

FOR THE EXCLUSIVE USE OF SGALIKEEVA@BHFS.COM

From the Denver Business Journal:

<https://www.bizjournals.com/denver/news/2020/05/05/colorado-coronavirus-layoff-challenges.html>

Colorado lawyers share advice on unique layoff challenges caused by the pandemic

May 5, 2020, 8:24am MDT

Brett Painter, a partner in the employment and labor group at Denver-based law firm Davis Graham & Stubbs, said the Covid-19 pandemic has led to a number of unprecedented potential legal quagmires when it comes to laying off employees.

"While the process and considerations for conducting a layoff largely are the same as in the past, employers have been forced to conduct layoffs with very little warning and without information on when business operations might normalize," Painter told Denver Business Journal. "The risk of making mistakes in this environment is much higher than when employers have more time to roll out reductions in force."

Brad Williams, of counsel in the labor and employment practice group at Denver-based law firm Holland & Hart, agreed that the speed at which layoffs are happening is rife with legal risks.

"Rather than reaching carefully considered decisions after weighing options and assessing risk, many employers have had to make snap judgments affecting entire workforces simply to stay afloat," Williams said.

And Christine Samsel, an employment attorney and shareholder at Denver-based law firm Brownstein Hyatt Farber Schreck, said company leaders are turning to employment lawyers for layoff advice now more than ever due to all of the new laws from federal, state and local governments.

"These hastily enacted measures to protect employees are sometimes not models of clarity, resulting in new guidance related to those laws being released on a virtually daily basis," Samsel said. "In addition, the requirements of the new laws sometimes overlap and/or conflict."

DBJ spoke with several Denver-based lawyers about the legal issues that have arisen with their clients who are conducting layoffs due to the pandemic. Here is their advice:

Document why layoffs are needed.

Todd Fredrickson, a Denver-based partner at Denver-based employment law firm Fisher Phillips, said that businesses should explore all of their options when considering what cost-cutting measures to take. For instance, some businesses may be better served by furloughing employees and keeping them on the company's health insurance for morale.

"Make sure you consider whether a furlough or temporary layoff, or a job-attached layoff might be the better approach," Fredrickson said.

And while the need for layoffs might seem obvious, Loughner said employers will be best served by carefully documenting the reasoning behind them should employees try to challenge them in the future.

"In the long run, it will pay to be strategic and document reasons why the layoffs were necessary and imminent," Stephanie D. Loughner, partner and co-chair of Denver-based Moye White's employment group, said.

Don't forget about WARN notices.



KATHLEEN LAVINE, DENVER BUSINESS JOURNAL

The Covid-19 pandemic has led to a number of unprecedented potential legal quagmires when it comes to laying off employees.

Samsel said one major concern regarding layoffs during the pandemic is the Worker Adjustment and Retraining Notification Act, which is a federal law that requires businesses to provide 60 days notice before layoffs. Most states have their own version of the law as well.

“The WARN Act contains an exception to the 60-day notice requirement for layoffs and closures due to ‘unforeseeable business circumstances,’ which likely applies to layoffs that occurred early on in this crisis,” Samsel said. “However, as time passes, it becomes more difficult to say that the need for layoffs was ‘unforeseeable.’ Employers should keep this in mind in making their business decisions, and consult with legal counsel about the applicability of the WARN Act.”

Williams added that businesses have already suffered from not filing WARN Act violations nationwide.

“Plaintiffs’ lawyers have already filed lawsuits asserting WARN Act violations, and employers who rely on the ‘unforeseeable business circumstances’ exception to WARN Act notices may find themselves litigating issues relating to the timeliness of their notices, and whether they could have provided notice earlier even notwithstanding the coronavirus,” Williams said.

Talk to employees if they don't want to return to work and you receive a PPP loan.

Congress has passed two rounds of funding totaling nearly \$660 billion for the Paycheck Protection Program to aid small businesses that have been negatively impacted by the pandemic. Run by the U.S. Small Business Administration, PPP loans can be made for up to \$10 million to cover expenses. The loans can also be forgiven under certain circumstances, such as by keeping most of the business’s employees on payroll.

But bringing back employees to receive PPP loan forgiveness is complicated, especially in Colorado.

Some employees have been reluctant to come back to work, both due to Covid-19 fears and because some are making more money on unemployment than they would at work. Under normal circumstances, Painter said these employees would automatically forfeit their unemployment if they refused to be rehired.

“A fundamental premise of most unemployment compensation statutes is that the status of unemployment is created through no fault of the employee,” Painter said. “An employee who makes the affirmative choice not to work may be hard-pressed to argue he or she is not at fault for being unemployed.”

However, these are not normal times, Painter said. Some employees may have protections that prevent them from returning to work under the Families First Coronavirus Response Act or the Americans with Disabilities Act in light of the recent guidance provided by the Equal Employment Opportunity Commission, Painter said.

And specifically in Colorado, the Colorado Department of Labor and Employment posted an emergency rule that requires the department to assess the level of risk to the employee’s health when deciding whether the employee must come back to work.

“This means there is protection from losing unemployment benefits for individuals who are considered vulnerable or who reside with a person who is member of a vulnerable group which might outweigh the risk of returning to work,” Loughner said.

Consider how to rehire employees.

Choosing which employees to bring back could lead to legal issues.

“Although at this juncture many companies likely are focused on the immediate needs of keeping their businesses operating during the crisis and preserving cash flow, it is not too early to start planning for the post-crisis reopening and how that will look,” Samsel said. “Employers should consider how they will determine which employees will return when and ensure there will be no adverse/discriminatory impact in the selection process.”

Address employee health concerns.

When employees are concerned about their health, Steve Bell, a Denver-based partner in the trial group at Minneapolis-based law firm Dorsey & Whitney, advised business owners to document all the ways the business is working to prevent Covid-19 exposures. He added that employers should discuss the long-term benefits of returning to work with their employees.

“Patiently advise the employees that their long-term financial situation will be better served by returning to work (even at the slightly less compensation than unemployment) particularly since the unemployment will likely cease once it is determined that the employee failed to return to the workplace,” Bell said in an email.

Don't forget about union rules.

Williams said employers need to communicate with unions about possible layoffs.

“Employers also need to review any union contracts as they often have specific layoff provisions, and employers must additionally be mindful of ‘effects bargaining’ requirements under the National Labor Relations Act for union-represented workforces,” Williams said.

Monica Vendituoli
Reporter
Denver Business Journal

