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*South Shore Chamber of Commerce Employment Law Update*

# Employment Strategies in a Recessionary Economy

*March 23, 2009*

*Presented by*

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# **Moderated By:** *Nan O'Neill*

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## **Wage Reductions and Work Furloughs**

*Kathryn M. Murphy*

## **Benefits, Cost-Cutting Modifications, Including Eliminations and Reductions**


*Katherine A. Hesse*

## **Strategic and Legal Considerations for RIF's, Exit Incentives, Severance Arrangements, Releases**

*Thomas W. Colomb*

## **The Workers Adjustment and Retraining Notification Act aka "WARN"**

*Geoffrey P. Wermuth*



# **Wage Reductions And Work Furloughs**

*March 23, 2009*

*Presented by  
Kathryn M. Murphy*

# Things to Consider

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- Where permissible – May Be Prospective Only
- Adequate Notice
- Exempt and Non-exempt Employees: Different Issues
- Careful and Thorough Communications
- Do Not “Defer” Pay

# Exempt Employees

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- Generally Must be Paid on a “Salary Basis”
- Reductions in pay, deductions from pay, pay furloughs, etc..... can easily cause an employer to run afoul of the “salary basis” requirement....

*See later slides on Salary Basis*



# **\*\* Careful Communications \*\***

# Massachusetts Wage Payment Law (M.G.L c. 149, §148)

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- The Massachusetts Wage Payment Law
- Enforces Agreements To Pay Wages
- Not Limited To Minimum Wage Or Overtime

# Timing of Payment of Wages Under Mass Wage Law

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“Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week . . . .”



# Timing of Payment

## *Cont...*

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“ . . . and provided, further, that employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; . . . ”

# Massachusetts Wage Payment Law

## *Cont...*

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The word “wages” shall include any holiday or vacation payments due an employee under an oral or written agreement.

# Payment Upon Separation Under Mass Wage Law

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“ . . . any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge . . . ”

# Commissions Under Mass Wage Law

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“ . . . This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty. . . .”

# Mass Wage Law Does Not Permit Contracting Out Of Its Requirements

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“ . . . No person shall by a special contract with an employee or by any other means exempt himself from this section. . . . ”

# Individual Liability Under Mass Wage Law

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“The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation . . .”

# Changing Pay Periods

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“An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.”

# Suitable Pay Slips and Check Stubs

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An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.



# Defenses to Non-Payment of Wages (M.G.L. Chapter 149, section 150)

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“ . . . On the trial no defense for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid. The defendant shall not set up as a defense a payment of wages after the bringing of the complaint.”

# Bringing a Complaint Under the Mass Wage Law

“Any employee claiming to be aggrieved by a violation of section 33E, 148, 148A, 148B, 150C, 152, 152A or 159C or section 19 of chapter 151 may, at the expiration of *ninety days after the filing of a complaint with the attorney general, or sooner, if the attorney general assents in writing*, and *within three years* of such violation . . . a civil action for injunctive relief and any damages incurred, including *treble damages for any loss of wages and other benefits*. An employee so aggrieved and who prevails in such an action shall be *entitled to an award of the costs of the litigation and reasonable attorney fees.*”  
*[Emphasis Added]*

*See M.G.L. c. 149, § 150*

# Non-Payment of Wage Case Example

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## **Gibbs v. Archie, 2002 Mass. App. Div. 205 (2002)**

As a result of severe financial problems the employer was unable to meet his payroll obligations. As a result the employee was not paid for several weeks. In total, the employer failed to pay the employee wages amounting to \$2,720. At the time of this case, the main issue before the appellate court was whether the employee was entitled to treble damages as a matter of law pursuant to [M.G.L c. 149, § 150](#), after having prevailed on his claim for non-payment of wages.

# Treble Damage Amendment

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Now, the statute is clear (and has been amended) to state that treble damages are mandatory in a Non-Payment of Wage claim under Chapter 149, section 148.

# Non-Payment of Wage Case Example

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## Allen v. Intralearn Software Corp., 2006

### Mass. App. Div. 71

Facing financial difficulties, the employer offered its employees a choice between being laid off and accepting reduced compensation. The employee alleged that he accepted a reduction with the understanding that unpaid amounts would be paid later, while defendants denied that such an agreement was made. The employee presented an e-mail from the president stating that unpaid wages would be paid back later and the employer's unsigned, undated letter acknowledging responsibility for the unpaid amount.

# Non-Payment of Wage Case Example

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## Allen v. Intralearn Software Corp. cont...

Among other things, the appellate court affirmed the summary judgment as to liability. The employee was owed deferred compensation which was based on his job performance and therefore constituted wages under the act. The employer violated the act by failing to pay it. The chief operating officer, who wrote the undated letter, was liable as an officer having management of the corporation under [M.G.L c. 149, § 148](#) of the act. Defendants also violated [§ 148](#) of the act by attempting to make the employee's receipt of his wages contingent upon the confidentiality of his termination agreement.

# Non-Payment of Wage Case Example

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## Dobin v. CIO view Corp., 16 Mass. L. Rep. 785 (Mass. Super. 2003)

A company hired an employee who had worked as a consultant. Five months later, the company's founder told the employee that the company was bankrupt and asked her if she would agree to defer receipt of her salary to help the company survive. After that conversation, the company deferred payment of the employee's salary for nine months. Two months after the employee started receiving her salary again, she informed the founder that she had learned it was unlawful to defer compensation, even if an employee agreed to a deferral. Seven days later, the company gave the employee checks for all salary she was owed, but terminated her employment. The employee immediately filed suit.

# Non-Payment of Wage Case Example

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## Dobin v. CIO view Corp. cont...

The trial court held that (1) the company violated [M.G.L c. 149, § 148](#) by deferring payment of the employee's salary, but under the circumstances of the case, the employee was not entitled to treble damages; and (2) because [M.G.L c. 149, § 150](#) gave the employee a statutory cause of action from wrongful termination based on her claim that she was being penalized for asserting her rights under Massachusetts's Wage Act, the court would dismiss her common-law claim for wrongful termination.





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# **Exempt Employees and the Salary Basis Requirement**

# Executive, Administrative and Professional Exemption

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In most instances, to qualify for exempt status under one of these exemptions, an employee must meet both of the following requirements:

- Perform the Job Duties of an Executive, Administrative or Professional employee, as set forth in the FLSA Regulations.
- Be Compensated on a “Salary Basis” (as defined in the Regulations) at a rate not less than \$455 per week.

# Executive Exemption

## (Quoting from U.S. DOL ESA Fact Sheet 17A)

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The employee must meet all four of the following criteria:

- ***Be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;***
- Have as his or her primary duty managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

# Executive Exemption

(Quoting from U.S. DOL ESA Fact Sheet 17A)

*cont...*

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- Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

(Limited exceptions apply for 20% business owners and persons earning at least \$100,000 per year)

# Administrative Exemption

## (Quoting from U.S. DOL ESA Fact Sheet 17C)

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To qualify for the administrative employee exemption, all of the following criteria must be met:

- *The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;*

# Administrative Exemption

(Quoting from U.S. DOL ESA Fact Sheet 17C)

*cont...*

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- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(Limited exceptions apply for persons earning at least \$100,000 per year)

# **Administrative Exemption**

## **(Quoting from U.S. DOL ESA Fact Sheet 17C)**

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The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same Educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment, as defined by the regulations.

# Learned Professional Exemption

## (Quoting from U.S. DOL ESA Fact Sheet 17C)

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To qualify for the learned professional employee exemption, all of the following tests must be met:

- *The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;*
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;



# Learned Professional Exemption

(Quoting from U.S. DOL ESA Fact Sheet 17D)

*cont...*

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- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(Limited exceptions apply for persons earning at least \$100,000 per year – see regulations)

# Creative Professional

## (Quoting from U.S. DOL ESA Fact Sheet 17D)

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To qualify for the creative professional employee exemption, all of the following criteria must be met:

- *The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;*
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(Limited exceptions apply for persons earning at least \$100,000 per year – see regulations)



Show.....

- Job Duties of Exempt Employee
- “Salary Basis”

# Salary Basis

## (29 CFR 541.118 (a))

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- An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly received each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation,....

# Salary Basis

(29 CFR 541.118 (a)) *cont...*

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. . . . which amount is not subject to reduction because of variations provided below, *the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work. [Emphasis Added]*

***But see the next section.....***

# Salary Basis

*(29 CFR 541.118 (a) (1)) cont...*

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... 1) An employee will not be considered to be “on a salary basis” if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.

Accordingly, if the employee is ready, willing, and able to work deductions can not be made for time when work is not available.

Note: Can the above cited sections be reconciled?

# Permissible Deduction's

(*See 29 CFR 541.118 et. seq*)

- One or more *full* days for personal reasons
- One or more *full* days for sickness or disability, if made in accordance with a bona fide plan covering such absences
- Offset amounts received as jury or witness fees or temporary military duty

# Permissible Deduction's

*(See 29 CFR 541.118 et. seq) cont...*

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- Suspensions related to infractions of safety rules of *major significance*
- One or more full days for suspensions for violations of serious workplace conduct rule infractions (written): see regulations...
- Unpaid FMLA leave



# Non-Permissible Deductions

(29 CFR 541.118 *et. seq*)

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- Anything not permitted by regulations
- Closure due to inclement weather
- Absences for jury duty
- Illness, when no bona fide plan
- Partial day absences

# Opinion Letters

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- DOL Opinion Letters should Not Be Relied Upon as a Final Statement of the Law
- Opinion Letters are Fact Specific
- Opinion Letters are not Statutory or Regulatory law
- Guidance as to how DOL May come out on an issue – Not Definitive

# **DOL Opinion Letter FLSA2008 – 1NA**

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**You ask whether the minimum salary of \$23,660 per year or \$455 per week required under 29 C.F.R. § 541.600 may be prorated to reflect the part-time status of an employee. You have provided an example of a full-time employee who is paid a salary to \$15,000 annually. You state that the employee would still be exempt under section 13(a)(1) of the FLSA at the prorated salary of \$15,000.**

# DOL Opinion Letter

## FLSA2008 – 1NA *cont...*

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There is no provisions to prorate the salary requirement of \$455 per week when an employee's hours are reduced. The employee must received a salary of at least \$455 in each week in which he or she performs any work regardless of the number of days or hours worked to qualify for the exemption in section 13(a)(1). See Wage and Hour Opinion Letter FLSA2006-10NA. ....

# **DOL Opinion Letter 2008 – 1NA *cont...***

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**....It is our opinion that the salary requirement of \$455 per week may not be prorated to reflect reduced hours, and the employee paid a salary of \$288 per week does not qualify for the exemption in section 13(a)(1) of the FLSA.**

# DOL Opinion Letter 2004-5

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....As you discussed in your letter, §22b00 of the Field Operations Handbook (FOH) **states that an employer may make a bona fide reduction in an employee's salary because of a "reduction in the normal scheduled workweek" so long as the reduction "is not designed to circumvent the salary basis requirement."**

# **DOL Opinion Letter**

## **2004-5 *cont...***

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**In the 1970 opinion letter discussed above, we addressed a situation involving an employer that already had made extensive layoffs, but needed to further reduce costs either by reducing the workweek of its employees or laying off additional employees.**

# **DOL Opinion Letter 2004-5 *cont...***

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**.....We concluded in that instance that the salary basis requirement would not preclude a reduction in employees' salaries to match the reduced workweek, because the reduction to avoid layoffs was bona fide and not designed to circumvent the salary basis requirement. A March 4, 1997 opinion letter allowing a salary reduction when the normal workweek was reduced from 40 to 32 hours to avoid layoffs due to reduced state funding for mental health services reached the same result...**



# **FLSA Opinion Letter**

## **2006-6**

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Policy requiring minimum hours and make-up time permissible so long as no reductions in salary.

# **FLSA Opinion Letter**

## **2006-7**

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Making deductions and/or charging exempt employees for lost or damaged property is an impermissible deduction from salary.

# Questions?





# **Benefits, Cost-Cutting Modifications, Including Eliminations and Reductions**

*March 23, 2009*

*Presented by  
Katherine Hesse*

# Employee Benefits in a Recession: Introduction

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- Benefit costs may make up 25-40 % of payroll costs.
- Cutting these costs is a necessity for many employers today.
- What cost cutting can be done legally?

# Employee Benefits in a Recession: Different Plans – Different Rules

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- Different rules apply to
  - “pension” plans,
  - “welfare” plans,
  - unfunded benefits, and
  - government mandated benefits.
- Union plans versus company plans
- Single employer versus multi-employer plans

# Employee Benefits in a Recession: Pension Plans

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- Pension plans include
  - Defined benefit plans
  - Defined contribution plans
    - 401(k) plans
    - 403(b) plans
    - 457 plans

# Employee Benefits in a Recession: Pension Plans

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- Defined benefit plans are subject to the “anti-cutback rule”. Employers may not retroactively eliminate retirement benefits, however, future accruals may be reduced or eliminated.
- This anti-cutback rule does not apply to
  - cuts in other benefits, such as health, disability and life insurance, or
  - ancillary benefits under the pension plan, *e.g.*, early retirement options.



# Employee Benefits in a Recession: Pension Plans

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- The anti-cutback rule does not prohibit an employer from converting from a defined benefit plan to a cash balance plan, as long as certain requirements are met.
- Employers may not retroactively reduce or eliminate promised defined contribution retirement benefits.
  - Future contributions may be reduced or eliminated.
  - Mandatory employer match may be made discretionary.

# Employee Benefits in a Recession: Pension Plans

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- Withdrawing (totally or partially) from a multiemployer plan can have significant adverse consequences.
- Make sure you know what your withdrawal liability will be before taking employment actions that will have a significant reduction in plan participants.
- Partial plan termination for qualified retirement plans can be an unintended consequence of a RIF.

# Employee Benefits in a Recession: Retirement Benefits

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- Partial plan termination occurs when there is a significant reduction in plan participation as a result of an employer initiated action.
  - Can also happen if there is a plan amendment adversely affecting the rights of employees to vest or to cease or decrease future benefit accruals.
- A RIF of 20% or more is presumed significant.
- All affected participants must be 100% vested in their plan accounts.

# Employee Benefits in a Recession: Retirement Benefits

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- Changes require the adoption of a plan amendment and notice to participants prior to the effective date of the change.
- A summary of material modifications supplement to the summary plan description must also be issued to participants within 210 days of the close of the plan year during which the modifications were made.
- Simplify plan and options to reduce administrative expense.

# Employee Benefits in a Recession: Pension Plans

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- Do not be tempted to “dip into” pension monies. They must be held in trust.
- Deductions from employee paychecks are held in trust as well: do not be tempted to use the “float” on 401(k) contributions deducted from employee paychecks.
- Hardship withdrawal provisions are available in some plans.

# Employee Benefits in a Recession: Pension Plans

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- If you take advantage of plan loan provisions in your pension plans:
  - Make sure any loans are documented.
  - Make sure they bear a commercially reasonable rate of interest.
  - Make sure they are for the legally permissible time period.
  - Make sure they are paid back by payroll deduction.
  - Beware of prohibited transaction rules for “parties in interest.”

# Employee Benefits in a Recession: Welfare Benefits

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- Welfare plans may include
  - Health plans
  - Dental plans
  - Life insurance
  - Long term disability plans
  - Short term disability plans

# Employee Benefits in a Recession: Welfare Benefits

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- A general rule of thumb is that, absent a contract to the contrary, employers are free to change or eliminate welfare plans prospectively upon appropriate notice to participants.
- Employers with unions may have contractual or bargaining restrictions on their ability to change or eliminate plans.
- Public sector employers may have statutory restrictions as well.



# Employee Benefits in a Recession: Welfare Benefits

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- Massachusetts employers may face penalties under the Massachusetts Health Care Reform Act for elimination of a health plan. Plan elimination could cause imposition of the Fair Share Contribution penalty.
- Further plan elimination or a reduction in benefits could have Minimum Creditable Coverage implications for employees.

# Employee Benefits in a Recession: Welfare Benefits

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- The regulations require that the plan and SPD specify the method in which a plan may be amended or terminated.
- A formal plan amendment properly adopted by those with the authority to do so is necessary to amend or terminate the plan.

# Employee Benefits in a Recession: Welfare Benefits

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- Notice to participants will also be required (summary of material modification or notice of intent to terminate)
- Although in many instances, ERISA allows Summaries of Material Modifications to be sent later, the better practice to reduce litigation risk is to make sure participants have advance notice and appropriate ability to plan before making major changes.

# Employee Benefits in a Recession: Welfare Benefits

So where are savings available other than eliminating a plan entirely?

- Most employers moved away from indemnity plans some time ago and moved to some form of managed care, HMO, PPO or POS products.
- Managed care is universally available although the savings are not as high in New England because of the culture of relatively free access to physicians and hospitals of choice.

# Employee Benefits in a Recession: Welfare Benefits

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- Tiered systems more available
- Pre-authorization and concurrent management of hospitalization commonplace
- Large case management
- Disease management
- Focused intervention (*e.g.*, asthma, diabetes)
- Substance abuse
- Smoking cessation
- Weight management, wellness programs

# Employee Benefits in a Recession: Welfare Benefits

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- Reducing or eliminating employer contribution to a plan (note the new HCR rules)
  - Employees
  - Family coverage
- Moving to a high deductible plan; self-funding a portion of the cost of a higher deductible plan
- Plan design/cost-sharing options/eligibility restrictions can reduce employer cost significantly.

# Employee Benefits in a Recession: Welfare Benefits

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- Plan design changes could include
  - Higher deductibles
  - Higher co-pays
  - Annual or lifetime maximum
  - Smaller employer contribution to coverage. Reduced or eliminated family coverage.
  - Elimination of certain benefits or lower daily, annual or lifetime maximum for various benefits.
- Changes in retiree coverage, if any, should be reviewed carefully with counsel.

# Employee Benefits in a Recession: Welfare Benefits

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- Certain insured benefits may provide for an individual conversion option.
- Employer may wish to look at so-called “voluntary benefits”, that is, making benefits such as life insurance, auto insurance, disability insurance, long term care insurance available to employee, but on an employee pay all basis.
  - Exercise due care in the selection and monitoring of vendors.



# Employee Benefits in a Recession: Welfare Benefits

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- For elimination of coverage (including through a RIF), be aware of COBRA rules, including the new subsidy.
- When an employee is involuntarily terminated, s/he and his/her qualified beneficiaries may be entitled to subsidized COBRA for up to 9 months with the employer picking up 65% of the cost until getting reimbursed through the payroll tax system.
- New COBRA notices are required (see Client Alert and materials behind Tab 3 for more information on COBRA).

# Employee Benefits in a Recession: Welfare Benefits

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- And don't forget state mini "COBRA's and plant closing or partial plant closing laws or tin parachute laws which may provide for continuation of coverage
  - Massachusetts "COBRA" covers employers with 2 to 19 employees, which unlike federal COBRA provides continuation coverage to same-sex spouses

# Employee Benefits in a Recession: Unfunded Benefits

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- Unfunded benefits paid out of a general account may include:
  - Paid or unpaid leaves of absence
  - Paid vacation time
  - Earned time
  - Paid sick time
  - Paid holidays
  - Bereavement leave
  - Personal days

# Employee Benefits in a Recession: Unfunded Benefits *cont...*

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- Other unfunded benefits may include:
  - Discount programs
  - Transportation assistance programs
  - Tuition assistance programs
  - On-site day care
  - Cafeteria/discounted meals
  - Mileage/expense reimbursement or allowance

# Employee Benefits in a Recession: Unfunded Benefits *cont...*

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- The general rule is that these benefits are at the discretion of the employer provided the employer has not created a contractual obligation to pay them. Thus, these benefits can normally be changed prospectively upon notice. The length of a reasonable notice period will vary depending on the type of benefit.
- Be careful of promises to pay contained in offer letters, employee handbooks, etc.

# Employee Benefits in a Recession: Government-Mandated Benefits

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- Governmentally mandated benefits include
  - Social security
  - Workers compensation
  - Unemployment insurance
  - Quasi mandated benefit: health insurance is now play or pay in Massachusetts. Federal proposals are pending.
  - Government-mandated benefits must be offered but funding options can be explored that can save significant dollars.

# Employee Benefits in a Recession: Other Issues

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- Early or voluntary retirement windows or longer term programs.
  - Discrimination issues
  - Releases (voluntariness, consideration, etc. )
- Severance pay plans may or may not be ERISA plans so be careful. There are pros and cons each way.
- Where applicable, consider Section 409A deferred compensation rules and their effect on severance. Is it an excluded “separation pay plan”?

# Employee Benefits in a Recession: Employment Issues

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- It is unlawful to suspend, expel, discipline, or discriminate against a participant or beneficiary
  - for exercising any right under ERISA or
  - for the purpose of interfering with the attainment of a benefit.
- Note potential ADA, ADEA claims as well.



# Employee Benefits in a Recession: Employment Issues

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- A pattern of abuse under a pension plan (such as dismissal of employees before their accrued benefits become non-forfeitable) tending to discriminate in favor of employees who are highly compensated can have adverse consequences.
- Do not misrepresent availability of coverage.
- Do NOT fail to remit timely employee contributions to health or 401(d) plans – this is a big focus of EBSA enforcement!

# Employee Benefits in a Recession: Summary

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- Pitfalls abound for the unwary employer attempting to cut benefit costs, but with the proper planning and advice, dramatic cost savings can often be achieved.
- Know the legal and practical restraints on your actions and their consequences before making a decision – do your homework!
- Remember that you may have two roles, that of fiduciary as well as employer/plan sponsor and act accordingly.

# Employee Benefits in a Recession: Summary

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- Seek qualified professional help well-versed in not only in employment but also in ERISA, COBRA, HCR and other employee benefits issues.
- Long range planning is essential to long term cost control, however significant savings can also be achieved in a short time horizon, in some cases almost immediately.
- Creative benefits planning can also be used to improve morale and deal with issues created by layoffs, furloughs, etc.

# Questions?





# **Strategic and Legal Considerations for RIF's, Exit Incentives, Severance Arrangements, Releases**

*March 23, 2009*

*Presented by  
Thomas W. Colomb*

# Reductions in Force

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- Attrition / Hiring Freeze
- Exit Incentive Program
- Individual Separations
- Layoffs
- Facility/Business Closure

# Exit Incentives

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- Voluntary Separation Incentive Plan (VSIP)
  - *employees/classes of employees without regard to retirement eligibility*
- Retirement Incentive
  - *enhanced benefits offered to employees of retirement age*

# Strategic Considerations

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- Select (best) options
- Review obligations
  - contracts, CBAs, covenants, policies
  - WARN, state notice
- Determine eligible employees
  - (Retention of key employees)
- Determine benefits/incentives
- Determine timeframe(s)



# Strategic Considerations *cont...*

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- Development and legal review of (written):
  - exit incentive program
  - severance program (ERISA/409A issues)
  - layoff criteria
  - EEO/disparate impact analysis for layoff
  - Severance Agreements / Releases

# Layoff criteria - objective, non-discriminatory:

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- seniority/length of service
- employment status (e.g., temporary, per diem, part-time)
- job duties or classification
- transferability of skill set
- pre-existing performance evaluations/metrics
- prior disciplines?

# Legal Considerations: Discrimination

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- Disparate Treatment
  - Hiring Freeze
  - Exit Incentives
  - Individual Terminations
  - Layoffs

# Legal Considerations: Layoffs

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- Contractual/collective bargaining issues
- WARN?
- Disparate impact
- Employees on leave
  - FMLA, MMLA, USERRA
- A word about “problem employees”

# Legal Considerations: Disparate Impact of RIF

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- Facially-neutral layoff program that has a disproportionate adverse impact on employees in protected classification(s)
- Consider age, gender, other classifications
- Consider:
  - % of protected classification in selected group vs. entire unit
  - % of protected classification to be eliminated in RIF

# Legal Considerations: Severance Agreements

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- Provisions to consider
- Effect on unemployment benefits
- Potential “pitfalls”
  - Attorneys fees, liquidated damages, “claw-back”

# Legal Considerations: Releases

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- Release is a contract – requires consideration
- Beware of “boilerplate” / unwaivable claims
- Restriction of right to file claim vs. damages/consideration
- Settlement of pending claims
  - FMLA
  - Workers’ Compensation

# Legal Considerations: Releases under OWBPA

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- Must comply with detailed regulations, including:
  - consideration “in addition to anything of value to which the individual is already entitled”
  - Employee must be given 21 / 45 days to consider and 7 days to revoke
  - Material change restarts the clock



# Legal Considerations: Releases for “Programs” under OWBPA

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- 45 days to consider
- Must provide additional information to employee:
  - group(s) covered, eligibility factors, time limits
  - job titles and ages of individuals eligible/selected
  - ages of all individuals in the same job classifications who are not eligible/selected
- “Program” is case-by-case determination. Voluntary or involuntary. Layoff of one person can be a “program”

# Questions?



# The Workers Adjustment and Retraining Notification Act aka “WARN” <sup>[1]</sup>

*March 23, 2009*

*Presented by  
Geoffrey P. Wermuth*

*[1] Also be sure to check state law requirements, such as “mini WARN Acts,” health insurance continuation requirements, etc.*

## Basic WARN rule:

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An employer must give a union, employees, the local government and the state, at least sixty (60) calendar days notice of a covered “plant closing” or “mass layoff”.

- Paying out accrued benefits, like 2 weeks of vacation, or severance pay that is legally required (such as under a collective bargaining agreement or employer policy) does not count.

## Basic WARN rule: *cont...*

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- Employees may individually waive their right to the 60 day notice; a union may not waive that right for them. Severance payments made that are not “required by any legal obligation” will offset any damages.
- Payment in lieu of notice is not recognized in the statute or the regulations, but even the Department of Labor concedes that pay in lieu of notice “effectively precludes any [judicial] relief.” Note that if pay in lieu of notice is an option, an employee who takes another job during what would have been the notice period is not entitled to any further payment in lieu of notice after taking that job.

# EXCEPTIONS:

## 3 Exceptions to Providing WARN Notice:

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1. If the employer reasonably believed that giving notice would impair its ability to get needed business or capital infusion;
2. If closing due to business circumstances that are not reasonably foreseeable; or
3. If due to natural disaster.

In case of exceptions, the employer must give as much notice as practicable.

## **WARN applies to:**

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Employers with 100+ full-time employees (or has 100+ employees who work at least a combined 4,000 hours/week), defined as employees averaging over 20 hours/week. WARN covers private sector employers and quasi-public entities (MWRA, for example), but does not cover governmental entities.

## Three ways to be subject to WARN:

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- A. A "plant closing," where an operating unit or plant at a single site of employment is shut down and at least fifty employees suffer an "employment loss"
  
- B. A "mass layoff," where the operating unit at the single site of employment still operates, but either (1) 500 employees, or (2) at least 50-499 employees constituting at least 33% of the workforce, suffer an "employment loss" within any 30 day period.



# Three ways to be subject to WARN: *cont...*

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C. A "deemed" plant closing or mass layoff, which occurs when there have been a series of employment losses at a single site of employment involving a total of at least 50 employees who have suffered an employment loss over any 90 day period; these are added together, independently of any other plant closing or mass layoff that was over 50 employees, to "deem" that a plant closing or mass layoff has occurred. In this case, the 60 day notice had to have been given 60 days prior to the first employment loss in that 90 day period. This has to be closely evaluated when there is a "winding down" of a plant or staggered layoffs.

# Counting:

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- All types of employees count, including management and supervisory employees.
- Part-time employees do not count towards the numbers above, but part time is defined as employees who averaged fewer than 20 hours/week for the 90 days prior to the date the notice is due. So 20 hour people count, as do 24 hour, 28 hour, etc. Part-time employees are, however, entitled to receive the notice.

## Counting: *cont...*

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- Also, employees offered a transfer within a reasonable commuting distance, for-cause terminations, retirees, and people who resign are not counted. Employees offered a transfer outside a reasonable commuting distance are not counted if they accept the offer; if they decline, they are counted.

# What is an “employment loss”?

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An “employment loss” is a termination of employment, a layoff from that employer of more than 6 months, or an hours reduction of 50% or more for any 6 month period.

# What is a “single site of employment” or “operating unit”?

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- A single location or group of contiguous locations, such as an industrial park housing a single employer, if within reasonable geographical proximity and share staff and equipment. On the other hand, a single building occupied by different employers could be several single sites of employment. For employees who travel, their site of employment is the home base from which work is assigned or to which they report.

# What is a “single site of employment” or “operating unit”? *cont...*

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- An “operating unit” is an organizationally or operationally distinct product, operation or work function within or across facilities at a single site of employment, which varies depending on the facts. A single site of employment containing a manufacturing facility, a warehouse, and a separate administrative facility could be three separate operating units.

# What if I have “bumping” by seniority?

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An employer with a seniority-based layoff procedure, whether under a collective bargaining agreement or not, should use its best efforts to give notice to the individuals who would actually be laid off at the end of the bumping process. If that is not possible, then notice should be given to the incumbent in the position being eliminated.

# Who Gets Notice?

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- the union for represented employees;
- individual employees who are not represented by a union;
- The state “rapid response dislocated worker unit”;
- local chief elected official.



# Notice:

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Generally notices must be written in clear and specific language that employees can easily understand and among other things must contain:

- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

# Date Of Termination/Layoff:

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- The WARN regulations recognize that it may not always be possible to identify, 60 days in advance, the exact date a termination or layoff will occur. WARN notice may identify a two-week (14-day) period during which terminations/layoffs will take place.

## Date Of Termination/Layoff: *cont...*

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- Additional notice is required if the actual date of separation is postponed until after the 14 day period. If the postponement is for fewer than 60 days, the additional notice need only refer to the prior notice, the new date of the planned action, and the reasons for the postponement. If the postponement is for more than 60 days after the end of this 14 day period, then the additional notice must be treated as a new notice and contain all the information required in an original notice.

# What happens if I don't give proper notice?

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You will be liable for 60 calendar days of pay and benefits and possibly attorneys fees for failing to give notice to employees, and a civil fine of \$500.00/day for failing to give notice to the local chief elected official unless back pay and benefits are paid within 3 weeks of the closing. Note that the 60 days does not begin to run until employee receipt of the notice, not when it is sent.

# Are there any specific Massachusetts requirements?

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## Massachusetts Plant Closing Law:

- Massachusetts does have a Plant Closing law, G.L. c. 151A, §71A-H, but no notice to employees is required for either a covered plant closing or a partial plant closing. It contains a number of requirements subject to legislative appropriation, but it has never been funded. However, the Director of the Department of Labor and Workforce Development must be notified.

# Are there any specific Massachusetts requirements?

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## Massachusetts Plant Closing Law:

### ■ Its Two Provisions:

- (A) First is the eligibility of employees losing jobs due to covered plant closings or partial closings for reemployment assistance benefits paid out by DET initially, but then billed to the employer.

# Are there any specific Massachusetts requirements? *cont...*

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- (B) Second is a requirement that any employee eligible to receive reemployment assistance benefits also shall be eligible to receive health insurance benefits.

**Both these provisions, however, are “subject to appropriation,” and they have not been funded or at least 15 years, and in 1997 DUA rescinded its regulations under these statutes.**

# Massachusetts “Tin Parachute” Statute:

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Massachusetts also has on the books a so-called “tin parachute” statute, G.L. c. 149, §183, which essentially mandates severance pay for employees losing jobs due to a “transfer of control” of the company. The severance pay under this statute is 2 weeks of pay for each year of service. However, the federal courts have held that this statute is preempted by ERISA since it required the employer to create an “ongoing administrative scheme” for payment of severance benefits. *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849 (1st Cir. 1993).



# Questions?





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