

Layoffs, Furloughs and Pay Reductions in Response to the COVID-19 Pandemic

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Question: Is it legal for an employer to reduce the wages or number of hours of an hourly employee?

Answer: The FLSA does not preclude an employer from lowering a non-exempt employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work. However, employers should inform employees that work is not authorized during a furlough or layoff without advance written approval.

Question: In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business?

Answer: An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to an exempt employee during a business or economic slowdown, provided the change is bona fide, it is not used as a device to evade the salary basis requirements, and the employee still receives on a salary basis at least \$684* per week. However, state law may require specific periods of advance notice for such pay changes.

On the other hand, deductions from an exempt employee's salary occasioned by day-to-day or week- to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption.

Question: If the company must suspend operations and institute large layoffs on account of the coronavirus and its aftermath, must the company comply with the Worker Adjustment and Retraining Notification (WARN) Act?

Answer: It depends. The general rule is that if your company is covered by the federal WARN Act (it has 100 or more full-time employees) and implements layoffs of fifty employees or more, even if forced to do so for public health or economic reasons, the company may be required to provide at least 60 calendar days of notice if the layoffs constitute a covered "plant closing" or "mass layoff" under the Act. However, if employees are laid off for less than six months, then notice may not be required. Unfortunately, with the COVID-19 pandemic, it is hard to know how long layoffs will last so providing notice may be advisable.

The WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances. The COVID-19 coronavirus pandemic may qualify. But this exception is limited and an employer relying upon it must still provide "as much notice to "affected employees" as is practicable, and must explain that the basis for reducing the notification period was the unforeseeable nature of the outbreak and its aftermath. The WARN Act further specifies the information that must be contained in each notice to employees, unions and certain government entities. Moreover, some states have "mini-WARN" laws that may apply.

Question: Do federal and state WARN Act have an exception WARN for epidemics?

Answer: It is not clear. The federal WARN Act and most state mini-WARN statutes address terminations due to natural disasters or calamities. It is unclear if those provisions cover an epidemic. It is unclear whether the federal WARN Act regulation relating to natural disasters will be held to include pandemics as being “similar effects of nature” to “floods, earthquakes, droughts, storms, tidal waves or tsunamis... .”