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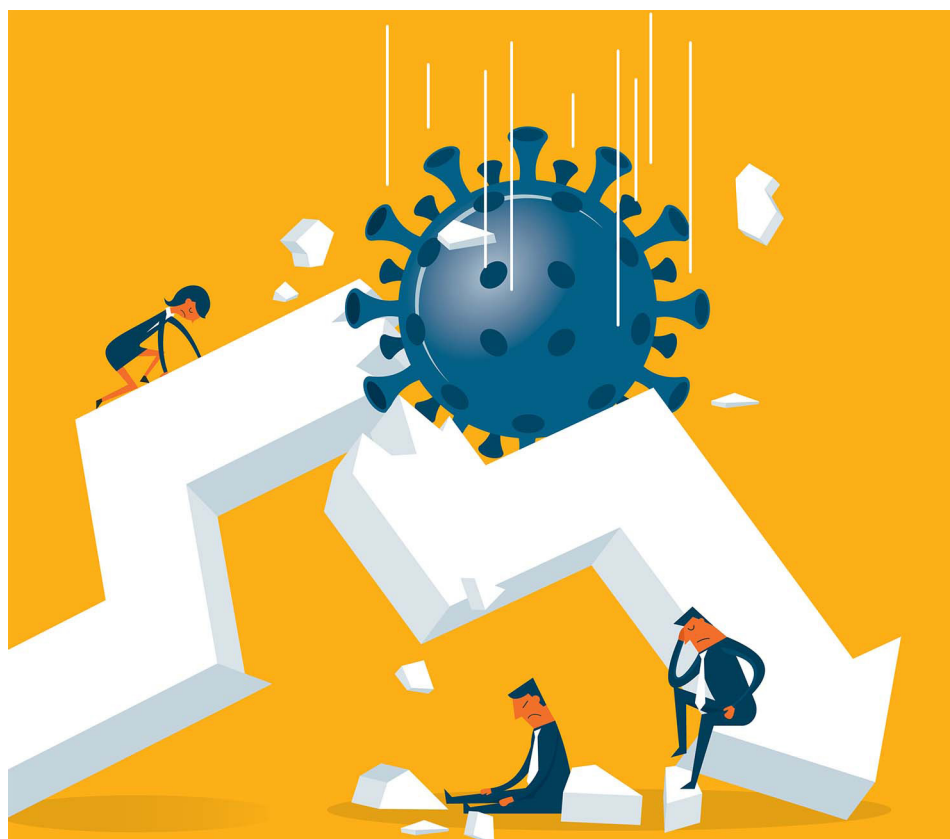
An Employer's Guide to Frequently Asked Questions about Reductions in Force and Unemployment Compensation Related to COVID-19

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As we continue to advise our clients through these challenging times, we have identified some frequently asked questions relating to reducing hours, furloughs, layoffs/reductions in force ("RIF") and unemployment compensation benefits. We hope that this article will assist in answering some of your initial questions. As always, there are rarely black and white answers, and we are here to provide you with further guidance when you need it. Note also that legislation at federal, state and local levels may change the information contained herein so it is important to consult with an advisor before finalizing any action.

1. WHAT ARE SOME OF MY OPTIONS TO REDUCE COSTS BESIDES A RIF?

Employers can consider alternatives to laying off or terminating employees, including 1) implementing a furlough, 2) reducing employees' hours for a temporary period or 3) reducing employees' pay for a temporary period (which could include converting exempt employees who are paid a salary for all hours worked to non-exempt employees who are paid an hourly rate for hours worked).



Furloughs and reduced working hours or compensation can provide necessary cost-saving measures while retaining employees with institutional knowledge and experience. Retaining experienced employees reduces the costly and timely process of rehiring and retraining personnel when economic conditions improve and allows employers to ensure some consistency in tough economic times.

In general, employees are not paid during furloughs, but they do keep employment benefits, such as health insurance (although you should check with your employer health plan to determine any rules or restrictions on participation in a health plan during a time when employees are not meeting the hours requirement of the plan). It should be communicated that furloughs are mandatory, and that workers are ordered not to do anything work-

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related while they are on furlough. If an employer decides to furlough employees or reduce employees' pay, the employer should be mindful of the requirements of the Fair Labor Standards Act, particularly with regards to salaried, exempt employees. For example, if a salaried, exempt employee performs any work during a workweek, even if on furlough, they are entitled to be paid their full week's salary. Exempt employees can be converted prospectively to non-exempt employees, but they must keep track of all hours worked during a workweek and be paid 1.5 times their hourly rate if they work more than 40 hours in a workweek.

2. HOW DO I DECIDE WHO TO INCLUDE IN A RIF?

Employers should use objective, non-discriminatory and consistently applied selection criteria in deciding who will be laid off or terminated. These selection criteria should be well documented and applied uniformly in case of any future litigation. Adopting pure seniority-based layoff criteria is the best way to minimize liability exposure. Other layoff selection criteria that have withstood legal scrutiny by some courts include 1) performance (supported by underlying documents such as performance evaluations or performance ratings), 2) special skills, 3) productivity, and 4) elimination of an entire job function, particular department or redundant positions.

3. WHAT SHOULD I DO IF I NEED TO RIF AN EMPLOYEE WITH AN EMPLOYMENT CONTRACT?

Employers should carefully review any employment contracts that they have with employees prior to terminating their employment as certain terms for termination of the contract may apply. During



these uncertain times, there may be defenses to a breach of contract claim such as impossibility or frustration of purpose; however, we encourage you to reach out to us if you have any employees who are bound by employment contracts prior to terminating or furloughing those employees or changing any contractual terms applicable to their employment.

4. WHAT HAPPENS AFTER A RIF IF I OFFERED HEALTH INSURANCE TO MY EMPLOYEES?

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), employers with at least 20 employees must offer COBRA coverage to all covered employees, and their spouses and dependent children, who lose coverage due to a layoff, termination or reduction in hours. An employer has 30 days to notify the plan administrator of a termination of employment. The plan administrator then has 14 days to provide a COBRA election notice to qualified beneficiaries. If the employer is also the plan administrator, the employer has 44 days to provide a COBRA election notice.

5. WHAT HAPPENS AFTER A RIF IF I OFFERED OTHER INSURANCE POLICIES TO MY EMPLOYEES?

An employer should also review all other employee benefit plans and insurance policies to determine when coverage ends. Disability insurance carriers are particularly strict about requiring that employees be actively at work for coverage to apply.

6. WHAT HAPPENS AFTER A RIF IF I OFFERED A QUALIFIED PLAN TO MY EMPLOYEES?

Depending on the type of qualified plan maintained by an employer, if any, a RIF may also trigger employees' rights to obtain 401(k) plan assets. Many defined contribution plans (such as 401(k) plans) allow employees to receive a distribution of their account balances on termination of employment. Employees generally cannot obtain distributions of accrued benefits under a defined benefit pension plan before reaching a retirement date defined in the plan. However, depending on the number of participants terminated, a partial termination of the plan may occur. In general, a termination of 20% of a workforce is presumed to be a partial termination that requires all participants to be 100% vested. Some

qualified plans provide for subsidized benefits in the event of a plant shutdown.

Employers should review the qualified plans they sponsor to determine if these types of benefits are provided and check with their plan sponsors before providing any such information to the employees.

7. DO I NEED TO GIVE ADVANCE NOTICE TO MY EMPLOYEES OF A RIF?

If an employer has fewer than 100 employees, then the employer does not need to give advance notice. For employers with at least 100 employees, advance notice is required under the Worker Adjustment and Retraining Notification Act (“WARN”) if there is plant closing affecting 50 or more employees or a mass RIF of 50 employees who comprise at least 33% of active employees during a 30 day period. Generally, WARN requires 60 days’ advance notice; however, WARN allows the notice period to be shortened under unforeseeable circumstances, such as when there is a government ordered closing of an employment site that occurs without prior notice. If an employer is using this exception, the employer must give as much notice as is practicable to the union, non-represented employees, the State

dislocated worker unit, and the unit of local government and, in some circumstances, give notice after the fact. The employer must, at the time notice is given, provide a brief statement of the reason for reducing the notice period, in addition to the other information required in the notice by WARN.

8. HOW DO I TELL MY EMPLOYEES THAT THEY ARE PART OF A RIF?

An employer should announce layoff or termination decisions in a meeting with the affected employees unless an entire facility or department is being closed. The employer should meet the affected employees with at least one witness present (typically, another member of management or a human resource professional). Be honest, respectful, and empathetic, and thank the employees for their contributions. Advise affected employees of their benefits rights and provide information related to, procedures for applying for Reemployment Assistance, COBRA coverage, if any, and any other benefit or plan information. If an employee questions their selection for inclusion in the RIF, they should only be advised of the criteria used in making the layoff selection decision. The employer should answer the employee’s questions honestly, but without condescension or engaging in arguments.

9. IF I LAYOFF OR TERMINATE EMPLOYEES DUE TO COVID-19, ARE THEY ELIGIBLE FOR REEMPLOYMENT ASSISTANCE (COMMONLY REFERRED TO AS “UNEMPLOYMENT COMPENSATION”)?

Employees may qualify for Reemployment Assistance if they are terminated or work reduced hours. This may include employees who are 1) quarantined by a medical professional or a government agency, 2) laid off or sent home without pay for an extended period by their employer due to COVID-19 concerns or 3) caring for an immediate family member who is diagnosed with COVID-19. Individuals whose employment has been impacted, but are still receiving wages through paid leave, are not eligible to receive Reemployment Assistance.

10. WHAT CAN I TELL MY EMPLOYEES ABOUT REEMPLOYMENT ASSISTANCE?

The Florida Department of Economic Opportunity has published a helpful information sheet: Reemployment Assistance COVID-19 Frequently Asked Questions. This information sheet provides the website that eligible employees need to use and the steps they need to take in order to apply for Reemployment Assistance. You can provide employees with this information sheet if you wish.

11. DOES THE FAMILY FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”) PROVIDE EMPLOYEES WITH GREATER REEMPLOYMENT ASSISTANCE BENEFITS?

The Emergency Unemployment Insurance Stabilization and Access Act of 2020, which is included in the FFCRA, does not directly provide greater monetary benefits



to employees. It only provides emergency grants to states to assist with processing and payment of unemployment compensation insurance benefits under some circumstances. It also requires that states waive some restrictions to receiving unemployment compensation. At this time, the state of Florida has not yet offered Disaster Employment Assistance for job loss related to COVID-19.

12. DOES THE FFCRA PREVENT ME FROM FURLOUGHING OR LAYING OFF EMPLOYEES?

The leave provisions of FFCRA do not become effective until April 2, 2020. As such, employees do not have any entitlement to paid Family and Medical Leave and Emergency Paid Sick Leave prior to this date. Under standard Family and Medical Leave Act rules, however, an employer generally can layoff or terminate an employee who is taking protected leave if the separation from employment is truly due to a RIF or is done for a legitimate non-discriminatory reason. In other words, an employer cannot use the protected leave as a factor in determining which, if any, employees will be laid off or separated. The FFCRA, however, may require certain reinstatement obligations from employers with fewer than 25 employees if a position becomes available after termination. The Secretary of Labor should provide additional guidance on this in the

coming weeks, and we will update you accordingly.

13. DOES THE FFCRA REQUIRE THAT I PAY EMPLOYEES THEIR UNUSED SICK LEAVE UNDER THE EMERGENCY PAID SICK LEAVE ACT IF THE EMPLOYEE IS FURLOUGHED OR LAID OFF?

The FFCRA does not require that employers pay out any unused Emergency Paid Sick Leave at the time of termination. It is unclear whether employers will need to pay Emergency Paid Sick Leave to furloughed employees. The Secretary of Labor may provide additional guidance on this in the coming weeks, and we will update you accordingly.

Employers, however, may need to pay any unused paid time off, vacation leave, or sick leave that has accrued under the employer's own policy if the policy states that such leave will be paid out upon termination. Employers with employees working in states other than Florida should refer to those state laws for specifics requirements regarding paid time off or sick leave for employees in those states.

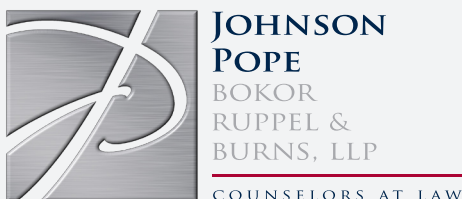
14. DOES THE FFCRA REQUIRE THAT I GIVE SEVERANCE PAY TO LAID OFF OR TERMINATED EMPLOYEES?

The FFCRA does not require that an employer provide its employees with severance pay if they are laid off or terminated. If an employer decides to offer a severance package, then it may need to comply with the requirements of the Older Worker Benefits Protection Act for employees age 40 and over and/or Section 409A of the IRC in connection with certain deferred compensation plans.

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