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COVID-19:
Workforce Planning Strategies

April 1, 2020

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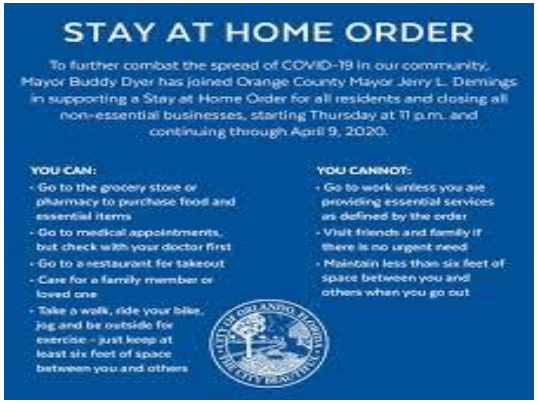
COVID-19: IMPLICATIONS FOR BUSINESSES



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RESPONDING TO COVID-19: WHAT EMPLOYERS ARE CONSIDERING

LAYOFFS	LEAVES OF ABSENCE	UI	PAY REDUCTIONS	OWBPA
NLRA	CARES ACT	WARN	FMLA	COBRA
FURLOUGHS	FFCRA	FLSA	EEO	WORKSHARE PROGRAMS

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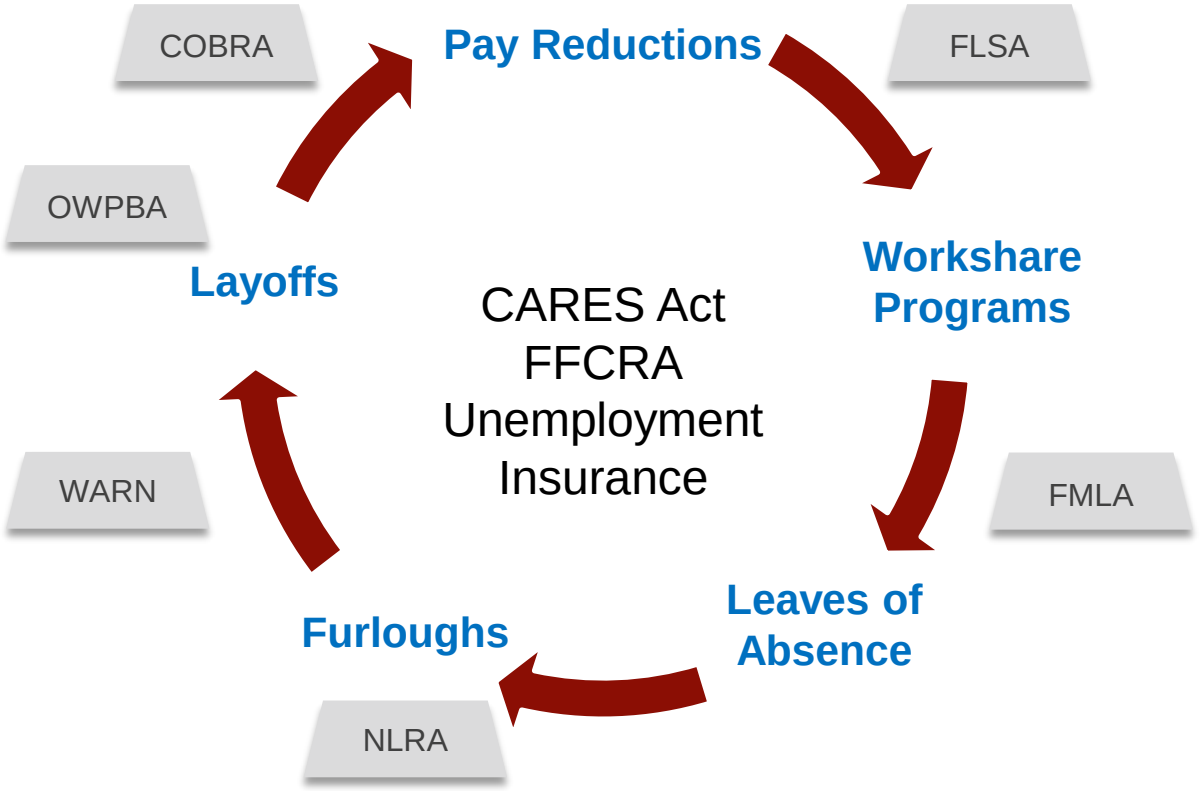
WORKFORCE PLANNING: A HELPFUL FRAMEWORK



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CARES Act: Financial Assistance to Businesses, with Conditions

CARES ACT: PROGRAMS CONDITIONED ON MAINTAINING EMPLOYMENT LEVELS

Small Business Paycheck Protection Programs

- Generally applies to employers with less than 500 employees (employees of companies under common ownership or controlling interest generally will be aggregated).
- Expands the ability to obtain loans under Small Business Act. Loans under the program are eligible for forgiveness up to the aggregate amount of payroll payments, interest payments on mortgage obligations, rent payments and utility payments made during the eight-week period following loan origination.
- The amount forgiven is lowered by reduction in full-time employment and where salaries and wages fall by more than 25% during the eight-week period.

CARES ACT: PROGRAMS CONDITIONED ON MAINTAINING EMPLOYMENT LEVELS (CONT'D)

Federal Reserve Lending Programs

- Treasury to work with Federal Reserve to implement lending program that targets U.S. businesses with between 500 and 10,000 employees.
- Loans to be conditioned on company's agreement
  - (i) not to outsource or offshore jobs for the term of the loan plus two years after repayment;
  - (ii) not to abrogate any CBA for the term of the loan plus two years after repayment; and
  - (iii) to remain neutral in any union organizing activity during the term of the loan.

Loans to Air Carriers and Businesses Critical to Maintaining National Security

- Employment levels must be retained until 9/30/20, to the extent practicable, and cannot fall more than 10% from 3/24/20 levels.

CARES ACT: PROGRAMS CONDITIONED ON MAINTAINING EMPLOYMENT LEVELS (CONT'D)

Employee Retention Credit for Employers Subject to Closure

- CARES Act provides **a refundable payroll tax credit** to all employers, regardless of size, whose:
  - Operations were fully or partially suspended due to a COVID-19-related shut-down order, or
  - Gross receipts declined by more than 50% when compared to same quarter in prior year
- Employers will receive a credit for 50% of "qualified wages," up to the first $10K of compensation (incl. health benefits) paid or incurred per employee from March 13, 2020 to Dec. 31, 2020.
  - For employers with over 100 full-time employees, "qualified wages" are wages paid to employees who are not providing services (*i.e.*, not working) due to a shut-down order.
  - For employers with 100 or fewer full-time employees, all paid wages constitute "qualified wages," regardless of whether the employer is open or subject to a shut-down order.

CARES ACT: PROGRAMS CONDITIONED ON MAINTAINING EMPLOYMENT LEVELS (CONT'D)

Delay of Employer Payroll Taxes

- Most employers will be able to defer payment of 100% of the employer-portion of social security taxes due on wages paid from the date of enactment of the CARES Act through December 31, 2020.
- 50% of the delayed payroll taxes will be due by December 31, 2021, and the remaining 50% will be due by December 31, 2022.
- The Medicare portion of payroll taxes is not eligible for this deferral.

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Alternatives to Layoffs and Furloughs

- Reductions in Pay/Hours
- Short-Time Compensation/Work Sharing Programs
- Employee Requested Leaves of Absence

1. REDUCTIONS IN PAY / HOURS – LEGAL CONSIDERATIONS

1. **Contract**
   - Employment agreements
   - Collective bargaining agreements
   - Benefit Plans (eligibility)
2. **WARN**
   - *See* WARN discussion in Layoffs section.
   - General rule: reduced work hours can equal "employment loss" if lasts beyond six months and pay reduced by more than 50% each month of six-month period.
3. **Wage and Hour**
   - Minimum salary requirements
   - Minimum wage requirements
   - Compensation reduction need not correspond to hours reduction.

REDUCTIONS IN PAY – GOVERNMENT SUPPORT PROGRAMS

1. **State Unemployment Insurance**
   - Partial wage replacement benefits may be available.
   - But employees may not qualify if their reduced weekly compensation exceeds UI benefits eligibility threshold.
2. **CARES Act**
   - Provides funds for several forms of unemployment insurance benefits.
   - One is funding to support "short-time compensation" or "workshare" programs ("layoff aversion" programs), where employers reduce work hours instead of laying off workers, and qualifying employees receive pro-rata unemployment benefit.
     - For states with existing programs: 100% of costs incurred by states will be paid through December 31, 2020.
     - For states without existing programs: $100 million in grants will be provided to fund creation of such programs.

2. WORK SHARING PROGRAMS - EXPLAINED

- Employer reduces hours and wages in lieu of layoffs; impacted employees are eligible for partial unemployment benefits.
- Example:
  - Business with 100 employees face a temporary setback and must reduce payroll by 20%. Under Work Sharing, business can reduce all (or defined group of) employees from five to four days of work (20% reduction).
  - Employees eligible to receive 20% of their weekly UI benefits.
- Employer's plan must be submitted to state for approval.
- Typical employer requirements include:
  - At minimum percentage (e.g., 10%) of regular workforce or a unit of workforce must be included in the plan.
  - Hours and wages must be reduced by a minimum percentage (e.g., 10%) but not exceed a specified amount (e.g., 60%).
  - Health and retirement benefits must remain the same as before, or they must meet the same standards as other employees who are not participating in the program.
- 28 states have work sharing programs. The list includes: Arizona, California, Colorado, Connecticut, D.C., Florida, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Virginia, and Washington.

WORK SHARING PROGRAM – FAQS

Q1: Why do employers participate in work sharing programs? Isn't it easier to just implement pay reductions and allow employees to seek partial unemployment benefits?

A1: Employees who just have their pay reduced are not necessarily eligible for partial unemployment benefits. They often earn too much, even with the salary reduction. However, employees in work sharing programs are typically entitled to partial unemployment benefits (and, therefore, partial CARES Act unemployment benefits), regardless of how much they earned that week.

* * * * *

Q2: Can an employer both lay off employees and also reduce the pay of other employees under the work sharing program?

A2: In most situations, yes.

3. LEAVES OF ABSENCE

Families First Coronavirus Response Act (FFCRA): Applies to Employers with Fewer Than 500 Employees

- This is a different law than the $2 Trillion Stimulus Law – "CARES Act." FFCRA creates two new paid sick/family leave laws relating to COVID-19.
- Provides:
  1. Emergency Paid Sick Leave Act: Up to 80 hours (*i.e.*, two weeks) of paid sick leave if person cannot telework and (1) is subject to quarantine order; (2) advised to self-quarantine; (3) is experiencing COVID-19 symptoms; (4) is caring for a person quarantined; (5) is caring for his/her child whose school is closed; or (6) has other similar condition specified by DHHS.
     - For reasons (1) through (3), it's full pay (up to a maximum of $511 per day).
     - For reasons (4) through (6), it's 2/3 pay (up to a maximum of $200 per day).
  2. Emergency Family and Medical Leave Expansion Act: If the leave is for caring for his/her child whose school is closed. First two weeks unpaid (but can use paid sick leave); next 10 weeks of paid leave (at 2/3 pay, up to a maximum of $200 per day).
- Applies to leaves taken from 4/1/20 through 12/31/20.
- U.S. DOL will issue regulations; in the meantime, DOL has posted guidance and Q&A on DOL website.

LEAVES OF ABSENCE – FFCRA: COVERED EMPLOYERS

- Which employers are covered?
  - Private employers with **fewer than 500 employees.**
    - Corporations are typically treated as a single employer.
    - If corp. has ownership interest in another corp. – separate, unless they meet "joint employer" test under FLSA (employee performs work for the employer that simultaneously benefits another person; multifactor test).
    - Also aggregate for "integrated employers." Under the FMLA (29 C.F.R. § 825.104(c)), factors to be considered in determining if separate entities are an integrated employer include:
      - common management
      - interrelation between operations
      - centralized control of labor relations, and
      - degree of common ownership or financial control.
  - Small employers (under 50 employees) may seek exemption from emergency FMLA leave; show complying "would jeopardize viability as a going concern."
- Date to use to calculate company's "fewer-than-500 employees" threshold:
  - The headcount as of the date each employee requests leave.
  - Potentially fluid coverage

FFCRA: ELIGIBLE EMPLOYEES

- Emergency paid sick leave: Full-time or part-time employees are eligible.
- Emergency FMLA leave: Full-time or part-time employees who have "been employed for at least 30 calendar days by the employer" are eligible.
- Exception for "health care providers" – employers can exclude them
- Neither paid sick leave nor the FMLA leave applies if the employee can telework.
- Neither one applies if the employer closes the worksite.
- Neither one applies if the employee is furloughed.

FFCRA: EMPLOYER 100% TAX CREDIT

- Costs 100% Reimbursed to Employers
  - Reimbursed through IRS payroll tax credits.
  - Credit will cover *entire amount* that FFCRA requires covered employers to pay.
- How it works:
  - Up front: Employer pays employee wages + continued cost of health insurance benefits.
  - Employer then claims the tax credit:
    - Employers generally withhold from employee paychecks federal income tax and employee share of Social Security and Medicare taxes, and deposit that amount (plus their own share) with IRS.
    - Under new tax credit, employer instead retains its share of Social Security taxes to cover the new paid leave costs.
    - Example:
      - Company must deposit $8,000 in payroll taxes with IRS.
      - Due to Families First Act, Company has paid $5,000 in sick leave.
      - Employer now must only send remaining $3,000 to IRS on its next, regular deposit date.
  - What if withheld payroll taxes are insufficient to cover the costs for the paid FFCRA leave?
    - Employer can file for accelerated tax credit payment from IRS.
    - Example:
      - Company paid $5,000 in sick leave, but was only required to send $3,000 to IRS in payroll taxes.
      - Company keeps entire $3,000 and applies for $2,000 accelerated tax credit.
      - IRS stated will expedite these requests: Process within two weeks or less.
  - IRS releasing streamlined claim form for employers to submit reimbursement requests.

LEAVES OF ABSENCE – OTHER LEAVE OPTIONS

- **Employer's Other Leave of Absence Programs**
  - The expanded FMLA leave is similar to other FMLA leaves – key differences are partial payment for up to 10 weeks.
  - Employer and Employee may agree to use company's preexisting leave entitlements to supplement the amounts paid during paid sick leave or FMLA leave.
  - Employee right to be restored to position.
  - The two weeks of sick leave pay is in addition to any other paid leave to which the employee may be entitled under state/local law or company policy.

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Furloughs

FURLOUGHS – EXPLAINED

- No universally accepted definition.
- Generally means a temporary leave of absence from work for a group of employees.
- People who get furloughed usually return to their jobs after a furlough.
- Employees are not paid by their employer, and only receive compensation to the extent they have available paid time off benefits and/or government assistance.

FURLOUGHS – LEGAL CONSIDERATIONS

1. **Contract**
   - Employment agreements
     - *Force majeure* provisions
     - Equitable excuses for nonperformance
       - Impossibility
       - Frustration of purpose
       - Impracticability
   - Collective bargaining agreements
   - Health insurance and other welfare benefit programs (COBRA)
2. **WARN**
   - See WARN discussion in Layoffs section.
   - General rule: reduced work hours can equal "employment loss" if lasts beyond six months and pay reduced by more than 50% each month of six-month period.
   - State WARN: Laws vary and often less clear. Short furlough (e.g., three weeks) can trigger CAL-WARN obligation.

FURLOUGHS – LEGAL CONSIDERATIONS (CONT'D)

3. Fair Labor Standards Act

- Employers are required to pay white collar exempt employees their full weekly salary in any work week in which they perform any work.

4. Final Payment of Wages

- State dependent

FURLOUGHS – GOVERNMENT SUPPORT PROGRAMS

1. State Unemployment Insurance

- Furloughed employees qualify for unemployment insurance benefits in most states.
- Benefit value varies by state (max. of $450 per week in California; $504 per week in New York).

2. CARES Act

- Provides an additional $600 per week (over and above any state unemployment benefits), lasting up to four months, and covering weeks of unemployment from the date of the bill's enactment until July 31, 2020.
- Need to qualify for state unemployment benefits to be eligible for this supplement.
- The Act also provides an additional 13 weeks of unemployment benefits after state unemployment benefits are exhausted.
- There is no cap on the amount of money that can be paid out, but the payments have a maximum duration of 39 weeks.
- These unemployment benefit increases are available to employees of employers of any size.

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Layoffs

LAYOFFS – LEGAL CONSIDERATIONS

1. **Contract**
   - Employment agreements (*see* Furloughs above)
   - Collective bargaining agreements (*see* Furloughs above)
2. **Severance**
   - Written severance plans
   - Individual employment contracts
   - Implied contracts from history of giving certain severance amounts.
3. **Release Agreements / Older Worker Benefits Protection Act**
4. **EEO / Adverse Impact Analyses**
5. **COBRA**
6. **Government Support Programs**
   - State Unemployment Insurance (*see* Furloughs above)
   - CARES Act (*see* Furloughs above)
7. **WARN**

WARN ACT OVERVIEW

- Federal and state WARN Acts generally require 60 days' advance notice of plant closings, mass layoffs, and similar events, counting employment losses toward the thresholds.
- Ordinarily is applicable if impacting:
  - either 50 or more full-time workers and at least 33% of the workforce, or
  - at least 500 full-time employees.
- The Federal WARN Act applies to employers with 100 or more full-time employees or 100 or more employees who work at least 4,000 hours per week.
- 23 states have mini-WARN Acts or similar legislation requiring some form of notice.
  - Some states, like California, look only to the employment numbers at the affected location. California's triggering events are mass layoff, relocation, and termination (i.e. plant closing).
  - Some states, like New York (50 or more employees), have lesser thresholds. New York requires 90 days' advance notice.

WARN ACT OVERVIEW (CONT'D)

- Employment loss is:
  - An employment termination, other than discharge for cause, voluntary departure or retirement,
  - A layoff exceeding six consecutive months, or
  - A reduction in hours of more than 50% during each month of any six-month period.
- Employment losses generally are aggregated over a 90-day period, unless the employment losses are for separate and distinct reasons or there is a WARN Act event, in which case employment losses in a 30-day rolling period are aggregated with the WARN Act event.
- Damages generally are 60 days' (less proper notice) of back pay and benefits.

WARN: SPECIAL RULES

- Exceptions to 60 days' advance notice.
  - Unforeseeable business circumstances.
  - Natural disasters.
  - Actively seeking business or capital.
- Notice is still required.
  - Still required to provide as much notice as is practicable, either before or after the fact;
  - Explain the reason for the shortened notice; and
  - Include as much of the otherwise required information as is available.

WARN: UNFORESEEABLE BUSINESS CIRCUMSTANCES

- Fewer than 60 days' advance notice may be given due to unforeseeable business circumstances:
  - Caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. An unanticipated and dramatic major economic downturn might be considered a business circumstance that is not reasonably foreseeable.
  - A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.
  - The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.
- Must still give as much notice as is practicable and explain the reason for the shortened notice.
- Not all states have similar rules:
  - California's new rule (Executive Order N-31-20).

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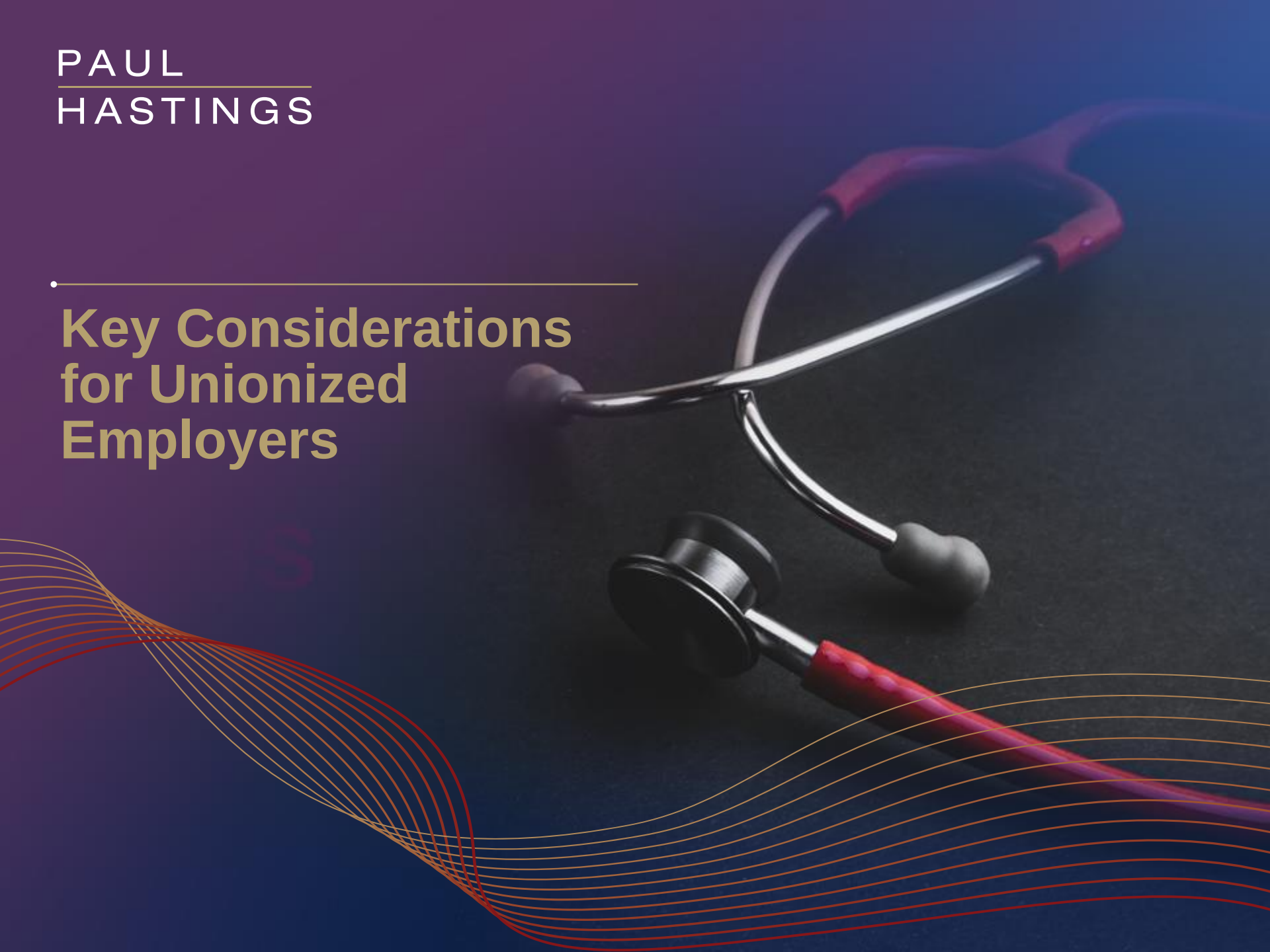
Key Considerations for Unionized Employers



APPLICABLE COLLECTIVE BARGAINING AGREEMENT

- If there is a CBA, you must check its terms first:
  - Management Rights clause;
  - Stand-alone layoff or severance clause; or
  - Seniority clause that contains a layoff process or super-seniority rights.
- Consider whether there is any past practice or applicable arbitration decision(s).
- Ensure consistency with your CBA.
  - Supervisors performing bargaining unit work.
  - Use of third-party contractors when bargaining unit is laid off.
- Notify the Union before employees.

BARGAINING OBLIGATIONS: DECISION AND EFFECTS BARGAINING

- Bargaining over many of the topics described above may be required.
- Exceptions to bargaining duty in emergencies.
  - A dire financial emergency requiring immediate action may excuse decision bargaining altogether; burden is on the employer to prove.
    - On March 27, 2020, NLRB General Counsel Peter Robb issued a summary of existing Board cases on bargaining duty in emergency situations. GC Memo 20-04.
  - If bargaining for a new contract (renewal or first contract), the general principle is that there must be an overall impasse before employer can declare impasse and implement proposed changes.
    - Exception: issue-specific impasse and implementation when a financial exigency, caused by external events, requires prompt action.
- Even if decision bargaining is excused, bargaining over the effects of the decision is generally required.

UNIONIZED EMPLOYERS

- Potential pitfalls in disparate treatment:
  - Although employer does not necessarily have to extend the same benefits to unionized employees that it extends to nonunion employees, it risks discrimination claims if it does not have solid contractual or business reasons for the distinction.
  - Conversely, if unionized employees are treated better, the employer risks employee discontent and potential organizing in its non-union population.
- Potential unfair labor practice charges stemming from work-from-home arrangements:
  - Surveillance of employees' electronic communications during work-from-home:
    - As long as employer is not targeting organizing, but is engaged in routine broad surveillance for business purposes, no NLRA violation should be found.

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Questions?

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