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Blog Post

Managing a California Workforce During COVID-19

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While some states have moved quickly to re-open for business, California Governor Gavin Newsom has announced a four-stage plan to modify the statewide stay-at-home order, beginning with expanded testing and contact tracing measures, and culminating with the re-opening of live-audience sports, concerts, and other large events. As California employers begin implementing that plan, they must keep California's unique employment law requirements in mind.

Cost-Saving Measures

In the immediate aftermath of the state and local stay-at-home orders, many businesses took temporary cost-saving measures—such as reduction in hours and salaries, and furloughs or temporary layoffs—hoping to return to normal operations in just a few weeks. Now that public health guidance has shifted to extend social distancing practices into the early summer, businesses may also need to extend or expand these cost-saving measures accordingly.

- **Reduction in hours and pay for non-exempt employees.** Employers that have continued to operate—either with essential employees or with employees working from home—may need to reduce pay or hours to reduce costs. Employers may reduce the pay rates of non-exempt employees prospectively, but not retrospectively,

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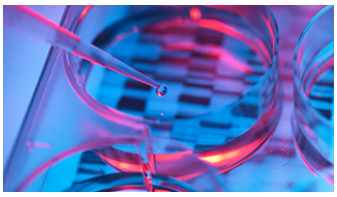

so long as the employer provides notice in advance and the employees' wages remain above the applicable minimum wage. While there is no specific timeframe required under California law, employers should provide at least one pay period's notice before implementing the change. Employers must also provide an updated wage notice as required by Labor Code section 2810.5. Employers that need to reduce hours should also keep in mind California's unique on-call time and reporting time requirements. If an employee is required to "report" to work, but is not put to work, the employee is entitled to receive half his or her expected hourly pay, but no less than two hours and no more than four hours of wages. The lines of "reporting" can be blurry, particularly with a remote workforce, because physical reporting is not required to trigger reporting time pay obligations. Further, if an employee is expected to be "on-call" and ready to accept assignments, the employee must be paid his or her regular hourly rate for the time waiting on-call as well as for any time actually worked.

- **Reduction in hours and pay for exempt employees.** Generally, employers may not reduce the weekly salary of exempt employees without renegotiating the pertinent employment agreement with the employee in question. California courts have not provided employers with any further guidance on this topic. However, the California Department of Labor Standards Enforcement (DLSE) has previously opined that during a "severe economic downturn," an employer may reduce an exempt employee's salary and scheduled work hours without compromising his or her status as an exempt employee, as long as: (1) the employee still earns a monthly salary at least twice the state minimum wage; and (2) the employee continues to meet the requirements for the applicable exemption. Employers should be wary of this guidance, however, as DLSE opinion letters are not binding on California courts and courts occasionally disagree with DLSE interpretations. But even if

exempt pay reductions are permissible in general, employers must convert exempt employees to hourly, non-exempt status during the crisis if the pay reduction causes the employee not to meet the salary threshold.

- **Another consideration for exempt employees.** As businesses remain open with limited numbers of non-exempt employees, they may rely on their exempt employees to bear most of the burden of keeping operations moving forward. Unless they do so cautiously, though, they may risk jeopardizing the exempt status of those employees. California's exemptions furthermore require that the exempt employee spend more than 50 percent of her time engaged in duties that are exempt in nature. If businesses rely too heavily on their exempt employees to carry the duties of furloughed or laid off non-exempt workers, those employees may consequently spend the majority of their time performing non-exempt duties and become entitled to overtime pay, meal and rest breaks, and assorted penalties.
- **Extending or expanding furloughs.** In the immediate wake of the state and local stay-at-home orders, many employers sought to furlough employees in the hopes of quickly recalling them. Furloughs—which are not legally defined, but generally understood to be a mandatory unpaid leave of absence during a business slowdown—are generally expected to be temporary. When employers are extending the length of furloughs, or expanding to furlough more employees, they must be cautious of the legal uncertainties around this relatively undefined status. A longer, more open-ended furlough runs the risk of appearing to be a termination, thus potentially triggering obligations to pay out employees' accrued vacation pay and any remaining unpaid earnings. There is very little law in California on how an employer should treat employees placed on furlough, and employers are well-advised to consult with experienced Akerman employment

counsel when using furloughs as a cost-reduction measure.

- **Layoff.** Employers that initially furloughed staff may now need to move toward laying off those employees. Unlike a furlough, a layoff—even when intended to be temporary—will trigger California's final pay requirements. Thus, the employer must be prepared to pay out all wages due to the employee, as well as any accrued but unused vacation time. While costly in the short term for companies facing a liquidity crisis, the potential exposure to waiting time penalties (up to an additional 30 days' pay for each employee paid late) could be catastrophic. Employers should maintain email and telephone contact with furloughed employees to the extent possible, and should they need to convert the furlough to a termination, make arrangements to have termination documentation and final wages delivered to the employee on the same day.

Regardless of which of these measures are implemented, employers must also be cognizant that unless the reductions are made across-the-board to every employee or are clearly based on a legitimate business goal (e.g., entire divisions or facilities shut down), cost-cutting measures can have a disproportionate impact (disparate impact) on one or more protected class of employees. Employers should therefore consider the demographics of all affected employees prior to implementation.

Use of Vacation or Paid Time Off

Employers may wish to manipulate how employees can use their accrued vacation or paid time off (PTO), either to restrict its use or to *require* its use during downtime. While California law designates accrued vacation/PTO as earned wages that employees cannot forfeit, the employer has broad discretion to manage its vacation policies, including by allowing employees to use vacation or PTO when their work hours are reduced, placing employees on furloughs,

or restricting the use of vacation time throughout the year (with advance notice).

Impact on Benefits Eligibility

Employers changing the status of employees must also be mindful of whether the action taken is a "qualifying event" under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and/or its state counterpart Cal-COBRA. Employers should review their benefits plans and consult the appropriate benefits administrator to determine whether a reduction or other measure triggers benefits obligations. Employers who do not offer health plan coverage to employees should consider whether layoffs or furloughs might trigger penalties under the Affordable Care Act. Other potential benefit plans that may be affected by employment actions include retirement plans, equity vesting, and paid time off accrual policies.

Impact on Unemployment Benefits

Unemployment insurance (UI) benefits work as a partial or total wage replacement benefit payments to workers who lose their job or have their hours reduced, through no fault of their own. Information about unemployment benefits is available at here. The Employment Development Department is currently advising employees who have had their hours and/or pay partially reduced to apply for full UI benefits. Employers who are experiencing a slowdown in business may also apply for California's UI Work Sharing Program, which allows employers to avoid layoffs by providing full-time and part-time employees who have had their hours and wages reduced with partial UI benefits. To be eligible, an employer must have at least 10 percent of its workforce, and a minimum of two employees, affected by a 10 percent (but no more than 60 percent) reduction in hours and wages.

WARN Act and Cal-WARN Act Considerations

The Worker Adjustment and Retraining Notification Act (WARN) and its state counterpart, the California Worker Adjustment and Retraining Notification Act (Cal-WARN) require advance written notice prior to qualified layoffs and plant closings, as defined in each act. Ordinarily, employers with any industrial facility employing 75 or more persons in the past 12 months must issue Cal-WARN notices 60 days before a "mass layoff" or "work stoppage" becomes effective. Governor Newsom temporarily relaxed this requirement by executive order on March 17, 2020, requiring employers who are required to stop work or layoff employees due to COVID-19 to provide notice "***as soon as practicable***" with "a brief statement of the basis for reducing the notification period."

There is very little case law touching upon the question of whether furloughs and reductions in hours/salary trigger WARN or Cal-WARN notice requirements. Federal WARN notification requirements apply only to layoffs exceeding 6 months and reductions in work hours greater than 50 percent in each month of a 6-month period. Cal-WARN does not expressly include those limitations. The closest analogue to a "furlough" under Cal-WARN appears to be "an intended [temporary] work stoppage." While there is no guidance on what constitutes a "temporary" work stoppage, the California Court of Appeal recently found a four-to-five week stoppage was long enough to require notice. Accordingly, employers should consider their notice obligations under WARN and Cal-WARN before implementing any reduction.

Use of Separation Agreements

Employers may also wish to enter into release agreements with the affected employees in exchange for a mutually agreeable monetary sum. However, employers should ensure that their actions are characterized appropriately in such agreements. For example, employers who intend to reopen and recall employees as soon as shutdown orders are lifted, may wish to avoid characterizing a furlough as a

termination and inadvertently expose themselves to Labor Code penalties. Employers who need to take a more permanent action (i.e., layoffs), on the other hand, can greatly reduce their risks by entering into separation agreements with the affected employees.

Return to Work

Though the state is nowhere near full recovery, employers should start planning now for their employees' return. Employers are encouraged to review state and local orders to ensure safe and compliant practices. As of May 3, 2020, there are a total of six California cities (Los Angeles, San Jose, Oakland, San Francisco, San Diego, and Emeryville) that have either enacted paid sick leave ordinances or expanded on pre-existing sick leave laws to address the COVID-19 pandemic. For example, San Francisco enacted the Public Health Emergency Leave Ordinance to provide eligible employees up to 80 hours of emergency paid sick leave. Employers should also ensure that the required protective equipment is provided. In the City of Los Angeles, all employees of "essential" businesses will need to continue wearing face coverings at work. Throughout the state, Governor Newsom's Executive Order N-51-20 will require covered employers to provide supplemental paid sick leave to California Food Sector Workers such as grocery store workers until the stay-at-home order expires. Employers should also follow the infection prevention measures recommended by the California Division of Occupational Safety and Health, including by, among other things, actively encouraging sick employees to stay home, sending employees with acute respiratory illness symptoms home immediately, and performing routine environmental cleaning of shared workplace equipment and furniture. For a more detailed discussion, please visit Akerman's related blog post here.