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COVID-19: Legal, Labor, and Employee Relations Considerations Regarding Layoffs, Furloughs, and Other Resourceful Employer Responses to the COVID-19 Emergency

By David P. Phippen
Washington DC Metro Office

Employers, employees, labor unions, and government agencies are all dealing with the disruption of their normal business caused by the COVID-19 emergency. Many (if not most!) employers are faced with tough choices regarding business and employee-relations issues as well as complying with government orders. For some employers and employees, it has become a matter of economic survival for however long the critical emergency period may last, which has been variously described as 15 days to 18 months, with a possible resurgence later in the year.

Thus, many employers are considering various responses to the current crisis and looking for practical solutions to improve their odds for economic survival. These options include short-term layoffs and/or scheduling reductions sometimes called furloughs. However, short-term layoffs and scheduling reductions may have implications under federal, state, and local laws.

The Worker Adjustment and Retraining Notification Act

The federal WARN Act is likely not implicated by relatively short-term layoffs, furloughs, shutdowns, and/or closings for the COVID-19 emergency, provided the duration of the action taken by the employer does not exceed six months. That is because the threshold for coverage under the WARN Act requires a "plant closing" or "mass layoff" of "affected employees" suffering "employment loss." "Employment loss" is defined as a termination of employment, a layoff exceeding six months, or a 50 percent or more reduction of hours in each month of a six-month period. The current emergency situation arguably necessitating layoffs, at least as currently described by federal and state authorities, is not likely to exceed six months. Thus, because of the currently expected duration of layoffs, it is not likely that there would be an "employment loss" under the WARN Act.

However, if the circumstances change and the duration of the COVID-19 pandemic lengthens, then an "employment loss" might meet the numerical thresholds for a "plant closing" or "mass layoff" (i.e., a minimum of 50 or more "affected employees" suffering "employment loss" at a "single site" of employment in a 30- or 90-day window, not counting employees of less than six months employment in the previous 12 months or who regularly work

fewer than 20 hours each week). In that situation, 60 days' advance written WARN notice may be required unless an exception applies due to the COVID-19 situation. When required, a WARN notice generally must be provided to each affected employee or the employee's representative (i.e., a labor union), if any, as well as the applicable state agency and local governmental unit for the "single site" of employment experiencing the plant closing or mass layoff.

Some exceptions exist to the federal WARN notice requirements where the required 60-day notice period may be shortened to as soon as possible. Exceptions exist for employment losses due to (1) "unforeseeable business circumstances" and (2) a "natural disaster," such as floods, earthquakes, droughts, storms, tidal waves, tsunamis, and similar natural events. While one of these exceptions might apply to the COVID-19 pandemic, that result is not certain.

State "mini-WARN" laws may differ from the federal WARN Act

In addition to the federal WARN Act, there are also many states with so-call "mini-WARN" laws that also require advance written notice of plant closings and mass layoffs. While these laws often resemble the federal WARN Act, they may not be identical. For example, state laws may define "employment loss" differently. Further, the acts in some states may treat a temporary layoff or furlough of any duration as an "employment loss." Many states have a lower threshold for the number of "affected employees" (i.e., 25 affected employees). Some state laws may require a longer period of advance notice (i.e., 90 days). Some state laws may impose wholly different ways for counting "affected employees" to determine threshold coverage (i.e., statewide vs. at a single site of employment). Finally, some state laws do not have the same exceptions for "unforeseeable business circumstances" or for "natural disasters." Accordingly, employers need to be aware of and familiar with any "mini-WARN" acts where they operate.

Unemployment insurance considerations

Another area of interest is unemployment insurance benefit eligibility. Unemployment insurance is generally governed by state law and varies considerably based on the state of the claim. Seven-day waiting periods and full-period look backs often apply. However, in light of the current COVID-19 emergency, numerous states are considering or have already taken action to modify their unemployment insurance laws and processes. For example, some states now permit eligibility for benefits due to unemployment, partial unemployment, and/or another absence from active work and pay due to layoffs, reductions in hours, closings, government orders, job sharing, and/or safety considerations stemming from COVID-19. Employers should check the current status of the unemployment insurance scheme in the individual states in which they operate to stay abreast of this issue.

Labor relations considerations

Employers with collective bargaining relationships with unions have obligations under the National Labor Relations Act, and they may also have collective bargaining agreements that impose some restrictions or give flexibility for handling the COVID-19 emergency as it affects their workforces. Employers with collective bargaining agreements generally should look for language in the contract permitting employer layoffs and recalls or other actions to deal with the COVID-19 emergency, as the agreement may specify rights and a process for such actions. Employer management rights provisions or others might also give the employer flexibility to deal with health emergencies or safety matters. A current majority of the National Labor Relations

Board has decided that union waiver of bargaining over a subject can be found when the agreement covers the subject. A collective bargaining agreement may also have a provision allowing unilateral employer action for acts of God or a *force majeure* provision. Whether these types of provisions apply to actions addressing the COVID-19 emergency (including any layoffs or other actions affecting employees) ultimately could be subject to grievance and arbitration under the collective bargaining agreement or become an unfair labor practice charge proceeding before the NLRB. And it should be noted that unions, too, can base their actions on the language of a collective bargaining agreement, for example, sanctioning a safety-based refusal to work.

Mandates from governmental authorities ordering employer actions may override rights and obligations in collective bargaining agreements and may be the basis for defense of unfair labor practice charges under the NLRA related to decisions made by employers to deal with the COVID-19 situation. The Board has recognized exceptions to or flexibility in the application of the duty to bargain in circumstances of "extraordinary events which are an unforeseen occurrence, having major economic effect requiring the [employer] … to take immediate action." Nevertheless, even in such circumstances, an employer may have an obligation to bargain over tangential decisions and the effects of government-ordered actions.

Because the COVID-19 emergency is largely, if not wholly, uncharted territory under the NLRA and the current Board majority, consult with labor counsel if you are dealing with this emergency when the matter involves union-represented employees. Employer communication with labor representatives and creativity may be particularly valuable in this unique circumstance.

Other possible subjects for consideration related to a short-term layoff or furlough situation arising from the COVID-19 Pandemic

In addition to considerations related to the federal WARN Act, any applicable state "mini-WARN" Acts, unemployment insurance, and collective bargaining agreements, employers also need to think about a variety of other statutes and considerations during the COVID-19 pandemic, including:

- Predictive scheduling laws of localities and states;
- Benefits effects and planning;
- Wage-and-hour implications, including maintaining exempt classifications;
- Intermittent and telecommuting work by non-exempt employees and the rules applicable for business expenses incurred therein;
- Personal paid time off, vacation benefits, and/or sick leave use and integration;
- Unemployment insurance tax implications;
- Ensuring fairness in and defending any layoffs;
- Handling wildcat walkouts or other protected concerted activity by non-union employees;
- OSHA rights and employee refusals to work;

- ADA and FMLA implications;
- Data security issues;
- Immigration implications;
- Workers' compensation coverage issues;
- Insurance policy coverage for loss caused by and/or related to the pandemic, and
- Employee and client/customer/patient privacy rights.

These are only some of the issues facing employers during this emergency.

Conclusion

Employers dealing with the COVID-19 emergency must navigate an ever-changing mosaic of facts, governmental guidance, and legal mandates, where many issues arising and questions are unprecedented. If you have any questions during this constantly evolving situation, please contact the Constangy attorney of your choice.

Please be aware that substantial changes in the governmental guidance and underlying laws are occurring on almost a daily basis, which will impact the analysis of the legal issues related to COVID-19. It is critical that you check the Resource Center often for the most recent information and stay in continual contact with your Constangy attorney.

For more information, check out our **Resource Center** for FAQs and updates about the coronavirus.

www.constangy.com
Toll free 866.843.9555

Constangy, Brooks, Smith & Prophete, LLP

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