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'Perpetual' COVID Furloughs Invite Suits in Hospitality Space

By Stephen Harris, Sara Kalis & Elliot Fink

A new lawsuit brought in federal court might signal looming trouble for hospitality companies who have engaged in the common practice of utilizing 'perpetual' furloughs in the wake of the COVID-19 pandemic. Accused of "Severance Siphoning," the Miami Four Seasons was named as Defendant in a suit filed on May 17, 2021 by a putative class of each of its employees furloughed for more than 6 months. In the suit, the plaintiffs demand 60 days of back pay for their employer's alleged failure to properly issue a Worker Adjustment and Retraining Notification ("WARN") Act notice. Although initially brought in Florida, the plaintiffs seek nationwide class certification on the theory that a furlough lasting over 6 months is viewed as an "employment loss" for WARN Act purposes under prevailing DOL regulations. The WARN Act claim alone would not be particularly unique; however, the Complaint alleges that WARN Act claims are not covered by the arbitration agreement and attempts to use that as a way to keep the "Severance Siphoning" claim before the court.

In their complaint filed in the Southern District of Florida, the putative class members in *Aletta Van Balderen et al. v. Four Seasons Miami Employment Inc*. claim that they were furloughed for 14 months and that their former employer has already replaced their positions and the underlying work; therefore, they accuse the Four Seasons of creating a scheme to deprive these furloughed employees of their severance benefits. When Plaintiffs charge the Four Seasons Miami with a "Severance Siphoning Scheme," their theory is that workers who find themselves on "perpetual" furlough are ostensibly forced into voluntarily resigning, which deprives them of the severance benefits to which they would otherwise be entitled if they were terminated or laid off by their employer in the normal course of business. This case does not seek to redefine "employment loss" for WARN purposes, but instead seeks to create additional damages under the severance policy by virtue of the definition of "employment loss" in the WARN Act.

According to Department of Labor regulations at 29 CFR § 639.3(f)(1)(ii), for purposes of the WARN Act, an "employment loss" is defined as "a layoff exceeding 6 months." Pursuant to special statutory guidelines, the WARN Act requires the issuance of a notice where a qualifying work site suffers a "mass layoff" and the individual employee suffers an "employment loss"; otherwise, the employer could be liable for up to 60 days of pay and benefits to the terminated employees who were not properly notified under the WARN Act, which is what the putative class is claiming here.

This suit is particularly concerning for employers in the hospitality industry, as entities such as the Four Seasons have heavily utilized indefinite furloughs over permanent layoffs to navigate the turbulent pandemic economy, which has hit hospitality especially hard, since March of 2020. Other employers,

particularly those who have furloughed employees for any extended period of time, should consider strategies that may mitigate risks raised in this suit, such as whether the special rules at 29 CFR § 639.4(b), regarding extension of a layoff not initially anticipated to extend beyond 6 months, apply. Employers should also consider the terms of any severance policy to ensure it is appropriately drafted to avoid triggering the policy in unintended ways.

Please reach out to your Paul Hastings attorney if you wish to be added to a group that will receive notice of targeted developments on this matter.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Lauren L. Giovannone
1.213.683.6374
laurengiovannone@paulhastings.com

Stephen H. Harris
1.213.683.6217
stephenharris@paulhastings.com

Rick S. Kirkbride
1.213.683.6261
rickkirkbride@paulhastings.com

Derek V. Roth
1.213.683.6350
derekroth@paulhastings.com

Alan W. Weakland
1.213.683.6241
alanweakland@paulhastings.com

New York

Eric F. Allendorf
1.212.318.6383
ericallendorf@paulhastings.com

Eric R. Landau
1.212.318.6843
ericlandau@paulhastings.com

Sara B. Kalis
1.212.318.6021
sarakalis@paulhastings.com

Elliot R. Fink
1.212.318.6710
elliotfink@paulhastings.com