



# Financial Markets Crisis Task Force

*Bringing Legal Clarity to the Economic Crisis*

## Employment

Alert 2 – December 2008

### Pay Attention to State Laws When Reducing Payroll

In reaction to the current economic and credit crunch, employers are scrambling to find ways to reduce payroll. Desperate times may call for desperate measures, but employers need not make it worse for themselves when reducing payroll only to add litigation costs. A number of state and federal laws limit how an employer may go about reducing payroll costs. In addition, individual contractual obligations, as well as collective bargaining agreements, will limit how and when payroll can be reduced. Careful consultation with labor counsel on a state-by-state basis is needed to determine how and when “decisional” and/or “effects bargaining” must be entered into with a union for those businesses with collective bargaining agreements.

#### State WARN Act May Be Stricter Than the Federal WARN Act

Employers with more than 100 employees must provide advance notice to employees impacted by a workforce reduction under the federal Worker Adjustment and Retraining Notice (WARN) Act. The WARN Act, in general, requires that 60 days’ notice be provided to employees included in a mass layoff (i.e., one-third of the workforce involving at least 50 employees, or a layoff of 500 employees) or a plant closing affecting 50 or more employees. The federal WARN Act provides for some exceptions to the general rule of 60 days’ notice in situations where there is a sudden change in the company’s economic circumstance. These exceptions, known as the “faltering business” exceptions, are interpreted narrowly, so employers should not take the requirements to give notice lightly.

A number of states have statutes similar to the federal WARN Act. In both Illinois and California, however, the state WARN Act has a lower threshold number for coverage—75 employees instead of the 100 employees under the federal WARN Act. Further, both Illinois and California do not provide any of the faltering business exceptions allowed to employers under the federal WARN Act. Notices must go to employees, the applicable union (if the employer has a collective bargaining agreement or a duty to bargain with a union), certain state government departments, and local government offices.

Other Midwestern states with their own WARN Act include Ohio and Wisconsin. Within the Midwest, Michigan, Indiana, and Iowa have no additional state law notice requirements beyond the federal WARN Act. Ohio requires three days’ notice to the Ohio Director of Jobs and Family Services any time an employer implements a layoff affecting 50 or more employees. Wisconsin’s WARN Act applies to employers with 50 or more employees and 60 days’ notice is required any time a layoff involves 25 percent or more of the employees.

Texas does not have a state WARN Act.

#### Calculations of Final Payment of Wages Are Often Governed by State Laws

In addition to limitations on how and when employers provide notice to employees under the state and federal WARN Acts, state laws provide for when and how final wages are paid to departing employees. The Illinois Wage Payment and Collection Act (IWPCA) limits deductions from final paychecks and requires payment of earned but unused paid time off. In addition, the IWPCA governs how and when bonuses and commissions are to be paid. Indiana’s law on the issue of final payment of vacation mirrors Illinois’s closely.

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Iowa defines wages to include compensation owed by employers for “vacation, holiday, sick leave, and severance payments, which are due under an agreement with the employer or under a policy of the employer.”

Ohio and Texas do not have laws addressing the issue of payment of earned but unused vacation for the private sector directly. Michigan law does not require employers to pay employees for earned but unused vacation or sick time.

California requires that unless a collective bargaining agreement provides otherwise, all vested paid vacation time earned but not used by the employee must be paid as wages at that final rate of pay.

Wisconsin employers are required to pay earned vacation and/or sick leave upon separation unless employment practices provide otherwise.

## **Timing of Final Wage Payments**

The timing of final paychecks is also governed by state law. Illinois, Indiana and Iowa all allow final paychecks to be paid by the next regularly scheduled payday. Ohio requires final paychecks to be paid on the first day of the month for work done in the last half of the preceding month or on the 15th of the month for work performed in the first two weeks of that same month. Michigan requires that an employer must pay final wages as soon as the amount can, with due diligence, be determined.

California law provides that all wages earned and unpaid at the time of an involuntary termination are due and payable immediately. Generally, if an employee quits, then all wages earned are due within 72 hours of when an employee gives notice of quitting. If an employer fails willfully to pay any wages due to the employee who quits or is discharged, the employer must continue to pay the employee's wages as a penalty from the due date until paid or until an action is brought to enforce payment for up to 30 days.

Texas requires that employers must pay discharged employees in full not later than the sixth day after the date of discharge. For employees who quit, wages must be paid no later than the next regularly scheduled payday.

## **Individual Liability for Wrongfully Withheld Final Wage Payments**

Most importantly for the company officials who must make these difficult decisions, the IWPCA, as well as the Fair Labor Standards Act (FLSA), provide for individual liability on the part of decision makers for wages withheld wrongfully. Individual liability has been found even in some cases of corporate bankruptcy, because the decision makers were found to be in fiduciary positions with respect to the withheld wages. The tough decisions must still be made, but they should be made with careful and informed weighing of the risks and benefits that flow from the decisions.

## **Smart Employers Are Using Creative Alternatives to Layoffs**

Realizing that as bad as the economic downturn is, many employers also know how hard it is to recruit and retain good employees, and they are trying to balance these competing concerns. Against this backdrop of state and federal laws that place limits on how and when employers reduce payroll, we have worked with a number of clients recently to develop creative responses to the severe downturns many businesses have experienced. Short of reductions in force, many businesses have instituted salary reductions, shortened workweeks, and furloughs. There is no one-size-fits-all solution to the economic crisis, and each business must weigh the risks and benefits of each contemplated move carefully and as early as possible. Careful planning for events can minimize the negative impact of payroll-reduction decisions on businesses and their employees while minimizing the risk of expensive litigation. Developing a contingency plan now can help businesses comply with the advance notice requirements and wage payment obligations employers face under state and federal laws.

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