## IMPORTANT RULES FOR EMPLOYERS TO KNOW IN THE WAKE OF COVID-19

Coping with the outbreak of COVID-19 will require most employers and employees to make significant changes at work. Businesses depending on large gatherings may also be forced to consider reductions in force. As changes are made, employers should be mindful of the following existing laws and new laws on the horizon.

### Expenses for Working at Home

Some cities are now legally requiring employees to take "shelter" in their homes and not report to the employer's place of business. Many employers are permitting employees to work from home as a preventative measure and to assist with childcare as many schools have closed. In California, Labor Code section 2802 requires employers to reimburse employees for expenditures the employee incurs as a consequence of performing work. As such, employers should be sure to implement programs to reimburse employees for such expenses as home internet, cell phone usage, printer ink, paper, and other relevant supplies. Employers may demand proof of incurred expenses. California does not mandate any deadline by which expenses must be submitted for reimbursement or paid. Employers must reimburse the employee within a time period "reasonable" under the circumstances. For expensive items or detailed invoices, that turnaround time rarely exceeds a few months.

### Reduction in Hours

To limit the effects of paying workers who have little work to perform, some employers are taking salaried employees "exempt" from the Labor Code's rest break and overtime requirements and converting them to hourly employees to limit the amount of hours worked.

Employers should be careful to reduce hours in a way that does not appear discriminatory. If an employer were to reduce only the hours of the highest paid workers, for example, such a practice may have the unintended impact of harming only older workers over 40-years-old and thus create the specter of age discrimination. A small minority of courts have held that reducing compensation and reducing normal hours worked could constitute a sufficient injury ("adverse employment action") to support a lawsuit for discrimination or retaliation.

Employers seeking to reduce labor costs temporarily sometimes use the euphemism "furlough." The term "furlough" has no legal or agreed-upon meaning in California. While the term "furlough" carries a layperson's connotation that the arrangement is temporary and that the employee can return to work in the near future, California regards a furlough as legally the same as a layoff.

## Reductions in Force

Employers in the hospitality industry are bracing to engage in mass layoffs in light of the dramatic drop in foot traffic and laws that temporarily prohibit dining in restaurants. Employers considering mass layoffs or entire business closures should be aware of the federal and state Worker Adjustment & Retraining Notification ("WARN") Acts. The WARN Acts are essentially designed to give employees and the government agencies advanced notice to prepare for mass layoffs.

The federal WARN Act generally applies to an employer who has 100 employees in the aggregate of its business enterprise. The California WARN Act, by contrast, applies to an employer with 75 employees at any individual facility. Both laws have complicated ways of calculating the number of employees based on their full-time or part-time statuses, as well as their tenures. Employers should seek legal counsel for closer analysis if the headcounts are very close to the threshold.

The general threshold for both the federal and California WARN Act is the layoff of 50 or more employees within a 30-day period. In addition to the threshold 50-employee requirement, the federal WARN Act applies only if the number of displaced employees exceeds 33% of the fulltime workforce. For example, if a company has 150 employees, a layoff of 50 employees would pass the 50-employee threshold and the 33% threshold. Yet if a company had 153 employees, a layoff of 50 employees would not pass the 33% threshold. Finally, the federal WARN Act only applies if the layoffs last more than six months. The California WARN Act, by contrast, applies regardless of the percentage of employees retained and the anticipated duration of the layoff.

Significantly, the WARN Acts require the employer to give the group of affected employees sixty (60) days' notice of the layoffs. If employers fail to give 60 days' notice, such employers often find themselves defending class action lawsuits seeking back pay up to 60 days, statutory penalties, and attorney's fees. But what if urgent circumstances do not allow for 60 days' notice?

Some business closures have been mandated by law to take effect immediately. Employers facing Executive Orders to cease hosting large crowds immediately must comply. Those employers have a strong defense that it was legally impossible to comply with both the shut-down order and the WARN Act.

Businesses that are faltering but not completely shut down face a bigger risk of not waiting 60 days to shutter or lay off workers. The federal WARN Act is more forgiving of employers. The federal law provides escape clauses for labor strikes, natural disasters, and even "not reasonably foreseeable" business circumstances. The California WARN Act is not as forgiving. California expressly rejected the hazy "not reasonably foreseeable" exception. In California, there are currently only two exceptions: acts of war and a "physical calamity." Labor Code § 1401(c).

The Labor Code does not define "physical calamity" and, in fact, does not contain the word "calamity" anywhere in other code sections. A judge trying to interpret the term "physical calamity" would look to a dictionary definition. Dictionaries tend to define "calamity" in terms of the effects of distress or misery rather than actual events. Finally, the judge will likely then examine how other California Codes use the term "calamity" for guidance. Many other laws found in the California Government Code, Public Utility Code, and Harbor & Navigation Code state that a "calamity" includes not only fires and floods, but also

"epidemics." Because an "epidemic" is usually defined as the spread of disease, a judge should find that the spread of deadly COVID-19 and the drastic attempts to curb its spread qualify as an "epidemic" and thus a "calamity."

Because there is presently no clear authority on whether the COVID-19 crisis qualifies as a "physical calamity" within the meaning of the Labor Code, employers run a risk that a judge presiding over a WARN Act class action case disagrees and finds no "calamity." Conceivably, a judge could rule that layoffs were a mere option to stem business losses caused by lessened customer demand and not because of the actual contracting of a contagious virus, the number of victims which thus far total less than one percent of the population. The fact that the Legislature qualified the term "calamity" with the word "physical" may suggest that the calamity must actually cause damage to the body of employees or customers, or the workplace itself. Hopefully, judges will not require bubonic plague-like infection statistics to deem the COVID-19 fallout a "calamity." Mitigating the employer's exposure is the California WARN Act provision that an employer may argue its "good faith" belief that the 60-day WARN Act notice was not required.

Employers should carefully weigh the risks and benefits of giving shortened WARN Act notice or late notice after mass layoffs have already occurred. On one hand, sending untimely mass letters to employees may draw attention to the 60-day violation and prompt a lawsuit the employee was not previously considering. Employers must also send WARN letters to the California Employment Development Department ("EDD"). The EDD publishes on its website the names of the employers, the date of the layoffs and the date of the notice. Unscrupulous lawyers are likely trolling the website for potential 60-day violators to sue. On the other hand, a judge may view an untimely notice as better than no notice at all. That principle may encourage a judge to find reasons to lower the award of damages. Judges in a federal WARN Act case have the discretion by statute to excuse shortened notice given under the circumstances; judges in a California case apparently do not have as much discretion in that regard.

**Rights of Employees**

Employers are reminded that laid-off employees are entitled to their final paychecks immediately upon separation. Courts and the Division of Labor Standards Enforcement may be sympathetic to employers facing an immediate shut-down order. However, an employer should certainly not wait more than 72 hours to tender final paychecks. Exempt employees must be paid not only for actual work performed but for the entire workweek if any time was worked during that workweek.

Even if an employee is "furloughed" and only works a few hours per week, the employee is usually eligible for unemployment benefits from the EDD. The EDD is reportedly expediting benefit payments in light of COVID-19.

Lawmakers are also planning soon to protect employee job status and health insurance coverage. The federal House of Representatives is in the process of passing bill H.R. 6201, which, among other things, will amend the Family and Medical Leave Act ("FMLA") to allow 12-weeks of job protection for those who are self-quarantining at home, caring for an infected family member, or even having to watch over young children due to a school closure. H.R. 6201 still requires approval by the Senate and the President to become law.

**Are Employees Entitled to Benefits If Furloughed?**

There are state benefits that the employee may receive in light of this shutdown due to the coronavirus. All employees may apply for unemployment benefits with the Employment Development Department ("EDD"). As the coronavirus situation is fluid, we encourage review of the EDD's website at least daily relative to whether, and to what extent, benefits might be available. In California, Governor Gavin Newsom waived the traditional one week waiting period for EDD benefits to kick in, thus providing employees with immediate relief. Critically, during the furlough period all employees will continue to receive their health benefits. Employees may also elect to use their PTO time to supplement any unemployment benefits.

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