April 3, 2020

Reduction-In-Force ("RIF") & Layoff Considerations
DISCLAIMER

These materials are provided by the Hawaii Employers Council for illustrative and general informational purposes only, are not intended to constitute legal advice, and should not be interpreted by you as legal advice. Because legal advice is dependent upon the specific circumstances of each situation, and because relevant law often changes and the situation is rapidly evolving, you should consult with competent legal counsel before relying upon or using any informational materials provided to you.

COPYRIGHT NOTICE

© 2020 Hawaii Employers Council. All rights reserved. This publication contains propriety and copyrighted material of the Hawaii Employers Council. These materials are being provided to HEC member organizations for internal use. Member organizations may not reproduce, redistribute, disclose, share, utilize, email, or otherwise transmit any part of these materials to any other individual or entity, without prior written permission of the Hawaii Employers Council.
Reduction-In-Force (“RIF”) & Layoff Considerations

In these challenging times, many employers are in the difficult position of having to reduce their workforces. Even if a reduction-in-force (“RIF”) or layoff must be implemented quickly, it is imperative for an employer to plan carefully. The following list is not exhaustive, but highlights areas for employers to consider to mitigate negative effects on employees and to minimize employers’ exposure to liability.

1. Identifying Employees

As an initial matter, unless the entire workforce is being laid off, employers should be mindful of how they are identifying employees to be laid off to minimize the potential for discrimination claims. The following are a few things to consider:

- Where possible, use objective criteria to determine who to lay off (e.g., seniority, sales revenue, or production numbers).
- Make sure the criteria for selection is nondiscriminatory (i.e., not based on a protected class: race, color, religion, sex (including pregnancy, gender identity, or gender expression), sexual orientation, ancestry, national origin, citizenship, disability, age, military/veteran status, marital status, arrest/court record, credit history, domestic/sexual violence victim status, or genetic information).
- Ensure compliance with anti-retaliation and whistleblower laws – be wary of laying off employees who recently reported discrimination, filed or threatened to file a complaint, or participated in an investigation.
- After compiling a list of employees, evaluate whether laying off those employees would result in the termination of a disproportionate number of individuals from a certain protected class. You want to make sure that the layoff does not unintentionally disparately impact a certain group. For more information and tips, see the EEOC’s Avoiding Discrimination in Layoffs or Reductions in Force (RIF).
- Document the reasons for the decisions made during this process. Employers should be able to express legitimate, nondiscriminatory reasons for those who are being laid off.

2. Is Advance Notice Required?

The federal Workers Adjustment and Retraining Notification Act (“WARN”) requires employers to give affected employees, their bargaining representatives, and local government officials at least 60 calendar days advance written notice of a “plant closing” or “mass layoff.” If the required notice is not given, WARN authorizes employees to recover pay and benefits in lieu of notice, up to a maximum of 60 days. For more information about WARN, HEC has prepared WARN Act Basics and FAQs: COVID-19 Edition for members.

The Hawaii Dislocated Worker’s Act (“DWA”) also requires written notices from the employer. However, in the vast majority of cases, the DWA will not apply to layoffs or terminations caused by the COVID-19 pandemic. The DWA requires that 60 days’ notice be provided to employees of a “closing, divestiture, partial closing, or relocation.” HRS § 394B-9. In turn, a covered closing or partial closing involves the full or partial “shutting down of operations within a
covered establishment due to the sale, transfer, merger, other business takeover or transaction of business interests, bankruptcy, or other close of business transaction that results in or may result in the layoff or termination of employees of a covered establishment.” HRS § 394B-2. A “divestiture” means the transfer of an establishment from one employer to another. A “relocation” is the removal of all or substantially all of the industrial, commercial, or business operations of a covered establishment to a location outside the state of Hawaii.

Business conditions such as a severe drop in revenue, drop in customers, increase in costs, inability to pay rent, or government orders prohibiting working at or traveling to non-essential businesses are not covered closings, partial closings, divestitures, or relocations that trigger the Hawaii DWA. Note, however, that a bankruptcy caused by COVID-19 is a “close of business transaction” that triggers DWA notice requirements.

3. **Review Policies, Procedures, and Agreements**

Employers should review all relevant company policies, procedures, and obligations including in handbooks, any applicable employment agreements, and collective bargaining agreements for:

- Severance plans or programs;
- Termination provisions, including possible mandatory notice periods;
- Procedures for payouts of paid time off and issuing final paychecks;
- Non-compete, confidentiality, non-solicitation policies; and
- Policies on return of company property and collecting personal property.

4. **Severance Agreements & the Older Workers Benefits Protection Act (“OWBPA”)**

Employers may consider offering an employee a severance package in exchange for the employee’s agreement to release any legal claims the employee may have against the employer. Employers should consult with legal counsel when drafting severance agreements.

Keep in mind that severance agreements with employees who are over 40 years old must meet the requirements of the Older Workers Benefit Protection Act (“OWBPA”), including allowing the employee 45 days to consider the agreement (assuming the severance agreement is requested in connection with a layoff of two or more employees). Other requirements include:

- The agreement is written in a manner reasonably calculated to be understood by the employee;
- The agreement specifically refers to rights under the Age Discrimination in Employment Act;
- The employee does not waive rights or claims that arise after execution of the agreement;
- The employee agrees to release claims in exchange for something of value that the employee is not already entitled to receive;
- The employee is advised in writing to consult an attorney before executing the agreement;
- The employee has 7 days to revoke the agreement after executing the agreement; and
• The employer must also provide information regarding the group of employees selected for the severance program, including job titles and ages.

5. Unemployment Insurance Benefits

HEC’s article, What Employers Need to Know about Unemployment Insurance, provides basic information on applying for unemployment insurance so you can help ease the financial burden on your employees.

6. Extended Medical Coverage or COBRA?

Some companies have decided to continue paying for laid-off employees’ medical premiums. Such payments do not affect an employee’s ability to collect unemployment insurance benefits.

Typically, however, terminated employees who lose eligibility under company benefit plans, potentially trigger the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), which generally applies to employers with 20 or more employees. For more information on employers’ COBRA obligations, visit the Department of Labor’s COBRA Continuation Coverage page.

7. FFCRA Considerations

The Families First Coronavirus Response Act (“FFCRA”) provides for paid sick leave and extended Family and Medical Leave, including the requirement that an employee be restored to the same or an equivalent position upon return from such leave in the same manner that an employee would be returned to work after leave under the Family and Medical Leave Act (“FMLA”).

Does that mean that an employer cannot lay off an employee who is on paid leave under FFCRA even if the company is closing or reducing the hours of many of its workers? No. Employees who take leave under the FFCRA are not protected from being laid off as long as the employer can demonstrate that the employee would have been laid off even if the employee had not taken leave.

Also note that the FFCRA does not apply to employees who were laid off prior to FFCRA’s effective date of April 1, 2020. As such, those laid off employees are not entitled to paid sick leave or expanded FMLA under the FFCRA. They may, however, be eligible for unemployment benefits under Hawaii law and the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.