer may be liable to each affected employee for back pay and benefits for the period of the violation, up to a maximum of 60 days, plus attorney's fees and costs.

State Notice Requirements. Pursuant to S.C. Code Ann. § 41-1-40, when a South Carolina employer requires an employee to provide advance notice prior to quitting, then the employer should give advance notice to its employees of its intent to stop work. This must be provided at least two weeks in advance or be equal to the time of notice an employer requires of employees who are quitting.

Instead of mandating written notice to each employee, South Carolina law requires employers to post a printed notice regarding the shutdown and its approximate length. Prior notice is not necessary, however, when the shutdown is due to an unforeseen accident to machinery or an act of God or of a "public enemy."

Failure to comply with the notification requirements can result in fines of up to \$5,000, upon conviction, for each affected employee. Unlike South Carolina, North Carolina does not have a specific state statute in this area.

Federal Wage and Hour Issues. Under the Fair Labor Standards Act, when reducing the schedules or pay of exempt employees (those ineligible for overtime pay), employers should not adversely affect the “salary basis” of those employees. Exempt employees still must be paid a salary for each workweek in which work is performed. Also, employers may not reduce any employee’s pay below minimum wage.

State Wage Payment Requirements. Employers in South Carolina must normally provide seven days advance written notice to employees before cutting their pay or schedules. In North Carolina, employers are required to notify employees, either in writing or through a posting that is accessible to employees, at least 24 hours prior to a reduction in wages.

Discrimination Issues. A principal concern with downsizing is the possibility that discrimination claims may follow. Obviously, employees may not be selected for layoff because of race, color, religion, sex, national origin, disability, citizenship, age, or other characteristics protected by federal, state, or local law or ordinance.

In addition, claims of discrimination may arise when facially neutral criteria used to select employees for layoffs have an unlawful, adverse impact on employees in a protected group. For example, selecting the employees who have been employed the longest may have a disparate impact on older employees, giving rise to a potential age discrimination claim. Employers should consider the possibility of discrimination claims and take steps to minimize the risk of such claims.

Waivers and Releases. Waivers and releases can extinguish many potential liabilities arising from the employment context. Most potential federal and state claims may be waived. Claims under the Age Discrimination and Employment Act (ADEA) may only be waived in accordance with the Older Workers Benefit Protection Act (OWBPA), which requires “knowing and voluntary” waivers of ADEA claims. There are detailed requirements of the OWBPA which must be satisfied for a waiver to be considered “knowing and voluntary,” including certain time periods to consider the waiver and a seven-day revocation period.

Unemployment Compensation. Employees who lose their jobs or who are temporarily laid off are eligible to receive unemployment compensation. Such benefits can be paid for up to 26 weeks, although extensions sometimes occur. The first step to qualify for compensation is to file a claim with the employment security office. Each employee is normally responsible for filing the proper paperwork. Employers can help coordinate the process and, in some situations, even file the claim on behalf of affected employees.

Employee Benefits. Many employers offer benefits, such as health care, to their employees. To receive those benefits, employees must meet various eligibility requirements that frequently include remaining “actively employed” by the employer. Significant reductions in work schedules, layoffs, or terminations can affect benefit eligibility and require that employees be notified of their

rights under the different benefit plans. For instance, employees and their dependents may be entitled to continue group medical benefits – at their expense – through COBRA or a similar state statute. Some group term life insurance plans allow terminated participants the right to continue coverage after termination of employment. Also, too many departures of employees from a retirement benefit plan may trigger a partial plan termination, which is a serious event and requires the attention of an employee benefits attorney.

Severance Benefits. Some employers may offer a severance package to departing employees. The composition of this package varies and may include such things as outplacement assistance or severance pay. Severance pay can be subject to ERISA and its legal requirements, so employers should consult with their benefits counsel.

Conclusion. While downsizing or other actions may be part of their response to difficult economic times, employers should carefully consider the related legal issues and potential liabilities that can arise. Otherwise, bad economic times could get even worse.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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