

# Maintaining a Workforce in Employment Purgatory

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# Scope of Presentation:

- Layoffs & Furloughs
- Severance Agreements
- Working Remotely

# **Considerations for Conducting Reductions in Force and Temporary Furloughs**

# Creating and Implementing the Plan

## 1. Determine Company Objectives

- Why is the furlough or RIF necessary?  
What are we trying to accomplish?
- How many employees will this impact?  
What type of employees (i.e., department, non-exempt, management)?
- Are the employees at-will? Are there applicable employment contracts or policies?
- What is the time frame? Is this permanent or temporary? Is it permanent for some?



## 2. Choosing the Approach

- Reduction in Force
- Full-time Furlough
- Reduced Schedule
  - This can be reduced hours or alternating shifts/waves.
- Evaluate the advantages and disadvantages of each.
  - Again, company needs will govern.
  - Unemployment benefits.



### 3. Selecting Employees

- How is the selection made by the Company?
  - Company-wide? By facility? By department?
  - What factors will be considered? What is the criteria?
  - For a RIF:
    - The criteria for deciding who will be laid off must be business-related and consistent with workplace policies and applicable contracts.
- Other considerations:
  - Are any employees currently on leave?
  - Will there be an impact on protected groups?
  - Any impact on exempt status?
  - Any impact on benefits?



# 4. Communication with Employees

- Create and Document a Plan
  - This can be used for management/executive-level internal use.
  - Include the explanation of the business reasons leading to a decision to conduct a RIF or furlough.
  - Document the selection criteria for the impacted employees.
- Notify Employees
  - Have a meeting with employees to explain.  
This could be one-on-one or in a group depending on the circumstance.
  - Discuss the reason for the decision.
  - Explain impact on benefits, tenure, and whether severance (for a RIF) will be offered. Return of company equipment?
  - If temporary, provide an idea of when to expect call back.



## 4. **Communication with Employees** *(continued)*

- Consider security concerns on potential negative employee responses.
- Approach this with the right tone.
  - Losing a job is terrible at any time – but it is especially tough for many in our current environment.
  - Be compassionate.



# 5. Compliance with Applicable Laws

- WARN Act
  - Mass layoff or plant shut-down?
  - Will the furlough last longer than six months?
  - Mini-WARN Acts
- Wage and Hour Issues
- Age Discrimination in Employment Act/Older Workers Benefit Protection Act
  - Consider this when conducting a RIF – are you having employees sign a release?
  - Be sure it is a “knowing and voluntary” release.
  - Include applicable consideration and revocation periods.
  - Include the other employees selected for the RIF.



# Recalling Employees from Furlough

## 1. Continually Assess Company Needs

- Can we have employees return in waves?
  - First furloughed, first reinstated?
  - Different company needs?
- Do we need to terminate any employees currently on furlough?
  - Which employees, and how are they being selected?
- What is the anticipated time frame for recall?
- Will pay reductions or schedule reductions be necessary?



# Recalling Employees from Furlough

## 2. Maintain Communication with Employees

- Provide as much support as possible.
- Stay transparent to the extent possible.
- Provide advance notice to employees with their recall date.
- Prepare for employees to re-enter the workforce.
  - Discuss return-to-work considerations with
  - Child care issues?
  - Other COVID-19 accommodation issues?
  - New employer policies?



# Best Practices for the Process

- Documentation – the shield and the sword.
- Be consistent.
- Communicate with employees.
- Minimize PR issues.
- Look to the future, and be creative.





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# Severance Agreements

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# Why Offer Severance During COVID-19?

- Reassures current employees of some protection from unanticipated job loss
- Boosts company image during uncertain times
- Avoidance of litigation



# Severance Arrangements During COVID-19

- Amount of Severance
- Other Types of Severance Benefits
- PTO payouts
- Outplacement Assistance



Wages



Insurance and Benefits



Uncontested  
Unemployment benefits



Letter of recommendation



Equipment



Unused vacation  
and sick days



# Employer Benefits in Severance Agreements

- Release of claims
- Employee representations and cooperation provision
- Restrictive Covenants (old and new)



# COVID-19 Specific Considerations

- Timing of terminations and severance agreements
- OWPBA compliance
- Exit incentives





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# Working Remotely

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# Telecommuting Employees

- “Telecommuting” means remote work and includes any work performed from a location away from the employer’s central workplace, often the employee’s home.



# Wage and Hour Issues for Telecommuting Employees

- The FLSA's requirement to pay for hours worked applies at home too, so employers must keep records of hours worked from home.
  - Explain to remote employees what time is/is not compensable time
  - Customize payroll procedures and compensation policies
  - Reference timekeeping policy in telecommuting policy
- Consider state/local laws



# Local Orders

- Telecommuting requirements
- Document the reasons for the recalled employees  
(why telework is not possible in their case)
- New lawsuits over teleworking: Texas employee claiming he was not allowed to keep teleworking after the office reopened



# Childcare and Home Distractions During COVID-19

- Ensure compliance with employer policies, including general telecommuting policies and COVID-19 telecommuting policies.
- Ensure compliance with applicable laws that provide for flexible schedules and leave.





# Families First Coronavirus Response Act

- Federal law that mandates new paid leave for COVID-19 related reasons. Applicable to employers < 500 employees
  - Emergency Paid Sick Leave (E-PSL)
    - Provides 10 days of paid leave when an employee is unable to work or telework because of a protected reason. Has payment maximums and caps of \$511 per day, capped at \$5,110, and maximum of \$200 per day capped at \$2,000 for certain protected leave.
  - Emergency Family and Medical Leave Expansion Act (E-FMLA)
    - Provides 12 weeks of FMLA for closure of school/childcare provider due to a COVID-19 emergency. First 2 weeks are unpaid, but E-PSL may be used; remaining 10 weeks are paid at 2/3, and subject to caps.

# Engaging and Communicating with Remote Employees

- Set goals and expectations, discuss performance measurements, maintain contact, and provide virtual training and employer-sponsored events.
- Continue to encourage communication, and clear written feedback among teams and managers.
- Consider how to adequately evaluate performance.



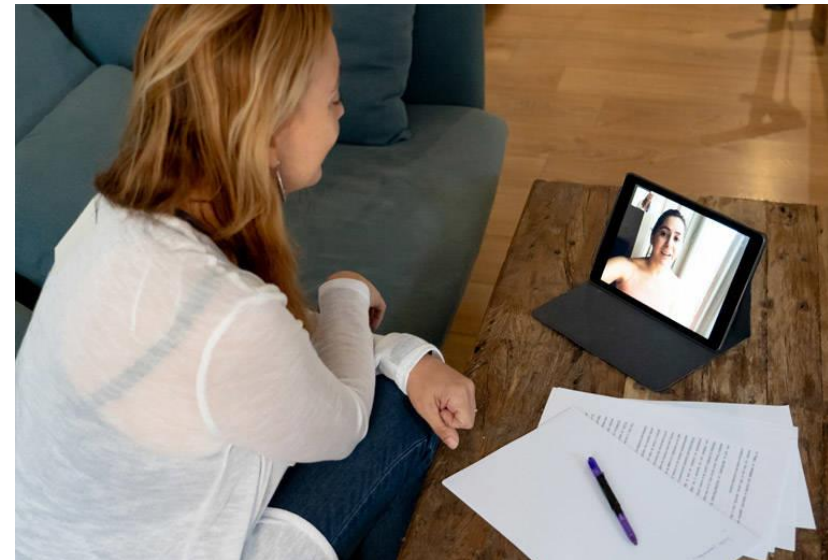
# Telecommuting and the ADA

- Is telecommuting the accommodation under the ADA?
- If an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.
- A reasonable accommodation under the ADA may include adjustments or changes to the workplace, such as providing devices or modifying equipment and making workplaces accessible.



# Telecommuting Policies

- Having a written telecommuting policy in place is a critical first step in addressing the challenges of employing a remote workforce.



# Purposes of Telecommuting Policies

- Defines eligibility under applicable COVID-19 laws
- Provides a specific procedure
- Explains telecommuting conditions in the proper context
- Sets out employer responsibilities (IT support, work expense reimbursements, equipment provided/repaired)
- Reminds employees that compliance is a condition of employment

# Contents of Telecommuting Policies

- Reasonable accommodation procedures
- Employee responsibilities and expectations
- Employer responsibilities and expectations
- Job duties, work area, and break times
- Compliance reminder





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