



## Restructuring Practices The Legal Way

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**A**mong the manifold devastations of the COVID-19 pandemic and consequent public health emergency, has been the disruptive effects on the health care provider community. Some of those effects may be to accelerate changes that were already in motion and ultimately desirable, such as the increased use of telehealth methods of delivering care. Other such effects may be longer-term but no less consequential, such as how the pandemic provides a vivid example of how varying social determinants of health affect disease outcomes. One immediate effect on providers, and one that confronts them with very serious near-term decisions, is the economic damage the pandemic has wrought on practices of all types and sizes.

That economic damage was highlighted by a recent Health Policy Commission study of more than 400 practices of all provider types in Massachusetts. That study found over half of primary care practices were considering furloughs, layoffs, pay cuts, or cutting services and expenses. It also found nearly a quarter of primary care practices were considering the more extreme steps of closing or merging their practices. Given the complexities of employment law, practitioners should tread carefully when considering reducing staff or salaries. The following pointers may help practitioners to avoid the many traps for the unwary in this field of law.

### **REVIEW YOUR EMPLOYEE AGREEMENTS**

Before taking any employment action, practitioners should carefully review any and all relevant employee agreements. This is an important and necessary first step, as such agreements may significantly restrict practitioners' options. For example, agreements that guarantee a salary or bonus, establish a fixed-term of employment, or contain provisions governing termination (such as requiring cause and/or advance notice) must be addressed prior to a layoff or salary reduction. Violations of such terms, termination and compensation provisions can lead to an expensive claim for monetary damages.

Agreements can also impose substantial post-employment obligations on both practitioners and staff through provisions such as restrictive covenants (such as non-solicitation or non-poaching agreements), confidentiality clauses, or terms that address or require severance pay. Restrictive covenants require particularly close attention, as the enforcement of such clauses may be prohibited or limited under applicable state law. Massachusetts, for example, specifically limits the enforceability of restrictive covenants against physicians and nurses by statute and case law has construed broadly what constitutes an unenforceable restrictive covenant.

Practitioners who want to deviate from an employment agreement may consider approaching the employee to bargain for an amendment or new agreement. However, keep in mind that pursuant to the Massachusetts Wage Act, employers can enter into an agreement with an employee under which the employee forfeits earned wages, including any accrued but unused vacation payments. One upshot of this principle is that while a practitioner may want to change its vacation policy to save costs, changes to how employees can use their vacation time can only apply prospectively and employees must be given reasonable prior notice of the change.

Practitioners considering salary reductions for non-physician employees — regardless of whether the salary is fixed in a written agreement — must also be mindful that the federal Fair Labor Standards Act requires payment of at least \$684 per week on a salary basis for executive, administrative and professional employees (other than physicians) to qualify as exempt employees. A salary reduction that places a non-physician salaried employee below this threshold can result in the employee becoming nonexempt, which means that he or she must be paid per hour, as well as time-and-a-half for any overtime hours worked in a given week.

### **LAYOFF OR FURLOUGH?**

The terms layoff and furlough are often used interchangeably but have significantly different legal consequences. Practitioners seeking to reduce payroll costs should be aware of these differences and their implications before taking employment action.

In short, a layoff is a termination of the employment relationship while a furlough is a temporary (but mandatory) leave of absence that does not end the employment relationship. A layoff comes with no guarantee of rehire whereas a furlough is for a defined length of time and generally short-term (usually measured in weeks, not months).

If an employee is laid off, his or her final wage payment (including payment for all accrued but unused vacation) is due on the last day of employment. Unless otherwise agreed, all of the employee's benefits will cease, subject to any COBRA rights, and the employee will be eligible for unemployment benefits.

In contrast, furloughs can be unpaid—although employers can also allow furloughed employees to use accrued time off. Furloughed employees can remain eligible for employee benefits, subject to the terms of the employer's plan, and may also be eligible for unemployment benefits during the furlough period. Accordingly, a furlough may be a better option for practitioners that expect regular (or something approximating regular) operations to resume in the relatively near term and intend to call back all current staff.

Practitioners considering a furlough should be mindful of the differences between exempt and nonexempt employees under state and federal wage and hour law. Nonexempt employees need only be paid for time actually worked whereas exempt employees must be paid their full salary for any week in which any work is performed. Thus, if a furlough starts on Wednesday, an exempt employee must

receive his or her full salary for that week, even if not working from Wednesday through Friday.

In all cases, a practitioner's decisions regarding who is selected for layoffs and furloughs must be based on legitimate business reasons. Failure to do so can expose a practitioner to potential liability for claims of discrimination, retaliation and interference, among other reasons.

#### CONSIDER WORKSHARE AS AN ALTERNATIVE

Practitioners may also want to consider applying for the WorkShare program administered by the Massachusetts Department of Unemployment Assistance as an alternative to layoffs or furloughs. The program allows employees to work reduced hours and simultaneously receive unemployment benefits along with their reduced wages. To qualify for the WorkShare program, employers must develop and submit for approval to the DUA one or more plans to uniformly reduce work hours for a fixed percentage — between 10% and 60% — for either the entire workforce or a given unit, department, shift or job category for a period up to 52 weeks. Plans can include salaried employees as long as the employer reduces both hours and pay on a pro rata basis (e.g. if salaried employees work 80% of their regular work week they receive 80% of their salary).

However, practitioners should be aware that employees can decline to participate in a WorkShare program and also that owners and officers of companies (including members of partnerships or LLC's) cannot participate in the WorkShare program unless they are eligible to receive unemployment benefits. Further, if an employee is guaranteed a fixed salary pursuant to a written agreement, that will have to be addressed prior to taking any action with respect to that employee's pay.

#### A NOTE ABOUT THE FFCRA

Generally, since April 2020, small employers with fewer than 500 employees have been required to provide their employees with emergency paid sick leave and expanded family and medical leave pursuant to the Families First Coronavirus Response Act. However, the FFCRA provides that employers of "a health care provider or an emergency responder" may elect to exclude such employees from receiving FFCRA leave.

Practitioners should be aware that U.S. Department of Labor currently defines the term "health care provider" very broadly to include, inter alia, "anyone employed at any doctor's office, hospital, health care center, clinic ... or any similar institution, employer, or entity" including non-clinical employees. Accordingly, practitioners have relatively wide discretion to exempt their workforce from application of the FFCRA. However, practitioners must always be mindful of their obligations under any employee agreements, policies, and the laws and regulations promulgated under the Americans with Disabilities Act, the Family and Medical Leave Act, and the Occupational Safety and Health Administration, when faced with a request for leave.

It is evident that the legal rules under which health care practices operate have been significantly modified by the pandemic and public health emergency. For the most part, these changes have increased those practices' flexibility to respond to extraordinary circumstances. That legal relief is notably absent in the largely unchanged area of employment law which remains a compliance challenge for health care employers. The urgency to take immediate steps to preserve a practice should not overcome a prudent analysis of how to do so legally. +

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## Society Snippets



### 2020 Graduate School of Nursing Community Partnership Award: Congratulations to Dr. Michael Hirsh

DR. MICHAEL P. HIRSH'S CLINICAL TITLES AT UMASS Memorial Medical Center include chief of the division of pediatric surgery, director of trauma services and surgeon-in-chief of the Children's Medical Center. In addition, Dr. Hirsh is the City of Worcester's medical director and has helped to lead the city's response to the COVID-19 pandemic.

Dr. Hirsh's dedication to all that he is involved with is, at bare minimum, impressive. In all that he does he is a dedicated educator. He is always willing to bring students — nursing or medical — to the table to be part of the solution. He has always been a true partner with the Graduate School of Nursing — offering experiences clinically, academically, and with a humanistic approach and enthusiasm that is contagious. He seamlessly works in interprofessional teams treating all professions on an even playing field and valuing everyone's input as necessary and contributing.

We are fortunate to work with him as often as possible and he is always willing and available to us and our students and we are grateful. +

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