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Navigating Adapted Operations Advisory Series: Part Four – Continuing or Expanded Telework, Other Staffing Arrangements, and Workforce Restructuring

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Who Needs to Know

Employers who are reopening (or have already reopened) and bringing employees back to their workplaces – or restructuring their workforces as a result of changing business conditions related to the pandemic.

Why It Matters

Bringing a workforce back to the workplace, whether from teleworking, furlough or layoff status, is an exercise with many moving parts. Employers need to follow a reasoned strategy to address COVID-19-related risks and other considerations associated with recalling some or all of a workforce to develop a sensible back-to-work protocol.

Troutman Pepper is issuing a series of client advisories, Navigating Adapted Operations, to help businesses design workplace operations adapted to the challenges of sustaining business efforts during and after the COVID-19 pandemic. This series addresses how businesses can reopen, recover, or control workplaces in the face of operational changes that could last even longer than first planned. In Part One of the advisory series, we examined phased-approach considerations for workplaces, creating and implementing a COVID-19 response plan, and employee benefits concerns for a returning workforce. In Part Two of the advisory series, we examined insurance coverages and the Paycheck Protection Program (PPP). In Part Three of the advisory series, we examined widely applicable issues for returning to actual workplaces.

We invite your questions and feedback on every topic and also ones you may want addressed, but are not covered thus far. Our aim is to provide a comprehensive review of matters that will enable employers to make informed decisions about the overlap and interplay of health/safety, risk management, financial challenges, and workplace oversight. At the conclusion of the series, we will share a dynamic outline of the categories examined that clients may adopt to navigate their own adapted operations.

Continuing or Expanding Telework

Many employers who permitted or required employees to work from home in response to the COVID-19 pandemic are now considering ways to expand their telework capabilities or facilitate telework for a longer period of time. Below are tips for employers to consider in implementing long-term remote work.

Remote Work Policy

Employers with teleworking employees should have a remote work policy in place, and employers who transitioned to telework in March without a formal remote work policy should implement one now. A policy should consider what an employer needs now amid the COVID-19 crisis, and what the employer will want in a post-pandemic world. Considerations include ensuring employees have the proper equipment to perform their jobs from home and setting performance expectations regarding work schedules, responsiveness, productivity, and communication.

Before the pandemic, many companies opposed any type of regular remote work. Over the past few months, companies have learned that employees can be just as productive (if not more productive) working from home. A solid remote work policy will protect a company's legal and business interests while providing an attractive perk to some employees.

Safety and Security

When developing work from home policies, employers should assess the sufficiency of security and privacy protocols to protect employer confidential information, determine whether technology protocols will need to be updated to ensure the security of company data, and determine whether employees will use employer-owned equipment, employee-owned equipment, or a combination of the two. Employers should also work with IT staff and vendors to develop appropriate cyber protection programs to ensure critical systems are virtually secure, adopt security measures for employee personal devices, and ensure employees' personal wireless internet networks include appropriate security and encryption technology. In addition, employers should develop a strategy to retrieve electronic equipment from employees who are part of a layoff, furlough or job elimination program. Finally, employers should remind employees tasked with handling particularly sensitive information (such as human resources professionals who may have access to confidential employee data or anyone exposed to confidential information and trade secrets) that hardcopy, handwritten, or printed notes likewise need to be maintained confidentially in a home office or workstation.

Wage and Hour Issues

Nonexempt employees must be paid at least minimum wage for time worked and overtime for hours worked over 40 in a workweek (or as otherwise required by state law). Therefore, it is important to determine a way to track all time worked by nonexempt workers while they work remotely so that a company can pay them accurately. Recently, the U.S. Department of Labor issued a Field Assistance Bulletin to clarify employers' obligation to track the compensable hours for employees who are teleworking or otherwise working away from premises controlled by their employers. To accurately track remote work hours, the DOL suggests that employers provide a reasonable reporting procedure for nonscheduled time, and further, that employers compensate employees for all reported hours of work, even for hours not requested by the employer. If employees work unauthorized time, they should be paid but disciplined for working unauthorized hours.

In addition, employers need to put a process in place to ensure meal and rest breaks are taken in states where these breaks are mandatory. Finally, in some states, such as California, an employee may be eligible for reimbursement of business expenses, such as internet charges, supplies, and specialized equipment like cables and monitors.

Tax Implications

As a result of employees working remotely, some employers may be subject to laws and regulations of jurisdictions in which the company previously had no operations. In addition, there may be additional state and local tax implications under previously inapplicable tax codes in those jurisdictions. These issues are fact-intensive and vary based on the laws of the states and localities where employers and employees are located. Companies with employees working remotely in new locales are encouraged to reach out to a member of the Troutman Pepper COVID-19 Task Force for more information.

Recalling Remote Workers to the Workplace

When reopening facilities and recalling employees to work, employers may face challenges with employees who would prefer to continue working from home. An employer may refuse a remote work request if the employee in question is not seeking a reasonable accommodation under the Americans with Disabilities Act (ADA) or a similar state law. On the other hand, if the remote work request is related to an employee disability, the employer must engage in an interactive process with the employee to determine whether an obligation exists to provide remote work as an accommodation or to identify another suitable accommodation.

Work Sharing

Some employers facing layoffs have turned to state unemployment work sharing programs, sometimes referred to as short-term compensation programs, as an alternative to reduce employment loss for employees. In some states, these programs permit companies to cut employee wages while simultaneously supplementing employee lost income with unemployment benefits.

Historically not well-known or widely utilized work share programs are growing in popularity during the pandemic since they allow employers to reduce workers' hours without cutting jobs, effectively sharing the burden of reduced labor demands across the workforce.

Work Share Nuts and Bolts

Work share programs are administered by state unemployment agencies, and employers can usually find state-specific requirements for the state's work sharing program, if one exists, on the state unemployment website. Companies must apply individually and file a separate plan for each category or unit of workers. Although the exact requirements and benefits for work sharing programs vary by state, the process generally involves the same criteria, for example:

- The employer must ensure the reduction in hours for each employee meets a minimum hours reduction (usually a 10% to 20% reduction), but is below the maximum hours reduction (usually a 40% to 60% reduction), and that it affects the requisite number of employees;
- The employer must ensure the same reduction percentage is applied to all employees in the affected unit;
- The employer must agree not to reduce hours further, lay off participating employees, or cut benefits for the duration of the work sharing plan;
- The plan's duration must be set, and is often capped by the state's unemployment agency;
- The employer must agree not to hire new employees or transfer employees into an affected unit;

- The employer must agree that each employer's work hours will not exceed 40 hours per week without first submitting a plan modification; and
- The employer must notify employees of the intent to participate in the work sharing plan, obtain consent if required, and submit unemployment benefits applications on their behalf for the duration of the work sharing plan.

Some states are expanding their work sharing programs or relaxing program requirements in response to the pandemic. For state-specific information about work sharing programs, contact a Troutman Pepper labor and employment attorney.

Workforce Restructuring

As the pandemic and its economic effects continue, many employers now face, or continue to face, difficult decisions about the structure of their workforce. Employers that planned for temporary furloughs lasting a few months are now considering whether to continue to extend furloughs or conduct layoffs. The pandemic has also changed the structure and needs of many businesses, sometimes permanently. For example, retail stores that have successfully shifted a large percentage of their business online may no longer have a need for the same in-store staffing levels. Similarly, office-based businesses that have switched to remote work for the indefinite future may no longer have a need for certain support staff members, such as receptionists and janitorial employees.

When analyzing and executing a workforce restructure, there are many employment-related issues to consider.

Position Changes/Job Restructuring

Changing an employee's job position, or restructuring an existing position, can be viable alternatives to layoffs, and an essential tool for employers to navigate new ways of doing business. Employers should ensure all such changes are properly documented, and clearly communicated to employees. For example, if what was previously expected to be a temporary change in job responsibilities due to the pandemic is now permanent, then that should be communicated to the employee and reflected in a new or updated job description. Employers should also assess overtime exemption classifications, and ensure the employee is properly classified in the position that emerged from adjusted job duties.

An additional restructuring option to transition out of partial furloughs is to make some positions permanently part time. Before making a change, employers should consider its effect on classification – for example, making an exempt employee part time could result in the employee's salary falling under the threshold minimum, thus meaning the position must be recategorized as nonexempt. Employers should also consider the effect on benefits, as a permanent reduction in hours could make an employee ineligible for certain employer-offered benefits. For more details on benefit considerations, please see COVID-19 Employee Benefits FAQs for Employers – Focus on Health and Welfare Benefit Plans and COVID-19 Employee Benefits FAQs for Employers – Focus on Retirement Plans. Prior to making a position permanently part time, employers should communicate the decision and all compensation and benefits details to the employee.

Layoffs/Reductions in Force

Some employers who previously were able to avoid layoffs now need to conduct them. Before implementing any

layoffs, employers should analyze three key considerations: WARN Act, adverse impact, and separation agreements.

WARN Act

The WARN Act requires covered employers to give advance notice of some mass layoffs. Employers could be subject to WARN notice obligations under both federal and state law, which can have significant differences. Under federal law, employers with 100 or more full-time employees must provide 60 days' advance notice if 50 or more employees at a single site of employment will suffer an "employment loss." An employment loss is defined as a termination, a layoff of more than six months, or a more than 50% reduction in hours of work for each month of a six-month period. Employers should also be aware that the 50 employee number must include job eliminations within a 30-day backward looking window and certain job eliminations within a 90-day backward looking window. Thus, even if the number of employees who will be terminated is less than 50, employers need to also be sure to count those individuals as appropriate, as well as any other employees who have been laid off for more than six months, or who had their hours of work reduced by more than 50% for each month in a six-month period. Because counting under WARN and the requirements for notice if it is required are subject to strict rules, employers should enlist counsel to assist in ensuring compliance.

Adverse Impact Analysis

Before finalizing a decision on which employees to terminate, employers should conduct an adverse impact analysis, which looks at the impact of the proposed terminations on certain protected classes. For example, if female employees make up 40% of the overall employee population, but make up 60% of the terminated employees, the reduction in force has an adverse impact on female employees. The existence of adverse impact does not necessarily mean a reduction in force cannot go forward as planned; rather it means that the decision should be thoroughly analyzed to ensure that it is properly supported by objective criteria – ones that are fundamentally based on job-relatedness and business necessity.

Separation Agreements

Employers who have the financial means can offer terminated employees separation packages. These packages can include a variety of benefits, including cash severance, company-paid COBRA, and placement assistance. Offering such a package helps the employee better navigate the loss of a job, and it helps the employer by securing a release of claims from the employee. In order for any release of potential age discrimination claims to be enforceable, a comprehensive "ADEA Notice" must be provided with the separation agreement that outlines the job titles and ages as of the date of the notice of the job action for employees who will be subject to the reduction in force or are being retained and provide for the consideration and revocation periods required by law.

As the COVID-19 pandemic continues to challenge business operations throughout the country, employers must remain vigilant about issues related to expanded teleworking and workforce restructuring. Please consult with a Troutman Pepper Employment Law attorney for any COVID-19-related issues. Please visit the Troutman Pepper COVID-19 Resource Center for COVID-19-related news and developments.

In **Part Five** of the **Navigating Adapted Operations Advisory Series**, we will examine **liability concerns and**

managing whistleblower issues.

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