



## *Webinars for Wise Nonprofits*

# **Responding to COVID-19: Reducing Your Workforce**

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*This presentation is meant to provide general information only and should not be construed as legal advice.*



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# Overview

- Alternatives to Layoffs
  - Salary reductions
  - Furlough
  - Shared Work
- Limiting Legal Risk of Layoffs
  - Selection Practices
  - Communications
  - Severance and Release
  - WARN
  - Benefits
  - COVID Concerns
- Post-Layoff Considerations



# Avoiding Layoffs

- **Reasons to Avoid Layoffs**
  - Preserve program services
  - Retain talent
  - Maintain morale
  - Reduce legal risk
  - Save certain costs (accrued vacation; severance)
  - Maintain unemployment experience rating
  - Be better positioned for recovery



# Alternatives: Salary Reductions

- Why do it?
  - Workforce remains intact
  - Maintain hours/schedule
- How is it implemented?
  - Entire workforce or departments
  - What is equitable?
    - across the board cuts?
    - larger cuts for highly compensated employees?
  - Greater than 25% wage reduction affects PPP loan forgiveness
  - Must give 7 days' written notice under WTPA
- CAUTION
  - Minimum wage must be maintained
  - Exempt employee salary threshold must be maintained
  - Employment agreements, CBA's, policy may prevent



## Alternatives: Furlough

- Furlough is a temporary layoff
  - May be full or partial reduction in schedule
  - May be mandatory or voluntary
  - Time off is unpaid
    - employer may permit use of vacation or PTO
- Duration and schedule must be set in advance
  - full, consecutive weeks
  - partial week
  - day/week off each month
- Effect on benefits
  - reduction in hours may trigger COBRA
  - consider amending benefits plans



# Alternatives: Furlough Legal Risks

- Wage and Hour Considerations
  - must maintain minimum wage
  - exempt employees
    - can reduce salary proportionately
      - *but must maintain salary threshold*
    - full week furlough presents least risk
    - any work (check email) triggers full weeks' salary
- Furlough may trigger WARN
  - if lasts longer than six months; OR
  - if hours are reduced by more than 50%
- May affect immigration status of certain visa-holders



## Alternatives: Shared Work

- NYS program helps maintain income by providing partial unemployment insurance benefits
- Eligible employers:
  - two or more full-time employees working in New York State ; and
  - liable for unemployment insurance purposes for at least four consecutive calendar quarters
- Submit shared work plan to NYS DOL two to four weeks before reduced hours begin
- Claims filed between 3/30/20 and 12/27/20 will be federally funded therefore experienced rating won't be affected



## Alternatives: Shared Work

- Employees' weekly hours and wages must be reduced at least 20 percent but not more than 60 percent
  - does not trigger NYS WARN
- Employees who normally work no more than 40 hours per week are eligible to participate
- The employees' fringe benefits cannot be reduced or eliminated
  - unless they are reduced or eliminated for the entire workforce.
- The plan cannot exceed 53 weeks
  - can be extended
- The employer cannot hire additional full-time or part-time employees for the work group covered by the plan
  - employees who leave may be replaced





## Layoffs: Selection

- Document the reasons for the layoff
- Follow or create a process
  - handbook/practice
  - collective bargaining agreements
  - employment agreements
- Who decides? Who reviews?
- Skills/performance based decisions
  - job demands may change
- Avoid adverse impacts
- Carefully review selection of employees on leave
- Obtain counsel immediately if WARN may apply



# Layoffs: Communications

- Affected Employees
  - private meeting, preferably in person
  - two management representatives, if possible
  - brief but honest reason for selection
  - legally required to give termination letter:
    - termination date
    - benefits information
    - reason not required
- “Surviving” Employees
  - inform entire organization at the same time
  - communication from ED as to need for layoff



# Layoffs: Releases

- Give severance in exchange for a release
  - give something you are not already required to give:
    - severance, pay all or part of COBRA, outplacement
- Age Discrimination Act in Employment Act
  - covers employers with at least 20 employees
  - covers employees who are at least 40 years old
  - specific requirements for releases during layoff
    - 45 days to review/7 days to revoke
    - information about ages and titles of employees who were and were not laid off
    - several other formalities
- Get legal assistance!



## NYS WARN Act

- NYS WARN requires
  - employers with **50** or more employees
  - to give **90** days' written notice before a layoff or plant closing at a single site of employment
  - causing an employment loss for at least **25** employees
- Only applies to employees within New York State
- Civil fines for failure to comply
- Liable to employees for pay/benefits during period of noncompliance
- Exemption if need not “reasonably foreseeable” at 90 days
  - but notice must still be given as soon as possible



# NYS Warn Act

- Covered Employers
  - at least 50 full time employees; OR
  - at least 50 employees working in the aggregate at least 2,000 hours per week
- Full time employee
  - regularly works at least 20 hours per week
  - has worked for employer for at least 6 months in 12 months before date on which notice should be given
- Employment Loss
  - plant closing causing job loss for at least 25 full time employees; or
  - layoff of at least 25 full time employees/one third workforce; or
  - layoff of at least 250 employees; or
  - relocation beyond 50 miles



# NYS WARN ACT

- Employment loss includes:
  - layoff lasting more than six months
    - may be liable for not giving notice for layoff extending beyond 6 months
  - reduction in hours by more than 50% in each month for six months
- Temporary or seasonal employment, for which employees were notified prior to beginning work, does not trigger WARN
- Notice must be given to:
  - all affected employees
  - union representative
  - NYS DOL
  - local workforce investment board



## Federal WARN Act

- Nearly identical to NYS Law, except:
- Covered employer: 100 employees
- Employment loss: 50 employees
- Required notice: 60 days
- Must notify federal DOL



# Benefits

- Group Health Plans and COBRA
  - employer must notify plan administrator within 30 days
  - plan administrator must notify employee within 14 days
  - employee has 60 days to elect and 45 days to pay premium





## Affect of COVID Laws

- **Leave Laws:** employees who are furloughed or laid off are no longer eligible for benefits under
  - Federal Emergency Paid Sick Leave Act
  - Federal Emergency Family and Medical Leave Expansion Act
  - NYS COVID-19 Leave
- **Unemployment Insurance:** employers will not be charged for benefits funded by the federal government
- **NYS WARN:** Second NYS WARN notice is not required if employees rehired due to PPP, after a layoff for which WARN notices were given, are laid off again



## Affect of COVID Laws

- **Payroll Protection Act loan forgiveness:** will be reduced if number of employees on payroll, or the amount of payroll, is reduced during 8 week period after receipt of loan or nearest pay period
  - Calculate FTE: average hours paid per week divided by 40 and rounded to nearest 10<sup>th</sup> or count ee's working at least 40 hours/week as "1" and others as ".5"
  - Forgiveness reduction exception: employee rejected good faith offer to return or terminated for cause; resigned; or asked for reduction in hours; AND position is unfilled
- **Safe Harbor:** No reduction if FTE's reduced between 2/15/20 and 4/26/20 but restored by 6/30/20 to FTE level in effect for the pay period included in 2/15/20



# Post-Layoff Considerations

- Monitor job openings
  - inform laid off employees?
- References for laid off employees
- Former employees as independent contractors
- Former employees as volunteers
- Remember the “survivors”
  - am I next?
  - overwork
  - demoralization
  - keep focus on mission!



## Resources

- Unemployment insurance: <https://dol.ny.gov/covid-19-frequently-asked-questions-employers>
- Shared Work: <https://dol.ny.gov/shared-work-program-0>
- NYS WARN:  
<https://labor.ny.gov/workforcenypartners/warn/warnportal.shtm>
- Federal WARN: <https://www.doleta.gov/layoff/warn/>
- PPP Loan Forgiveness Application:  
<https://www.sba.gov/document/sba-form--paycheck-protection-program-loan-forgiveness-application>



## QUESTIONS?

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