



QUARTERLY EMPLOYMENT LAW NEWSLETTER

June 2009

## Workforce Reduction through Work Hour Reduction

By: Lori Athmann and Jessie Becker, Attorneys

With the current economic recession, many employers are being faced with the difficult decision of whether or not to layoff a part of their workforce to sustain their business. In response, the Minnesota legislature unanimously passed a bill in both the House and Senate which approves a plan to reduce full layoffs through a “shared work program”.

The program gives employers more flexibility by allowing them to reduce the employees’ work hours in lieu of doing complete layoffs. For example, as opposed to a 20 percent reduction in the total workforce, the program allows an employer to reduce some, or all, of the employees’ scheduled hours by 20 percent. Participating employees would be paid by their employer for the reduced hours that they work and also be compensated by the Unemployment Insurance Program for the “lost time” through shared work benefits. The shared work benefits would make up about one-half of each employee’s lost income as a result of the reduced hours. The overall intended impact of the shared work program is to allow employers to more equitably distribute the impact of the economy among its workers. In return, the program assists the affected employees by reducing their overall lost income through shared work benefits. This allows the employer to maintain morale, productivity, and flexibility within the business and to retain trained and skilled employees who will be needed once the economy recovers.

This program is an option only for employers faced with layoffs in the regular course of business. It does not include employers facing seasonal layoffs, nor is it available to employers faced with a permanent downsizing. An employer can participate in the shared work program from two weeks to one year, depending upon how long the slowdown in business is projected to last. However, the plan can be stopped at any point.

An employee cannot be required to use their accrued vacation and/or sick time before they become eligible for shared work benefits. Rather, the manner in which

leave time is used depends upon the company policy. Shared work benefits are only paid for periods of unemployment caused by the employer; not for periods when an employee is not working due to illness, injury or vacation. Social Security benefits, some pensions, and workers’ compensation are deductible from shared work benefits. As with regular unemployment benefits, shared work benefits are taxable for income tax purposes. Any affected employee will receive a Form 1099-G listing the total benefits paid to them during the preceding calendar year.

For the purpose of the shared work plan, an “affected employee” eligible to receive partial unemployment benefits must have been continuously employed for at least six months on a full-time basis prior to submission of the shared work program.

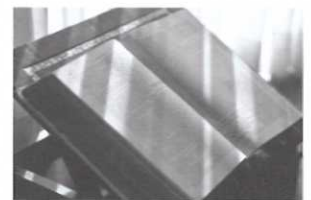
An employer who wishes to participate in the shared work benefit program must submit a plan to the commissioner in a manner and format prescribed for approval. The commissioner may approve a shared work plan only if it meets certain prescribed requirements:

1. specifies the employees in the affected group;
2. applies to only one affected group, which is defined as five or more employees designated by the employer to participate in the plan;
3. includes a certified statement by the employer that each employee in the affected group meets the definition of an affected employee;
4. includes a certified statement by the employer that for the duration of the plan the reduction in normal weekly hours of work of the employees in the affected group is in lieu of layoffs that otherwise would result in at least as large a reduction in the total normal weekly hours of work;
5. specifies an expiration date that is no more than one year;
6. specifies the fringe benefits available to the

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### ELECTRONIC NEWS

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## Retaliatory Discharge

By: Paul Rajkowski, Managing Partner

The Minnesota Court of Appeals recently held that a plaintiff alleging retaliatory discharge need only show that the claimant in good faith believed that the conduct complained of was discriminatory. The Court held that under the Minnesota Human Rights Act (MHRA) it is not necessary for a plaintiff to establish that the conduct was in fact discriminatory.

The case in question is Bahr v Capella University. In Bahr, the plaintiff alleged she was terminated after complaining that her superiors were discriminating against an employee the plaintiff supervised. The alleged discrimination consisted of the fact that her superiors were telling her to tread lightly when dealing with the employees unacceptable job performance and prevented her from instituting a Performance Improvement Plan. After months of obstructing the plaintiff to perform her supervisory tasks, the plaintiff complained that her credibility was being called into question by co-workers because of her failure to deal with the problem employee. Eventually, the plaintiff was terminated from her employment for failing to remedy the situation on her team to the satisfaction of her supervisors. As a result of her termination, the plaintiff

brought a claim of reprisal under the MHRA alleging the defendant engaged in unlawful employment practices, including denying employment opportunities and engaging in retaliatory conduct because of the plaintiff's good faith reports of discriminatory treatment. The District Court dismissed the plaintiff's claims stating that the plaintiff must show that the employment practice she opposed was actually discriminatory. The plaintiff appealed and the Court of Appeals agreed with the plaintiff and reversed the District Court holding that all the plaintiff must show is a good faith belief that the conduct was discriminatory.

This case has the potential for expanding retaliation cases brought under MHRA as now the plaintiff employee need only show that the facts they rely on to support their claim was that their belief was objectively reasonable. The court, in finding a reasonably objective belief, would find the employer to be responsible for retaliatory discharge based on that belief alone. The bottom line is that an employer could be sued on a retaliation claim for conduct that was in fact never illegal. Please contact the employment law lawyers at Rajkowski Hansmeier with any questions.

## Minimum Wage Goes Up Again in July - Strategies for Implementing a Fair Plan for All Employees

By: Tom Jovanovich, Attorney

The federal minimum wage goes up again on July 24, 2009. This is the third and final annual increase under the Fair Minimum Wage Act of 2007. The rate increases from \$6.55 to \$7.25 per hour.

The federal minimum wage law is the FLSA or Fair Labor Standards Act. Most Minnesota employers come under this act because of the FLSA's broad definition. The FLSA regulates the pay of employees in businesses that engage in interstate commerce. A business engages in interstate commerce when it mails to potential out-of-state customers, makes goods sold out of state, or buys its supplies from vendors who are outside their state. It also applies to those employers who have more than 50 workers or who earn revenues of more than a half-million dollars a year.

More than half of all states have passed laws with a higher minimum wage than the federal statute. Employees in those states are legally entitled to the higher rate. Minnesota minimum wage is \$6.15 for large employers (more than \$625,000 in annual gross volume or sales) and \$5.25 for small employers. Therefore, the federal rate applies in Minnesota for employees who are subject to the FLSA.

The increase in the minimum wage rate for employers with pay ranges that run close together can cause

problems with certain employees. The new wage hike for the lowest paid workers can have a ripple effect by putting beginning workers on the same pay level as more experienced workers. When workers at the bottom level get an increase, others workers a little higher up the pay scale will want a pay increase too. There are three approaches to dealing with this problem.

1. Same-percentage increase - Increase everyone by 10.7% which is the increase in the federal minimum wage. This is a very expensive solution since higher paid workers will receive a larger dollar increase than lower paid workers.
2. Same-dollar increase - Increase everyone by \$28 a week which is the weekly pay increase in the federal minimum wage. This has the advantage of maintaining some pay differential without a 10.7% across the board increase as in example 1.
3. Tapered raises - Increase all hourly workers rate, but taper off the amount for higher paid workers so the increases are proportionately lower for higher paid workers. This is the least expensive approach. This approach works well since all employees receive something, it is least expensive for the business and it is a fair approach in economically difficult times.

### **Workforce Reduction** *continued from page 1*

employees in the affected group will not be reduced beyond the percentage of reduction in hours of work; and

7. is approved by any collective bargaining agent.

An employee is only eligible to receive shared work benefits with respect to any week if 1) during the week the applicant is employed as a member of the affected group that was approved prior to the week and is in effect for the week; and 2) during the week the normal weekly hours were reduced at least 20 percent but not more than 40 percent with a corresponding reduction in wages.

The total amount of regular unemployment benefits and shared work benefits paid cannot exceed the maximum amount of regular unemployment benefits available. An otherwise eligible applicant cannot be denied shared work benefits because of any provision relating to availability for employment, active search for employment, or refusal to apply for or accept suitable employment from an employer other than the shared work employer.

An applicant who is eligible for shared work benefits must be paid an amount equal to the regular weekly unemployment benefit amount multiplied by the percentage of reduction of the applicant's regular weekly hours of work as set forth in the plan. The deductible earnings shall not apply to earnings from the shared work employer of an applicant eligible for shared work benefits, unless the resulting amount

is less than the regular weekly unemployment benefits the applicant would otherwise be eligible to receive without regard to shared work benefits. An applicant is not eligible for shared work benefits for any week that employment is performed for the shared work employer in excess of the reduced hours set forth in the plan.

Not every employer, however, may benefit from the shared work program. Under the Unemployment Insurance Law, an employee is not eligible for or entitled to unemployment benefits if they are performing 32 hours or more in any given week. Thus, if a full-time employee's scheduled hours are reduced by one-fifth, they may not be entitled to unemployment benefits (40 hours x 20% reduction = 32 hours of work). Shared work program benefits are reflected in an employer's experience rating and would be repaid over a four-year period of time. Because the taxes charged to employers for unemployment benefits is based on its "experience rating", which measures how frequently employees receive unemployment benefits, a shared work program may not be in the employer's best interest as it may suffer an adverse consequence of driving up its experience rating, resulting in an increased tax rate. The employer must consider its future goals, projected length of slowdown in its business, and the cost associated with increased tax rates to ensure that it balances the objective of maintaining its total workforce and the cost of so doing.

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## **The Worker Adjustment and Retraining Notification Act**

By: Paul Rajkowski, Managing Partner

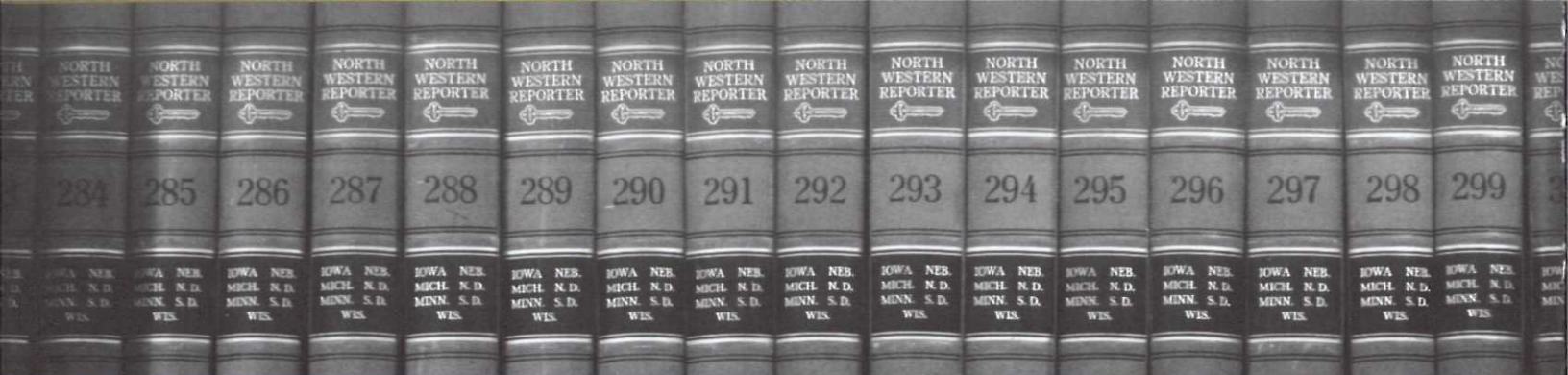
"In these hard economic times" is a phrase that all businesses hear too frequently in the current economy. Many businesses are being put in a position of having to reduce their workforce. When a reduction in workforce involves either a mass layoff or a plant closing, the Worker Adjustment and Retraining Notification Act (WARN) sets forth obligations that must be met by covered employers.

WARN covers businesses with 100 or more employees excluding Federal, State and local government entities providing public service. Employers covered by WARN must provide 60 days notice to employees in advance of any plant closings or mass layoffs. The notice must also be given to the State and to the appropriate unit of local government. Notice is required when a shutdown involves employment loss for 50 or more employees during a 30-day period or when a mass layoff involves 500 or more employees or 33% of the employer's active workforce.

Notices must be specific and in writing. There is no requirement about how the notice is to be delivered as long as it is received 60 days before a closing or layoff.

Should an employer not give proper notice, the employer will be responsible for paying each aggrieved employee an amount including back pay and benefits for the period of the violation, up to 60 days. In addition, if notice is not given to a unit of local government, the employer is subject to a civil penalty not to exceed \$500 for each day of the violation.

Any employer with at least 100 employees should consult with legal counsel if the employer will be laying off at least 50 employees at any single site during a 90 day period.



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### Items of Interest

- The IRS has announced new limits for Health Savings Accounts for 2010. The maximum annual contribution will be \$3,050 for employee only coverage and \$6,150 for family coverage. The maximum out-of-pocket amounts for a high deductible health plan for employee only coverage will be \$5,950 and \$11,900 for family coverage. The minimum deductible on these plans will be \$1,200 for employee only coverage and \$2,400 for family coverage. Employees who are aged 55 or older can make "catch-up contributions" of up to \$1,000.
- The Fair Labor Standards Act allows employers of tipped employees to pay wages of \$2.13 per hour if the amount employees receive in tips makes up the difference to achieve minimum wage. With the new minimum wage increase, it may be more difficult

for employees to make up this difference in tips. If the employee does not earn at least minimum wage with tips and wages, the employer must make up the difference.

- Summers are a time when businesses frequently hire minors. It's important to be aware of the guidelines the Department of Labor and Industry has established for employers hiring minors. Some of these are: 1) no hiring of minors under 14 years of age except in very restricted situations 2) proof of age must be maintained as part of payroll 3) employers covered by both state and federal requirements must follow the more strict guidelines. The penalty structure for violations of these range from \$500 to \$5,000 for each offense.

Rajkowski Hansmeier Ltd.'s QUARTERLY EMPLOYMENT LAW NEWSLETTER is intended to be informational and not to solve individual legal problems. Some of this information involves significant changes which could impact your organization. If you have further questions about this information, please contact us for an attorney's opinion. If you would prefer to receive this newsletter via e-mail, just let us know at [jphillips@rajhan.com](mailto:jphillips@rajhan.com).

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