Ogletree Deakins 3-19-2020

# You Need to Cut Costs, but Don't Want a RIF: Alternatives to Terminations in the Age of COVID-19

David J.B. Froiland Milwaukee Author

Keith E. Kopplin Milwaukee Author

During this season of COVID-19, in which the duration of the crisis is unknown, employers across the country are seeking to implement cost-cutting measures which avoid full-blown reductions in force (RIFs). Many employers are opting instead for cost-saving measures that are designed to be temporary and reversible placeholders in the event the economy snaps back sooner rather than later. Employers have several tools in their toolkits.

As a general rule, employers must pay exempt employees a full week's pay for any week in which work is performed. The premise of this exempt classification is that employers generally may not dock the pay for any time the employee did not work during the week except for certain recognized exceptions. Employers may not dock an exempt employee's pay for any absence caused by the employer or at the direction of the employer if ordered by the state. For example, if an employer sends all exempt employees home on Tuesday, the exempt employees must be paid their full salary for the full week. The employer can require them to work from home. An employer is not required to pay an exempt employee for any full workweek in which an exempt employee does not perform any work.

However, the terms and conditions of an exempt employee's employment are not fixed forever. In the same way that employment is at will, the terms of employment are also at will, and can be changed, in advance, for exempt and non-exempt employees alike. Note that there may be certain notice requirements under applicable state wage and hour laws.

The following catalogues some of the ways in which employers may reduce pay for exempt employees:

## 1. Mandatory Furloughs

Because employers are not required to pay exempt employees for any week in which they did not perform work, employers may require exempt employees to take a full workweek off. To

distinguish from a position elimination or termination, this may be referred to as "furlough." This can also minimize unintended consequences associated with terminations such as needing to pay out accrued but unused paid time off. To the contrary, the U.S. Department of Labor (DOL) has noted that employees can also be required to use vacation pay during furloughs. This can provide much needed pay to workers without causing an immediate financial hit to the employer.

Of course, exempt employees may not work while they are on furlough, and most employers shut off their access to the computer systems to promote this result. It is important that employers not use this approach on an intermittent basis. The DOL has warned that frequent furloughs (on-again and off-again) could jeopardize employees' exempt status, so this option should be implemented one time only, or sparingly.

One other point is critical: If an employer implements a "furlough" (i.e., an unpaid leave of absence with benefits), as opposed to a "layoff" (i.e., a termination of employment with the potential for rehire), there are myriad complications that must be considered:

1. Benefits continuation. Can employers offer employees the continuation of benefits under their plan? The answer depends on the plan language. If the plan does allow for continuation, who will pay for the benefits? If the employee pays a portion of them, how does the employer collect their contributions? The answer may be different for each type of benefit as each has a different plan.
2. Healthcare continuation. The Consolidated Omnibus Budget Reconciliation Act (COBRA) is the federal law that permits employees to continue their health insurance coverage in the event of some job losses. Will COBRA be triggered if the job loss is a furlough rather than a layoff?
3. The Affordable Care Act (ACA). Are penalties triggered under the ACA if an employer institutes a furlough rather than a layoff?
4. Paid time off (PTO) Use. Can employees use their PTO? Can employers force them to use it? (The answers to these questions vary by state and sometimes municipality.)
5. PTO Accrual. Do employees continue to accrue PTO while on furlough? (The answer to this question varies by state and sometimes municipality.)
6. Retirement benefits. Will there continue to be employer contributions to employees' retirement benefits in the event of a furlough or layoff?

Employers should also consider employees' eligibility for leave under the Family and Medical Leave Act (FMLA), mandatory paid sick leave laws or policies, other leaves of absence allotments, unemployment compensation benefits, and child support and other garnishments. This list is illustrative and not exhaustive.

**2. Reduced Job Hours and Pay**

Employers may reduce an exempt employee's work assignments and compensation on a prospective, forward-looking basis, as long as the exempt employee's guaranteed salary remains over $684 a week. For example, an employer may notify an employee as follows: "Starting in the next pay period, your job is going to change temporarily in light of coronavirus. You will work a reduced schedule and your pay will be 75 percent of your prior salary."

The reduction should not be for a single week or two on grounds that this looks more like docking pay and less like a reduced-schedule" arrangement. There is no bright-line rule on how long a reduced schedule needs to continue. Further, a reduced arrangement must not be intermittent (i.e., employers may not switch back and forth between reduced and unreduced jobs). Again, importantly, state law may require prior notice before making this change.

**3. Reduced Pay Even When Job Duties Are Not Reduced**

Because the terms and conditions of employment are all "at will," pay rates may be changed on a prospective basis including for exempt employees, even for a workload and schedule that remains unchanged. Employers may tell employees the following:

In light of the recent economic downturn, we are looking for ways to identify cost-saving measures other than permanent employment terminations. Starting with the next pay period, the company will be reducing pay for certain exempt employees. Starting on the pay period that begins on March ___, 2020, your pay will be reduced by 25 percent.

We know that this is a difficult time for workers and families alike, and we are hopeful that this cost-cutting measure will prove to be short-lived and manageable in a way that allows our business to continue to serve our customers, and which still permits our workers to maintain an income stream. We are grateful for the services you provide, and we are hopeful that if we can all work together through the next few months, we will see normal business operations resume, along with normal (unreduced) paychecks for our employees.

One caveat, of course, is that pay must not be reduced beneath the minimum salary requirement of $684 per week, which constitutes a hard floor and limit when using this approach. California and New York have higher minimum salary requirements (for example), so state law must always be taken into consideration.

**4. Unpaid Personal Days for Volunteers**

Employers may reduce weekly pay if the exempt employee takes (i) entire days off in a way that is (ii) completely voluntary. Section 541.602(b)(1) of the **federal regulations** discussing the salary basis for exempt status states that

[d]eductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons." Salary deductions, therefore, may be made when exempt employees voluntarily take time off for personal reasons, other than sickness or disability, for one or more full days. For instance, an exempt employee paid $500 per week on a salary basis may take VTO [voluntary time off] for personal reasons for four days in a workweek and receive one fifth of the salary. The employee's decision to take VTO, however, must be completely voluntary and not "occasioned by the employer or by the operating requirements of the business.

29 C.F.R. § 541.602(a).

This only applies to full day absences caused by the employee not the employer.

### 5. Full-Day Deductions for Bona Fide Sick Leave

Deductions from an exempt employee's salary may also be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents), if the deductions are made "in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability." Thus, if an employer's plan provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability "may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder." 29 C.F.R. § 541.602(b)(2).

### 6. Docking PTO During Shortened Work Periods

Employers **may reduce** an exempt employee's PTO hours if the employee works shortened days or weeks, provided they still receive the same full weekly salary. No true deduction from pay occurs here only a reduction in the exempt employee's PTO bank.

### 7. Benefit and Bonus Reductions

Any reduction in 401(k) match or bonus amounts should be performed only after careful review of applicable plans, employment agreements, and company policies.

### 8. Voluntary Separations

Employers may offer consideration for employees to separate their employment altogether. Even though some amount of consideration is needed to support this approach (monies that many struggling employers do not have this week), there are many advantages to developing a voluntary separation program. Because the program is voluntary, this approach is unlikely to damage employee morale. Additionally, it allows those employees considering retirement or early separation an opportunity to move forward with their plans at a faster pace. Using this approach, employers should decide which employees will receive the offer. Because the program is voluntary, employers may be selective about which employees will be invited to apply and which employees are approved for the voluntary separation package (employers may reserve the right to reject a volunteer based on business necessity or otherwise).

## A WARN Act Consideration

Under the federal Worker Adjustment and Retraining Notification (WARN) Act, an "employment loss" can be a termination, a layoff exceeding six months, or a reduction in hours of work of more than 50 percent during *each* month of any six-month period.

In this uncertain COVID-19 landscape, what if an employer believes a layoff will be for less than six months (in which case federal WARN will not be triggered), but cannot really be sure how long the layoffs will last?

This question is important, because the WARN Act may apply, and notice maybe be required, if the requisite number of employment losses occur, and the layoffs extend six or more months. Of course, one exception to the WARN Act's notice requirement is the "unforeseeable business circumstances" exception. The intersection of this "six month" durational rule and the "unforeseeable business circumstances" creates a dilemma for many employers:

Six-Month Durational Rule: If the layoffs are for less than six months, there will not be a covered event under WARN, and the law won't be triggered. However, if the layoffs extend for six months or more, in a way that triggers the WARN Act, at some time in the future the "unforseeable business circumstances" will likely no longer apply (because formerly unforeseeable circumstances can become increasingly foreseeable over time), unless there has been some new incident that again triggers the "unforeseeable business circumstances" exception at that later date.

Unforeseeable business circumstances exception: This week, when the reactions to the COVID-19 pandemic are at their peak and the markets are volatile, the unforeseeable business circumstances argument is quite strong for many employers. However, eventually (likely in the near future), the narrowly-construed and rarely-granted "unforeseeable business circumstances" exception will no longer apply. As time passes, the employer will lose this exception to WARN Act compliance (unless, potentially, there is an additional and demonstrable, intervening unforeseeable business circumstance that directly elongates the current layoffs).

Given this dilemma, employers facing the least amount of certainty regarding their business forecast should strongly consider issuing a WARN Act notice. Of course, sometimes the analysis is guided not by the foregoing legal considerations, but by a more practical consideration: whether the employer is willing to tell employees what the WARN Act requires, namely, that the employment relationship is terminated. For many employers, this is not a possibility they are willing to entertain and not a communication they are willing to convey.

Note that state "mini-WARN" laws can present different obligations, some of which are more restrictive for employers.

## Unemployment Compensation

The newly-signed **Families First Coronavirus Response Act** applies to employers with fewer than 500 employees (plus certain employees in multi-employer collective bargaining agreements) and provides up to two weeks of unemployment for certain layoffs.

Most (if not all) states are likely to update and loosen their unemployment restrictions. The list of states is changing quickly, but as of March 18, 2020, they include: **Alabama**, **California**, District of Columbia, **Illinois**, **Kentucky**, **Michigan**, Minnesota (which issued an executive order instructing change and has legislation pending), **New York**, **Ohio**, **Rhode Island**, **Vermont**, **Washington**, and **Wisconsin**. Further, **Canada** has also announced a change to its unemployment benefits.

In sum, employers have a number of tools in their toolkits to creatively address the employment issues presented by COVID-19. Care should be taken to review and understand applicable federal, state, and local obligations and to consider how employees may perceive each option before implementation. As always, employers should continue to monitor the relevant developments because the situation is evolving quickly.

Ogletree Deakins will continue to monitor and report on developments with respect to COVID-19 pandemic and will post updates in the firm's **Coronavirus (COVID-19) Resource Center** as additional information becomes available. Critical information for employers is also available via the firm's **webinar programs**.