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Employee Furloughs, Salary
Reductions, and Voluntary Separation
Programs: Questions for Employers
Looking to Avoid More Layoffs

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Particular Pressures in an Economic Downturn

- General lack of available alternative work
- No early retirement option as investment portfolios devalued
- Great deal more anxiety/stress
- Increased likelihood of sabotage and employee theft
 - 60% according to one survey
- Increased likelihood of disputes/litigation because nothing to lose
- Greater likelihood of hitting WARN and Cal-WARN
- Greater likelihood of cross-border layoffs
- Need to retain talent so that employees do not have to be rehired and retrained when the economy rebounds

RIF Alternatives:

Partial Week Mandatory Furloughs Without Pay

- OK to reduce hours for nonexempt employees, but they may possibly become eligible for unemployment benefits (UI generally week-to-week determination)
- Partial-week shutdowns may be problematic for exempt employees if they result in employees receiving less than full week's salary, since that may jeopardize the employees' exempt status
 - Per DOL, may be allowed if decision is “fixed” or “permanent”
 - FLSA 2009-18 (January 16, 2009)
 - Illinois court recently approved, if prospective and not “ad hoc” (*Robinson v. Tellabs*)
 - Per DOL, not allowed if salary deductions are “due to day-to-day or week-to-week determinations of the operating requirements of the business”
 - Per California DLSE, salary deductions for forced days off are not allowed, even if recurring

RIF Alternatives: Full-Week Mandatory Furloughs Without Pay

- OK for nonexempt employees (BUT – if union present, bargaining likely required before implementation)
- Full week shutdowns for exempt employees are allowed and do not jeopardize the employees' exempt status
 - FLSA 2009-14 (January 15, 2009)
 - BUT: Watch for WARN Issue (50% hours reduction during each month of six month period)
- Exempt employees may not perform any work during the week
 - Watch for checking voicemails and BlackBerry usage

RIF Alternatives: Mandatory Use of Accrued Vacation/PTO During Unpaid Furloughs

- Does not jeopardize exempt status of employees per recent DOL opinion letter, provided employees still receive full salaries for the workweek
 - FLSA 2009-18 (January 16, 2009); ok even if partial week furlough
- But California DLSE has expressed a contrary view for partial-week furloughs
- Employees with no vacation/PTO balance must be paid full salary, so penalizes employees with balances
- In California, must give reasonable notice before requiring employees to use vacation/PTO
- Loaning vacation/PTO is problematic in California given difficulty in getting it repaid on termination

RIF Alternatives: Reduced Hours Per Day

- OK for nonexempt employees, but be careful to consider obligation to pay “show up” pay
- Problematic for exempt employees, if results in reduced salary
- Also raises possibility of partial unemployment eligibility
- In California, employers may not be able to charge exempt vacation balance for less than four-hour increments per DLSE policy

RIF Alternatives: Voluntary Unpaid Furloughs

- Does not jeopardize exempt status of employees per recent DOL opinion letter because employer can treat time off as unpaid time off for personal reasons
 - FLSA 2009-14 (January 15, 2009)
- Must be voluntary
 - How do you document that decision was voluntary?
- Must be in full-day increments
- May jeopardize employees' right to benefits

RIF Alternatives: Mandatory Pay Reductions

- No problems for nonexempt employees (if non-union)
- Cannot do retroactively
- If pay reduction is too much, employee may quit and be eligible for unemployment benefits

RIF Alternatives: Mandatory Pay Reductions (cont'd)

- For exempt employees, pay reduction cannot be associated with a reduction in quantity of work without risk to exempt status
 - Overall pay cut for everyone OK
 - Cuts for certain departments or for short periods problematic
 - DOL view: ok, if reduced hours and pay are permanent or for a fixed period
 - Wal-Mart cases (10th Cir.): employer can prospectively reduce exempt salaries to accommodate business needs unless done with such frequency that the salary is the functional equivalent of an hourly wage
 - But see *Dingwall v. Friedman Fisher* (N.D.N.Y) and DLSE opinion letter (employer cannot reduce salary based on a reduction in the amount of days worked)

RIF Alternatives: Mandatory Pay Reductions (cont'd)

- Make sure exempt employees continue to earn the minimum required for the salary basis test (twice the minimum wage) or computer-related professional rate
- Check employment agreements – right to quit for good reason in the event of a compensation reduction
- Consider morale implications

Potential Immigration Pitfalls

- Employers of H-1B non-immigrants are subject to additional regulations affecting furloughs. Department of Labor regulations at 20 CFR Section 655.731(c)(7) makes it illegal for an employer to stop paying (or reduce pay for) an H-1B employee who is in nonproductive status due to "a decision by the employer."
- Placing H-1B employees on furlough could lead to liability for back-pay and fines. See Administrator, Wage & Hour Div. v. Itek Consulting, Inc., 2008-LCA-00046 (May 6, 2009) (finding employer liable for back-pay for "benching" H-1B employee).
- If employees are put on part-time schedule rather than furlough, employer must amend Labor Condition Agreement (LCA) and H-1B filings to reflect that schedule. Pay offered for part-time work must meet the prevailing wage for the occupation in the area of intended employment, consistent with H-1B rules.

RIF Alternatives: Reduced Vacation/PTO

- What is a valid cap in California?
 - 1.5 times annual accrual is generally safe
 - Will depend on amount of vacation offered, opportunity of employees to take vacation, and type of business or industry
 - Can employees reasonably take all accrued vacation?
 - Full week shutdowns make lower cap more reasonable
 - Large amounts of annual vacation make lower cap more problematic
 - Cannot be a “use it or lose it” policy in practice
 - Lowered cap can result in increased use of vacation or employees not accurately recording vacation days

RIF Alternatives: Reduced Vacation/PTO (cont'd)

- How do you lower cap for employees already at or over the cap?
 - Pay out excess
 - Bank the excess and pay out over time (e.g., $\frac{1}{4}$ per quarter)
 - Require that employees use their excess
 - Make sure that you give employees a sufficient amount of time to use both the excess and accruing vacation

RIF Alternatives: Reduced Vacation/PTO (cont'd)

- How much notice of the lower cap do you need to give?
 - California law requires reasonable notice before changes in vacation policy can be implemented
 - Sufficient time for employees to use their accrued and accruing vacation
 - If employees have a lot of accrued vacation, must give longer time
 - If many employees are over the cap, will need to give more time (or business may suffer if too many employees take vacation time)

RIF Alternatives: Voluntary Separation Plan

Voluntary exit incentive programs – different flavors . . .

- available to everybody, all applicants accepted
- available to selected departments or facilities, but not others
- two-stage process: interested eligible employees volunteer, but Company may “reject” volunteers depending on business needs

– other variations

- can be stand-alone programs, or part of process that may eventually include involuntary separations (depending on level of participation)

Voluntary Separation Programs: Advantages

- Substantial long-term cost savings
- Significant reduction in legal risk
 - Especially important where targeted workforce consists of disproportionate number of employees in a protected class
- Less damaging to morale
- Flexibility to tailor program according to employer's goals and resources
- Can be easier to administer than a RIF

Voluntary Separation Programs: Disadvantages

- Significant time required to create and administer the program
- Costs money
- Less certainty over who stays and who goes
 - But, can achieve more certainty through plan design
- Risk supervisors/managers may “hint” that bad performers should “volunteer”

Voluntary Separation Programs: Plan Design Options

- Available to everybody, all applicants accepted
 - Risk of losing too many employees, and risk of losing top performers
- Tailored for more certainty over who stays and who goes
 - Limiting eligibility to (or excluding from eligibility) certain levels, positions, departments or locations (show business need!)
 - Offering retention benefits or inducements to critical employees
 - Two-step process: interested eligible employees volunteer, but Company may “reject” volunteers depending on business needs
 - Caution! Too much management involvement may lead employees to challenge voluntariness of program; also raises possibility of getting sued for not letting employees participate.

Voluntary Separation Programs: Plan Design Options (cont'd)

- Huge variety among VSPs
 - “Early retirement” benefit incorporated into existing retirement benefit plan (i.e., avoid early retirement penalties or enhance benefit)
 - Retirement incentive involving benefits not part of a formal retirement plan (e.g., eligibility based on age plus years of service; BUT – watch for ADEA problems)
 - Benefits package designed to induce separation, not related to retirement (severance pay, continued medical benefits, etc.)

Voluntary Separation Programs: Plan Design Options (cont'd)

- How much cost to incur and what benefits to offer?
Consider:
 - Existing benefits programs
 - Employee groups and number of employees potentially eligible
 - Other employment options available to employees at that location
 - Details of and participation in previous separation programs

Voluntary Separation Programs: Potential Pitfalls

- Ensuring voluntariness
 - Essential to reducing legal risks!
 - Provide employees clear and effective communications about the program
 - Emphasize that separation is optional, employees do not have to accept
 - Provide information necessary for employees to make an informed choice
 - Provide a reasonable time period for employees to decide whether to elect
 - 45 days to consider a waiver and release agreement; 7 day revocation period (can start 45 days at start of window, but raises 2 release possibility)
 - If involuntary separations may follow, avoid having supervisors/managers “hint” that certain employees will be selected or protected

Voluntary Separation Programs: Potential Pitfalls (cont'd)

- The possibility of problems down the road:
 - Succession of increasingly lucrative incentives over time will decrease likelihood of employee participation in a VSP
 - Employees will hold out for a better incentive package
 - Representations that better incentives would not be offered in the future can lead to legal claims if the company then offers enhanced benefits
 - Claims may also arise from misleading or inaccurate statements regarding future involuntary separations after a VSP
 - Employer must weigh risk of discussing future reductions
 - General rule: can talk about general state of business

Voluntary Separation Programs: Other Issues

- **Paper Trail**
 - For a successful VSP, essential to have documentation including a written procedure, documented criteria, waiver/release forms, well-crafted benefit plans, required disclosures, and more.
- **Union and Bargaining**
 - Potential challenges exist in implementing a VSP in a unionized workplace.
- **State and Federal Laws**
 - OWBPA, WARN Act, ERISA, employment contracts, NLRA, COBRA and other benefits requirements
- **Unemployment Compensation Issues**
 - UI laws generally viewed expansively, and employees leaving voluntarily generally ineligible; BUT – if employee can show well-grounded fear of imminent layoff, may be eligible for UI benefits.

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