

# Labor and Employee Benefit Plan Guidance: Furloughs, Layoffs and Your Retirement Plans

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# AGENDA

## ❑ **Furloughs, Layoffs and Leaves of Absences**

- ✓ What's the Difference?
- ✓ Workforce Reduction Considerations
  - ❖ WARN Act
  - ❖ Final Compensation
  - ❖ Unemployment Insurance
  - ❖ Fair Employment Laws

## ❑ **CARES Act and Your Retirement Plans**

- ✓ Relief Requirements
- ✓ New Distribution Options and Changes to Loans
- ✓ Modifying Retirement Plans Due to Restructuring
- ✓ Partial Plan Terminations
- ✓ Pension Plans
- ✓ Executive Compensation Plans

# Furloughs, Layoffs and Leaves of Absences

“leave of absence,” “furlough,” “layoff,” “sabbatical,” “reduction in force”

- ❑ **What’s the Difference?** Ultimate Question is whether the employment relationship continues or is terminated.
  
- ❑ **Furlough (Sabbatical, Leave of Absence):**
  - ✓ No Precise Definition
  - ✓ A period of time off work without pay initiated by the employer
  - ✓ Typically of a *defined* duration.
  - ✓ Mutual expectation of reinstatement
  - ✓ Employee remains on payroll and may remain eligible for benefits, including health insurance coverage
  - ✓ Avoid Euphemistic Use of the Term.

# Furloughs, Layoffs and Leaves of Absences

“leave of absence,” “furlough,” “layoff,” “sabbatical,” “reduction in force”

## ❑ Layoff:

- ✓ Permanent termination of the employment relationship
- ✓ Generally refers to when an employer terminates an employee’s employment without any right to be recalled/reinstated if business conditions improve.
- ✓ Triggers Final Compensation Obligations
- ✓ May trigger federal or state Worker Adjustment and Retraining Notification (WARN) Acts
- ✓ benefits typically are terminated and employee has right to continue that coverage pursuant to Consolidated Omnibus Budget Reconciliation Act (COBRA).

# Furloughs, Layoffs and Leaves of Absences

**“leave of absence,” “furlough,” “layoff,” “sabbatical,” “reduction in force”**

## ❑ **Reduction-in-Force (RIF):**

- ✓ Elimination of a position from the company organization resulting in the permanent termination of the employment relationship
- ✓ No intention to re-hire for the position
- ✓ Job duties are redistributed to remaining employees
- ✓ Employee does not have the right to be recalled/reinstated if business conditions improve.
- ✓ May trigger federal or state Worker Adjustment and Retraining Notification (WARN) Acts
- ✓ Benefits typically are terminated and employee has right to continue that coverage pursuant to Consolidated Omnibus Budget Reconciliation Act (COBRA).

# Furloughs, Layoffs and Leaves of Absences

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## ❑ **Reduction in Hours:**

- ✓ May trigger right to unemployment insurance
- ✓ Reduction in hours may trigger employee becoming ineligible for benefits under health plan
- ✓ Fair Labor Standards Act (“FLSA”) exempt/non-exempt requirements remain in place.

## ❑ **Reduction in Compensation:**

- ✓ May trigger advance notice requirements
- ✓ Fair Labor Standards Act (“FLSA”) exempt/non-exempt requirements remain in place.
- ✓ May trigger reclassification of employees

# Workforce Reduction Considerations

## ❑ WARN ACT REQUIREMENTS

- ✓ **Covered employers:** 100 + full-time employees or those with 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime work.
- ✓ **Notice Requirement:** 60 days' advance written notice of a mass layoff or plant closing impacting 50 or more employees over a 90-day lookback period.
- ✓ **Mass Layoff:** at least 50 full-time employees and at least 33% of the active full-time employees at a “single site of employment” or at least 500 employees (excluding part-time employees),

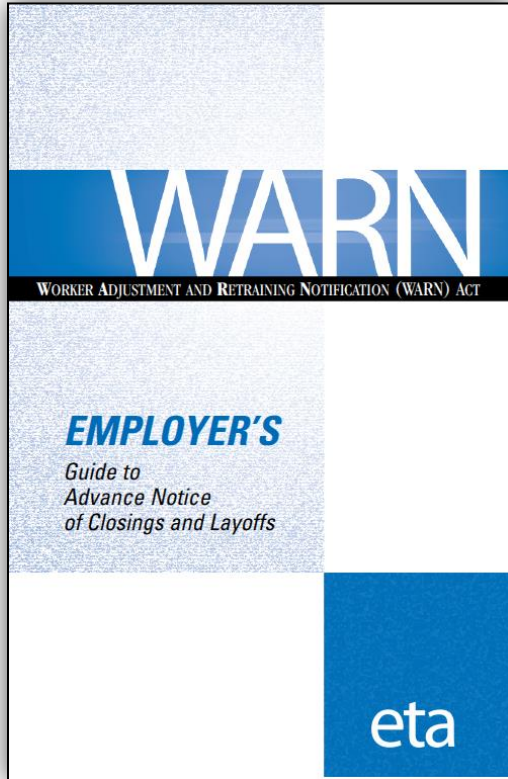
# Workforce Reduction Considerations: WARN Act

## ❑ WARN ACT REQUIREMENTS - EXCEPTIONS

- ✓ **Lay-off of less than 6 months**
- ✓ **Temporary/Seasonal Project**
- ✓ **Faltering Company:**
  - ❖ actively seeking capital or business at the time that the 60-day WARN Act notice would have been required
  - ❖ Reasonable and good faith belief that giving the required notice would have prevented the employer from obtaining the financing or business
  - ❖ realistic opportunity to obtain that financing,
  - ❖ the capital would have been sufficient to avoid the shutdown
- ✓ **Unforeseeable Business Circumstances:**
  - ❖ a sudden, dramatic economic hardship that is not reasonably foreseeable
  - ❖ beyond an employer's control.
- ✓ **Natural Disaster**



# Workforce Reduction Considerations: WARN Act FAQs



- Can a furlough trigger the WARN Act?
- How do I take advantage of an exception under the WARN Act?
- Can individuals be laid-off while they are on FMLA or other job protected leave?
- Where can I find Department of Labor resources on the WARN Act?

<https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/ EmployerWARN2003.pdf>

# Workforce Reduction Considerations: Final Compensation

## ❑ Layoffs and RIFs

- ✓ Anything an employer owes an employee when their employment ends
  - regular wages
  - fringe benefits payable under a written policy (i.e. accrued vacation pay/PTO)
  - earned bonuses/commissions
  - reimbursable business expenses
- ✓ **Timing:** State regulated
- ✓ **Warning:** if no policy on the payout of accrued time off may be determined based on Company pattern and practice of the employer

## ❑ Furlough

- ✓ **State Specific – e.g. California:** California Labor Commission finds that a temporary furlough that is planned to last longer than the current payroll period triggers the obligation to pay all wages due on the last day worked.

# Workforce Reduction Considerations: Unemployment Insurance

- ❑ **Layoffs and RIFs:** UI available
  
- ❑ **Furlough:** UI available
  
- ❑ **Reduction in Work Hours:** UI maybe available.
  - ✓ Eligibility Determined by the state but generally require no fault
  - ✓ Employees hours must have been cut by their employer and not at the employee's own request.
  - ✓ Wages must be reduced to an eligible level based on state requirements.
  - ✓ Employee must not be able to work remotely
  - ✓ Demonstrating actively searching for work temporarily suspended in some states.
  - ✓ CARES Act Pandemic Unemployment Benefits (\$600 enhancement) available if adopted by state.

# Workforce Reduction Considerations: Fair Employment Laws Remain in Effect

- ❑ **Fair Labor Standards Act**
  - ✓ employees must be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.
  - ✓ Exempt Employees paid on a salary basis at not less than \$684 per week + Job Duties Test.
  
- ❑ **Americans with Disabilities Act:** Reasonable Accommodation analysis and Interactive Process still in effect.
  
- ❑ **Family Medical Leave Act:** Avoid Interference and Retaliation Claims.
  
- ❑ **Older Workers Benefit Protection Act:** protects workers over 40 from age discrimination. As a result, employers that provide severance benefits in exchange for a release under the Age Discrimination in Employment Act (“ADEA”)

# Layoff, Furloughs and RIFs: FAQs

- Can I force employees to use their accrued leave benefits during furlough?**
- Can I convert a furlough into a permanent layoff?**
- Do I need to pay Exempt Employees who are furloughed?**
- Can I furlough an employee in lieu of certifying them for FMLA leave?**

# Coronavirus Aid, Relief, and Economic Security (CARES) Act

- ❑ Enacted on March 27, 2020.
- ❑ The CARES Act is designed to assist those with financial hardships as a result of COVID-19.
- ❑ Retirement plan relief is available for 401(a), 403(b) and governmental 457(b) plans, as well as IRAs.

# Coronavirus-Related Distributions

- ❑ NEW category of in-service distribution.
- ❑ “Qualified Individuals” are allowed to request penalty-free distributions of the lesser of their vested account balance or \$100,000 for qualifying coronavirus-related reasons.

# Coronavirus-Related Distributions

- ❑ Participant Self-Certification
  - ✓ Plan participants may self-certify that they satisfy the conditions in determining whether any distribution or loan is a coronavirus-related event.
- ❑ Employer must ensure \$100,000 limit applies for all retirement plans in its controlled group.



# Coronavirus-Related Distributions

- ❑ A “qualified individual”
  - ✓ Who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention.
  - ✓ Whose spouse or dependent is diagnosed with such virus or disease, or
  - ✓ Who experiences adverse financial consequences as a result of (i) being quarantined, being furloughed or laid off or having work hours reduced due to COVID-19, (ii) being unable to work due to lack of childcare due to COVID-19, (iii) being unable to work due to closing or reducing hours of business owned or operated by the individual due to COVID-19, or (iv) other factors as determined by the Secretary of the Treasury.

# Coronavirus-Related Distributions

- ❑ CRDs are more favorable than standard hardship provisions (including those for Federal Emergency Management Agency (FEMA) declared disasters) because:
  - ✓ Three (3) year income inclusion period (2020-2022);
  - ✓ Three (3) year re-contribution period (2020-2022);
  - ✓ All contribution sources are available (other than money purchase pension);
  - ✓ 10% early withdrawal penalty is waived;
  - ✓ IRC 402(f) and 20% mandatory withholding is waived; and
  - ✓ Distributions in 2020 only.

# Participant Loan Relief

- ❑ Additional participant loans available for coronavirus-related events:
  - ✓ Participant loan limit increases to the lesser of 100% of the participant's vested account balance or \$100,000;
  - ✓ Available for loans on or before September 23, 2020 (180-day period from date of enactment);
  - ✓ Payments for current outstanding loans and new loans may be delayed up to one year (due date occurs March 27 to Dec. 31, 2020);
  - ✓ Interest continues to accrue and the plan can extend the term of the loan for up to one year; and
  - ✓ One year delay is disregarded for determining the five year loan limit.

# Required Minimum Distributions

- ❑ RMDs waived in 2020 for all types of defined contribution plans.
- ❑ Waiver includes any RMD required to be paid in 2020 and to 2019 RMDs required by April 1, 2020.
- ❑ If an RMD already received during 2020, the participant may roll it over and defer paying taxes, including rolling it into the plan.
- ❑ RMD calculated on Dec. 31, 2019 value could lead to disproportionate RMD relative to today's account value, resulting in disproportionately large taxable distribution.

# Plan Amendments

- ❑ Plan sponsor of a pre-approved plan may adopt a global amendment for regulatory changes.
- ❑ Although CARES Act provisions are effective now, the plan amendment deadline for calendar year plans is December 31, 2022 (or December 31, 2024 for governmental plans).
- ❑ For plans with fiscal year ending July 1, deadline is June 30, 2023 (or June 30, 2025, for governmental plans).

# Changes to Retirement Plans

- ❑ Due to workforce restructuring, plan sponsors may reconsider employer contributions.
  - ✓ *Discretionary* match and profit sharing contributions may be stopped at any time without an amendment.
  - ✓ *Fixed* match and profit sharing contributions with stated amount or percentage in the plan document REQUIRE a plan amendment, Summary of Material Modifications (SMM) and/or Summary Plan Description (SPD).

# Changes to Retirement Plans

## ❑ Safe Harbor Plans

- ✓ Plan document and safe harbor notice specifically provide for safe harbor match or non-elective contributions.
  - An amendment is required to remove safe harbor contributions before the start of next plan year with 30-day notice.
- ✓ Was a “maybe” notice provided?
  - Safe harbor contributions may be waived with second notice.

# Changes to Retirement Plans

- ❑ Mid-year “stop” to safe harbor contributions
  - ✓ Requires economic business hardship or circumstances that would cause a plan sponsor to terminate the plan.
  - ✓ Administrative requirements
    - Plan amendment
    - 30-day notice to participants
    - Safe harbor contributions must be provided until effective date
    - Non-discrimination testing for the entire plan year



# Partial Plan Termination

- ❑ Lay-off or severance from employment
  - ✓ If 20% or more of an employer's workforce is laid off, this could trigger a partial plan termination.
    - Partial plan termination - requires all laid off employees to be immediately vested in any employer contributions.
  - ✓ If a mandatory, unpaid and temporary lay-off for a short period of time this will not trigger a partial plan termination.
    - Need to consider Federal and State laws for lay-offs, plant closings and terminations for large numbers of employees.

# Pension Plans

- ❑ Multiemployer Pension Plan Withdrawal Liability
  - ✓ COVID-19 layoffs and facility closures may trigger withdrawal liability if a complete or partial withdrawal.
  
- ❑ CARES Act
  - ✓ 2020 minimum required contributions for single employer pension plans delayed until January 1, 2021 (interest accrues).
  - ✓ Plan sponsors can treat adjusted funding target attainment percentage (AFTAP) for last plan year ending before Jan. 1, 2020 as the target for plan years which include 2020.

# Executive Compensation

## ❑ Issues to consider

- ✓ Who has corporate authority to make changes?
- ✓ Is executive consent necessary for salary reduction? Does salary reduction without consent trigger “good reason” termination rights?
- ✓ Special distributions upon disability, unforeseeable emergency, or terminated plans.
- ✓ Is a temporary leave of absence or furlough a “separation from service” under Section 409A to allow a distribution?
- ✓ Is modification of performance-based goals feasible?
- ✓ Eligibility for vesting or payments upon leave of absence or furlough?

# Ice Miller COVID-19 Resources

## 1 Home Page – icemiller.com



The screenshot shows the Ice Miller home page. At the top, there is a navigation bar with links for 'LOCATIONS', 'CAREERS', 'BLOG', 'CONTACT', and 'SUBSCRIBE'. Below this is a search bar and a 'SEARCH' button. The main header features the Ice Miller logo and the tagline 'LEGAL COUNSEL'. A large red banner with the text 'Opportunity Zones' and 'build opportunity' is prominent. Below the banner, there is a section titled 'Ice on Fire meet the lawyers' featuring three attorneys: Jay Augustine, Timothy J. Caputo, and Matt Stronoff. A 'Spotlight: Coronavirus Task Force and Resource Center' section is highlighted with a red arrow, featuring the Ice Miller logo and the text 'COVID-19 Task Force'. To the right of this section are links for 'Subscribe', 'Go Sign Up for the New Ice on Fire Content Publication', 'Ice TV', and 'Ice on Fire Insights'.

## 2 COVID-19 Resource Center



The screenshot shows the Ice Miller COVID-19 Resource Center page. The navigation bar is the same as the home page. The main header features the Ice Miller logo and the tagline 'LEGAL COUNSEL'. Below this is a large graphic with icons representing various aspects of business and health. The main content area is titled 'Coronavirus (COVID-19) Resource Center' and contains the following text:

COVID-19 and the current concerns of community spread have raised novel issues for us and many other business outbreaks of COVID-19 are being reported on a daily basis and strict travel restrictions have been put in place. If we have contracted the virus have recovered without requiring significant medical treatment. As we are reminded by (CDC), there is no reason to panic – the key is to be prepared and to make sure you and your business understand the commercial ramifications of COVID-19.

The coronavirus continues to impact both day-to-day life and the global economy. However, it can be difficult to understand how the coronavirus will impact your business and what steps can be taken to mitigate that impact. Given the fluid nature of this global crisis, Ice Miller has organized a COVID-19 Task Force to help educate our clients about their risks and their companies' risks due to COVID-19.

**Ice Miller Resources**

**Families First Coronavirus Response Act Bill Webinar**

Our attorneys hosted a webinar to discuss the Families First Coronavirus Response Act bill and other considerations for employers during the COVID-19 pandemic on Wednesday, March 18 at 2 p.m. EDT. Please note this bill has since been signed into law by President Trump. The latest information about the bill is available here.

A copy of the webinar recording from March 18 is available here.

**Business**

- NEW New York Guidance, Order and Regulation Providing Borrower Protections in Response to COVID-19
- NEW COVID-19 - Summary of Federal Loan Programs
- Meeting Product Demand in the COVID-19 Era: What to Consider When Considering a New Product
- COVID-19 Business Impact Update
- What is an "Essential Business" Amid the COVID-19 Pandemic?
- Small Businesses Can Apply for Loans through the U.S. Small Business Administration's Economic Injury Disaster Loan Program
- Tax Obligations Delayed Due to COVID-19
- COVID-19: Impact on Reporting Obligations
- SEC Grants Exemptive Relief for Certain Investment Advisers Due to COVID-19
- Fiduciary Duties of Boards of Directors and Officers When Nearing or Within the Zone of Insolvency

# Frequently Asked Questions

- Do I have to offer CARES Act distributions?
- Is there a risk to the plan in offering (or not) CARES Act distributions?
- Which provisions are mandatory and which are optional?
- Can we wait and add the provisions later if there is more demand/need?
- How are the CARES Act early withdrawals taxed?

# Common Questions – CRDs and Loans

- How does the loan repayment extension and reamortization work?
- Does the \$100K limit apply separately to CRDs and loans?
- Is self-certification allowed for loan relief?
- Will participants receive a new 1099R each year?
- When will we have additional guidance?

# Common Questions – RMD waiver

- Will RMDs have to be made up in 2021?
- What plans are eligible?
- Is this optional or required?
- Can payments already taken be rolled over or recontributed under CRD rules?

# QUESTIONS?

