

IMPORTANT CONSIDERATIONS IN IMPLEMENTING WORKFORCE FURLOUGHS

To Our Clients and Friends:

In the current environment, many businesses have faced a precipitous drop in demand for their goods and services. At the same time, economic and public health circumstances continue to change and legal frameworks continue to evolve in response. In this rapidly changing environment, many employers are weighing employee furloughs as a means to conserve resources while remaining positioned for eventual recovery. Employee furloughs can, however, implicate a variety of considerations and employment law obligations, many of which are changing in response to the current crisis and can vary by jurisdiction and employer specifics. This Update highlights some of the common issues that employers must keep in mind when considering and implementing employee furloughs during the current health crisis.^[1]

1. Is an Employee Furlough the Right Response for Your Business?

While the term “furlough” is not one that derives from any law or statute, it is generally recognized as a temporary cessation of employment, with the expectation that the employee will resume work for the employer at a later time. A furloughed employee is usually, but not always, unpaid, although many employers will continue to provide benefits such as health and dental insurance to furloughed employees.

Given its temporary nature, the furlough has become a common response to the COVID-19 crisis, where many employers intend to restore employees to their full positions once the circumstances safely and legally permit. Whether a furlough is right for a particular business in the face of this uncharted crisis, however, will depend on that business’s particular circumstances.

a. Employee Furlough Business Considerations

A starting point for assessing a potential furlough is a business’s likely near-term operational needs. This will often turn on two factors: (1) whether the business is legally and safely able to operate, and (2) whether there is demand for the business in light of the current crisis. As to the first, whether the business *can* operate, except where employees can work from home, this factor will often turn on whether the business qualifies as “essential” or “critical” under the current patchwork quilt of state and local “stay at home” and shelter-in-place orders. In general, many states have adopted in whole or in part the guidance regarding what businesses may qualify as critical infrastructure issued by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, although local orders vary and should be consulted.^[2] Notably, even where some of a company’s workforce may qualify as essential under the applicable orders, other employees may not. Moreover, during the current health crisis, some employers have transitioned their activity to products and services that may more clearly qualify under controlling orders as essential. And, under many (but not all) state and local orders,

maintenance, information technology, or other activities necessary to preserve the operational viability of a non-essential business or to allow other employees to work from home during a shut-down may be considered essential.

As to the second factor, even where an employer can operate its business safely and legally under the applicable orders, demand may have fallen due to the physical limitations on the population, or even due to financial insecurity of consumers. Thus, even businesses that qualify as “essential” under the applicable orders and *can* operate at this time may not find it profitable to do so due to lack of demand. In such cases, employers may consider reducing cash expenditures through employee furloughs.

b. Potential Alternatives to Employee Furloughs

Of course, furloughs are not the only option for reducing the costs of payroll. Employers should also carefully consider potential alternatives, including offsetting payroll costs with financial incentives available to businesses that continue to operate during this difficult time. In particular, the federal CARES Act may offer financial incentives to such businesses, including tax credits, tax deferrals, and forgivable loans for small businesses that retain workers. Several key provisions of the CARES Act warrant particular consideration.

First, the CARES Act authorized the Small Business Administration (“SBA”) to provide loan guarantees for up to \$349 billion in loan commitments under the SBA’s 7(a) program, through a new “paycheck protection” program under which loans may be forgiven. For further information on eligibility, loan terms, and loan forgiveness under the program, please see Gibson Dunn’s March 27, 2020 Client Alert, “SBA Paycheck Protection Loan Program under the CARES Act.”

Second, the CARES Act enacted the Coronavirus Economic Stabilization Act of 2020 (CESA), which authorizes up to \$500 billion in loans, loan guarantees, and other investments by the Secretary of the U.S. Department of Treasury for businesses that do not qualify for other assistance under the CARES Act. Approximately \$46 billion in funds are allocated to passenger air carriers and certain allied businesses, cargo air carriers, and businesses critical to maintaining national security. The remaining \$454 billion may be used for loans, loan guarantees, and other investments for programs of facilities established by the Board of Governors of the Federal Reserve System for eligible businesses, States, and municipalities. Also under CESA, the Secretary must implement a program to provide for direct, low interest loans to mid-sized businesses. Additionally, \$32 billion of financial assistance is available to air carriers and certain related contractors under the CARES Act. There are, however, certain restrictions under CESA and other provisions of the CARES Act to consider. For example, a company that receives a federal loan or loan guarantee under CESA must maintain the company’s employment levels as of March 24, 2020 through September 2020 to the extent practicable, and if it must reduce such levels, it may not do so by more than 10%. Similarly, mid-sized businesses who receive direct loans under the Secretary’s program must, among other requirements, retain 90% of their workforce at full compensation and benefits until September 30, 2020, restore 90% of their workforce as of February 1, 2020 (with full compensation and benefits) within four months following the end of the public health emergency, not outsource or offshore jobs, and remain neutral in any union organizing effort. Additionally, air carriers

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and certain related contractors that receive financial assistance must refrain from conducting involuntary furloughs or reducing pay rates or benefits through September 30, 2020.

Third, the CARES Act provides for a number of temporary and permanent changes to the Internal Revenue Code of 1986. These changes allow for certain tax relief including, but not limited to: modifications to the rules applicable to the use of business losses (including net operating losses); an increased limit of a taxpayer's business interest expense deduction from 30% to 50%; the ability for certain employers to defer payment of the 6.2% employer share of Social Security payroll tax on wages paid from March 27, 2020 through December 31, 2020—with 50% of the deferred tax due December 31, 2021, and the remaining 50% due by December 31, 2022; a federal excise tax holiday applicable to aviation kerosene (including at refineries, terminals, and importation facilities) and alcohol and distilled spirits in the production of hand sanitizer; and SBA loan forgiveness income exclusion. For further information on these changes, please see Gibson Dunn's March 29, 2020 Client Alert, "Tax Relief in the CARES Act."

Finally, states and cities have also announced economic aid packages for certain businesses and individuals.^[3]

As a potential alternative to employee furloughs, both federal and state laws generally permit companies to make downward pay adjustments to employees, subject to certain wage and salary thresholds and certain state-specific notice requirements. Where pay adjustments are made, non-exempt employees must continue to be paid hourly wages and overtime in compliance with applicable federal, state, and municipality minimum wage requirements, and wages must never drop below the applicable minimum wage. Employees who are covered by the Fair Labor Standards Act ("FLSA") and qualify as exempt from the FLSA's minimum wage and overtime requirements must continue to be paid a salary of at least \$35,568 per year, or \$684 per week, or else be transitioned to hourly positions. Businesses should confirm that salary adjustments also comply with any state-specific exemption requirements. While some states rely on the FLSA requirements, or have lower requirements or none at all, others, including California and New York, have higher salary thresholds. Employers must also take care to avoid impairing the exempt status of salaried employees by adjusting their weekly pay based on hours worked. Generally, salaried employees are entitled to their agreed weekly salary in full for any weeks in which they perform compensable work for an employer, although there are certain provisions for pro rata adjustment of salary for long-term changes in schedule.^[4]

Employers implementing pay reductions should also consider state-imposed notice requirements. Some states, including California, Connecticut, Idaho, Illinois, Kansas, Kentucky, Michigan, New Jersey, Oregon, Tennessee, and Texas, require employers to provide advance notice to employees regarding pay adjustments, but do not specify a fixed statutory time period for issuing such notice.^[5] Other states like New York, North Carolina, and Missouri require advance notice ranging from 1 to 30 days. Employers who fail to comply with these notice requirements may incur penalties. Employers should also be cognizant of the form of notice provided; written notice is often required and may need to be posted at the workplace. And employers are typically prohibited from imposing retroactive wage reductions for hours already worked. As a result, employers should assume that any wage changes will only apply to hours worked after effective notice is provided.

Union employees, and those with individual employment agreements, may have additional rights.

2. Important Furlough Considerations

For those employers who choose to move forward with furloughs, there are several legal aspects of a furlough that employers should consider.

a. Is WARN Act Notice Required?

Employers considering furloughs in response to the current health crisis must assess whether advance notice to affected employees may be required. Under the Federal Worker Adjustment and Retraining Notification (“WARN”) Act, employers who employ 100 or more full time workers must provide at least sixty days’ advance notice of a “plant closing” or “mass layoff.”^[6] A “mass layoff” occurs when a reduction in force “results in an employment loss at the single site of employment during any 30-day period for: (i) at least 33 percent of the active employees, excluding part-time employees, and (ii) at least 50 employees, excluding part-time employees.”^[7] “Where 500 or more employees (excluding part-time employees) are affected,” however, “the 33% requirement does not apply.”^[8] A covered “plant closing” means “the permanent or temporary shutdown of a ‘single site of employment’ or one or more ‘facilities or operating units’ within a single site of employment if the shutdown results in an ‘employment loss’ during any 30–day period at the single site of employment for 50 or more employees, excluding any part-time employees.”^[9] Both of these triggers turn on the number of employees who are expected to experience an “employment loss,” which is defined as “a layoff exceeding 6 months” or “a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.”^[10]

This means that, under federal law, employers must provide advance notice if they employ at least 100 full time employees and are planning to furlough or reduce by at least 50% the hours of:

- More than 50 employees at a single site during any 30-day period;
- Comprising at least 33 percent of its active workforce (or 500 or more full-time employees) at the single site or compromising the complete shutdown of one or more facilities or operating units.

The Federal WARN Act includes an exception for layoffs or furloughs “caused by business circumstances that were not reasonably foreseeable as of the time that the notice would have been required.”^[11] Under these circumstances, which likely encompass many of the challenges employers are facing in the wake of the COVID-19 crisis, the employer is only required to provide “as much notice as is practicable.”^[12]

Understandably, it may be difficult for employers to predict the duration of necessary layoffs or furloughs during this unprecedented crisis. Thankfully, the law does not require employers to be omniscient. Instead, it requires employers to issue notice only when it becomes “reasonably foreseeable” that one of the Federal WARN triggers will be met.^[13] Accordingly, “[a]n employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not

reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required.”^[14] In such circumstances, “[t]he employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.”^[15]

Where required, WARN notices must be provided to:

- The affected employees, defined as those who will suffer an employment loss;
- The dislocated worker unit (or Governor) in the State in which the furloughs will occur; and
- The chief elected official of the unit of local government in which the furloughs will occur.^[16]

If the furloughed workers are represented by a union, notice must be provided to the chief elected officer of the affected employees’ bargaining agent or representative.^[17]

Alongside the Federal WARN Act, many states have adopted so-called “Mini-WARN Acts” which reinforce and sometimes augment the federal scheme. Importantly, some states require WARN notices to be sent in a broader set of circumstances than required under federal law. As a result, it is important to consider state notice requirements as well. To assist in this process, we have grouped the various state laws into three broad categories: (1) states where the Mini-WARN Act imposes additional substantive obligations on employers beyond the Federal WARN Act; (2) states where the Mini-WARN Act expands coverage to smaller employers; and (3) states that currently either do not have a Mini-WARN Act or where the Mini-WARN Act currently does not impose significantly more stringent requirements than required under the Federal Act.

In particular, at least six states have enacted Mini-WARN Acts that impose greater obligations on employers than does the Federal WARN Act.^[18] Most notably, in California an employer has “a duty to provide statutory notice . . . even if the layoffs [a]re not permanent and [a]re for less than six months.” *Int’l Bhd. of Boilermakers v. NASSCO Holdings Inc.*, 17 Cal. App. 5th 1105, 1118 (2017).

Like the Federal WARN Act, several of those states have exceptions that may relax these notice requirements in the current crisis. However, as under the Federal WARN Act, in most cases these exceptions continue to require an employer to provide as much notice as is feasible under the circumstances. For example, New York’s Mini-WARN Act includes an exception for “business circumstances that were not reasonably foreseeable when the 90-day notice would have otherwise been required.”^[19] The regulations further explain that such circumstances include “an unanticipated and dramatic major economic downturn.”^[20] While New York has not issued a blanket declaration that the COVID-19 crisis qualifies for this exception,^[21] other states, including Vermont, have made clear that the COVID-19 crisis qualifies for similar exceptions.^[22]

Furthermore, states without these “business circumstances” exceptions are already taking steps to address the mass layoffs triggered by the COVID-19 crisis. Most notably, Governor Gavin Newsom of California issued an Executive Order officially suspending the 60-day notice requirement under

California’s Mini-WARN Act for mass layoffs “caused by COVID-19-related ‘business circumstances that were not reasonably foreseeable as of the time that notice would have been required.’”^[23] The Executive Order still requires California employers to provide “as much notice as is practicable,” as well as a “brief statement of the basis for reducing the notification period.”^[24]

Beyond these states with substantively more demanding state Mini-WARN Acts, at least five states have adopted the Federal WARN Act’s framework but applied it to smaller employers or lower thresholds in their states. For example, in Iowa, the Mini-WARN Act is similar to the Federal Act but applies to employers with more than 25 employees, essentially extending the Federal Act to employers with between 25 and 100 employees.^[25]

Finally, at present, 39 states and the District of Columbia either do not have a Mini-WARN Act or have a Mini-WARN Act that does not impose significantly greater requirements on employers beyond those in the Federal Act. In these states, employers should primarily follow the Federal WARN Act in assessing whether planned furloughs trigger WARN Act notice requirements.^[26] Even in these states, however, some statutes may require (or encourage) employers to provide supplemental information to the state in the employer’s WARN notice,^[27] while others may require notice to the state *following* the initiation of layoffs.^[28] Employers should also remain aware that the current health crisis is spurring rapid change in this and related areas.^[29]

b. Is Other Notice Required?

Employers implementing furloughs must also consider potential notice and other obligations under state unemployment insurance systems. In particular, a number of states and the federal government have taken steps in response to the current health crisis to increase eligibility for unemployment benefits, including among employees who have been temporarily furloughed or who may continue to receive limited pay or benefits from their employers during a furlough.^[30]

In conjunction with these increased opportunities for unemployment benefits, states have taken divergent approaches to enhanced employer obligations under state unemployment schemes in light of the crisis. To date, approximately half of the states—including Illinois, New York, and Texas—have not addressed enhanced employer responsibilities as pertaining to furloughs or temporary layoffs in response to the current health crisis. In contrast, some states—such as California, Kansas, and Michigan—have instituted notice requirements. California, for example, requires employers who trigger the state’s WARN Act by furloughing employees due to COVID-19 to provide specific language in notices to those employees regarding eligibility for unemployment insurance. In Kansas, employers must notify employees at the time of separation of the availability of unemployment benefits. And in Michigan, employers are required to provide employees with a formal unemployment compensation notice and communicate to employees their eligibility for unemployment benefits. Other states that have addressed employer responsibilities take different approaches to, for example, charging an employer’s account when an employee files for unemployment. Some states have postponed employer tax increases until 2021, while others have indicated tax rates could rise sooner.

One area in which the states take a similar approach is in their recommendation that an employer considering furloughs or temporary layoffs work with state shared work (or similar) programs. These programs generally provide an alternative to furloughs or layoffs by allowing an employer to reduce employees' hours while allowing the employees to receive a limited unemployment benefit. Many states have also recommended that employers implementing furloughs or temporary layoffs submit a "mass claim" on behalf of their employees to the state unemployment insurance division.

c. How Does a Furlough Impact Accrued Vacation, Paid Time Off ("PTO") and Other Paid Leave Rights?

Employers considering furloughs should be aware that some states may view even temporary furloughs as a termination of employment, thereby triggering final pay obligations. For example, the California Division of Labor Standards Enforcement ("DLSE") issued two advisory letters in the 1990s, taking the position that a temporary lay-off will constitute a termination except where the lay-off does not exceed 10 days and there is a definite date given for return to work within the normal pay period.^[31] Because California law requires that all accrued vacation be paid at the time of "termination,"^[32] these DLSE letters suggest that a temporary lay-off extending beyond the then-current pay period will trigger an obligation to pay final wages, including accrued vacation. Such a rule could have significant implications for California businesses, as an employer's willful failure to timely pay final wages can result in waiting time penalties under Labor Code Section 203, which are calculated as a day's wage for every day final wages are not paid, up to 30 days.

Whether this DLSE guidance will apply in the time of COVID-19 is unknown. The DLSE has provided no additional direction on whether final wages, including accrued vacation, must be paid out to employees furloughed in response to recent state and local orders. Moreover, the two DLSE letters are not binding on courts, and are persuasive authority at best.^[33] Regardless, the DLSE's guidance plainly did not contemplate a situation like the one employers face today, where employers are temporarily furloughing employees due to government-mandated closures and public health concerns, rather than solely business needs. Notably, current furloughs share few of the markers of traditional temporary lay-offs, where the expectation is that the employees may seek and find other work during the lay-off (this may of course happen here—with employees obtaining other temporary or even permanent work—but this may be less likely). By contrast, here, employers generally hope and expect to resume the employment relationship as soon as is legally and safely possible; many employers are providing assistance to employees such as partial pay or continued healthcare which would not typically accompany a temporary lay-off; and employees may want and expect to have their accrued vacation waiting for them when they return. None of these circumstances indicate an intent to terminate the employer/employee relationship. As a result, employers in California will want to carefully consider, in consultation with counsel, whether final wages including accrued vacation should be paid out to furloughed employees.

Employers outside California should similarly consider applicable state laws which may require the payment of final wages including accrued vacation when employees are furloughed. For example, Colorado requires the pay-out of accrued vacation upon "interruption in the employer-employee relationship by volition of the employer."^[34] A state- or locality-mandated shutdown would

presumably not be “by the volition of the employer,” but employers should carefully consider this issue with counsel as well as whether the furlough of any employees who *can* work under the applicable orders (such as essential or work-from-home employees) prompted by reduced business demand for the employer’s goods or services would trigger final pay obligations.[35]

d. Other important employment considerations

Employee furloughs frequently raise a host of other issues employers must consider. One frequent question is whether furloughed employees will continue to participate in employer-provided health benefit plans. Typically, the ability to do so will turn on whether the plan’s terms and any underlying insurance policy (including any stop-loss policy associated with an otherwise employer funded plan) permit coverage of individuals who continue to be considered “employees” but who are performing no services and receiving no pay. If workers will not continue to participate in employer health plans while on furloughed status, the furlough will likely trigger an employer’s obligation to provide timely notice of continuation coverage under COBRA.

Employers must also take care to avoid unintended wage and hour violations as a consequence of employee furloughs. For example, because federal and state laws typically require an employer to compensate its employees for any work performed, employees should be clearly instructed not to perform any work for the benefit of the employer while on furlough, and the employer should be prepared to compensate employees for any job related activities by employees of which it becomes aware. Employers who partially furlough their workforce should also be alert to unintended consequences the furloughs may have on those workers who remain on the job. For example, in a small retail setting, staff reductions may result in formerly overtime-exempt managers supervising fewer workers or performing a larger share of operational (as opposed to managerial) tasks, either of which may impact their continuing status as overtime-exempt.[36]

Likewise in a partial furlough, the process by which employees are selected for furlough (or selected for recall if some but not all employees are called back) should be carefully considered to minimize potential claims of discrimination or retaliation. Employers should ensure that the methodology for selecting employees for furlough can be clearly articulated and defended and is consistently followed. Employers should also remain sensitive to potential adverse impact in the selection process on workers in legally protected groups, including employees who may have voiced concerns over workplace health and safety. And employers should work to ensure that managers do not use the furlough selection process as an indirect means of addressing neglected employee performance or conduct issues (although performance, conduct, and skill set may, in appropriate cases, be relevant criteria for consideration).

Although temporary employee furloughs historically have not been coupled with employee releases of claims, during the current unsettled and rapidly changing environment employers may also want to consider whether, to the extent they are providing furloughed employees with voluntary compensation or benefits during the furlough period, to link such voluntary benefits to an employee release. To the extent an employer does so—or should temporary furloughs evolve over time into permanent separations due to changed circumstances—an employer must keep in mind the requirements that may apply to such

a release under the Federal Older Workers Benefit Protection Act and possible state laws as well as employee rights under any existing employer severance plans or agreements.

Apart from these and other employment law considerations, employers implementing a furlough should also consider how they will implement the change. Where employees are not already required to remain home due to state or local “safer at home” or shelter-in-place orders, an employer should provide a safe, orderly, and humane plan to allow employees to gather necessary personal items and transition from work to furlough status. As in all cases, such plans should give proper consideration to employee health and safety, including providing for appropriate hygiene and social distancing.

3. Post-Furlough Communications With Employees

Employers will be well-served to maintain open channels of communication with employees while on furlough. At a minimum, an employer should have a clear and well-publicized point of contact for employee questions or issues that may arise during the furlough and maintain current contact information for furloughed employees. Employers may also find it beneficial to provide employees with periodic updates on status and the business’s recovery planning. Such updates may aid morale and help improve the employer’s opportunities to recall and quickly re-engage furloughed workers when the business is ready to resume operations. Employers should remain sensitive, however, to the need to avoid employees engaging in uncompensated “work” while on furlough; accordingly, any updates should be brief and passive in nature, not requiring any action or follow-up on the part of employees.

Employers should also remain vigilant to changing circumstances that may impact the status of employees on furlough. As noted earlier, if it appears that some or all furloughed employees may not be recalled due to evolving business conditions, the employer should immediately evaluate whether additional obligations, including potentially WARN Act notification, may be triggered.

Conclusion

Employers must weigh not only the legal implications of a potential furlough but also whether—in light of these and other considerations—a furlough is the best course under the circumstances to balance immediate staffing and financial needs against the longer term ability to retain a ready workforce and to be best positioned for a rapid recovery post-crisis. The proper balance among those considerations will depend in part on the legal obligations and burdens triggered by a furlough under applicable federal and state law. As events and governmental responses to them continue to rapidly evolve, employers should work closely with legal counsel in developing and implementing an appropriate plan for their particular circumstances and workforce.

[1] These considerations assume a non-union workforce. Where collective bargaining exists, additional considerations will come into play and must be included in any furlough planning.

[2] The Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency’s revised guidance on “Essential Critical Infrastructure Workers” is available at

https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf, and our April 1, 2020 Client Alert “The Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security Updates Essential Critical Infrastructure Workforce Guidance” is available [here](#).

[3] *E.g.*, Florida Small Business Emergency Bridge Loan Program; Maryland Small Business COVID-19 Emergency Grant Relief Fund; City of Los Angeles Small Business Emergency Microloan Program; New York City Small Business Continuity Loan Fund.

[4] According to the DOL, a prospective and “fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment. Therefore, the exemption would remain in effect as long as the employee receives the minimum salary required by the regulations and meets all the other requirements for the exemption.” Wage and Hour Opinion Letter, FLSA2009-14 (January 15, 2009); Wage and Hour Opinion Letter, FLSA2009-18 (January 16, 2009). By contrast, “deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business are . . . preclude[d].” Wage and Hour Opinion Letter, FLSA2009-14 (quoting § 541.602(a)(2)).

[5] In addition, some jurisdictions including the District of Columbia generally require employers to provide information regarding employee wage rates without specifying the timing of such notices.

[6] 20 C.F.R. § 639.2.

[7] 20 C.F.R. § 639.3(c)(1).

[8] 20 C.F.R. § 639.3(c)(1)(ii).

[9] 20 C.F.R. § 639.3(b).

[10] 20 C.F.R. § 639.3(f)(1).

[11] 29 U.S.C. § 2102 § 2102(b)(2)(A).

[12] 20 C.F.R. § 639.9(b).

[13] 20 C.F.R. § 639.4(b).

[14] *Id.*

[15] 20 C.F.R. § 639.9(b)(2).

[16] 29 C.F.R. § 639.6.

[17] *Id.*

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[18] Those states are: California (*requires notice of any “separation from a position for lack of funds or lack of work,” regardless of duration and expands WARN Act to cover employers with between 75 and 100 employees*); Maine (*requires 90 days’ notice*); New Jersey (*starting July 19, 2020, requires 90 days’ notice*); New York (*requires 90 days’ notice and expands WARN Act to cover employers with between 50 and 100 employees*); Tennessee (*requires notice when employer will “permanently or indefinitely” reduce the workforce by 50 or more employees for at least three months and expands coverage to employers with between 50 and 100 employees*); and Vermont (*requires notice of permanent employment loss for at least 50 employees during a 90-day period and expands coverage to employers with between 50 and 100 employees*).

[19] N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.3.

[20] *Id.*

[21] New York Department of Labor, *Worker Adjustment and Retraining Notification*, <https://labor.ny.gov/workforcenypartners/warn/warnportal.shtm> (“The WARN Act requirement to provide 90 days’ advanced notice has not been suspended because the WARN Act already recognizes that businesses cannot predict sudden and unexpected circumstances beyond an employer’s control, such as government-mandated closures, the loss of your workforce due to school closings, or other specific circumstances due to the coronavirus pandemic. If an unexpected event caused your business to close, please provide as much information as possible to the Department of Labor when you file your notice about the circumstances of your closure so we can determine if an exception to the WARN Act applies to your situation.”).

[22] *See* Vermont Department of Labor, *WARN Act and Notice of Potential Layoffs Act – COVID-19 Update*, <https://labor.vermont.gov/warn-act-and-notice-potential-layoffs-act> (“[T]he Department of Labor does not intend to enforce the provisions of the Act against businesses who are forced to lay off employees due to the effects of the COVID-19 pandemic.”).

[23] <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-motor.pdf>.

[24] *Id.* *See also* https://www.edd.ca.gov/About_EDD/coronavirus-2019/faqs/Warn.htm.

[25] These states include: Delaware (*expands the definition of how part-time employees are counted for meeting the 100-employee threshold*); Illinois (*covers employers with 75 or more employees*); Iowa (*covers employers with 25 or more employees*); New Hampshire (*expands definition of how part-time employees are counted for meeting the 100-employee threshold*); and Wisconsin (*covers employers with 50 or more employees*).

[26] At the time of writing, these states include: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Washington, D.C., West Virginia, and Wyoming.

[27] For example, Michigan and Minnesota.

[28] For example, Georgia, Maryland, and North Dakota.

[29] State WARN Act requirements, as well as other valuable state-level developments, are tracked and regularly updated in our separate 50-State Survey of COVID-19 Responses. To subscribe to that update, contact any member of the Gibson Dunn COVID-19 Response Team identified at the end of this Update.

[30] Expanded opportunities for unemployment benefits under the federal CARES Act are summarized in our March 26, 2020 Client Alert, “Senate Advances the CARES Act, the Largest Stimulus Package in History, to Stabilize the Economic Sector During the Coronavirus Pandemic.”

[31] DLSE Op. Ltr. (May 4, 1993); DLSE Op. Ltr. (May 30, 1996).

[32] Cal. Lab. Code, § 201.

[33] *See Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1029 (noting that DLSE opinion letters are not controlling upon the courts); *see also Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.

[34] Co. Rev. Stat. § 8–4-109.

[35] Similarly, other states such as Illinois, Louisiana, Massachusetts, Montana, and Nebraska require payout of accrued vacation upon termination. *See, e.g.,* Mass. Gen. Laws ch. 149, § 148; Mont. Att’y Gen. Op. 56, vol. 23; Nebraska Stat. 48-1229(4), 48-1230(4)(a). While none of these states offer specific guidance on whether a furlough or temporary lay-off would require payout of accrued vacation, employers should consider whether their particular employment decisions trigger such obligations.

[36] Federal and state wage laws may provide some allowance for the performance of non-exempt work by managers during an emergency. *See* 29 C.F.R. § 541.706. The extent to which this would apply will of course depend on the facts of your situation.



Gibson Dunn’s lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm’s Coronavirus (COVID-19) Response Team.

*Gibson Dunn attorneys regularly counsel clients on the array of employment issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn attorney with whom you work in the **Labor and Employment Group**, or the following authors:*

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