

STAFF AND SALARY REDUCTION LAND MINES

The tough economic climate has caused many employers to do many things to cut costs. Making reductions in payroll costs can have a high payback in cost reduction, but they are not without their potential for causing major problems.

There are many types of reductions that an employer can make, but there are three reductions that can get you in real trouble, if not done right. They are reductions in force, reductions of staff in the higher paying positions and reductions in the salaries of exempt employees.

WARN Act & California's WARN Act

Employers who have employed 75 or more employees in the past year can find themselves owing huge sums of money if they do not follow the notification and waiting time rules under the Federal WARN Act and California's equivalent.

The federal Worker Adjustment and Retraining Notification Act (WARN), which covers companies employing 100 or more employees must provide employees, their representatives and specified government officials and agencies with 60 days' written notice prior to any mass layoffs or plant closings. Penalties, including up to 60 days' back pay per employee, could be assessed for failing to provide required notice.

California's own version of the WARN Act is broader in scope than the federal act and impacts more employers including firms that employed 75 or more employees in the last year. California businesses must comply with the requirements of both laws.

State law and the federal Worker Adjustment and Retraining Notification (WARN) Acts require you to issue notice 60 days in advance of a layoff or plant closing. Failure to do so can subject you to substantial penalties. While both state and federal laws apply, you are required to follow whichever is more restrictive. Any time you are considering a layoff of a large number of employees or the temporary or permanent close or relocation of a facility or department, it is best to review these two laws to determine if you must comply.

Penalties include all wages and benefits to employees affected by the layoff or closure who should have received the notification.

Age Discrimination

An employer trying to get a handle on costs might choose to layoff employees in classifications that are higher paying, thereby saving money by getting rid of the higher wage earners. Even a general layoff in some employee classifications can cause unintended discrimination by disproportionately impacting older workers.

When you make reductions in force that targets workers with higher salaries as a cost-cutting measure, you increase your potential for age discrimination if a disproportionate impact exists on employees over 40 years of age.

The legal theory is not that you intentionally discriminated against the employee(s), but that your policy unintentionally created a discriminatory impact.

Both federal and California law targeting age discrimination resulted from a California Court of Appeal case decided in 1997 called *Marks v. Loral Corp.*, where the court decided that an employer's decision to terminate certain employees based purely on economic factors could not be held to be illegal age discrimination. The state Legislature passed a law that declared that “the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if that use of criterion adversely impacts older workers as a group....” Federal law now supports the same position.

You can use an affirmative defense if your employee claims age discrimination under this law. You can avoid liability by proving an overriding legitimate business purpose, such that the practice is necessary to assure the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve.

However, you may not be interested in spending the time in court with the hope that the judge will see your point of view. Therefore, it is best to determine in layoff and reduction of force cases, whether you will disproportionately impact those 40 years and older. If that is the case, you may wish to use another method of saving money.

Illegal Salary or Schedule Reductions

Reducing work schedules and salaries for exempt-salaried employees may violate the salary basis test and destroy exempt status of otherwise exempt workers. An exempt worker must meet the duties test for exemption and then be paid a guaranteed salary of two times the California minimum wage, which at the current \$8 an hour, is \$33,280 annually.

While all employees are potentially going to have their wages affected by the current economic problems, we have received inquiries regarding the circumstances under which an employer can reduce the salary of an exempt employee without destroying the employee's exempt status under California law.

As a general rule, an employer may lawfully reduce an exempt employee's salary, on a prospective basis, so long as the employee's guaranteed salary does not drop below two times the California minimum wage which would be \$33,280 annually based on the current \$8 per hour minimum wage.

Where the reduction becomes a problem is when the reduction is tied to the employee's hours/days of work and/or to some measure of production. Many times this arises where the employer tries to give the employee something positive to "offset" the reduction in salary and negative morale that flows from the reduction. For example, an employer might consider reducing exempt employees' salaries by 20% in exchange for giving the employees Fridays off.

California's Department of Labor Standards Enforcement (DLSE) takes the position that this type of salary reduction violates the salary basis test and destroys exempt status (meaning that meal and rest breaks and daily/weekly overtime rules would apply to the affected employees).

The DLSE reasons that exempt employees are paid for the value of their work, not for the number of hours or days they work, and it is generally up to the exempt employee to determine the number of hours to work to accomplish his or her job duties. Tying the amount of an employee's compensation to the quantity of work the employee performs is at odds with the notion of being a salaried employee.

An employer considering salary reductions for exempt employees should review their decision and consider that the reductions can be made, but the reduction should not be linked to any corresponding change in days or hours worked. In addition, the employees' salary must not fall below twice the minimum wage for a 40 hour week, and the employees' job duties must still meet the test for exempt status.

State and federal leave laws do allow for reductions in wages and hours of an exempt employee who for health or other reasons, voluntarily seeks to work a reduced schedule for personal reasons.

Planning for a reduction? For questions regarding ways you can accomplish your needs, contact Pacific Employers at (559) 733-4256. You may also visit Pacific Employers' website at www.pacificemployers.com

