

Maintaining a Workforce in Employment Purgatory

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Scope of Presentation:

- Layoffs & Furloughs
- Severance Agreements
- Working Remotely

Considerations for Conducting Reductions in Force and Temporary Furloughs

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Creating and Implementing the Plan

1. Determine Company Objectives

- Why is the furlough or RIF necessary?
What are we trying to accomplish?
- How many employees will this impact?
What type of employees (i.e., department,
non-exempt, management)?
- Are the employees at-will? Are there applicable
employment contracts or policies?
- What is the time frame? Is this permanent or
temporary? Is it permanent for some?



2. Choosing the Approach

- Reduction in Force
- Full-time Furlough
- Reduced Schedule
 - This can be reduced hours or alternating shifts/waves.
- Evaluate the advantages and disadvantages of each.
 - Again, company needs will govern.
 - Unemployment benefits.



3. Selecting Employees

- How is the selection made by the Company?
 - Company-wide? By facility? By department?
 - What factors will be considered? What is the criteria?
 - For a RIF:
 - The criteria for deciding who will be laid off must be business-related and consistent with workplace policies and applicable contracts.
- Other considerations:
 - Are any employees currently on leave?
 - Will there be an impact on protected groups?
 - Any impact on exempt status?
 - Any impact on benefits?



4. Communication with Employees

- Create and Document a Plan
 - This can be used for management/executive-level internal use.
 - Include the explanation of the business reasons leading to a decision to conduct a RIF or furlough.
 - Document the selection criteria for the impacted employees.
- Notify Employees
 - Have a meeting with employees to explain.
This could be one-on-one or in a group depending on the circumstance.
 - Discuss the reason for the decision.
 - Explain impact on benefits, tenure, and whether severance (for a RIF) will be offered. Return of company equipment?
 - If temporary, provide an idea of when to expect call back.



4. Communication with Employees *(continued)*

- Consider security concerns on potential negative employee responses.
- Approach this with the right tone.
 - Losing a job is terrible at any time – but it is especially tough for many in our current environment.
 - Be compassionate.

5. Compliance with Applicable Laws

- WARN Act
 - Mass layoff or plant shut-down?
 - Will the furlough last longer than six months?
 - Mini-WARN Acts
- Wage and Hour Issues
- Age Discrimination in Employment Act/Older Workers Benefit Protection Act
 - Consider this when conducting a RIF – are you having employees sign a release?
 - Be sure it is a “knowing and voluntary” release.
 - Include applicable consideration and revocation periods.
 - Include the other employees selected for the RIF.



Recalling Employees from Furlough

1. Continually Assess Company Needs

- Can we have employees return in waves?
 - First furloughed, first reinstated?
 - Different company needs?
- Do we need to terminate any employees currently on furlough?
 - Which employees, and how are they being selected?
- What is the anticipated time frame for recall?
- Will pay reductions or schedule reductions be necessary?



Recalling Employees from Furlough

2. Maintain Communication with Employees

- Provide as much support as possible.
- Stay transparent to the extent possible.
- Provide advance notice to employees with their recall date.
- Prepare for employees to re-enter the workforce.
 - Discuss return-to-work considerations with
 - Child care issues?
 - Other COVID-19 accommodation issues?
 - New employer policies?



Best Practices for the Process

- Documentation – the shield and the sword.
- Be consistent.
- Communicate with employees.
- Minimize PR issues.
- Look to the future, and be creative.





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Severance Agreements

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Why Offer Severance During COVID-19?

- Reassures current employees of some protection from unanticipated job loss
- Boosts company image during uncertain times
- Avoidance of litigation



Severance Arrangements During COVID-19

- Amount of Severance
- Other Types of Severance Benefits
- PTO payouts
- Outplacement Assistance



Wages Insurance and Benefits



Uncontested
Unemployment
benefits Letter of recommendation



Equipment Unused vacation
and sick days

Employer Benefits in Severance Agreements

- Release of claims
- Employee representations and cooperation provision
- Restrictive Covenants (old and new)



COVID-19 Specific Considerations

- Timing of terminations and severance agreements
- OWPBA compliance
- Exit incentives





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Working Remotely

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Telecommuting Employees

- “Telecommuting” means remote work and includes any work performed from a location away from the employer’s central workplace, often the employee’s home.



Wage and Hour Issues for Telecommuting Employees

- The FLSA's requirement to pay for hours worked applies at home too, so employers must keep records of hours worked from home.
 - Explain to remote employees what time is/is not compensable time
 - Customize payroll procedures and compensation policies
 - Reference timekeeping policy in telecommuting policy
- Consider state/local laws



Local Orders

- Telecommuting requirements
- Document the reasons for the recalled employees
(why telework is not possible in their case)
- New lawsuits over teleworking: Texas employee claiming he was not allowed to keep teleworking after the office reopened



Childcare and Home Distractions During COVID-19

- Ensure compliance with employer policies, including general telecommuting policies and COVID-19 telecommuting policies.
- Ensure compliance with applicable laws that provide for flexible schedules and leave.



Families First Coronavirus Response Act

- Federal law that mandates new paid leave for COVID-19 related reasons. Applicable to employers < 500 employees
 - Emergency Paid Sick Leave (E-PSL)
 - Provides 10 days of paid leave when an employee is unable to work or telework because of a protected reason. Has payment maximums and caps of \$511 per day, capped at \$5,110, and maximum of \$200 per day capped at \$2,000 for certain protected leave.
 - Emergency Family and Medical Leave Expansion Act (E-FMLA)
 - Provides 12 weeks of FMLA for closure of school/childcare provider due to a COVID-19 emergency. First 2 weeks are unpaid, but E-PSL may be used; remaining 10 weeks are paid at 2/3, and subject to caps.

Engaging and Communicating with Remote Employees

- Set goals and expectations, discuss performance measurements, maintain contact, and provide virtual training and employer-sponsored events.
- Continue to encourage communication, and clear written feedback among teams and managers.
- Consider how to adequately evaluate performance.



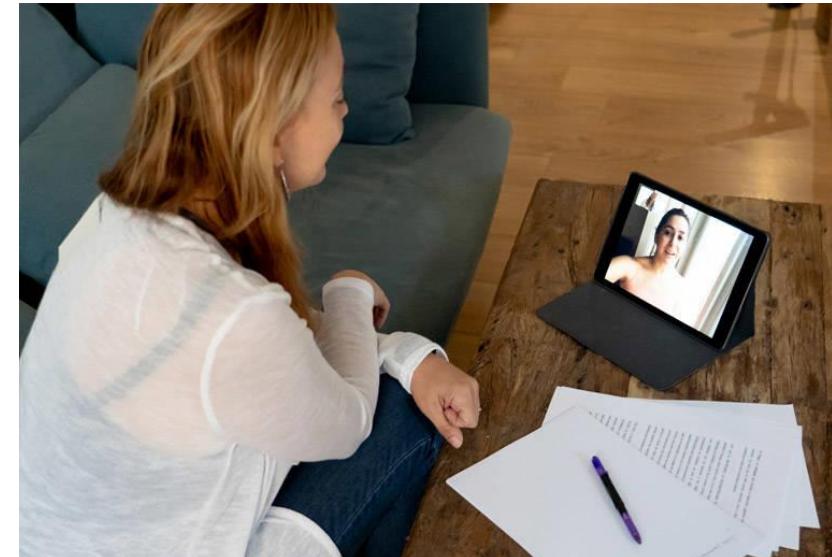
Telecommuting and the ADA

- Is telecommuting the accommodation under the ADA?
- If an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.
- A reasonable accommodation under the ADA may include adjustments or changes to the workplace, such as providing devices or modifying equipment and making workplaces accessible.



Telecommuting Policies

- Having a written telecommuting policy in place is a critical first step in addressing the challenges of employing a remote workforce.



Purposes of Telecommuting Policies

- Defines eligibility under applicable COVID-19 laws
- Provides a specific procedure
- Explains telecommuting conditions in the proper context
- Sets out employer responsibilities (IT support, work expense reimbursements, equipment provided/repaired)
- Reminds employees that compliance is a condition of employment

Contents of Telecommuting Policies

- Reasonable accommodation procedures
- Employee responsibilities and expectations
- Employer responsibilities and expectations
- Job duties, work area, and break times
- Compliance reminder





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