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Furloughs v. Layoffs/Reductions-In-Force: Guidance for Oklahoma employers during the coronavirus pandemic

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March 24, 2020

To put it mildly, the COVID-19 pandemic has had a profound effect on the economy and has forced businesses of all sizes to confront difficult questions about how, or if, they can stay financially solvent. Employers, especially in industries hit hard by government-mandated closures of non-essential businesses, need guidance in managing payroll costs while also considering the long-term needs of their employees and the future of their business. There are generally two methods of doing this: via furloughs or layoffs/reductions in force. This is a quick summary of certain important legal ramifications of each, including federal and Oklahoma-specific considerations.

Furloughs

A furlough is a mandatory suspension from work without pay, with the expectation that a suspended employee will return to the same position once the furlough is over. This can be an outright suspension, a reduction in hours, or a reduction in schedule. It is, in other words, an unpaid leave of absence. It can be for as long or as short as the employer prefers, but various legal requirements may be triggered depending on the length of the furlough.

Specific Issues:

A. The Fair Labor Standards Act (FLSA).

For non-exempt employees (generally, hourly employees), it is lawful for an employer to reduce the number of hours worked each day or days worked each workweek.

For exempt employees (generally, salaried employees), employers must exercise caution before furloughing exempt employees, because doing so without a coherent plan to ensure those employees are not working during furloughed weeks could sacrifice their exempt status under the FLSA. For exempt employees, their salary must be paid for each work-week in which work is performed, but salary can be withheld for work-weeks in which no work is performed. In other words, if a salaried employee does any sort of work (like opening an email), the employer must pay them their full salary for that work-week. That is why it is crucial to set out guidelines and rules to prevent furloughed exempt employees from working during a specific period. This is colloquially referred to as the "no work" rule. Employers implementing a furlough should designate full work-weeks prohibiting work during the period to rely on this exception, and implement policies (such as limiting the use of work phones or laptops, for example) to make sure well-meaning exempt employees do not inadvertently violate the "no work" rule.

For exempt employees, employers could lower a salaried exempt employee's pay on a prospective basis as an alternative to a full work-week furlough. Any adjustments of this manner should be maintained for long enough to demonstrate it is a true change in salary, as opposed to an hourly reduction akin to that appropriate for a non-exempt employee. Employers should

carefully document these reductions to ensure that they reflect a business downturn as opposed to an hourly decrease.

B. Federal anti-discrimination laws

A furlough decision is an adverse employment action because, among other things, it results in a loss of pay. As such, employers must make furlough decisions about an employee or group of employees independent of their status in a protected group (gender, race, color, religion, national origin, age, or disability). For more information, see the "Americans with Disabilities Act" section below.

C. The Family First Coronavirus Response Act (FFCRA).

Since a furlough is not an employment separation, a furloughed employee would be eligible after April 2, 2020 (the date it takes effect), for Families First Coronavirus Response Act employment-related benefits as provided for in the new law. For a detailed summary of key provisions of the FFCRA, please visit: https://www.kff.org/global-health-policy/issue-brief/the-families-first-coronavirus-response-act-summary-of-key-provisions/. If after April 2 employees are sent home as a result of a government—federal, state or local—order to close, the employees would be eligible for the Emergency Paid Leave benefit. They would not, however, be able to take advantage of the Emergency Family Medical Leave benefit because they are unable to work as a result of the closure order, not as a result of a personal medical issue.

D. The Worker Adjustment and Retraining Notification Act (WARN).

The federal WARN act requires employers with 100 or more employees to provide at least 60-days' notice of a layoff affecting 50 or more employees at one employment location. Typically, WARN would not apply to a mass furlough because they tend not to last as long as the WARN trigger period (six months). That said, no one knows how long the coronavirus pandemic, or the resultant economic downturn, will last. For that reason, employers who are furloughing employees must constantly evaluate the changing conditions to determine whether an implemented furlough will last longer than 6 months, or the employee group's hours are reduced by 50% or more during each month in the 6 month period. If so, WARN may apply. Some states have "mini WARN" acts that require different notice than the federal WARN Act. Oklahoma does not, but state agencies assist in the enforcement of the federal act.

E. The Americans with Disabilities Act (ADA).

The COVID-19 pandemic poses unique questions about the applications of the Americans with Disabilities Act. These questions should inform an employer's decision to furlough or lay off an employee. The Equal Employment Opportunity Commission has published guidance for employers on the application of the ADA to these unique circumstances, and the full PDF can be found here: https://www.eeoc.gov/facts/pandemic_flu.html

The ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. Some highlights from the EEOC guidance, which can be found at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm:

The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice. When employees return to work, the ADA allows employers to require doctors' notes certifying their fitness for duty because (1) they would not be disability-related or, (2) if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

Practically, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability. Employers may also take an applicant's temperature as part of a post-offer, pre-employment medical exam. Employers can, similarly, delay the start date of an applicant who has COVID-19 or symptoms associated with it. And, if an employer has made a job offer in which the applicant needs to begin immediately, the employer can withdraw the job offer if the applicant has COVID-19 or symptoms of it.

F. Oklahoma-specific legal interests.

i. Benefits.

Furloughs may impact health insurance and other benefits. Employers should review their benefit plans to determine this. Specifically, the employer should identify whether a reduction in hours creates COBRA obligation or health insurance continuation issues under state law. Oklahoma has what is called a "mini-COBRA" law which covers any employer not covered by the federal COBRA (which is usually because the employer has less than 20 employees). If a furlough results in a loss of benefits coverage (because the employee is not meeting a plan's hours requirement, for example), then it would be a COBRA or mini-COBRA qualifying event and the provisions of the federal or state law would apply.

ii. Unemployment.

In Oklahoma, furloughed workers can apply for and receive unemployment benefits in the same way that terminated workers can apply for and receive unemployment benefits. See "Unemployment," below. One option that is available to employers, if they intend to close temporarily and furlough their employees, is to file a "mass claim" on behalf of their employees. For details on doing so, see https://www.ok.gov/oesc/Businesses/Employer_FAQs_about_Unemployment_Insurance_and_COVID-19.html

Layoffs and Reductions-In-Force

Unlike furloughs, layoffs are terminations in employment for an employee or group of employees. On an individual employee basis, the terms layoff and reduction-in-force refer to the same thing, legally—that employee was terminated. Employers use them a little differently. In a "temporary layoff," for example, an employer may truly intend to recall laid-off employees after the underlying reason subsides. In other cases, the employer simply is terminating the position or positions entirely. Regardless, in a layoff or a reduction-in-force, the employment relationship ends.

Specific issues:

A. FFCRA.

If an employer implements a layoff or RIF, terminated employees would not be eligible for benefits under Families First Coronavirus Response Act. While not specifically prohibited, companies should consider the public relations appearance of undergoing terminations simply to avoid the FFCRA's application, and if terminations are necessary, should make a detailed record supporting that layoffs or RIFs were done solely for business purposes.

B. Unemployment.

Laid-off employees are usually eligible for unemployment benefits, and Oklahoma is no different. However, as a result of changes in the law in response to the COVID-19 pandemic, Oklahoma, like many other states, has eased the requirements for unemployment claimants. Among the most notable, individuals making unemployment claims do not have to show that they are actively searching for new positions. Guidance from the Oklahoma Employment Security Commission instructs applications to respond "yes" when asked if the required number of work search contacts have been made when filing a weekly claim for benefits.

Elsewhere, any claims filed on or after March 15, 2020, do not have to undergo the one-week waiting period normally applied to unemployment claims (i.e., normally a payment is not made in an applicant's first week after they make an unemployment claim. For details and frequently asked questions, please see https://www.ok.gov/oesc/Claimants/Claimant_Unemployment_Insurance_FAQs_on_COVID-19.html

C. Federal anti-discrimination statutes.

Like furloughed employees, the federal anti-discrimination statutes apply to layoffs and reductions in force. As such, employers must make termination decisions about an employee or group of employees independent of their status in a protected group (gender, race, color, religion or national origin). Though times are undoubtedly turbulent, employers should take the time to pay special attention to documenting the reasons for layoffs and RIFs, as employment discrimination claims tend to rise during periods of mass unemployment.

D. WARN.

If WARN applies, employers should issue the require notices. As noted above, even employers that intend to rehire a laid-off workforce could trigger WARN if the rehiring does not occur within 6 months. WARN provides certain exceptions that employers could avail themselves that might be particularly applicable to COVID-19 pandemic, including exceptions for unforeseeable business circumstances and natural disasters. Accordingly, employers should seek legal advice as to whether they can rely on certain exceptions under the WARN Act that may permit notice of less than 60 days and ensure communications with the employees regarding the layoff are legally drafted.

E. Severance:

Layoffs or RIFs will likely implicate severance plans, and the impact to employers will evolve depending on the size of the layoff. Employers should be mindful to review their contracts with employees and ensure that if those employees are entitled to contracted-for rights regarding termination, those rights are respected and the proper procedures are undertaken.

F. Benefits:

A layoff or RIF will likely trigger the COBRA or mini-COBRA notice requirement and health insurance continuation obligations. Employers should be familiar with which law governs their employees and be prepared to facilitate the necessary paperwork to ensure that the required continuation stays in place for all eligible employees.