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Layoffs & Mandatory Closures: What Employers Need to Know & Consider

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Both Washington Governor Jay Inslee and Oregon Governor Kate Brown have announced emergency executive orders this week restricting social gatherings, and either closing or limiting much of the hospitality and service industry.

Oregon's Executive Order

Beginning at 5:00 p.m. on March 17, 2020, Governor Brown's Executive Order 20-07 went into effect, limiting bar and restaurant service and prohibiting gatherings of more than 25 people until at least April 14, 2020. Under the Executive Order, any establishment that offers food or drink may no longer offer or allow on-site consumption, but may allow for takeout, drive-through, or delivery, as long as they implement social distancing protocols of at least three feet between customers while they are ordering, waiting, or in line.

Importantly, the prohibition on gatherings of 25 people or more does not apply to workplaces, grocery stores, or retail stores, among other limited exceptions. However, the Executive Order makes note that exempt businesses are encouraged to implement social distancing protocols. This Executive Order will likely cause many businesses to re-evaluate how they are operating, as well as the sustainability of their current workforce.

Washington's Emergency Proclamations

On March 15 and 16, 2020, Governor Inslee issued two emergency proclamations that ordered the closure of bars, entertainment, recreational, and other facilities (including salons and barbershops), and limited public gathering to 50 people. Similarly, restaurants are limited to take out or delivery service only. Additionally, the Governor established new requirements for retail establishments (including gas stations, banks, and shopping centers), which may remain open with limited occupancy, in order to ensure social distancing and cleanliness. These emergency measures are in place until at least March 31, 2020.

Employer Considerations

These orders have forced many employers to make difficult decisions regarding the status of their employees and their business. These decisions are complicated given the relatively unknown time frame associated with temporary layoffs, furloughs, and business closures.

Below are items that employers should be sure to consider in making decisions related to their workforce. We understand that there is no one-size-fits-all approach to addressing the impact of these mandates and COVID-19 impacts on the workforce.

Paid Sick Time

So long as an employee *remains* an employee, they will be allowed to use accrued but unused leave under Oregon or Washington's respective Paid Sick Leave laws to cover qualifying absences, including absences for the closure of a child's school (or place of care) by order of a public official.

If an employer is forced to temporarily lay off an employee, and absent a policy stating that the employer will do so, an employer *does not* have a duty under either Washington or Oregon Law to pay or cash out accrued but unused paid sick time. Instead, in the event that the employee is re-hired within 180 days in Oregon, or 365 days in Washington, the employer must reinstate the balances of accrued but unused paid sick time upon the rehire of that employee.

Employers may *choose* to pay out accrued but unused paid sick time in the event of a temporary or permanent layoff (in which case the leave balance does not need to be reinstated upon rehire), but are not required to do so.

PTO Policies & Final Paychecks

Employers should follow their individual policies with respect to the use and payout of any additional paid time off ("PTO"). If an employee remains an employee, they are entitled to use accrued PTO pursuant to the employer's internal policy.

The cash out of accrued but unused PTO is also a matter of internal policy. If an employee is permanently laid off or terminated, employers should be careful to ensure that any accrued but unused PTO is accounted for in the employee's final paycheck, if the employer's internal policy provides that such PTO will be paid out upon termination.

In the event of a permanent, non-temporary separation or layoff, the employee's final paycheck will be due by the end of the next business day following the separation in Oregon; and by the employee's next regularly scheduled pay date in Washington.

In Oregon, when the layoff is temporary and the employee returns to work within 35 days, the layoff is not considered to be a termination of employment and all wages earned and unpaid are not due and payable until the next regularly scheduled payday *following* the layoff.

Nonetheless—if possible, and to mitigate potential legal risks associated with non-timely payment of final paychecks, employers are strongly encouraged to cut "final" paychecks as soon as possible, even in the event that the layoff is intended to be temporary.

Unemployment Compensation

Both the Washington Employment Security Department and the Oregon Employment Department will provide benefits to employees in some COVID-19-related circumstances, including where a workplace temporarily closes or lays employees off. For example, benefits may be eligible when an employer stops operation for a short period of time, such as cleaning following a coronavirus exposure or due to a closure mandated by the government. In these cases, employees expect to be back to work in four weeks or less.

For the State of Oregon, additional information can be found [here](#). A State of Oregon Scenarios & Benefits chart is also available [here](#).

For the State of Washington, additional information may be found [here](#). A Washington State Scenarios & Benefits chart is also available [here](#).

COBRA

Employers should check with their health insurance provider on the status of coverage for employees who are either being laid off, terminated, or working reduced hours. In the event that health insurance coverage may be lost as a result of a layoff, termination, or reduction in hours, employers will likely need to provide appropriate notice to employees pursuant to the Consolidated Omnibus Budget Reconciliation Act (“COBRA”).

WARN Notices (For Employers With 100+ Employees)

The Worker Adjustment and Retraining Notification Act (“WARN”) requires that qualifying employers provide advanced notice of plant closings and/or mass layoffs to affected employees or their representatives, as well as other state agencies and officials.

A qualifying employer is defined as any business enterprise that employs either: (a) 100 or more employees, **excluding part-time employees; OR** (b) 100 or more employees who aggregately work at least 4,000 hours per week (exclusive of overtime hours). A part-time employee is defined as an employee who is employed for an average of fewer than 20 hours per week, or who has been employed for less than 6 of the past 12 months.

A “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.

A “mass layoff” means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during any 30-day period for: (i) At least 33% of the active employees, excluding part-time employees, and (ii) At least 50 employees, excluding part-time employees. Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met.

Although notice must typically be given 60 days in advance of a planned plant closing or mass layoff, an exception exists for “unforeseeable business circumstances” – where notice must only be given as soon as “is practicable” – even if the notice comes after the fact of the plant closing or mass layoff.

Both Oregon and Washington provide more specific information regarding to whom qualifying employers must send notice. For additional information regarding WARN notice requirements, including the entities whom qualifying employers must send notice to, employers planning a qualifying plant closure or mass layoff are encouraged to review the following:

- [Oregon WARN Notice Requirements](#)
- [Washington WARN Notice Requirements](#)

With the rapidly changing landscape of COVID-19 and the ongoing efforts of state and federal governments to provide guidance and assistance to those affected, we will continue to provide you with advice for best practices under your circumstances.

If you have any questions about responding to the circumstances created by COVID-19, contact Sarah, Wilson, or Chris at 503-228-0500, or at shale@barran.com, wjarrell@barran.com, or cmorgan@barran.com.