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# LABOR AND EMPLOYMENT LAW UPDATE

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## A SIGN OF THE TIMES: MASS LAYOFFS ON THE RISE!

According to a news bulletin published by the Bureau of Labor Statistics on June 24, 2008, there were 7,615 mass layoffs (seasonally adjusted) of 50 or more employees from January through May 2008; a total of 783,942 workers (seasonally adjusted) were affected. These figures were more than 20% higher than those for the same time frame in 2007.

There is no reason to believe that mass layoffs will not continue in the second half of 2008. Already this month, layoffs have been announced in the financial, automobile, airline and newspaper industries. Congressional testimony by Federal Reserve Chairman Ben Bernanke on July 15, 2008 painted a bleak picture of the softening labor market.

Beyond the human toll, mass layoffs also present daunting legal obligations and risks for employers. Due to the number of employees affected, a single misstep can mean significant potential liability. No employer should implement a mass layoff without meticulous attention to these obligations and risks.

**NOTICE:** For certain plant closings and mass layoffs, the Worker Adjustment and Retraining Notification Act (“WARN”) requires 60-days prior written notice to employees or their union representative and the state dislocated worker unit. WARN applies to employers with 100 or more employees.

**PLANT CLOSING:** Written notice is required for the permanent or temporary shutdown of a work site which results in the loss of employment of 50 or more full-time employees during any 30-day period. WARN does not apply to the closing of a temporary facility.

**MASS LAYOFF:** Written notice is required for a reduction in force which results in the loss of employment during any 30-day period of either: (1) 33% of the full-time employees, but only if the layoff affects at least 50 employees, or (2) 500 or more full-time employees. WARN does not apply to a layoff which follows the completion of a temporary project.

**EXEMPTIONS:** Among the exemptions to the WARN requirements are plant closings or mass layoffs brought about by a natural disaster or unforeseen circumstances. The 60-day notice requirement may also be reduced under defined circumstances for a faltering employer.

**PAY IN LIEU OF NOTICE:** Employers who provide less than the required notice may instead pay the employees the balance of their wages and benefits through the 60-day period.

Some states, most notably California, have similar notice requirements applicable to smaller employers and smaller layoffs.

**ANTI-DISCRIMINATION LAWS:** The selection criteria and decisions in a mass layoff or recall can be scrutinized under federal and state laws which bar discrimination against persons who belong to protected groups and/or who engage in protected activities. Statistics showing that such persons have been disproportionately impacted by a layoff or recall can be probative evidence of discrimination.

**SEVERANCE BENEFITS AND RELEASES:** To be enforceable as to a federal age discrimination claim, a release required as part of a severance pay program for a mass layoff must comply with the requirements of the Older Worker Benefit Protection Act (“OWBPA”). In addition to requirements regarding the language of the release, the employee must be:

1. provided at least 45 days to consider the release;
2. informed in writing as to any class, unit or group of individuals covered by the program, any eligible factors for the program, and any time limits applicable to the program; and
3. informed in writing as to the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Some states have stricter and more expansive release requirements.

**EMPLOYEES ON LEAVE OF ABSENCE:** An employer faces additional hurdles if it includes in a mass layoff employees on protected leave.

**FAMILY AND MEDICAL LEAVE ACT (“FMLA”):** To include in a mass layoff an employee on FMLA leave, an employer must be prepared to prove in court that the employee would have been included in the layoff even absent the FMLA leave.

**UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (“USERRA”):** To include in a mass layoff an employee on USERRA leave, an employer must be prepared to prove in court that (1) the employer’s circumstances have so changed as to make reemployment of the employee impossible or unreasonable, or (2) the reemployment of the employee would impose an undue hardship on the employer.

Employers have similar evidentiary burdens with respect to state leave laws which protect employees of smaller employers, provide for longer leave periods and/or protect employees who take leave for other reasons, such as criminal victim leave.

**UNION EMPLOYERS:** A layoff may be governed by existing collective bargaining agreements. If not, a layoff is still a mandatory subject of bargaining between an employer and union.

**ADDITIONAL QUESTIONS?** If you have any questions about the legal obligations and risks associated with mass layoffs or any other labor and employment law problem, please contact Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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## **CAMPBELL & CHADWICK**

**A PROFESSIONAL CORPORATION**

BRUCE A. CAMPBELL  
ROBERT G. CHADWICK, JR.\*  
TIMOTHY B. SOEFJE  
KAI HECKER  
JOHN A. KOWTUN, JR.

4201 SPRING VALLEY ROAD, SUITE 1250  
DALLAS, TEXAS 75244  
TELEPHONE: 972.277.8585  
FACSIMILE: 972.277.8586  
WWW.CAMPBELLCHADWICK.COM

\* BOARD CERTIFIED, LABOR AND EMPLOYMENT LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

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