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EMPLOYER GUIDE TO WORKFORCE REDUCTIONS RESULTING FROM THE COVID-19 PANDEMIC

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Given the extraordinary measures city, state, and federal authorities are taking to combat the spread of the Covid-19 virus, many businesses are temporarily halting operations, closing doors, or reducing the scope of their business. "Shelter-in-place" orders issued by governors or local leaders are also limiting the ability of businesses to operate. This in turn may require reducing a business' workforce, through layoffs, hour or wage reductions, or furloughs. While not a pleasant prospect, the swift shuttering of normal operations may leave employers in certain industries no choice. Nonetheless, employers still have obligations under both state and federal law towards employees, and violation of those obligations can result in liability.

This article is to give employers an overview of the process to reduce their workforce as a result of the Covid-19 pandemic and subsequent government action. The information provided in this document does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available on this site are for general informational purposes only. Use of this information or communication with Chestnut Cambronne PA about this document does not create an attorney-client relationship.

1. Determine if Employees are "At-Will" Employees.

Prior to taking any action, the employer should confirm that each of the employees subject to the workforce reduction are "at-will" employees. At-will employment is the standard type of employment in Minnesota and most of the United States. However, employees are not at-will if they are (i) party to an employment contract which guarantees hours of work and rates of pay, (ii) part of a collective bargaining agreement, or (iii) working in a jurisdiction which is not an "at-will" jurisdiction.

If an employee is not at-will or if you are uncertain about their at-will status, please contact Chestnut Cambronne to discuss the specific circumstances of that employee and how it relates to a furlough or layoff.

2. Determine Workforce Reduction Method.

While employers might take a number of actions to reduce their workforce, most workforce reductions fall into three categories: Furloughs, hour or wage reductions, or lay-offs.

A. Furlough

Employers might choose to furlough employees as a temporary measure instead of layoffs. Furloughs are a temporary suspension of employment for a specified period of time during which employees do not receive wages. Furloughs might be appropriate where an employer anticipates resuming full operations after Covid-19 restrictions are lifted.

Employers must be careful when placing exempt employees on furlough, to ensure it does not void their exempt status. Further, employers sponsoring foreign workers have obligations to notify the United States Citizenship and Immigration Services (USCIS) or Department of Labor (DOL) in the event of a furlough, pay reduction, or hours reduction.

B. Hour Reduction or Wage Reduction

Similar to a furlough, employers might reduce employee hours or wages to cut costs or meet reduced demand. Employers should not ask employees to work at wages lower than applicable minimum wage or work without pay. Doing so will expose the employer to significant liability, including punitive damages.

C. Lay-Offs

Employers who are uncertain about when their business operations will resume, or who do not anticipate resuming normal operations immediately, might choose to lay-off employees.

3. Implement the Workforce Reduction.

Regardless of which option they elect, employers should carefully plan and implement their actions to ensure they are uniform. Different treatment of employees strengthens claims of discrimination or retaliation. Documentation of workforce reduction is also critical to limit liability for future claims.

A. Document the need for workforce reduction. This might be as simple a short memo identifying that the business is closed or reduced operations, but it is important to establish a legitimate business reason for the reduction. A lack of documentation significantly improves a potential claim for illegal adverse employment actions.

B. Identify the employees subject to the workforce reduction. The employer must have a neutral set of criteria to determine who will be subject to the workforce reduction, particularly if it will not affect all employees. Neutral criteria include:

- Performance, as shown on regular performance reviews;
- Productivity;
- Special skills;
- Employees who are in a particular position;
- Employees who are in a particular department; and
- Redundant positions.

Employers who do not use neutral criteria risk significant exposure if their workforce reduction does not apply to all employees. Employees who bring claims due to a workforce reduction might argue they were being targeted for an illegal reason, *e.g.*, being a member of a protected class or engaging in a protected activity. Protected classes include but are not limited to age, race, gender, religion, sexual orientation, or national origin. Protected activities include, but are not limited to, reporting unlawful behavior internally or to government agencies, testifying against the employer in legal proceedings, making workers' compensation requests, or taking medical leave.

Employers who use neutral criteria also should confirm that the neutral criteria do not have a disparate impact on employees in a particular protected class. Employees who use neutral criteria might still be liable if that neutral criteria unfairly targets or impacts employees in a particular protected class. In particular, using employee wage as a criteria might result in a disparate impact on older workers.

The federal Worker Adjustment and Retraining Notification Act (WARN Act) requires that certain employers provide 60 days' advance notice of a covered plant closing or mass layoff unless limited exceptions apply (notably that unforeseeable business circumstances arise or a natural disaster occurs) (29 U.S.C. §§ 2101-2109).

Generally, the WARN Act applies to private employers with more than one hundred employees.

Finally, employers should consider how the workforce reduction might affect employees on protected medical or military leave and their right to reinstatement, as well as those who recently returned from leave. This is generally a fact-specific analysis that can implicate various federal and state laws. Family Medical Leave Act ("FMLA") leave in particular has a variety of protections associated with it, and taking FMLA leave is a protected activity. Recent changes to the FMLA statutes allow workers to take "emergency FMLA leave" for illness or care obligations related to COVID-19, which might impact an employer's ability to eliminate their position.

C. Give notifications for each affected employee. These notifications should identify the workforce reduction measures, state the reason for the workforce reduction measures (which should match the employer's internal documentation), and identify that employees might be eligible for unemployment compensation and other emergency relief aid as a result of the action. If the employee is subject to a furlough, the notice should include a statement when the employer expects to end the furlough, but that the employer might extend the date based on developing circumstances.

D. For employees subject to a furlough or termination, the employer must complete employee separation tasks:

- Pay final paychecks for all work performed (best practice is to provide these to employees with the workforce reduction notice);
- Collect all employer property held by employee, including keys, key cards, and other means of access (employers cannot withhold wages conditioned on return of these items);
- Remove employee access to employer computer systems, <u>including social media accounts</u>, by changing passwords and removing remote access;
- To the extent allowed by employment contracts or policies, recoup all amounts owed to the employer; and
- Notify health insurance carriers of the change in status for employees.

While employees on a furlough might return at a future time, employers should still remove employee access and collect employee materials. Employees who

retain access to these materials might misuse them or not return them if they find new employment prior to reinstatement.

E. Update employee files to reflect the workforce reduction. Employees have a right to review or receive copies of their personnel files, and documents that are not include in those personnel files will likely not be admissible to prove a lawful termination if there are later proceedings.

Employers should also be aware of employee rights and benefits during the COVID-19 pandemic. A summary of state and federal requirements issued, to date, are set forth in the following link *Obligations of Employers and Employee Rights Amidst the COVID-19 Public Health Emergency*.

A Note On The CARES Act

Employers considering permanent lay-offs or wage reductions should be mindful of requirements of the recently passed CARES Act federal legislation. The CARES Act provides significant loans for business employers. Those loans are potentially forgivable if the employer applies for forgiveness. Those loans, however, will not forgiven (in whole or in part) if the employer reduces their workforce or cuts wages. Employers who seek such loans should be mindful of this if they want to proceed with workforce reductions. If an employer is seeking to obtain such loans, they should consult with counsel about the terms of forgiveness.

The situation with the COVID-19 virus continues to evolve on a daily basis, and with that the needs of employers continue to evolve as well. Further, the information contained in this article is provided as general information, but is not legal advice as every situation requires a review of the specific factual circumstances. If you have any questions about how the information herein pertains to your situation, how to implement a workforce reduction, or otherwise handle employment issues, please do not hesitate to **contact Emeric Dwyer of the Chestnut Cambronne firm at 612-336-2914 or edwyer@chestnutcambronne.com** to discuss.