

LEGAL

## What protections do US employees and employers have if jobs are slashed?

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*Many would argue that French fashion and leather goods giant Hermes is structured and positioned for long-term survival. Seen here, the new Hermes Beauty line of lipsticks, which is set to become another best-seller. Image credit: Hermes*

By MICKEY ALAM KHAN

Armageddon is what it looks like to observers of the world economy. The COVID-19 coronavirus may have scarred China and its neighbors, but it has the potential to totally disembowel the economies of Europe and North America.

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Many luxury brands and retailers have already closed their store and factory doors in the United States and Canada for two weeks, with full pay and healthcare for employees for that period. It is a similar situation in Europe.

Open and shut?

The ranks of those implementing the closures include Rolls-Royce Motor Cars, Cartier, Gucci, Chanel, Jimmy Choo, Neiman Marcus, Saks Fifth Avenue, Nordstrom, Bloomingdale's, Selfridges, Rolex, Patek Philippe, Hublot, Aston Martin, Marriott hotels, Sephora and Versace, as well as a bunch of brands belonging to luxury conglomerates LVMH, Kering and Richemont.

The choice of two weeks' pay and healthcare coverage is interesting. It certainly does not seem like the virus will peak in that period. Nor is there any end in sight to the stock market meltdown or the oil crisis spurred by Saudi Arabia's scorched-earth policy to put U.S. shale and Russian oil producers out of business.

So what happens after the two-week grace period expires?

It does seem there may be some virtue signaling going on marketers showing good faith they care for employees with two weeks' pay and healthcare, and then beyond that, say it is out of their hands and do everything to save the company. That includes layoffs, redundancies and permanent store closures.

Several sectors are already seeing job cuts, including dining services as well as travel and tourism, which is under threat of 50 million layoffs if the current global ban on cross- and intra-border movement continues.

What options do employees of luxury brands and retailers have in the worst-scenario that they lose their jobs? And how do employers navigate this employment minefield in case they need to make necessary cuts to save the company?

Milton Springut, partner at New York-based fashion law firm [Springut Law](#), pulled out some laws that might help executives in the unfortunate position of losing their jobs and companies that may have to do the unthinkable.

"We are entering a difficult period, which we trust will be shorter, rather than longer," Mr. Springut said.

"Downsizing has happened before during economic downturns, and the model for companies to move forward is the experience and expertise learned from prior occasions," he said.

The laws might differ from U.S. state to state, but broadly here are the protections afforded:

Unemployment insurance

Workers are generally entitled to unemployment insurance if they are furloughed when a business temporarily shuts

down or downsizes, and all other unemployment requirements are met.

Depending on the size and length of the temporary shutdown, the jurisdiction may require notification to the applicable unemployment department as a mass separation.

So employers who are considering this need to consult their unemployment insurance and advisors.

#### Health insurance coverage

If employees are no longer working, they may not be entitled to group health plan coverage. This is a matter of the group health plan document or certificate of coverage, which will indicate how long employees who are not actively working may remain covered by the group health plan.

Once this period expires, active employee coverage must be terminated. However, it is anticipated that many plans will agree to temporarily waive applicable eligibility provisions.

If employees are terminated, then a COBRA notice must be sent.

Usually, group health plan coverage will cease when an employee's share of premiums is not timely paid. But insurance carriers providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and until an employer reopens its doors. It is likely that under government pressure, many carriers will do some variation of this.

An employer might also make an arrangement with the insurance carrier providing health coverage to pay the employees' share of premiums to keep coverage in place at least temporarily and possibly until the employer can reopen its doors.

So employers should consult their insurance carrier, and be especially alert about COBRA issues.

#### Obligation to pay employees

Under the Fair Labor Standards Act (FLSA), employers have no obligation to pay for employees who are not working. 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 the FLSA requires.

One possible exception are "white collar" employees whose exempt status requires that they be paid on a salary basis. These employees are generally exempt from overtime requirements of FLSA. Conversely, FLSA requires that if such an employee performs at least some work in the employee's designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek.

There may be contractual obligations to pay employees, especially if they unionized.

Of course, any company considering layoffs has to carefully consider the public relations and morale impact of such a move.

#### Downsizing

Downsizing a workforce itself has many legal perils.

The federal Worker Adjustment and Retraining Notification Act ("WARN") Act applies to employers of 100 or more employees and requires that employers provide employees and certain governmental agencies with a 60-day advance notice of a plant closing or certain types of mass layoffs. Many states also have mini WARN Acts, and specific rules about contacting the state employment division and providing notice of a mass layoff. So employers first need to analyze whether these may apply.

Second, one has to be concerned about discrimination. Downsizing by definition involves firing a large percentage of the workforce, but is often followed by claims that the firing involved some sort of discrimination by race, sex, age, *etc.*

Generally, it is recommended that the employer develop and implement a plan for downsizing that lays out objective criteria for who will be retained and who let go. It may also be necessary to do a statistical analysis of who is being laid off or retained, to avoid claims of "disparate impact."

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