

EMPLOYER FAQs ON LIQUIDITY CONCERNS IN LIGHT OF THE SVB CRISIS

Insights

Mar 13, 2023

The recent collapse of Silicon Valley Bank highlights many of the concerns that employers might face should they find themselves in the midst of a liquidity crisis. Making payroll, arriving at decisions related to wage reductions, considering furloughs – and possibly reductions-in-force – are just some of the actions you might need to take into consideration. But each of these potential moves carry with them significant legal risk and therefore must be approached with care. This set of FAQs provides employers with a general overview of the most significant topics on your mind during any liquidity crisis.

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WAGE AND HOUR ISSUES

Does the fact that we cannot access our funds provide a defense to late or non-payment of wages?

Generally, no. While the reason for late or non-payment of wages may impact the potential for civil or criminal penalties, it is not likely to serve as a viable defense to late or non-payment of wages, or potential liquidated damages (which, in some states, like Massachusetts, are automatic regardless of intent).

What are the penalties for non-payment of wages?

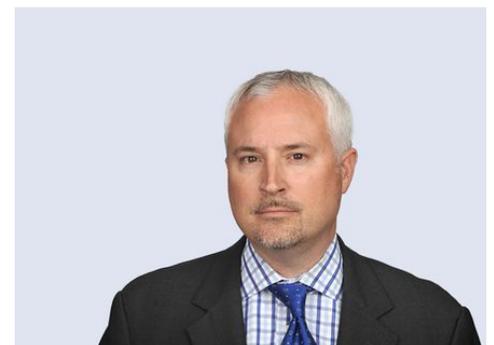
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The penalties for non-payment of wages, which can arise under both federal and state law, can be significant.

Federal Wage and Hour Law

The federal Fair Labor Standards Act (FLSA) contains, among other things, minimum wage and overtime requirements for non-exempt employees. Failure to pay minimum wage can result in civil penalties of \$1,000 per violation. Although very rare, egregious and willful violations can also result in fines of upwards of \$10,000 and/or imprisonment for upwards of six months.

In addition, employers can be liable for:

- the amount of the unpaid wages,
- double that amount as liquidated damages (unless you can show you acted in good faith and had reasonable grounds for believing you were complying with the FLSA), and
- the attorneys' fees and costs of any employee who pursues such a claim.

Workers and former workers frequently bring such claims on a class or collective basis, seeking such damages for themselves and all those similarly situated – significantly raising the stakes when it comes to your legal exposure.

State Laws

State laws imposing penalties for non-payment of wages vary widely, with some providing particularly draconian liability well above those you find in federal law. Here are some examples:

California

Labor Code section 204 generally requires employers to pay employees twice per month on designated paydays. If the employer fails to do so, the penalty for any initial violation is \$100 for each failure to pay each employee under Labor Code section 210. For each subsequent violation or any willful or intentional violation, the penalty is \$200 for each failure to pay each employee, plus 25% of the amount of wages unlawfully withheld. The State of California takes the position that the higher penalty for subsequent violations will apply after notice to the employer of a previous violation



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has been established, regardless of whether penalties were actually assessed.

Alternatively, an employee may seek a civil penalty under the Private Attorneys General Act (PAGA) in similar amounts: \$100 for the initial violation and \$200 for each subsequent violation. An employee can seek and recover penalties under section 210 or PAGA, but not both for the same underlying violation. For penalties recovered under PAGA, 75% of the recovered penalties are paid to the state and 25% paid to the employee.

In addition, employees may seek to add additional penalties, such as wage statement penalties under Labor Code section 226. Those penalties are \$50 for the first failure to provide a timely wage statement and \$100 for each subsequent failure.

Both PAGA actions and actions under section 226 also allow for the employee to recover reasonable attorneys' fees and costs. Of course, if the wages are not paid, employees will be permitted to recover the unpaid wages and liquidated damages in an amount equal to the unpaid minimum wages. California also imputes personal liability to an "owner, director, officer, or managing agent of the employer" of an employer that does not pay minimum wage or fails to provide accurate wage statements under Labor Code section 226.

In addition, employees who were separated from employment but not paid all wages owed will be entitled to collect penalties under Labor Code section 203. Penalties are one day of the employee's wages for each day that the wages are not paid, capped at a maximum of 30 days. For instance, an employee who is paid \$20 per hour and works a typical eight-hour work day will be entitled to collect \$160 per day that the wages remain unpaid, and the penalties can continue for up to 30 days.

Again, an "owner, director, officer, or managing agent of the employer" may also be held personally liable, including for the penalties under section 203. While employers can defend against a claim for section 203 penalties on the basis of a "good faith dispute," that defense will likely be unsuccessful in circumstances involving a liquidity emergency.

Colorado



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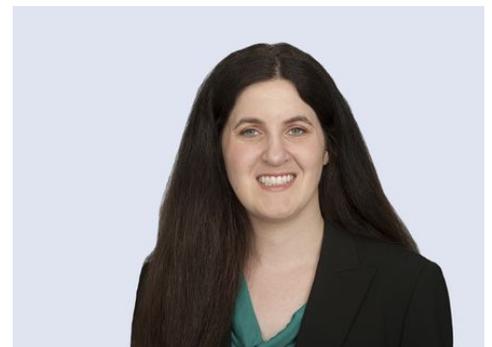
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Under Colorado law, wages must be paid at least once per month or no later than ten days following the close of the regular pay period. Failure to pay wages owed within 14 days of a demand by the employee will be penalized the greater amount of two times the amount owed or \$1,000. For willful violations, the penalty is increased to the greater of three times the amount owed or \$3,000.

If wage theft is determined to be willful, criminal penalties may also apply – the “wage theft” is considered a felony if the amount owed is greater than \$2,000. Criminal penalties will also apply to employers unable to pay wages due to Chapter 7 bankruptcy or other court action resulting in the employer having limited control over its assets.

Massachusetts

Civil and criminal penalties can range depending on the willfulness and severity of the violation, and whether the employer has any prior violations. The maximum civil penalty for employers with no specific intent to violate the law and no history of violations is \$7,500. Employers can be liable for the amount of the unpaid wages, treble damages as liquidated damages (which is automatic and regardless of intent or the reason for the violation), and attorneys’ fees and costs.

New Jersey

Civil and criminal penalties are very stiff under the New Jersey Wage Theft Act. Penalties include disorderly person convictions (first or second offenses) with fines of \$500 to \$1,000 (\$1,000 to \$2,000 for a second offense) and imprisonment for 10 to 100 days, or both. A third or subsequent violation can result in a conviction for a third-degree crime called “pattern of wage nonpayment.”

Employers can be liable for the amount of the unpaid wages, liquidated damages of up to 200%, and attorneys’ fees and costs. Employers can avoid liquidated damages for a first violation if they demonstrate good faith and reasonable grounds to believe their actions were not in violation of the law, the violation is admitted, and the amount owed is paid within thirty days

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Service Focus

California Class Actions and
PAGA

Employee Benefits and Tax

Labor Relations

Reductions in Force (RIFs)

Wage and Hour

It is a misdemeanor to fail to pay wages under NYLL 662, which carries potential imprisonment for up to a one year and fines of \$500 to \$20,000. Employers can be liable for the amount of the unpaid wages, liquidated damages equal to 100% of the underpayment plus 9% interest, and attorneys' fees and costs.

What are the penalties for late payment of wages?

The penalties for late payment of wages under the FLSA are essentially the same as those for nonpayment of wages. The same may be true under state law and will vary from state to state.

Last year, for example, the [Massachusetts Supreme Judicial Court held the automatic trebling of the unpaid wages attaches to the violation itself rather than the lawsuit](#). In that case, the employer paid the employee's wages three weeks late and was liable for triple the amount, plus attorneys' fees and costs.

Is there risk of individual personal liability for failing to pay wages or late payment of wages?

Maybe. Under the FLSA, an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." Courts have interpreted this definition to include individuals who exercise significant operational control over corporate affairs, regardless of whether they were directly responsible for the wage law violations. As a result, corporate officers and directors may be at risk of personal liability failure to pay wages or for late payment of wages.

Some states have also imposed personal liability on officers, directors, and management for failure to pay wages. For example, Section 558.1(a) of the California Labor Code states that "Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work. . . may be held liable as the employer for such violation." The term "other person acting on behalf of an employer" means an "owner, director, officer, or managing agent of the employer" of an employer that fails to provide accurate wage statements, fails to pay certain penalties, or fails to reimburse expenses, among other sources of personal liability.

Similarly, New York Business Corporation Law Section 630 provides that the 10 largest shareholders of privately held corporations, including foreign corporations, “shall jointly and severally be personally liable” for wages or salaries due to any of its employees for services performed in New York.

Similar laws exist in New Jersey and Illinois, to name just a few.

Must we keep paying employees who are not working?

Under the FLSA, for the most part the answer is “no.” FLSA minimum-wage and overtime requirements attach to hours *worked* in a workweek, so employees who are not working are typically not entitled to the wages.

However, some key differences apply to salaried employees. First, employees treated as exempt under one of the FLSA’s “white collar” exemptions are required to be paid on a salary basis. Generally speaking, if such an employee does any work during the employer’s designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek. Second, non-exempt employees paid on a “fluctuating-workweek” basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work.

Of course, you might have a legal obligation to keep paying employees under the terms of an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract. It is also essential to evaluate wage payment obligations under state wage law.

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FURLOUGH ISSUES

Can we furlough employees until we figure out whether we can afford to pay them?

Yes, but there are a number of issues to be considered when deciding to furlough employees – which for purposes of this FAQ is defined as any temporary suspension or termination of employment on account of economic conditions.

What wage and hour issues do we need to take into account when we furlough employees?

Under federal law, you first must need to determine whether the worker is non-exempt or exempt. For non-exempt employees, it is lawful under the FLSA to reduce the number of hours worked each day or days worked each workweek.

For exempt employees, you must take care when furloughing salaried exempt employees to avoid jeopardizing their exempt status under the FLSA. For salaried exempt employees, the salary basis test must be met for each workweek in which work is performed but is not triggered for workweeks in which no work is performed. Thus, you should prohibit work during a designated full workweek to rely on this exception when implementing a furlough.

You should also take state wage and hour issues into account. In California, for example, a furlough decision could be treated as something that triggers immediate payment of final wages, including unpaid vacation, depending on its length. Delaware requires three days advance written notice and New York requires seven days. Many other states require advance notice but do not specify the timeframe. For a full listing of state law issues to consider, we suggest you review the [Fisher Phillips Wage and Hour Map on Pay Reductions](#).

Will employees be entitled to unemployment benefits during a furlough?

A furlough could prevent or limit the ability of your employees to qualify for unemployment compensation. Check with your state unemployment office to ensure you have all the information necessary.

Will a furlough trigger any notification requirements under federal or state law?

Under the federal Worker Adjustment and Retraining Notification (WARN) Act, employers with 100 or more employees must provide at least 60 calendar days' advance notice of a "plant closing," or a "mass layoff" at a single site of employment affecting 50 or more employees who also comprise 33% of the workforce. A layoff exceeding six months could also trigger federal WARN obligations.

Such notices would thus typically not apply if you implement a furlough as defined above since the employee will not have an employment loss for more than six months. With

that said, it is possible WARN could be triggered if the furlough extends longer than six months or the employee's hours are reduced by 50% or more during each month in the six-month period.

Some states have "mini WARN" acts that apply even when the federal WARN Act does not – and may require different notice periods. For example, under California WARN, a layoff of 50 or more employees, *regardless* of their percentage of the workforce, can trigger notice obligations.

Will we have to pay severance to furloughed employees?

Severance pay is not typically implicated by furloughs – as long as the furlough is truly temporary in nature.

Do we have to consider employee benefits during a furlough?

In some cases, health insurance and other plan benefits may be impacted by a furlough. You should review your plan document to determine if, and when, benefits are impacted. You need to determine whether a reduction in hours creates COBRA obligation or health insurance continuation issues under state law.

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REDUCTIONS IN FORCE

What steps do we need to take if we are considering carrying out a RIF?

You need to ensure you carry out any RIFs or layoffs correctly if you hope to salvage anything of value from such actions. They bring considerable risks with significant consequences – placing them among the most critical actions you'll ever take as an employer. If you believe a RIF is in your future, you should review the seven-step blueprint overview provided below.

Step One: Identify Your Desired Goals and Objectives

This might be better categorized as "step zero," because you should determine whether a RIF or series of layoffs is even necessary for your business before even looking at any blueprint. What is the business rationale for your planned action? What is the intended result? Do you hope to achieve

cost savings? Do you hope to improve efficiency? How will your customers (and remaining employees) react when they learn about the RIF? Will you be able to service your customers effectively? Are there less-drastic alternatives that would help you achieve the same results, such as temporary furloughs, compensation reductions, worksite relocations, etc.?

Step Two: Make Initial Logistical Decisions

Once you have decided that you have no other course of action, you should establish a decision-making team to take charge of the RIF. It should include a representative from each stakeholder area (e.g., human resources, legal, upper management, supervisors in affected areas, etc.) and closely coordinate with your workplace law counsel. That team should then make initial decisions about the planned actions, including:

- The necessary depth of RIF (how many positions to reduce and at which locations);
- Whether voluntary separations will be solicited;
- The budget for your RIF (including legal fees, severance payouts, unemployment insurance, etc.);
- The timing of the layoffs;
- The anticipated messaging to your remaining employees and other stakeholders; and
- And various other critical conclusions.

Step Three: Create a Selection Process for Involuntary Layoffs

Perhaps the most scrutinized part of any RIF – and therefore the most critical – is the selection process used to determine which employees will be let go. There are a whole host of legal standards to consider in such a decision, and therefore you should only proceed once you have clear guidance from your workplace law counsel.

- What criteria will be used to make your selections?
- Who will be the decision makers on which employees are selected?

- How will you manage documentation regarding the decision-making process?
- What are the safest options and will those accomplish your business objectives?
- Will you use different selection criteria for different types of jobs – such as hourly and salaried positions — and what are the consequences of deviating from the criteria in select situations?

If any employees impacted are unionized, then you need to evaluate your bargaining obligations. And before finalizing your plan, you need to run a statistical discrimination analysis of your intended selections to determine if the numbers suggest discrimination.

Step Four: Understand the Various Intersecting Laws

Of course, RIFs are subject to a number of federal, state, and local laws that need to be considered when proceeding with layoffs. They include the North American Free Trade Act (NAFTA), the WARN Act, and state-specific mini WARN Acts, among others. State and local laws may also affect the enforceability of relevant restrictive covenants in these situations. These laws will impact your timing, your decision-making, your notification responsibilities, and other aspects of your action. You first need to understand the legal landscape – and whether and which laws apply to any RIF – before you proceed.

Step Five: Create Legal Documents

Once you have decided how to proceed, you should work with your legal counsel to develop applicable severance policies and documents to give departing employees as may be required in any termination. These crucial documents need to take into consideration your company policies, federal benefits law (ERISA), and other related factors. You also need to develop any applicable release agreements required in exchange for severance benefits. There are a number of individual questions that need to be answered for each worker as these are crafted, focusing on vacation and other PTO benefits, retirement/severance overlap, unemployment, and the Older Worker Benefits Protection Act (OWBPA) for those age 40 or older.

Step Six: Communicate

Perhaps the hardest part of a RIF is communicating the news to not only those selected for layoff but the rest of your workplace. You need to carefully craft such messages and deliver them with empathy and understanding. You need to provide the proper support to those who are being laid off and to those remaining at your business. You should also consider whether public announcements are necessary to the local community and key customers.

Step Seven: Miscellaneous Considerations

You should prepare for the various additional steps necessary to carry out an effective RIF. This could include developing outplacement and other support resources for your workforce. These final steps will largely be tailored by your company's own individual circumstances.

We still need assistance with a planned RIF – where can we get more help?

Our firm has created a RIF Toolkit for purchase. Contact your Fisher Phillips attorney for more information.

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SHUTTING DOWN OPERATIONS

Do we have any legal liability if we are forced to suspend operations without prior notice?

Probably not, so long as you take steps to issue appropriate notice as soon as practicable. The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so because of a natural disaster or unforeseeable business circumstance. It is important to keep in mind that these quoted terms are defined extensively under WARN's regulations, and that they are not intended to cover every single layoff or plant closing. There may be state mini WARN Act laws that require notice as well.

What does the WARN Act require?

As noted above, generally speaking, covered employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff.

Any WARN notice to affected employees must contain, at a minimum, the following information:

1. whether the planned action is expected to be permanent or temporary, and if a plant is being closed, a statement to that effect;
2. the expected date the plant closing or mass layoff will commence, as well as the anticipated date of each employee's layoff or termination (or a 14-day window when each employee's layoff or termination will occur);
3. an indication as to whether bumping rights exist; and
4. the name and phone number of a company official who can be reached for further information.

Of course, many of these facts may not yet be known, in which case the Department of Labor takes the position that "notice need only contain such information as is available at the time the notice is given."

Does a bank-related liquidity crisis trigger the WARN Act's "unforeseeable business circumstances" exception?

Businesses confronted by a bank-related liquidity crisis may benefit from the "unforeseeable business circumstances" exception. This exception is limited in that an employer relying upon it must still provide "as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period."

In other words, once you are in a position to evaluate the immediate impact of the liquidity crisis, you must then provide specific notice to "affected employees" and certain government agencies, along with a statement explaining the failure to provide the full 60-day notice, which in this case would obviously be tied to the unforeseeable nature of the hurricane and its aftermath.

Do we need to send notice to government entities?

Whether your employees are unionized or not, you must deliver notice to the state dislocated worker unit and to the chief elected official of the local municipality in which the affected facility resides (we recommend sending notice to the city and county officials). Both notices must contain the following information:

- the name and address of the work site where the planned action will occur, and the name and phone number for a company official to be contacted for further information;
- whether the planned action is expected to be permanent or temporary, and, if a plant is to be closed, a statement to that effect;
- the expected date of first separation and anticipated schedule of layoffs (including the date or 14-day window during which each employee will be laid off or terminated);
- the job titles of positions to be affected and names of workers currently holding those positions; and
- the name of each union representing affected employees and the name and address of the union's chief elected officer.

Will the government really enforce this law in a bank-related liquidity crisis?

The extent to which the Department of Labor will focus upon enforcement of the WARN Act is always uncertain. Nonetheless, the law provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to \$500 per day. More importantly, it provides for a private cause of action in federal court, suggesting that employers may face lawsuits arising under the WARN Act regardless of the enforcing agency's official position.

Consequently, we advise that you evaluate your current situation triggered a WARN Act qualifying event in your organization. If so, provide as much notice to affected employees as is practicable under the circumstances. When in doubt, the best approach is to work through counsel to arrive at a safe but practical solution to a potentially thorny situation for many employers that are impacted by the disaster, either directly or indirectly.

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EMPLOYEE BENEFITS ISSUES

How do we handle payroll tax remittances during a temporary liquidity crisis?

For any delayed or missed payrolls, there should not be any payroll tax obligations (i.e., no payroll means no payroll tax obligations are triggered).

If any payroll tax remittances have not yet been made for prior payrolls, please keep in mind that those remittances are generally considered “trust fund” taxes (i.e., the employer is, in effect, holding the amounts in trust for the applicable government agency before the actual remittance is made). Trust fund taxes are generally subject to a 100% “hammer penalty” if they are not remitted.

In addition, there is generally the potential for personal liability if the funds are used for other purposes and not remitted to the applicable government agency. Accordingly, any payroll tax remittances for prior payrolls should be considered a high priority payment obligation in the event an employer is forced to triage its payment obligations during a temporary liquidity crisis.

How do we handle benefit plans insurance premiums during a temporary liquidity crisis?

Many insurance premiums are paid in arrears for future periods (e.g., the premiums for March coverage were already paid in February). If insurance premiums are not paid in arrears, there is typically a “grace period” for payment (e.g., the premiums for March coverage are due by the end of March, even if they are typically paid earlier than that). In any event, it will be important to coordinate with your insurance broker to determine when premiums are due and the period for which coverage is already paid. The broker may also be able to secure an extended due date from the carriers.

If coverage is ultimately terminated for nonpayment of premiums, it will be terminated retroactive to the end of the period for which coverage was already paid. Accordingly, it will be necessary to be mindful of the timing of a potential termination of coverage and be prepared to provide as much notice as possible to employees in case they are in a position to delay services or switch to other coverage.

Remember that termination of health coverage for nonpayment is not a COBRA qualifying event, so employees could end up with a true gap in coverage if they are not provided enough notice to switch to other coverage.

If premium deductions made from prior payrolls are not ultimately used to pay premiums to the insurance carriers, they will need to be refunded to employees and should be considered a high priority payment obligation in the event an employer is forced to triage its payment obligations during a temporary liquidity crisis.

How do we handle 401(k) plan contributions during a temporary liquidity crisis?

For any delayed or missed payrolls, there should not be any issues with employee deferral contributions (i.e., no payroll means no deferrals are taken). When payrolls resume, it will be necessary to evaluate the impact of any missed payrolls on participant loan repayments, which could require catch-up payments or the re-amortization of future payments, depending on the plan and loan documents and the specific circumstances.

If any employee deferral or loan payment remittances from prior payrolls have not yet been contributed to the plan trust, please keep in mind that those remittances are considered plan assets and need to be deposited in the plan trust ASAP. If they are deposited late, you will likely need to contribute lost earnings and comply with regulatory voluntary compliance program requirements. Given that such amounts are considered plan assets, there will be significant ERISA fiduciary exposure (including potential personal liability) if they are not remitted to the plan trust. Accordingly, any employee deferral or loan payment remittances have not yet been contributed to the plan trust should be considered a high priority payment.

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LABOR RELATIONS

Our workforce is unionized. Can we unilaterally change work schedules or duties for bargaining unit employees in response to the liquidity crisis?

The National Labor Relations Act (NLRA) imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Generally speaking, employers that unilaterally change these items are subject to unfair labor practice charges even in emergency situations, unless

their collective bargaining agreements provide otherwise. Many contracts do provide for employer flexibility in determining work assignments, scheduling, and layoffs. The first authority for determining your rights and obligations is the language within your own collective bargaining agreement.

Although the circumstances of any bank-related liquidity crisis would seem to fit the description of a “compelling economic exigency,” its effect will likely differ from one employer to the next. The safest course of action (and the one most likely to avoid future litigation) is to notify the union in all cases.

How much notice do we have to give the union before making a change to our contract?

The law requires employers to give the union “adequate” notice of a proposed change to the collective bargaining agreement, so as to engage in meaningful bargaining over that change on request. There is no hard and fast rule as to how much notice is adequate. But where you can show a need for a prompt change and time is otherwise of the essence, a notice period as short as a couple of days might be considered adequate under the circumstances.

The loss of funds has caused our company to go out of business. Do we have to notify the union before we do this?

An employer has the right to cease operations and go completely out of business without first bargaining with the union over its decision. But an employer that decides to close its operation must nonetheless furnish the union with adequate notice of its decision, and bargain over the *effects* of that decision if the union requests bargaining.

If we decide to close our business as a result of the loss of liquidity, how much notice do we have to give to the union?

You are required to give the union sufficient notice to allow for meaningful bargaining over the effects of your decision upon request. There is no bright line test for determining how much notice is sufficient, and depending on the circumstances, as little as a couple of days may be deemed sufficient. Remember that you are still subject to applicable state and federal laws with respect to plant closure notifications, as discussed in more detail above.

What is our bargaining obligation after we've notified the union of our decision to close?

Once the decision has been made to close a business and the union has been adequately notified, you are required to bargain over the effects of the closure on employees upon union request. By way of example, these "effects" can include severance payments, letters of recommendation, transfer rights, vacation payouts, continuation of health insurance benefits, and similar topics. Remember that your collective bargaining agreement may already provide for the continuation of some of these benefits in a plant closure situation.

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UNEMPLOYMENT COMPENSATION

How can we or our employees get information about unemployment benefits?

You should seek out information about unemployment eligibility, waiting periods, and similar issues by contacting your state unemployment officials directly or visiting their website for more details:

- [Alabama](#)
- [Alaska](#)
- [Arizona](#)
- [Arkansas](#)
- [California](#)
- [Colorado](#)
- [Connecticut](#)
- [Delaware](#)
- [District of Columbia](#)
- [Florida](#)
- [Georgia](#)
- [Hawaii](#)

- [Idaho](#)
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- [Pennsylvania](#)
- [Rhode Island](#)
- [South Carolina](#)
- [South Dakota](#)
- [Tennessee](#)
- [Texas](#)
- [Utah](#)
- [Vermont](#)
- [Virginia](#)
- [Washington](#)
- [West Virginia](#)
- [Wisconsin](#)
- [Wyoming](#)

Conclusion

For more information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our relevant practice teams: [Employee Benefits and Tax](#), [Wage and Hour](#), and [Labor Relations](#). Make sure you are subscribed to [Fisher Phillips' Insight system](#) to ensure you receive the most up-to-date information about this situation directly to your inbox.