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Client Alert Commentary

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US Employment Considerations During the COVID-19 Pandemic

The COVID-19 pandemic has created bleak economic conditions for many businesses, forcing them to undertake or consider drastic changes to their workforce. Although each employer's business needs vary and require individual assessment, employers may be considering (1) telework arrangements, (2) reductions in pay or hours, (3) paid leave, (4) furloughs, and/or (5) layoffs. This *Client Alert* identifies key US issues to consider relating to each of these employment actions.[1]

This *Client Alert* does not identify all issues that may arise. Employers are encouraged to consult legal counsel prior to implementing the actions below to determine if and how the considerations below or other considerations may apply.

1. Telework Arrangements

With state and local orders requiring individuals to shelter in place and non-essential businesses to close, as well as voluntary widespread efforts to practice social distancing, many employers have already implemented telework (*i.e.*, work-from-home) arrangements. Others contemplating telework arrangements should bear in mind the following key considerations.

Positive considerations:

- *Active work environment.* Employers maintain an active workforce, retain talent, and continue business. For many businesses, implementing a telework arrangement is the only solution to keep employees actively working for the near future.

- *PPP loan*. Telework arrangements may allow employers to avoid layoffs and maintain employee levels, which would be needed (among other conditions) for any recipient of a Paycheck Protection Program loan (PPP loan) to have such PPP loan forgiven. (For more information, see endnote 1(A).)

- *Employee retention credit (smaller employers)*. For employers eligible under the Coronavirus Aid, Relief, and Economic Security Act's (CARES Act's) Employee Retention Credit program and who have 100 or fewer full-time employees, the credit is available for qualifying wages paid to employees who are working from home. (For more information, see endnote 1(C).)

  Note: Recipients of a forgivable PPP loan are ineligible for the Employee Retention Credit.

- *FFCRA*. If the employer is a covered employer (*i.e.*, has fewer than 500 employees in the US), employees who are teleworking remain active employees and eligible for paid leave under the Families First Coronavirus Response Act (FFCRA), which took effect on April 1, if one of six qualifying reasons prevents the employees from being able to work or telework. Employers covered by the FFCRA are eligible for tax credits to cover the costs of providing employees with paid leave required under the FFCRA.

  Note: Employers cannot receive both an FFCRA tax credit and an Employee Retention Credit for FFCRA-required wages.

Other considerations

- *Employee retention credit (larger employers)*. For employers eligible under the CARES Act's Employee Retention Credit program and who have more than 100 full-time employees, the credit is not available for wages paid to employees for services they provide while working from home, because wages paid for services are not qualifying wages. (For more information, see endnote 1(C).)

- *Potentially difficult to implement*. Depending on the business and the employee's particular job function, a telework arrangement may be impracticable. When an employee works from home, employers may face difficulties in (1) ensuring employees can securely access confidential work-related information, (2) accurately tracking hours worked by non-exempt employees, (3) ensuring non-exempt employees are taking any legally required meal and rest breaks, (4) reasonably accommodating employees with disabilities, and (5) properly supervising work performed.

Employers should consider now whether telework arrangements are feasible and begin preparing for telework if they have not already, as they may not have much time to switch to a telework arrangement in the event they become subject to a "shelter in place" or a similar governmental order, often with short notice.

2. Reductions in Pay or Hours

To reduce costs, employers may consider reducing employees' pay or hours. Unless agreements in effect prohibit unilateral reductions in pay, subject to certain limitations, generally, US employers can prospectively change an at-will employee's compensation and hours, but doing so triggers a number of considerations.

Note: Significant limitations on such reductions may apply outside the United States and local counsel should advise as appropriate.

Positive considerations

- *Cost reduction.* Employers are able to reduce costs while maintaining an active workforce and retaining talent.

- *Unemployment benefits*. Reductions in hours may (but not always) render employees eligible for unemployment insurance benefits under applicable state unemployment insurance laws. Under the CARES Act, such employees may be eligible for enhanced unemployment benefits. *Employers can instruct terminated employees on where to apply, but employees must apply themselves, and ultimately the state unemployment agency determines eligibility and benefit entitlements.* (For more information, see endnote 1(D).)

- *Work share programs*. Under applicable state unemployment laws, a "workshare" program may be available now or in the near future, which would allow an employer to enter into an agreement with the state agency to render the employees eligible to receive a portion of their regular unemployment insurance benefits to compensate for their lost wages.

- *Employee retention credit (smaller employers)*. For employers eligible under the CARES Act's Employee Retention Credit program and who have 100 or fewer full-time employees, the credit is available for qualifying wages paid to employees who are working (even at reduced pay). (For more information, see endnote 1(C).)

- *FFCRA*. If the employer is a covered employer (*i.e.*, has fewer than 500 employees in the US), the employees, whether full-time or part-time, remain active employees and eligible for paid leave under the FFCRA. However, the pay that the employer must pay during FFCRA leave may be higher than the employees' recently reduced pay, because the FFCRA requires employers to pay employees based upon their average regular rate of pay calculated over the past six months. Employers covered by the FFCRA are eligible for tax credits to cover the costs of providing employees with paid leave required under the FFCRA.

- Note: Employers cannot receive both a FFCRA tax credit and an Employee Retention Credit for FFCRA-required wages.

Other considerations

- *Reduction may trigger rights or benefits*. Under agreements, policies, and/or plans in effect, unilateral changes to pay or hours may trigger notice or other rights. For example, a unilateral reduction in pay could constitute "Good Reason" under an executive's employment agreement, allowing the executive to quit and receive severance benefits.

- *Notice*. Applicable state or local law may require notice in a particular form or advance notice. Failure to provide proper notice may result in liability under applicable law.

- *Minimum wage*. Employers should be mindful of minimum wage laws for non-exempt employees. A reduction below the applicable minimum wage would be unlawful.

- *Exempt status*. Employers should be mindful of the minimum base salary requirements to qualify for an exemption from the overtime pay provisions of federal, state, and/or local wage and hour laws. A reduction of base pay below such minimum base salary would cause an exempt employee to lose his or her exempt status, rendering the employee eligible for overtime pay and, depending on applicable wage and hour laws, meals and rest breaks. Further, any salary change should be bona fide and not used as a device to evade the salary basis requirements of the exemption.

- *Potential claims*. If a reduction in pay or hours is based on a protected characteristic or tends to impact employees based on a protected characteristic, the employer could face discrimination claims.

- *Work share programs*. Given the increase in unemployment insurance claims in the past few weeks, state agencies are overwhelmed and understaffed, and many employers have had difficulty connecting with agencies to explore the availability of a workshare program at this time.

- *COBRA*. Reductions in hours can trigger loss of benefits and COBRA obligations.

- *PPP loan*. A reduction in pay may jeopardize the ability of a recipient of a PPP loan to have the loan fully forgiven. (For more information, see endnote 1(A).)

- *MSL loan.* If an employer is seeking or has received a loan through the Main Street New Loan Facility or Main Street Expanded Loan Facility, it must attest that it will make reasonable efforts to maintain its payroll and retain its employees during the term of the applicable loan. Compliance with such attestation should be considered when reducing pay or hours. (For more information, see endnote 1(B).)

- *Employee retention credit (larger employers)*. For employers eligible under the CARES Act's Employee Retention Credit program and who have more than 100 full-time employees, the credit may not be available for wages paid to employees even at reduced pay, because wages paid for services are not qualifying wages. (For more information, see endnote 1(C).)

- *WARN liability*. A reduction in an employee's hours of more than 50% in each month of any six-month period is considered an "employment loss" under the federal Worker Adjustment and Retraining Notification Act (WARN Act). If enough employees are impacted to constitute a "mass layoff" (*i.e.*, at least 50 employees and 33% of the workforce experience an "employment loss" at a single employment site), the failure to provide 60 days' notice could expose the employer to liability under the WARN Act.

Prior to reducing employee pay or hours, employers should review any policies, plans, and agreements in effect and applicable law to understand what type of notice, pay, or other benefits, if any, may be triggered. Employers should also ensure that any pay or hour reduction is done fairly and, if such reduction will impact employees differently, that there is a legitimate, non-discriminatory business reason for the different treatment.

3. Paid Leave

Many employers have decided to continue to fully pay their employees for the time being. Employers contemplating paid leave should consider the following:

Positive considerations

- *Benefits to both employees and employers*. Employers maintain a gainfully employed workforce and retain talent. When business returns, such employers will incur fewer recruiting and training costs.

- *PPP loan*. Paid leave allows employers to maintain employee and pay levels, which would be needed (among other conditions) for any recipient of a PPP loan to have such PPP loan forgiven. (For more information, see endnote 1(A).)

- *Employee retention credit*. Paid leave is pay for not working. Therefore, for employers eligible under the CARES Act's Employee Retention Credit program, the credit is available for such paid leave, regardless of the eligible employer's size. (For more information, see endnote 1(C).)

  Note: Recipients of a forgivable PPP loan are ineligible for the Employee Retention Credit.

- *Potential cost saving*. For some employers, paid leave could be less expensive than layoffs that may otherwise trigger severance and WARN Act notice rights.

- *Reduced risk of claims*. With no adverse employment action, the risk of claims is reduced, in particular where paid leave is provided to all.

Other considerations

- *Costly*. Paid leave is costly. With no clear indication of when business will resume, employers may not be able to continue to pay employees on leave indefinitely.

- *Unemployment benefits*. Employees on fully paid leave are generally likely ineligible for state unemployment insurance benefits. For certain low-wage earners, the pay employees receive during paid leave may be less than the benefits they could otherwise receive from the state in light of the CARES Act's enhanced unemployment insurance benefits. (For more information, see endnote 1(D).)

4. Furlough

A furlough is a temporary layoff with an expectation that the employee will return to active status, whether in two weeks, two months, or other duration specified by the employer. Furloughs are typically without pay, though employers may consider providing some pay or benefits during periods of furlough.

Positive considerations

- *Reduced costs*. Employers reduce costs and can extend the period of furlough as needed. Employers will have more time to see how the situation unfolds over the next few weeks, prior to making more drastic and permanent decisions.

- *Use of PTO*. During furlough, employees may use their accrued vacation or paid time off (PTO) days to ensure some pay during furlough.

- *Retain talent*. Unlike an outright termination, furloughed employees have an expectation that they will have a job to return to after the furlough period concludes. Therefore, in some labor markets furlough is an effective means of retaining and continuing a stable workforce after the period of disruption ends.

- *Benefit plans*. Employees may be eligible to continue to participate in some or all of the employer's benefit plans, depending on the plan terms.

- *Employee retention credit*. Any pay or benefits provided to furloughed employees is pay for not working. Therefore, for employers eligible under the CARES Act's Employee Retention Credit program, the credit is available for such pay or benefits provided during periods of furlough, regardless of the eligible employer's size. (For more information, see endnote 1(C).)

- *Unemployment benefits*. Furloughed employees may apply for unemployment insurance benefits with the state agency. Depending on the reason for furlough and other considerations, the employees may be eligible for the enhanced unemployment benefits available under the CARES Act. *Employers can instruct terminated employees on where to apply, but employees must apply themselves, and ultimately the state unemployment agency determines eligibility and benefit entitlements*. (For more information, see endnote 1(D).)

Other considerations

- *PTO*. Depending on the employer's vacation or PTO policy and applicable law, an employer may not be able to force an employee on furlough to use such paid time, or an employer may be required to pay out all accrued paid time.

- *Health benefits*. As inactive employees, employees may no longer be covered by the group health plans. If group health plan coverages cease during furlough, employees should become eligible for continued coverage under COBRA (generally at the employees' expense but which the employer may elect to pay in whole or in part).

- *Non-qualified deferred compensation obligations.* A furlough will need to be analyzed to determine whether it should result in payout under any nonqualified deferred compensation plan (including certain severance plans and equity awards). The failure to comply with stringent payment timing rules may subject employees to significant adverse tax consequences.

- *Equity plans*. Equity plans should be reviewed to determine if during a furlough the employee continues to vest, and/or at what time does the employee incur a "termination of employment" for purposes of his or her awards. Furlough for more than 90 days could impact the treatment of an incentive stock option (ISO). Equity plans and award agreements should be reviewed to determine how furloughed service is treated for vesting and payout purposes.

- *Unionized employees – bargaining obligations.* If the affected employees are represented by a union, the employer will be bound by the collective bargaining agreements in effect and its obligation to engage in *effects bargaining* with the union. *Employers should consult the applicable labor agreements*.

- *PPP loan*. Furloughing employees who are not timely rehired may jeopardize the ability of a recipient of a PPP loan to have the loan fully forgiven. (For more information, see endnote 1(A).)

- *MSL loan.* If an employer is seeking or has received a loan through the Main Street New Loan Facility or Main Street Expanded Loan Facility, it must attest that it will make reasonable efforts to maintain its payroll and retain its employees during the term of the applicable loan. Compliance with such attestation should be considered when conducting furloughs. (For more information, see endnote 1(B).)

- *FFCRA*. To determine who is a covered employer, employer size is determined based on the number of employees at the time leave commences. Furloughed employees are excluded from the count until they have become reemployed. Therefore, an employer that is not initially covered by the FFCRA (*i.e.*, because it has 500 or more employees in the US) may become covered if it furloughs enough employees to cause the headcount to dip below 500, at which point the employer would be required to post notice of the FFCRA and provide paid leave to qualifying employees.

  Note: Even if the employer is or becomes a covered employer, any employee who is furloughed because there is not enough work, for example, is ineligible for FFCRA leave while on furlough.

- *Stability of workforce.* Furlough is not as effective at maintaining a stable workforce as providing paid leave or telework arrangements. Employees may secure other employment and be unavailable for work when the employer resumes business.

- *Constructive termination*. If the period of furlough is long, is continually extended, and/or there is no real expectation of return, the employees may be considered to have been terminated. *With an involuntary termination, see considerations in No. 5 below.*

Prior to placing employees on furlough, employers should review their policies, plans, and agreements in effect to determine if any notice, severance, or other rights may be triggered. Employers should also consider whether vacation or other paid time off can, can't, or may be required or denied and assess the impact of furlough on employee benefits and equity arrangements.

5. Layoffs

Many employers may have no choice but to consider permanent layoffs to reduce costs. Generally, whether an employer conducts layoffs remains a business decision. For example, neither the FFCRA nor the CARES Act prohibits employers from carrying out reductions in force, though under certain CARES Act programs employers may be incentivized not to. Employers contemplating layoffs should bear in mind the following considerations.

Considerations

- *Loss of talent*. Employers may have a difficult time recruiting talent when they are ready to resume business, and at that time they would need to re-offer employment and onboard employees.

- *Timely payment of final wages*. In the event of an involuntary termination, applicable state law may require payment of all accrued final wages on the date of discharge, by the next regular payday or other deadline set by law. *Check the final pay laws of the state where the employee works to ensure final pay is timely paid.*

- *Payment of accrued PTO.* Upon termination, applicable law may require that final pay include payment of accrued but unused vacation or PTO days. In other states, payment of accrued but unused vacation or PTO days is only required if the employer's policy requires it or is silent on it. *Check the vacation laws of the state where the employee works and applicable policies to ensure accrued but unused vacation and PTO days are paid out if required.*

- *Officer and director liability.* Under many state laws, officers and directors can be personally liable for the failure to pay wages. *Employers should ensure employees' wages are fully and timely paid.*

- *Severance.* If the employer has a severance plan or has entered into an employment agreement for severance, the laid-off employee would be entitled to severance payments in accordance with such plan or agreement, which would typically require a release of claims. Generally, severance plans can be amended at any time with prospective effect, but this is not always the case. *Review any severance plans and individual agreements and comply with any severance obligations.*

- *Unemployment benefits*. Terminated employees may apply for unemployment insurance benefits with the state agency and may be eligible for enhanced benefits under the CARES Act. *Employers can instruct terminated employees on where to apply, but employees must apply themselves, and ultimately the state unemployment agency determines eligibility and benefit entitlements.* (For more information, see endnote 1(D).)

- *Unionized employees – bargaining obligations.* If the affected employees are represented by a union, the employer will be bound by the collective bargaining agreements in effect and its obligation to engage in effects bargaining with the union. *Consult the applicable labor agreements.*

- *Unionized employees – withdrawal liability.* If the employer contributes to a union-sponsored multiemployer defined benefit pension plan (*e.g.*, Central States Pension Fund) the termination or layoff of employees could trigger withdrawal liability. Withdrawal liabilities can be large and are joint and several among entities that are under common control. Triggering withdrawal liability commonly requires notice to lenders and is an event of default under credit agreements. *Unionized employers should review whether or not they contribute to a multi-employer pension plan and take care in structuring any shutdown or layoff to avoid triggering withdrawal liability, if possible.*

- *Vesting of retirement benefits; loans.* If the employer sponsors a tax-qualified retirement plan, the termination of more than 20% of plan participants in any one year will require vesting of retirement benefits for the affected participants and will cause participant loans to become due earlier than expected.

- *COBRA*. Terminated employees can elect continued coverage under the employer's health plans for the employee and his or her dependents, with the employee generally paying the full premium plus an additional 2% (although the employer can agree to subsidize some or all of the premium amount for a period of time). Employees must elect COBRA within 60 days of termination. *Typically, employers must notify their plan administrator of the termination, and the plan administrator is responsible for timely providing separated employees with a notice of right to elect COBRA.*

- *Non-qualified deferred compensation obligations.* Many non-qualified deferred compensation plans pay out upon separation from service. Many of these plans are not funded and are only book reserve liabilities. *The pay out of deferred compensation plan liability should be in the cash flow analysis of a termination scenario.*

- *WARN Act*. Immediate termination without notice may trigger liability under the federal WARN Act. The WARN Act requires 60 days' notice in advance of a plant closing or mass layoff, as those terms are defined in the WARN Act. A mass layoff occurs when at least 50 employees and 33% of the workforce experiences an employee loss at any single site of employment. State or local WARN-like laws may apply when fewer employees are laid off and/or may require enhanced notice. There are limited exceptions to such 60-day notice obligation that may apply. For example, under the WARN Act, the "unforeseen business circumstances" exception could apply — in particular if the layoff is a result of an order requiring the business to close. Even under such exceptions, employers are to provide as much notice as possible. *Employers should perform a WARN-related assessment to determine potential exposure.*

  Note: The California WARN Act does not include an "unforeseen business circumstances" exception. However, under a California executive order, employers are temporarily relieved from notice obligations under the California WARN Act, subject to certain conditions in the executive order. Application of any exception and this California executive order requires a review of the facts.

- *PPP loan*. Laying off employees may jeopardize the ability of a recipient of a PPP loan to have the loan fully forgiven. (For more information, see endnote 1(A).)

- *MSL loan.* If an employer is seeking or has received a loan through the Main Street New Loan Facility or Main Street Expanded Loan Facility, it must attest that it will make reasonable efforts to maintain

its payroll and retain its employees during the term of the applicable loan. Compliance with such attestation should be considered when conducting layoffs. (For more information, see endnote 1(B).)

- *FFCRA*. To determine who is a covered employer, all employees in the US are counted, and size is determined at the time leave commences. Therefore, an employer that is not covered by the FFCRA (*i.e.*, because it has 500 or more employees in the US) may become covered if it lays off enough employees to cause the headcount to dip below 500, at which point the employer would be required to post notice of the FFCRA and provide paid leave to qualifying employees.

  Note: Even if the employer is or becomes a covered employer, any employee who is laid off because there is not enough work, for example, is ineligible for FFCRA leave following the date of layoff.

- *Potential claims.* A layoff could give rise to discrimination claims. Any layoff should be carried out without regard to age, disability, national origin, sex, or any other characteristic protected by applicable anti-discrimination laws. *Prior to carrying out a reduction-in-force, employers should determine the non-discriminatory factors they will use to make the selection decision and assess the results of the layoff to determine if the layoff tends to impact employees of one protected class more than another.* To reduce the risk of claims, employers may consider offering severance or other benefits to which the employees are not already entitled in exchange for a release of claims.

As noted above, each employer's situation will vary, based on the particular circumstances it faces, its business needs and goals, the local labor market, and applicable employment laws, which differ from state to state.

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

David T. Della Rocca
david.dellarocca@lw.com
+1.202.637.1050
Washington, D.C.

Joseph B. Farrell
joe.farrell@lw.com
+1.213.891.7944
Los Angeles

Linda M. Inscoe
linda.inscoe@lw.com
+1.415.395.8028
San Francisco

Robin L. Struve
robin.struve@lw.com
+1.312.876.7632
Chicago/Boston

Bradd L. Williamson
bradd.williamson@lw.com
+1.212.906.1826
New York

Nineveh Alkhas
nineveh.alkhas@lw.com
+1.312.876.7724
Chicago

Endnotes

[1] This *Client Alert* refers to certain programs under the new CARES Act:

A. *Paycheck Protection Program (PPP)* provides small businesses with funds to pay up to eight weeks of payroll costs including qualified health plan expenses. The funds can also be used to pay interest on mortgages, rent, and utilities, provided that 75% of the funds must be used for payroll costs. The loan amount will be forgiven if certain conditions are met, which includes without limitation that employee and compensation levels be maintained at certain levels. More information is available in Latham & Watkins' *Client Alert* and in the U.S. Department of the Treasury's guidance.

B. *Main Street Lending (MSL) Program* makes loans available to certain qualifying companies employing up to 10,000 workers or with revenues of less than US$2.5 billion. More information is available in Latham & Watkins' *Client Alert* and in the Federal Reserve's guidance.

C. *Employee Retention Credit Program* is a fully refundable tax credit for eligible employers equal to 50% of up to US$10,000 in qualified wages paid to each employee (*i.e.*, up to a maximum credit of US$5,000 per employee). For eligible employers with an average of more than 100 full-time employees in 2019, qualified wages are wages paid to an employee for time the employee is not providing services but excludes wages paid for services. For eligible employers with an average of 100 or fewer full-time employees in 2019, qualified wages includes wages paid whether the employees are providing services or not. More information is available in the US Internal Revenue Service's guidance.

D. *Enhanced unemployment insurance benefits* include making state unemployment benefits available to certain individuals who might not otherwise qualify for up to 39 weeks (including an additional US$600 each week to anyone receiving state unemployment benefits up to July 31, 2020, provided the applicable state agency has agreed to such benefits). More information is available in the US Department of Labor's guidance.