

## Barran Liebman Electronic Alerts

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# Alternatives to Layoffs for Employers Navigating the COVID-19 Pandemic

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On March 23, 2020, Oregon Governor Kate Brown issued Emergency Order 20-12. As detailed in Barran Liebman's prior E-Alert, the Emergency Order has sweeping impacts to many businesses that are outright closed under the order or forced to implement telework and social distancing. On March 18, 2020, Barran Liebman discussed the legal considerations of layoffs as a result of mandatory closures and the economic impact of the COVID-19 pandemic. However, employers may also want to consider alternative options to address employment challenges unique to the current landscape.

### 1. Wage Reductions

One option considered by employers is a wage reduction to reduce employer overhead while maintaining operations. Note that while classes and groups of employees should ideally be subject to a uniform wage reduction, employers are permitted to decelerate the percentage of pay decreases depending on employees' roles within the organization. For example, executives (the highest earners in the organization) within a company may take a 20% cut, while a 10% reduction may be applied to the remaining employees.

Wage reductions require different considerations for non-exempt and exempt employees:

Non-Exempt Employees: Employers may prospectively reduce the pay of non-exempt employees if the hourly rate is above the minimum wage (currently \$11.25 in Oregon and \$12.50 in the Portland metropolitan area). If employees have employment agreements with individual employees, a wage reduction must be negotiated. Employers should consult with labor counsel if employees are unionized, as wages are a mandatory subject of bargaining.

Exempt Employees: Although payment of a fixed weekly salary regardless of hours worked is required to classify an employee as exempt, employers may prospectively reduce the salary of exempt employees if the salary is at least \$684 per week. For exempt employees, this must be a prospective reduction in the predetermined pay related to the long-term business needs, rather than day-to-day or week-to-week deductions, which would be impermissible. For an exempt employee's salary reduction to be defensible, it should be:

- Applied to an entire group or class of employees;
- Not directly tied to a reduction in hours;
- Not accompanied by a promise or suggestion that it changes based on performance or other discretionary factors; and
- Not accompanied by job duty changes that may undermine the classification of the employee as exempt.

If considering or making wage reductions to exempt or non-exempt employees, employers should also be particularly cautious about potential discrimination claims and pay equity violations. Any wage reduction must be based on objective criteria—job duties, seniority, or other non-discriminatory factors and be implemented across a group or class of employees.

## 2. Reclassification of Exempt Employees

If maintaining operations, another potential option is to reclassify exempt employees to non-exempt. Reclassification allows the employer to pay these employees on an hourly rather than salary basis. Since an exempt employee must be paid his or her full salary for any week in which the employee performs any work, regardless of the number of days or hours worked or availability of work, reclassifying certain employees as non-exempt can limit costs during a slowdown in business. Then, the employer will only pay reclassified, non-exempt employees for the hours actually worked. It also allows employers to impose a partial week furlough or reduce hours worked.

Of course, the reclassification will result in several operational changes, including requiring the employee to track hours worked. In addition, non-exempt employees are entitled to overtime if they work over 40 hours in a given workweek. Employers should review their policies and ensure that approval to work overtime is required, and provide training to employees on these requirements.

Non-exempt employees are also eligible for meal and rest breaks based on state law. For example, Oregon employers must ensure all non-exempt employees receive meal periods of no less than 30 minutes for employees who work six or more hours in a work period and a paid rest period of no less than 10 minutes for every segment of four hours or major portion thereof in a work period.

Finally, if considering reclassification, employers should also consider whether the employee is subject to a non-compete, as the reclassification from exempt to non-exempt status will impact enforceability of this agreement.

## 3. Complete or Partial Furlough

A furlough is voluntary or involuntary unpaid leave or a reduction in hours where employees remain employed and generally eligible for benefits. This is an alternative to a traditional layoff, which involves a termination from employment with the potential for rehire at a later date (in which employees are no longer eligible for most benefits during this time). A furlough can reduce the employer's overall payroll costs, while still maintaining some protections for employees. Furlough may allow employers to retain employees, while likely making employees eligible for unemployment benefits.

**Unemployment Benefits:** Furloughed employees are likely eligible for unemployment benefits. While employers should still avoid making any representations to employees about unemployment eligibility since that determination is up to the state rather than the employer, employers may note that both the Washington Employment Security Department and the Oregon Employment Department will provide benefits if an employer shuts down due to quarantine, business slowdown or lack of demand, or if the employer reduces hours due to a business slowdown or lack of demand. In addition, the Oregon Employment Department issued temporary rules related to COVID-19, allowing for more flexible standards for

unemployment benefits. These temporary rules consider furloughed employees to be “actively seeking work” and therefore eligible for benefits as long as they and the employer intend on the person resuming work when COVID-19-related situations permit and the person stays in contact with their employer, as reasonably required by the employer, so they can return to work when the employer permits them to do so.

Work Share: Oregon’s Work Share Program provides an alternative for employers and workers who may be facing the prospect of layoff or complete furlough. Work Share provides a useful alternative to a complete furlough where the skillset is still needed and a reduction in hours is appropriate. With Work Share, instead of reducing staff, an employer reduces the hours of work for a group of workers. Partial Unemployment Insurance benefits are then paid to supplement workers’ reduced wages. Employers must select three or more employees with reduced work hours to participate in a Work Share program. Employers are limited to reduction in hours and wages of at least 20%, but no more than 40% per week, and the employees’ normal work week is 40 hours or less. Selected employees must have worked full-time for six months, or part-time for 12 months just before the employer’s Work Share plan was submitted.

Health Benefits: Employees on furlough will generally still be eligible for health benefits, although each employer should review the details of its qualified benefit plan to confirm whether the length of the furlough will affect the employee’s eligibility.

Accrued Leave: Employees on furlough may be entitled to sick time and other employer-provided benefits such as PTO, depending upon the employer’s policy. Allowing employees to take accrued leave benefits provides some economic stability for employees and may also provide an important morale boost. Alternatively, employers implementing a furlough may consider amending policies to prohibit the use of accrued vacation and PTO during any period of time that an employee is in an unscheduled status due to the furlough.

Emergency FMLA Under the Families First Coronavirus Response Act: Employees on furlough may be eligible for emergency paid sick leave and emergency FMLA under the Families First Coronavirus Response Act, although we are currently waiting for further guidance to confirm eligibility of furloughed employees under these new programs. Stay tuned for the Department of Labor’s rules and guidance.

Timing & Duration of Furlough: If implementing a furlough, employers must consider employees’ status as exempt or non-exempt when determining the timing and duration of the furlough. Non-exempt employees may be placed on furlough for any duration of time. On the other hand, exempt employees’ furloughs should only be in full workweek increments to maintain the employee’s exempt status.

Like layoffs, furloughs may also trigger notice requirements under federal and state WARN Acts. Furloughs less than six months are not subject to the WARN Act.

Timing of Final Paycheck: In Oregon, for furloughs lasting 35 or more days, employers must provide the final paycheck no later than the end of the first business day following the employee’s last day of employment. Since the duration of a furlough is likely unpredictable in the current COVID-19 situation, we recommend employers provide final paychecks on the employees’ last day before furlough, regardless of the expected duration of the furlough.

Considerations for Retail, Hospitality, & Food Services: Employers that are subject to “secure or predictive scheduling” or “fair workweek” laws must consider how those laws are implicated if an employee’s shifts are changed or cancelled due to furlough. While employers should still engage in proactive communication to the extent possible, employers will not have to pay a penalty if an employee’s work shift or on-call shift cannot continue due to the recommendation of a public official.

Since there are multiple strategies to approach new employment challenges raised by the COVID-19 pandemic, employers should reach out to counsel to evaluate whether any of these approaches meet the unique needs of their businesses.

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