Telework, Shortened Work Schedules, Layoffs, and Worksite Closures: Handling Employment Interruptions in the Age of COVID-19

Article
March 18, 2020

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Virtually all employers are grappling with employment-related questions given the novel coronavirus (COVID-19) pandemic. Many employers are investigating or already implementing telework options. Unfortunately, many employers are being forced to consider furloughing employees (by reducing their days, hours, or shifts) or laying them off, whether temporarily or permanently. Some employers are even faced with the prospect of closing offices, locations, or plants (hopefully on just a temporary basis)—either as a result of declining or interrupted business or because a state or local authority has ordered them to close. Employers may have many questions when dealing with these issues, including:

- What are the legal implications of taking these actions?
- How should employers handle non-exempt and exempt employees who can telework?
- May an employer send employees home without pay if they cannot work or telework?
- When must an employer pay an employee who is no longer working? How do exempt and non-exempt employees differ in this regard?
- When does an employer need to give advance notice of layoffs or worksite closures?

This article will cover these and related questions.

Telework by Non-Exempt Employees

If an employee can telework—whether that employee is exempt or nonexempt—he or she must be compensated. Further, state laws, such as those in Wisconsin, require that non-exempt employees precisely track their work start and end times, as well as meal and other unpaid breaks, just as if they were at work.

Non-exempt employees, of course, must be paid overtime for hours worked over 40 in a workweek. Accordingly, employers must be explicit in their instructions to such workers about when they are and are not expected to work. Employers should inform such employees that work beyond certain hours is not authorized without advance written approval from management.

Furloughs: Sending Employees Home or Reducing Their Hours

Non-exempt employees are usually paid by the hour. Generally speaking, such employees must only be paid for time worked. Employers can simply schedule such employees for fewer days or hours without wage-and-hour liability concerns. Bear in mind that some states (such as California, Oregon, and Vermont—but not Wisconsin) or municipalities (such as New York City, Seattle, San Francisco—and soon Chicago) may require employers to pay certain minimum amounts to employees who report for work only to be sent home, but non-exempt, hourly employees who are not scheduled to work need not be paid.

Under federal law, exempt employees who work any portion of a day must be paid for that entire workweek, absent certain exceptions. The Fair Labor Standards Act requires that exempt employees be paid unless the business is closed for at least a full workweek *and* the employee performs no work at all during that time. Failure to pay an exempt employee for a week in which they perform *any* work could jeopardize that employee's exempt status. This can be especially problematic for employers when exempt employees, even if told they are not to work, still check and respond to work emails and voicemail messages while at home. Again, explicit instructions from management about work expectations is required.

Effect of Furloughs or Layoffs on Medical, Dental, and Vision Coverage

Employees who lose eligibility for health, dental, or vision coverage due to a termination in employment or reduction in hours should be offered appropriate COBRA election documents in order to continue coverage. This requirement applies to medical, dental, vision, and prescription drug coverage, as well as to health reimbursement arrangements and health flexible spending accounts.

Are Furloughed Employees Entitled to Unemployment Benefits?

Unemployment benefits vary by state, and some states have waiting time periods before benefits are provided. In some states, "partial" unemployment claims are permitted where the workweek is changed for non-exempt employees.

On March 12, 2020, the Department of Labor issued new guidance encouraging states to amend their unemployment laws to provide greater flexibility for unemployment arising from coronavirus.

On March 17, 2020, Governor Evers announced he would waive the requirement that unemployment insurance claimants conduct at least four weekly work search actions during the COVID-19 emergency. This order will also ensure that claimants who are otherwise eligible but out of work due to COVID-19 are considered available for work and therefore eligible for benefits. The Wisconsin Legislature will be tasked with passing this emergency legislation and allow affected workers to receive the benefits to help support their households and communities.

May Employers Reduce Salaries or Hourly Wages?

Yes. An employer may *prospectively* reduce an exempt employee's salary or a non-exempt employee's hourly wage as a cost-saving measure, as long as both types of employees continue to meet the applicable minimum wage.

If an Employer is Considering Laying Off a Substantial Number of Employees or Closing a Workplace Because of COVID-19-Related Issues, Must They Give Advance Notice?

Maybe, but likely only for long-term or permanent worksite closings and layoffs.

If a layoff of workers or a large reduction in hours is predicted to be of short-term duration, significant advance notice is likely not required. Under both the federal Worker Adjustment and Retraining Notification Act ("WARN Act") and the Wisconsin Business Closing and Mass Layoff Law ("Wis-WARN"), *temporary layoffs are not considered employment losses requiring advance notice*. The federal WARN Act defines an "employment loss" as: (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) *a layoff exceeding 6 months*, or (C) *a reduction in hours of work of more than 50 percent during each month of any 6-month period*. Similarly, the Wis-WARN Act *excepts* from its requirements the "temporary cessation of operations if the employer recalls the affected employees on or before the 60th day beginning after the cessation."

However, if an employer finds that a longer-term mass layoff or a plant or work location closing is necessary, it should ensure that it complies with both the federal WARN Act and the Wis-WARN law, as well as any other states' "mini-WARN" laws. Both the federal WARN Act (which applies to businesses with 100 or more employees), and the Wis-WARN Act (which applies to employers with 50 or more employees) require employers to provide 60 days' advance notice to covered employees, unions, and government officials prior to a plant closing or mass layoff at a single site of employment. The following chart describes the major differences between the federal and Wisconsin laws. (Again, employers with operations in other states should be sure to check the requirements of any mini-WARN laws in those states):

WARN Act and Wis-WARN Comparison Chart

As noted in the chart, a *plant closing* is defined under the federal law as 50 or more countable employment losses at a single site of employment in a 90-day period that results from ceasing operations in one or more operating units, while a *mass layoff* is defined as those involving 50 or more countable employment losses at a single worksite in a 90-day period that also involves at least 33 percent of the active workforce at that site. The Wis-WARN Act is triggered when fewer numbers of employees are affected.

Importantly, employees with less than 6 months of service in the prior 12 months, and employees who work less than 20 hours per week, are not "countable."

More Exceptions to Advance Notice Requirements (i.e., Shortened Notice)

The federal WARN Act provides certain exceptions to the 60-day notice requirements, one or more of which may apply to employers affected by the COVID-19 pandemic.

Further, there are two other exceptions that may allow employers to give *shortened notice* of layoffs or facility closures caused by the COVID-19 pandemic:

(1) The **"Faltering Company"** exception to the federal WARN Act *applies to plant closings only*, and despite its name, is not tied exclusively to an employer's financial condition. Instead, the exception requires proof of specific efforts by the struggling company to secure financing that would enable it to avoid (or at least postpone) the shutdown of operations. An employer relying on the "Faltering Company" exception must also show that providing the required notice to employees would have "precluded the employer from obtaining the needed capital or business."

(2) The **"Unforeseeable Business Circumstances"** exception *applies to both plant closings and mass layoffs*. This exception allows employers to be excused from providing timely WARN notices if the plant closing or mass layoff is "caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required." The exception must be caused by "some sudden, dramatic, and unexpected action or condition outside the employer's control," such as "[a] principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn." Importantly, the Wis-WARN Act also contains an "Unforeseeable Business Circumstances" exception.

Notably, even if one or both of these exceptions were to apply to a particular employer's situation, the law would still require the employer to provide "as much notice as is practicable" of the employment terminations, in addition to "a brief statement of the reason for reducing the notice period." While this notice may only be given a day or two prior to the employees' terminations, *actual written notice must still be provided*.

Again, employers who avoid federal WARN Act applicability must still comply with state mini-WARN laws, and when both the state and federal law applies, the most favorable law to the employee will apply.