



RIFS, RIGHTSIZING, AND COST SAVING DURING THE CORONAVIRUS CRISIS

Presented by Brett Miller and Bernard Fuhs

Topics (**UPDATED**)

- “Stay at Home” Executive Order
- Ways to reduce costs without RIFs
- Potential federal aid
- RIFs and risk
- How to implement a RIF
- How to protect trade secrets during RIFs, particularly with those working from home

Executive Order 2020-21 (COVID-19) – “Stay at Home”

- Temporary requirement to suspend activities that are not necessary to sustain or protect life
- “Critical Infrastructure workers”
- Sets forth various exemptions
- Order will be in effect for “at least the next three weeks,” until April 13, 2020 at 11:59 p.m.

Exempt Companies

1. Businesses and operations that employ critical infrastructure workers
2. Designate and send letters to critical workers
3. Designate and send letters to suppliers and distribution centers
4. Designated suppliers/centers - REPEAT

Critical Infrastructure

These include businesses in the following sectors:

- a) **Health care and public health;**
- b) **law enforcement, public safety, and first responders;**
- c) **food and agriculture;**
- d) **energy;**
- e) **water and wastewater;**
- f) **transportation and logistics;**
- g) **public works;**
- h) **communications and information technology, including news media;**
- i) **other community-based government operations and essential functions;**
- j) **critical manufacturing;**
- k) **hazardous materials;**
- l) **financial services;**
- m) **chemical supply chains and safety, and**
- n) **a defense industrial base.**

Other Exempted Businesses

- Child care workers necessary to serve the children or dependents of other critical infrastructure workers;
- Workers at properly designated suppliers and distribution centers;
- Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely;
- Workers and volunteers for businesses or operations that provide food, shelter, and other necessities of life for disadvantaged or need individuals; and
- Workers who perform critical labor union functions, so long as any administration or monitoring be done by telephone or remotely where possible.

Non-Exempt Companies

1. May still designate certain “basic operations”
 - “necessary...to conduct basic minimum operations”
 - Maintain value of inventory & equipment
 - Care for animals
 - Ensure security
 - Process transactions (payroll and benefits)
 - Facilitate ability of others to work remotely (IT, HR, Accounting)
2. “Bare bones” skeletal crew

All Companies

1. Must adopt social distancing measures and other mitigation measures
2. Restrict # of workers – only strictly necessary
3. Promote remote work
4. Keep works at least six feet apart
5. Increase facility cleaning and disinfection
6. Anything else recommended by CDC

Can employees remain working under Michigan Governor Executive Order 2020-21:

NO

YES,
if considered:

Necessary to sustain and protect
life; i.e. Critical Infrastructure
Workers ("CIWs"):

Necessary to
"conduct minimum basic
operations":

Automatically
designated as CIWs:

(9)(a) Child care workers

(9)(b) Workers at
designated supplier and
distribution centers
ONLY if:

(9)(c) Insurance Industry
(if cannot be done
remotely)

(9)(e) Those performing
critical labor union
functions
(but should done
remotely when possible)

(8) Workers described by
US Cybersecurity and
Infrastructure Security
Agency, including:

Because in-person
presence is necessary to
allow:

(5)(a)(1) Health care and
public health workers.

(9)(d) Volunteers
providing food, shelter,
and life necessities for
needy.

(5)(a)(2) Necessary
government activities.

(6)(a) Law enforcement;
public safety; first
responders

(6)(b) public transit,
trash pick-up, election
management,
operations supports
CIWs, maintenance of
public parks

(9)(b)(1)-(2) Workers are
"necessary to enable,
support, or facilitate the
work of the original
operation's or business's
critical infrastructure
workers."

(9)(b)(3)-(5): Identified
by another supplier,
distribution center, or
service provider as
"necessary to enable,
support, or facilitate the
work of the critical
infrastructure workers at
the supplier, distribution
center, or service
provider that has
designated them."

Health care and public
health; Law
enforcement, public
safety, and first
responders; Food and
agriculture; Energy;
Water and wastewater;
Transportation and
logistics; Public works;
Communications and
information technology,
including news media;
Other community-based
government operations
and essential functions;
Critical manufacturing;
Hazardous materials;
Financial services;
Chemical supply chains
and safety; Defense
industrial base.

Check also:
<https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>

Business or operation to
maintain value of
inventory and
equipment

Care for animals

Ensure security

Process transactions
(examples include:
payroll, employee
benefits)

Facilitation of other
employees to work
remotely

Photos from Butzel Long's post



BUTZEL LONG

**EXECUTIVE ORDER
ANALYSIS TEAM**



What About Businesses Who Have to Temporarily Close?

- Again, maintain “skeleton crew” to perform essential functions
- Provide written designation of critical workers
- Consider cost reduction and other options
 - Insurance
 - State or federal aid

Insurance

- Business continuity insurance
- Some policies contain a business interruption provision in a business insurance policy that may help mitigate business interruptions caused by COVID-19.

Federal Aid

- Stimulus bill(s) (TBD!)
 - Loans/grants for payroll
 - Loans to cover leases or mortgage
 - Direct aid to Workers
- Small Business Administration Loans
 - Who qualifies?
 - How much do they qualify for?

State Aid

- Michigan Small Business Relief Program
 - Provides \$20 million (mixed loans and grants) in support for small businesses negatively impacted by COVID-19
 - Funds for the program are expected to be available no later than April 1, 2020

Cost Reduction Without RIFs

- Reduction in Hours of Non-Exempt Staff or Elimination of Overtime
- Michigan Work Share Program
- Federal or State aid
- Pay cuts
- Furloughs
- Early retirement or voluntary separation

Cutting Hours (Non-Exempt)

- Reduce hours of non-exempt hourly staff
- Eliminate overtime hours
- Consult collective bargaining agreement if unionized

Unemployment

- Employees who are unable to work can file for unemployment
- An **Employer or Employing Unit** **MUST NOT** be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations
- Executive Order No. 2020-10 – Item #6 in effect until April 14, 2020

Michigan Work Share Program

- For employers who are not exempted from the stay at home order but need to reduce costs, the Michigan Work Share Program may be an option.
- Rather than being laid off, employees work a reduced number of hours and receive a portion of their potential weekly unemployment compensation based on the percentage of the reduction in hours

Example:

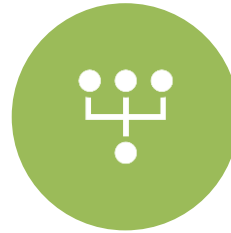
If a worker's weekly unemployment benefit amount is \$360 and their hours and wages are reduced by 20%, the worker would receive a weekly Work Share benefit payment of \$72 ($\$360 \times 0.20 = \72)

- You can implement a Work Share plan for one or more departments, shifts, or units. A unit consists of two or more employees. Companies may stop or continue within the timeframe of approved Work Share application.

Work Share Requirements



Employee work hours reduced by at least 15% not more than 45%



Cannot hire new employees into the affected work unit or transfer employees into the unit, nor reduce work hours below the number agreed



All employees in the affected unit must participate



Plans may be approved for up to 52 weeks

Work Share Participation

- Any employer who has a reduction in production, services or other conditions which will cause potential layoffs
- Participating employees must:
 1. Be eligible for regular unemployment benefits
 2. Be full time employees
 3. Have earned a sufficient amount of wages in order to establish an unemployment claim and receive Work Share benefits
- Unemployment taxes must be current
- Experience account balance must have “positive reserve”
- Must have paid wages for 12 of the previous quarters
- Expanded eligibility due to COVID-19 crisis per Executive Order No. 2020-10 Item #5

**Work Share does not apply to seasonal, temporary, or intermittent employment*

Families First Coronavirus Response Act

- Families First Coronavirus Response Act Considerations – Expanded FMLA and Emergency Paid Sick Leave
- Available Tax Credits to repay employers for the paid leave

Tax Credit Details

- **Complete Coverage** - Employers receive 100% reimbursement for paid leave pursuant to the act.
 - Health insurance costs are also included in the credit.
 - Employers face no payroll tax liability.
 - Self-employed individuals receive an equivalent credit.
- **Fast Funds** - Reimbursement will supposedly be quick and easy to obtain.
 - An immediate dollar-for-dollar tax offset against payroll taxes will be provided
 - Where a refund is owed, the IRS will send the refund as quickly as possible.

Tax Credit Examples

1. If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
2. If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments, and file a request for an accelerated credit for the remaining \$2,000.
3. Equivalent child-care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances through tax refund on income tax return.

Other Options - Salary Reduction

- Across board salary cuts for exempt employees
- Work-week and salary reduction
- Salary reduction as a result of reduced workweek. (e.g., a 20 percent reduction in an exempt employee's salary while assigned to work a normally scheduled 4-day reduced workweek due to the financial exigencies of the employer and/or to avoid layoffs)
- Reduction cannot go below the applicable minimum salary of \$684 per week

Furloughs (Non-Exempt)

- For non-exempt employees, employees are only paid for hours actually worked. Thus, employers might furlough these employees by using a temporary shutdown, reducing time on the job, asking employees to take certain days per month off, or placing them on an indefinite furlough
- Review benefits plan documents for insurance coverage during furlough

Furloughs (Exempt)

- Full week increments – exempt employees do not need to be paid for weeks in which they perform no work
- No-work rule during furlough week or exempt employee would be owed salary (with limited exceptions)
- Determine whether accrued PTO available

Early Retirement or VSPs

- Voluntary separation programs (VSPs) are generally available to certain classes of employees based on certain eligibility requirements such as length of service, organizational unit, or job function
- Early retirement or VSP can save costs and reduce need for full RIF
- Legal risks still exist

Reductions in Force

- Determine business need and costs
- Consider alternatives to RIFs including potential federal aid
- Determine what workforce will look like after RIF

RIF Legal Risks

- Discrimination claims
 - Disparate Treatment
 - Disparate Impact
- Retaliation
- Union considerations – possible duty to bargain, response to union information requests
- Immigration issues – potential loss of status or violations for wage reductions

Potential WARN Act Liability

- The WARN Act offers protection to workers, their families and communities by requiring certain employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs

WARN Act - Notice

A WARN notice is required when a business with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) is laying off at least 50 people at a **single site of employment**, or employs 100 or more workers who work at least a combined 4,000 hours per week, and is a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government.

WARN Act – Temporary Layoff

- A temporary layoff of six months or less is not an "employment loss" under WARN. But a plant closing or mass layoff that is intended to be temporary will trigger WARN obligations if it later turns out to exceed six months
- Consult counsel regarding WARN and timing of layoffs

Implementing a RIF

- Establish the Business Justification for the RIF. These can include:
 - (a) Cost reductions
 - (b) Change in focus of business
 - (c) Change in market conditions
 - (d) Change in customer demand
 - (e) COVID-19 related business changes

Develop RIF Plan

- Set forth plan with business justification
- Develop objective selection criteria
 - Seniority (within the company, unit, department, facility, etc.)
 - Elimination of certain types of workers, such as part-time workers or temporary workers
 - Disciplinary records
 - Objective performance measures, such as sales figures
 - Subjective performance measures, such as annual evaluation scores
 - Specific skills
 - Ability to perform a variety of jobs at the company

Review RIF Plan

- Disparate Impact Analysis
- Review with counsel – attorney-client privilege
- Severance and release plans – if applicable

Protecting Trade Secrets During Work-From-Home or Layoffs

- Confidentiality agreements
- Policies
 - Reminder of obligations
 - Paper files
 - Internet access & security (DUO)
 - Cloud or third party storage
- How to retrieve company property
- IT strategy for access before, during and after lay-off

Questions?



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Contact

Brett J. Miller, Shareholder | 313.225.5316 | millerbr@butzel.com Twitter: @HR_Resource

Bernard Fuhs Shareholder | 313.225.7044 | fuhs@butzel.com Twitter: @BernieFuhs