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## Labor and Employment Update: Federal Government Issues Flu Guidance to Employers

By John Balitis and Whitney Sedwick Meister

On August 19, 2009, the federal government issued updated guidance to assist employers in developing plans to respond to the upcoming flu season, which experts predict could result in half of the United States population becoming infected this fall. The federal guidelines recommend that employers plan for and develop a response plan for two scenarios: (1) illnesses at the level of severity observed during the spring and summer of 2009; and (2) illnesses resulting from a more severe outbreak.

At a minimum, the federal government recommends, among other things, that employers:

- Review sick leave and paid time off policies to make sure they are consistent with public health recommendations.
- Consider whether sick leave and paid time off policies can be modified to allow for flexible worksites (e.g., telecommuting) and flexible work hours, which will increase the physical distance among employees and the public if public health authorities recommend the use of social distancing to fight the spread of illness. Employers should be prepared to allow employees to stay home to care for ill family members or to care for children whose schools or child care facilities are temporarily closed in response to a flu outbreak.
- Encourage all employees to get vaccinated for seasonal flu and the 2009 H1N1 influenza.
- Prepare for an increased number of employee absences and establish a plan for essential business functions to continue.
- Consider relaxing policies that require a doctor's note from employees who are ill with flu-like symptoms to validate their illness or to return to work because medical providers may be extremely busy and not able to provide such documentation in a timely manner.

If the upcoming flu season is more severe than what was observed earlier in 2009, the federal government recommends, among other things, that employers:

- Consider active screening of employees who report to work to detect signs of illness.
- Consider alternative work environments for employees who run a higher risk for complications of flu during periods of increased flu activity.
- Consider increasing social distancing at work by canceling non-essential travel, increasing telecommuting and using staggered shifts so that fewer workers are in the workplace at the same time.

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## Work Furloughs

Depending on the extent and severity of the upcoming flu season, employers may need to consider temporary, mandatory time off due to the health concerns presented by an H1N1 outbreak. Many employers have utilized furloughs recently as a result of economic conditions. As with any employment matter, employers need to be mindful of the legal implications of their decisions.

## Fair Labor Standards Act Considerations

The Fair Labor Standards Act (“FLSA”) sets minimum wage and overtime requirements. If an employer reduces a non-exempt employee’s hours by way of a short furlough, the employer need not pay the non-exempt employee for time not worked. The issue becomes more complicated, however, for exempt employees. The FLSA exempts from minimum wage and overtime pay “any employee employed in a bona fide executive, administrative, or professional capacity.” To qualify for such an exemption, an employee must meet the duties and salary tests. Assuming the employee meets the duties test and receives at least \$455 per week, an employee must be paid on a “salary basis.” That is, an employee must regularly receive each pay period “a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”

The Department of Labor’s Wage & Hour Division recently issued two opinion letters clarifying that salary deductions due to a reduction of hours worked for short-term business needs are impermissible. “An employee is not paid on a salary basis if deductions from the employee’s predetermined compensation are made for absences occasioned by the employer or *by the operating requirements of the business*. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.” An employer is not, however, required to pay an exempt employee’s salary for any workweek in which he or she performs no work. Therefore, in the event of a flu outbreak, an employer may send exempt employees home as part of a social distancing exercise. However, if an exempt employee works any portion of a workweek, he or she should be paid his or her regular salary for the entire workweek.

“Employers can, however, make deductions for absences from an exempt employee’s leave bank in hourly increments, so long as the employee’s salary is not reduced.” An employer can substitute or count time against an exempt employee’s accrued leave for the time an employee is absent from work, even if the time off is a mandatory furlough. In such instances, the employee must receive his or her full salary to remain exempt, even if the employee does not have enough accrued leave to cover the mandatory time off.

Under a different set of circumstances, in which an employer makes a bona fide change in the work schedule by permanently reducing the workweek, an exempt employee’s salary and schedule may be reduced. An employer planning such a permanent reduction should consult an attorney because the Department of Labor is on the lookout for impermissible attempts to circumvent the wage and hour rules. Day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis test is intended to preclude. Therefore, short furloughs, as opposed to bona fide permanent changes in the work schedule, are inconsistent with the guaranteed salary basis of payment required by the regulations.

## Unemployment Benefits Considerations

Some employees – regardless of exempt or non-exempt status – who are furloughed may seek unemployment benefits. It may surprise some employers to know that an employee need not be terminated to be eligible for unemployment benefits. There are, however, several impediments to a furloughed employee collecting unemployment benefits. To be eligible for benefits under Arizona’s unemployment benefits statutes, an “unemployed” individual must register; make a claim for benefits; be able to work; be available for work; and have been unemployed for a waiting period of one week, among other qualifying criteria. An individual is “unemployed” with respect to any week during which the individual performs no services and with respect to which no wages are payable to the individual, or with respect to any week of less than full-time work . . . if the wages payable to the individual with respect to the week are less than the individual’s weekly benefit amount.” Given that Arizona’s weekly benefit amounts are relatively small, a reduction in hours would have to be significant to qualify an employee as unemployed. While technically a furloughed employee can seek unemployment benefits, it is unlikely to be a source of income during short furloughs due to the one-week waiting period.

Nevertheless, employers should respond to any requests for employer input in the unemployment benefits application process to avoid inaccurate determinations or alleged uncooperation.

## The Worker Adjustment and Retraining Notification Act Considerations

The Worker Adjustment and Retraining Notification (“WARN”) Act requires an employer to give 60 days notice to affected workers (including hourly and salaried workers, as well as managerial and supervisory employees) or their representatives, and state and local government units before a covered “plant closing” or “mass layoff.” A plant closing occurs when an employment site (or one or more facilities or operating units within an employment site) shuts down, and the shutdown results in an employment loss for 50 or more employees during any 30-day period. A mass layoff is an employment loss at the employment site during any 30-day period for 500 or more employees or for 50 or more employees if they make up at least 33% of the employer’s active workforce. A plant closing and mass layoff are triggered by an “employment loss.” Employment loss is defined as “(A) An employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period[.]” Although it is unlikely that even in the event of severe flu outbreaks employees will have to take measures of such magnitude to trigger WARN obligations, employers nonetheless should consult with legal counsel to determine whether layoffs separated by more than 30 days are aggregated under the WARN Act, as these determinations are often fact-intensive.

Therefore, the typical short furlough that lasts one week or requires employees to take off one day per week is unlikely to trigger WARN Act notice obligations. Note, however, that the Department of Labor’s Final Rule on the WARN Act indicates that a “prudent” employer will notify employees when there is a layoff of an “indefinite” duration because if the layoff ultimately exceeds six months then the employment loss is deemed to have started at the beginning of the layoff. As such, if an employer is laying off employees for an indefinite period of time, as opposed to a planned one-week furlough, for example, then the WARN Act analysis may change.

*John Balitis practices primarily in the labor and employment area, representing employers in arbitration, litigation, and administrative proceedings. His labor and employment practice includes counseling employers on personnel policies, restrictive covenants, employee disability issues, drug/alcohol testing, wage and hour issues, and unemployment compensation matters. He received his B.A. (1984) from Dickinson College and his J.D. (1991) from the University of Virginia.*

*Whitney Sedwick Meister focuses her practice in the areas of labor and employment law, civil appeals and commercial litigation. Her practice focuses on employment litigation and counseling clients on human resources issues. Ms. Sedwick Meister represents clients on a variety of employment matters, including the defense of allegations of employment discrimination, sexual harassment, retaliation and wrongful termination. She received her B.A. (1998) from Colorado College and her J.D. (1993) from Wake Forest University.*



John Balitis  
Director  
602.916.5316  
jbalitis@fclaw.com



Whitney Sedwick Meister  
Associate  
602.916.5412  
wmeister@fclaw.com