

Managing your Workforce in Unprecedented Times

March 16, 2020

The novel coronavirus (COVID-19) pandemic has reached almost all U.S. states, the District of Columbia, and Puerto Rico. It appears that COVID-19 originated in China's Hubei province and it presents the greatest risk to older (over 60) and immunocompromised individuals.

In an effort to mitigate the spread of COVID-19, federal, state, and local governments have responded with various restrictions on travel, public events, and crowd sizes. These restrictions, as well as the decisions made by various businesses, will impact virtually all industries.

Many employers will have to make difficult employment decisions in the near-term. Economic circumstances and government decisions may necessitate short- or long-term reductions in workforces. As employers face these decisions, they must remain mindful of applicable law protecting employees:

- **Discrimination.** Employers cannot make employment-related decisions or treat employees differently, based on a protected status, including national origin, age, and disability. Employers considering workforce reductions should establish neutral criteria and metrics to identify employees and avoid any practices which either target protected groups or have an unintentional effect on protected groups. For example, it would be unlawful to release or terminate only those employees at the greatest risk from the disease.
- **Older Workers Benefit Protection Act (OWBPA).** The OWBPA protects older employees (*i.e.*, over 40 years old) from age-based discrimination. When two or more employees are terminated, the OWBPA requires employers to provide specific information about the employees that were terminated and the employees that were retained. The OWBPA also governs the contents and timing of a covered employee's release. This provision only applies in circumstances where employers seek releases as a condition of separation pay. If no release is sought, these provisions do not apply. Compliance with the OWBPA's requirements is necessary to avoid potential liability for age-related discrimination.
- **WARN Act.** Employers covered by the federal Worker Adjustment and Retraining Notification Act ("WARN Act") may have notification obligations before implementing a "plant closing" or "mass layoff." However, these obligations do not apply to all layoffs or closings, and the WARN Act includes exceptions (and reduced obligations) for unforeseen business circumstances. There are also similar statutes in some states. Any employer considering dramatically curtailing or ceasing its operations should consult experienced employment counsel.

- **Wage-and-Hour Laws.** Multiple federal and state laws govern employers' obligations to provide their employees with final paychecks and other post-employment benefits. In addition, these laws govern the ability to furlough employees, schedule employees for fewer days or hours, and reduce employees' wages, salaries, and benefits. Before adopting modified work-weeks or other approaches, employers should consult with counsel to ensure compliance with state and federal wage and hour laws.
- **Leaves (paid or unpaid).** Employers may want to consider providing employees with access to leave—either unpaid or paid depending on circumstance. Some employees may well prefer to be away from work in the near-term and a voluntary unpaid leave program may obviate the need for a broad termination program.
- **Severance and Release of Claims.** Employers generally are not required to provide terminated employees with severance payments. However, employers should consider whether to provide terminated employees with severance. This could provide terminated employees with necessary assistance, in return for a full release of all potential liability.

This is a non-exclusive list of the more salient issues employers will encounter when reducing employment levels over the next several months. Each employer's situation involves unique circumstances and considerations, and it is crucial for employers to work with their counsel to ensure compliance with applicable laws during this challenging period.