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A Quarterly Publication of The Ohio State Bar Association
and Our Members

Issue 41 • Fall 2009

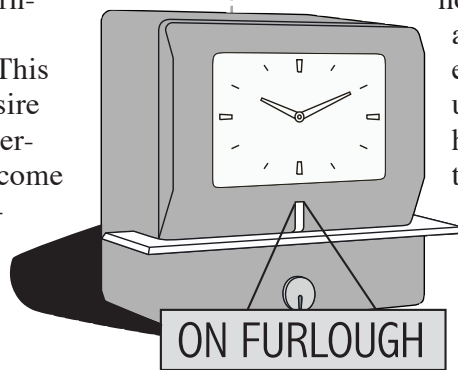
Consider Risks, Rewards of Employee Furloughs

By Justin D. Flamm

Although economic conditions remain difficult, many businesses are banking on a turnaround and making plans accordingly. This often includes a desire to retain valuable personnel who will become indispensable if demand improves. But what if those employers cannot afford to maintain current payroll costs?

Fortunately, layoffs are not the only option in this situation. For some employers, cost-saving measures like furloughs (i.e., mandatory, unpaid leaves of absence) may make more sense. With employees who are paid by the hour, such arrangements are simple because their compensation rises and falls with the time they spend working. When it comes to salaried exempt employees, however, the practical and legal issues become more complicated.

Under the federal Fair Labor Standards Act, most of the exemptions regarding minimum wage and overtime premium payments require that the employees be paid on a salary basis. That is, they must receive a predetermined



amount that is not subject to reduction based on the number of hours worked. So, a salaried exempt employee who usually works 40 hours must be paid the full amount even for a week in which he or she works just one hour per day. Otherwise, the employer may lose the exemption.

An exception exists for weeks in which salaried exempt employees perform no work whatsoever.

Relying on this provision, some employers have instituted periodic weeklong furloughs to reduce their payroll expenses. The catch is requiring and ensuring that the employees do not work at all during the furlough week. Even checking e-mails or phone messages, as many employees do while on vacation, can trigger a requirement that the entire week's salary be paid.

Pay cuts have also become common, and some employers have tried to soften the blow with corresponding reductions to the business hours of affected employees. Thus, salaried exempt employees work-

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Economic Conditions Make the WARN Act a Hot Topic

By Paula J. Dehan

Many employers are cutting back operations and reducing their workforce headcounts. For example, the federal Department of Labor reported 2,690 "mass layoffs" in August 2009 alone. These economic trends have made the 20-year-old Worker Adjustment and Retraining Notification ("WARN") Act a hot topic for employers. Although the WARN Act may appear straightforward, it contains technical points that can trip up an unwary employer.

What Does WARN Require?

Generally, employers are required to provide notice if they have 100 or more employees and experience a "mass layoff" or "plant closing" as

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ing 40 hours per week could move to a 32-hour schedule at 80 percent of their regular salary. The federal Department of Labor has indicated its approval of such arrangements if made prospectively as a change to the employees' regular work week (provided that the resulting salary remains above \$455 per week). The changes need not be permanent; however, occasional reductions or adjustments based on the ebb and flow of business will likely cause the business to forfeit the exemption.

Wage and hour law is highly technical, and other factors like employment agreements or union contracts can complicate matters

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even further. Employers should consult with counsel before implementing any of these measures.

Of course, furloughs and schedule reductions may cause morale problems in the workforce. Yet the other options may be termination, or inheriting numerous extra responsibilities from downsized coworkers. Employers should take care to explain their overall situation, as well as their efforts to position themselves for the improvement that everyone hopes will come.

Justin D. Flamm is an attorney in the Cincinnati office of Taft Stettinius & Hollister LLP.

FTC "Red Flag" Rules Effective November 1, 2009

Following a delay in enforcement, the Federal Trade Commission's (FTC) Identity Theft "Red Flag" Rules are effective as of November 1, 2009. Enforcement was delayed to give creditors time to develop and implement written identity theft prevention programs. To view the FTC's new compliance manual, *Fighting Fraud with the Red Flag Rules: A How-to Guide For Businesses*, visit www.ftc.gov/redflagrule.

WARN Act, cont. from page 1

defined by the Act. The regulations exclude from the headcount employees who have worked less than six months and employees who have averaged less than 20 hours per week during the relevant period.

What Triggers WARN Notice?

A covered employer must give notice for a "plant closing," defined as a permanent or temporary shutdown that will result in an employment loss of 50 or more employees during any 30-day period. Notice is also required for a "mass layoff," which means an employment loss for 500 or more employees at a single site during any 30-day period. A mass layoff also may occur where as few as 50 employees lose their jobs, if those 50 employees make up at least 33 percent of the employer's active workforce. This seems simple enough to calculate, but beware of issues involving multiple locations.

The terms "single site of employment" and "employment loss" can also complicate the analysis. Trickier still may be determining the appropriate time period to consider when a series of layoffs occurs.

What Notice Must Be Given?

Sixty days before a plant closing or mass layoff, a covered employer must give notice not only to the affected workers or their representatives, but also to state and local government. The WARN regulations specify the contents of a notice and certain circumstances that may require additional notice. This 60-day period is intended to provide time for employees to work with placement services and access training opportunities that will assist them in obtaining future employment.

What If Notice Is Not Given?

The penalties under the WARN

Act include requiring the employer to pay back pay and provide benefits for the period of violation, up to a maximum of 60 days. A court also may award attorney fees to an employee who wins a lawsuit against the employer. Additionally, a civil penalty of \$500 per day of violation may be imposed on an employer that fails to provide the appropriate notice to local government.

As employers adjust to economic conditions and contemplate the possibility of a mass layoff or plant closing, it is imperative to think ahead about WARN Act implications. A WARN violation can make a bad situation even worse.

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