

EMPLOYMENT LAW

A L E R T

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

What You Need to Know About Layoffs and Reductions in Force

February 9, 2009

With the state of the current economy, a growing number of employers are facing difficult employment issues such as layoffs and reductions in force (“RIFs”). Below, we have addressed several common questions that arise during periods of layoffs and RIFs.

1. Can we reduce a salaried exempt employee’s pay if we go to a four day work week without losing such exemption?

Yes, if an employer operates a shortened workweek to avoid layoffs, a salaried employee’s pay may be reduced accordingly. However, under the Fair Labor Standards Act (“FLSA”), the employee must still be paid at least \$455 per week, even after the reduction in pay, in order to maintain the employee’s exempt status.

2. If a salaried exempt foreman begins to do more "hands on" work because of a reduction in the number of hourly employees, is the foreman still exempt from overtime?

According to the FLSA, the foreman will remain exempt from overtime only if the foreman’s primary duty remains supervisory. In other words, if the foreman performs so much “hands on” work that it becomes his/her primary duty, the foreman will lose exempt status. A good rule of thumb to follow is that if the foreman spends over 50% of his/her time performing supervisory work, he/she will remain an exempt employee. The FLSA regulations do not, however, require that exempt employees spend over 50% of their time performing exempt work.

3. If an employee is laid off and receives severance pay, is he/she entitled to receive unemployment compensation? Does it make a difference if the severance is paid out in a lump sum or paid out weekly or monthly?

Yes, an employee who receives severance pay is fully eligible for unemployment benefits because severance pay is not considered income or earnings under the Tennessee unemployment statute. This is true regardless of whether the severance pay was paid out in a lump sum or over an extended period of time.

4. If we have a plant shut down for a full week, do we have to pay salaried employees for that week?

No, salaried employees do not have to be paid during a week-long plant closing. Under the FLSA, a salaried employee need not be paid for a work week in which the employee performs no work.

5. If we shut down for a full week, are employees eligible for unemployment?

Yes, under Tennessee unemployment law, employees are eligible for partial unemployment during a week-long shut down. The employer is required to file a Joint Low Earnings and Claim for Benefits for Partial Unemployment with the Tennessee Department of Labor. The employer will have to provide information such as the names and social securities of all affected workers, the employer's name, address, and registration number, and other information as specifically requested on the claim form.

6. If we have subsequent shut downs for a week or more, does the first week count as the "waiting period" for unemployment purposes?

The answer will be different for each employee. Under Tennessee law, each employee has one week-long waiting period per 52-week benefit year. If an employee has previously undergone his/her waiting period for the benefit year, the first week of a shutdown will not be a waiting period for that employee. If an employee has not yet undergone his/her waiting period for the benefit year, the first week of a shutdown will be a waiting period for that employee.

7. Can we offer a retirement "incentive" to employees who are otherwise eligible to retire under our retirement plan?

Yes, the Age Discrimination in Employment Act ("ADEA") allows employers to offer retirement incentives to employees who are eligible for retirement. However, the retirement must be completely voluntary and the employee must have the option of rejecting the incentives. An employer, in offering incentives, may not assert pressure or coercion on an employee in an attempt to force such employee into retirement.

8. If an employee agrees to take a voluntary layoff as part of a reduction in force, is that employee still eligible to receive unemployment?

Yes, under the Tennessee unemployment statute, an employee who accepts a voluntary layoff as part of a reduction in force will be eligible for unemployment benefits. It is important to note, however, that the layoff program must be based on a lack of work in order for the employee to qualify for unemployment.

9. If an employee is on Family and Medical Leave Act ("FMLA") leave when we have a layoff, are we required to bring that employee back to work the end of his/her leave?

No, employers may layoff an employee on FMLA leave so long as the employer can show that the employee would have been laid off even if he/she had not been on FMLA leave. An employee on FMLA leave has no greater right to reinstatement than had the employee been continuously working during the

leave period. Therefore, an employee laid off during FMLA leave must simply be restored to layoff status after his/her leave ends.

10. Do I need to provide warning to my employees before implementing layoffs or a RIF?

Under the Worker Adjustment and Retraining Notification Act (“WARN”), employers with 100 or more full-time employees must provide 60-days notice to employees that will be affected by employment loss due to a covered plant closing or mass layoff. A covered plant closing includes the temporary or permanent closing of a facility which affects 50 or more employees, excluding any part-time employees. A covered mass layoff includes a layoff of 500 or more employees, or a layoff of 50-499 employees which represent 33% of the employer’s total workforce, again excluding any part-time employees. The mass layoff must occur within a thirty-day period at a single site of employment, or at one or more facilities or operating units within a single site of employment. If you fall under the criteria explained above, you may be subject to WARN’s notice rule.

Tennessee also has a plant closing law that requires employers with 50 to 99 full-time employees to notify the affected employees of a closing or layoff which affects 50 or more employees during a three-month period. The statute does not, however, require any specific form of advance notice.

If you have any questions about this alert, please call one of our labor attorneys listed below.

Bass, Berry & Sims Labor and Employment Attorneys

Karen L.C. Ellis
(615) 742-6226
kellis@bassberry.com

Robert W. Horton
(615) 742-7708
rhorton@bassberry.com

Alonda W. McCutcheon
(615) 742-7717
amccutcheon@bassberry.com

Annie Warnock Neal
(615) 742-6517
aneal@bassberry.com

Leslie G. Sanders
(615) 742-7711
lsanders@bassberry.com

Davidson French
(615) 742-6240
dfrench@bassberry.com

Lin B. Howard
(615) 742-7927
lhoward@bassberry.com

Carolyn V. Moore
(615) 742-7944
cmoore@bassberry.com

William N. Ozier
(615) 742-6232
bozier@bassberry.com

Tim K. Garrett
(615) 742-6270
tgarrett@bassberry.com

L. Lymari Martinez
(615) 742-7903
lmartinez@bassberry.com

Michael S. Moschel
(615) 742-6297
mmoschel@bassberry.com

Justin A. Page
(615) 742-7786
jpage@bassberry.com

The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.

To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900

1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200