

# Employment Law Newsletter

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With the economy still floundering, many employers face an unprecedented need to reduce labor costs through layoffs, furloughs, pay cuts, reduced schedules, and other methods. However, these cost-control measures create legal risk, and an unprepared employer may incur liability that exceeds the cost savings. To make matters worse, many employers' management and HR personnel have never experienced such hard economic times before, or have done so only many years ago, before many of the current legal restraints were in place. This issue highlights common employer responses to the current recession and the risks attendant to those measures.

## LAYOFFS LOWER PAYROLL, RAISE RISK

Layoff notices are a sign of the times. But a mishandled layoff can lead to significant liability in a variety of ways.

### WARN Act Requires 60 Days Notice

Employers in "survival mode" may resort to a layoff as a way to cut costs quickly, but they must not overlook the notice requirements of the Worker Adjustment and Retraining Notification (WARN) Act. For employers with 100 or more full-time employees, WARN generally requires 60 days notice of a "plant closing" affecting 50 or more employees, or a "mass layoff" of 500 employees (or 50 employees if that is 33 percent of the workforce) at a single site of employment.

Less notice may be permitted where the employer can prove that the shutdown or layoff was not reasonably foreseeable 60 days in advance, or that full notice would have interfered with efforts to obtain business or capital needed to avoid or postpone that event.

Violations of WARN can result in liability for up to 60 days' wages and benefits for each affected employee, and state laws may be more restrictive or impose greater penalties. Therefore, employers should ensure that any layoff complies with the WARN Act, and any state counterpart, or that the cost of non-compliance has been adequately considered.

### Spike in Age Claims Underscores Common Layoff Threat

Age discrimination claims have jumped 29 percent since 2007 and almost 50 percent since 2006, the U.S. Equal Employment Opportunity Commission (EEOC) reported on March 11, 2009. In 2008, 24,582 claims were filed, compared to 19,103 in 2007 and 16,548 in 2006.

These figures are especially troubling for employers in a down economy, because layoffs frequently spawn age discrimination claims. In addition, this is the first national recession since the U.S. Supreme Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005) that the Age Discrimination in Employment Act (ADEA) permits claims for "disparate impact," a form of unintentional discrimination in which facially neutral criteria have a greater impact on protected workers. Thus, employers must be particularly careful when laying off employees who are age 40 or older.

To reduce the risk of age-based layoff claims, employers should: (1) use age-neutral criteria for the selection process where possible; (2) train the decision makers in the selection process; (3) be prepared to articulate good reasons why older workers were let go when younger workers were retained; (4) conduct a statistical analysis of the comparative ages of those retained and those let go; and (5) document every step of the process.

### Proper Handling of Age-Claim Releases Essential

In today's hyper-litigious society, employers often condition payment of severance on the signing of a release of claims. To be enforceable, all such releases must be (1) comprehensible; (2) signed voluntarily; and (3) supported by "consideration" to which the employee would not otherwise be entitled. However, releases of age discrimination claims (i.e., by those age 40 or older) require much more.

Under the Older Workers Benefit Protection Act (OWBPA), a release of age claims must: (1) be written in a manner "calculated to be understood" by the average person asked to sign it; (2) specifically refer to the Age Discrimination in Employment Act; and (3) not apply to claims arising

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after it is signed. In addition, the employer must: (1) advise the employee in writing to consult a lawyer before signing the release; (2) give the worker at least 21 days to consider the release before signing; and (3) allow the employee seven days to revoke the release. Where more than one older worker is affected, the 21-day "consideration period" is increased to 45 days, and the employer must provide specific "separation information" to each person who is asked to release age claims, including:

- a description of the "decisional unit" from which persons were selected for layoff;
- the criteria used to decide who would be laid off and who retained;
- the time limit for signing the release;
- the job titles and ages of those selected for layoff; and
- the ages of those in the same job classifications who were not selected for layoff.

The EEOC imposes additional barriers to an effective release of age discrimination claims. Under 29 C.F.R. 1625.23, a release agreement may not:

- preclude the worker from filing a charge of age discrimination with the EEOC or filing suit to challenge the validity of the age-claim release, or penalize the worker for doing so;
- require the worker to "tender back" the consideration if he/she files suit under the ADEA anyway; and
- terminate payments to a worker who successfully challenges the validity of the release agreement (although such payments "may" be offset against any subsequent recovery by the worker under the ADEA, in the court's discretion).

Failure to comply with even one of the requirements of the OWBPA invalidates the release of age discrimination claims entirely. See *Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139 (10th Cir. 2005). On the other hand, several of the provisions of 29 C.F.R. 1625.23 may be contrary to the OWBPA or beyond EEOC's authority to impose. Finally, some states have laws that are even more protective of older workers. Therefore, employers should consult with experienced employment counsel before seeking any release of age discrimination claims, in a layoff context or otherwise.

**New COBRA Subsidy: Pay Now, Refund Later**

Employers must now subsidize the premiums paid by certain ex-employees and their beneficiaries for continuation of group health insurance coverage under the "COBRA" provisions of the Employee Retirement Income Security Act. On March 19, 2009, the U.S. Department of Labor issued model notices to help employers comply with the new requirement, enacted in February as part of the American Recovery and Reinvestment Act of 2009 (ARRA). See [www.dol.gov/cobra](http://www.dol.gov/cobra).

Under ARRA, COBRA-eligible employees involuntarily separated since September 1, 2008 (and their beneficiaries), are entitled to a 65 percent subsidy of their COBRA premiums starting March 1, 2009, and a second chance to elect COBRA coverage in light of the new subsidy. Employers pay the subsidy and claim a credit against their payroll taxes. High-income employees may opt out in order to avoid repaying the subsidy as a tax. Employers with fewer than 20 employees may be required to provide the subsidy for continuation coverage under state law, but a second chance to elect such coverage may not be required. Employers should consult with employment or benefits counsel for more details.

**FURLOUGHS AND SCHEDULE REDUCTIONS MAY TRIGGER LIABILITY**

To weather the current financial storm, some employers are implementing reduced work schedules or unpaid furloughs. Such actions raise several legal issues that should be discussed with employment counsel before implementation.

**WARN Act**

Employers must be careful that furloughs or schedule reductions do not inadvertently trigger WARN Act liability. An "employment loss" under WARN includes both a temporary layoff that exceeds six months and a 50 percent hours reduction that lasts six months. In addition, all related employment losses within 90 days are aggregated to determine whether a covered event has occurred.

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### Unemployment

A furlough or schedule reduction may result in claims for unemployment benefits. In Colorado, for example, workers may be considered “partially unemployed” if they work fewer than 32 hours per week for wages less than the weekly unemployment benefit. See C.R.S. 8-70-103(19). In addition, a pay cut might allow the employee to quit and claim full unemployment benefits, if the cut is “unreasonable” or “a substantial change” in light of various factors. See C.R.S. 8-73-108(4)(e); C.R.S. 8-73-108(4)(d).

### Wage and Hour (Exempt Status)

Two recent opinion letters by the Wage and Hour Division of the U.S. Department of Labor point out how furloughs or schedule reductions for exempt employees can lead to violations of the Fair Labor Standards Act (FLSA) (and comparable state laws). To be “exempt” from the overtime requirements of the FLSA, employees must normally receive their full weekly salary for any week in which they work any hours. Docking an exempt employee’s pay due to lack of work, in increments of less than a full week, risks losing the exemption for that employee and all others in the employee’s classification. See *WH Opinion Letters FLSA 2009-14 (1/15/09) (released 3/6/09)* and *FLSA 2009-18 (1/16/09) (released 3/6/09)*. However, employers who wish to reduce the hours (and pay) of exempt employees have several options under the FLSA:

- Send them home without pay in full-week increments.
- Send them home without pay in any increments and require them to use available paid leave to make up the lost salary, so long as they ultimately receive a full paycheck for the week.
- Allow them to volunteer for unpaid time off for personal reasons, in any increments, so long as the decision is truly voluntary and not “occasioned by the employer or the operating requirements of the business.”
- Make a permanent change in their salary, so long as it is genuine and not merely an attempt to pay them like hourly employees.

### Wage and Hour (Work Off-the-Clock)

Finally, furloughs and schedule reductions raise the specter of employees working off-the-clock from home. Non-exempt employees who work from home are entitled to pay for the hours worked, including overtime if weekly hours exceed forty. Exempt employees who work while furloughed or scheduled off may destroy the exemption for themselves and others in that classification. A “de minimis” rule under the FLSA provides some protection from claims based on very small amounts of time that are sporadic, unpredictable, and impractical to record. However, employers should strongly caution all employees not to work while furloughed or scheduled off.

### MANDATORY VACATION? MAYBE NOT

Employers may consider requiring employees to use accrued vacation or other paid leave in connection with a furlough or schedule reduction or simply to reduce the accrued liability. Such a practice does not violate the FLSA but may violate state laws. Courts in California, for example, have held that mandatory use of accrued vacation can be a form of “use-it-or-lose-it” policy prohibited by the state labor code. Therefore, employers should check state law carefully before requiring employees to use accrued vacation or other paid time off.

### CUTS IN HOURS AND PAY MUST COMPLY WITH FLSA AND STATE LAW

One common alternative to layoffs is to reduce work schedules and cut pay. This creates an issue for exempt employees under the FLSA, who are entitled to their full weekly salary for any week in which they work any hours. To avoid destroying the exemption, such changes must not occur so frequently that the employee is effectively being paid based on hours worked. See *Archuleta v. Wal-Mart Stores*, 543 F.3d 1226 (10th Cir. 2008) (“If . . . the salary changes are so frequent as to make the salary the functional equivalent of an hourly wage, we will treat the ‘salary’ as a sham and deny the employer the FLSA exemption . . .”). How many salary changes are permissible – and how frequently – is a matter for discussion with counsel.

State laws may be even more strict. For example, the California Division of Labor Standards Enforcement appears to take the position that pay cuts coupled with schedule reductions are always an attempt to treat exempt workers like hourly employees, thus destroying the exemption under state law.



### HRO's Going Green

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## SALARY DEFERRALS CAN BE "TAXING" FOR EMPLOYEES *by Carolyn Cox*

Employers seeking to defer part of an employee's compensation to a later year must beware of Section 409A of the Internal Revenue Code. That section imposes strict requirements when an employee obtains a contractual right to compensation in one year (without a substantial risk of forfeiture) but does not receive that compensation until a later year. Unless those requirements are satisfied, deferred compensation can be fully taxable to the employee in the year in which it is earned, rather than the year in which it is paid, and the employee can face substantial penalties.

Subject to some exceptions, Section 409A's general rules regarding deferred compensation are:

(1) the initial decision to defer compensation must be made before the year in which the services are performed; (2) changes to that decision are restricted; (3) the deferral agreement or plan must be in writing; (4) the deferral payments must be made on a fixed schedule; and (5) acceleration of the payments is prohibited. Employers contemplating any deferral of compensation should consult with tax counsel regarding Section 409A.

## California Corner *by Nicole D. Gomes*

### NEW RESTRICTION ON EMPLOYEE RELEASE AGREEMENTS

As of January 1, 2009, it is now a misdemeanor in California to require an employee to sign a release (or other document) stating that the employee has been paid for all hours worked if the employer knows that the hours listed are incorrect. See California Labor Code, Section 206.5 (as amended by AB 2075). Therefore, employers seeking a release of claims in connection with a layoff (or any employee termination) should ensure that the release is accurate if it states that the employee has worked a specified number of hours and has been paid for those hours.

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