WORKFORCE REDUCTION IN LIGHT OF COVID-19

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Introduction

As the COVID-19 pandemic continues to evolve in the United States, business owners and managers are being confronted with increasingly difficult decisions concerning the economy and their work force.

Many employers are forced to consider workforce reductions as a means to keeping operations afloat through this period of economic instability. Laying off employees or reducing hours is difficult in normal times; during this global health crisis, the task is particularly overwhelming. We at Messerli Kramer have prepared this overview as a means to guide business owners through necessary workforce reductions in a way that builds resiliency and minimizes losses.

Definitions

There are numerous terms floating around concerning workforce reductions, and sometimes they are used improperly or interchangeably. It is important for business leaders to know these definitions and thoughtfully consider their options to reduce costs. These include:

- *Furlough*. Short-term mandatory leave for a group of employees due to lack of work, typically unpaid.
- *Leave of Absence*. Similar to a furlough, however a leave of absence is typically utilized to address individualized circumstances that temporarily prevent an employee from performing available work.
- *Layoff*. End to employment, usually for business reasons. May be temporary and contemplate re-hire at a later date.
- *Termination*. Permanent end to employment for any reason.

Alternatives to Termination/Layoffs

The current pandemic's impact on the world's economy is still unknown. For this reason, business owners need to carefully balance the best ways to scale back on costs, while also maintaining their connection to employees who will be invaluable when business operations restart. This overview addresses certain options as to the human capital costs to a business, but when evaluating business continuation, employers should look at all costs in order to fully explore their options. Some of the measures below, when combined with other cost-saving measures taken by the business, could present options beyond simple mass layoffs.

Hiring Freeze

A hiring freeze is when an employer temporarily halts hiring to save on costs. Hiring freezes may be accomplished by not filling open positions or by simply not creating any new positions. Hiring freezes are a good short-term solution, often used to avoid layoffs, as they can immediately address a sudden economic downtown by quickly reducing costs. However, long-term, they may place a strain on overworked current employees.

Salary Freeze or Reductions in Pay

Similar to a hiring freeze, a salary freeze is when an employer temporarily halts any increases in pay, including cost of living adjustments. Employers may also choose to freeze bonus programs, where permissible depending on company policy. While a salary/bonus freeze may not offer immediate relief, it can be used as a long term planning tool. Immediate relief can be provided by reducing the pay of existing employees, or a group of employees. Some employers may choose to reduce and/or defer executive pay first before affecting the remaining employees.

Reducing Hours

Rather than laying off employees, employers may also consider reducing hours as a means to scale back. This may allow employees to stay on the payroll and maintain their benefits (depending on the benefit plan requirements), while also giving the business some economic breathing room. There are a few different ways to accomplish this, including an overall reduction (ie: 80% reduction in hours), changing to a 3day workweek, eliminating overtime hours, etc.. Employers may also implement alternating or defined furloughs. (Note that under the Fair Labor Standard Acts (FLSA) employers must generally pay exempt (salaried) workers their full pay for a week in which any work was provided. Therefore exempt employees are typically furloughed for a week at a time, as a reduction to 30 hours for an exempt employee will typically not permit a decrease in the amount paid.)

Alternating furloughs

In an alternating furlough, employees' hours are reduced for specific time periods. For example, an employee may be on furlough one day a week, one week a month, or be placed on a one week on-one week off plan. Employees are typically not paid for time on furlough, but would maintain a greater connection to the business and their work.

Defined furlough

A defined furlough is exactly as it sounds; a complete leave from work for a set period of time. Two months, four months, six months, etc. The exact time frame may depend on factors like the business's particular economic forecast and the status and impact of COVID-19 in its geographic region.

Early Retirement

As an additional cost-saving measure, employers may opt to offer an early retirement package to employees who have already declared a desire and intent to retire in the near future.

Legal Considerations in Termination/Layoff Decisions

There will be circumstances when cost-saving measures and the alternatives suggested above will not be sufficient and employers are faced with termination and/or layoff decisions. Below are some of the key legal considerations to help employers navigate those decisions.

Termination Selection Criteria

When making decisions about layoffs and terminations, employers need to be careful about selecting employees. Specifically, managers and business leaders need to avoid discrimination, and comply with state and federal laws, including the FLSA, the Family and Medical Leave Act (FMLA), the American with Disabilities Act (ADA), and state and local sick leave laws. Identifying objective selection criteria, developing procedures for the fair application of such criteria, and documenting the process as well as the business needs for the selections are important to protect against future liability. Employers may select to eliminate entire business groups, job descriptions or a certain number of positions to meet business needs. The decisions and criteria around those decisions should be reviewed with counsel to ensure compliance with all state and federal laws.

WARN Act

Employers must consider a federal law- the Worker Adjustment and Retraining Notification (WARN) Act when making large layoffs. The WARN Act requires advance notice when a mass layoff or plant closing occurs that results in employment loss for a certain number of people. An "employment loss" includes furloughs that last longer than six months. The WARN Act applies to employers with 100 or more full-time employees and layoffs of 500 or more employees. It also covers employers of 50 to 499 employees if those workers constitute at least one-third of the workforce. Many states also have state WARN laws as well.

Generally, the notice requirement means that employers must give 60-day notice to employees before making a large layoff. Failure to provide the required notice can subject an employer to penalties, including 60 days of pay for the departing employees. However, there are exceptions to the notice requirement where the layoff is caused by business circumstances that were no reasonably foreseeable as of the time notice would have be required. In this situation, notice should be given as soon as practicable, along with a statement of the basis for reducing the notice period. Employers that find themselves in this situation should consult with counsel about the exception and appropriate notice period.

Severance Pay

Generally an employer is not required to pay severance pay upon termination, unless there is contract or company policy that provides otherwise. In the event that an employer does offer severance to more than one employee as part of an exit incentive in exchange for a release of claims, employers are required to provide appropriate disclosures under the Older Workers Benefit Protection Act (OWBPA).

Timing of final paycheck

In Minnesota, a terminated employee's paycheck must be paid on the next regularly scheduled payroll. However, if an employee makes a demand for their final wages, they must be paid within 24-hours of the employee's demand. The suggested practice, therefore, is to have an employee's final paycheck ready to deliver at the time of termination. Employers should also review the legal requirements for payment of commissions and bonuses which may depend, in part, upon the written policies of the business, as well as other applicable state laws if they have a multi-state workforce.

Other Considerations

Employers should also check their own employee handbook and personnel policies to make sure all applicable procedures have been followed consistently, including payout of any vacation/sick time or PTO benefits, if required.

Conclusion

As the situation concerning COVID-19 continues to develop, we at Messerli Kramer are dedicated to providing guidance for business owners and employers to consider when making some of these difficult decisions. These are uncertain times; however, with the right information, you can make informed choices and ultimately do what is best for your employees and business.

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