



LIFOCUS

LAW

FOCUS EDITOR

✉ BSTARZEE@LIBN.COM

☎ 631.913.4225

🐦 @BSTARZEE1



# Pay cuts, furloughs and layoffs

Employers facing difficult decisions as they look to weather the storm

By **BERNADETTE STARZEE**

A few short weeks ago, the big question employers were asking themselves was, “How do I keep my workforce safe?” Now, the issue du jour is, “What do I do with my workforce?”

Employers across the economic spectrum are mulling layoffs, furloughs and reductions to hours and pay rates as they wrestle with meteoric drops in revenue resulting from the COVID-19 crisis.

## Cutting employees or hours?

“Employers might face the question of whether they should furlough employees or reduce hours,” said A. Jonathan Trafimow, partner and co-chair of the employment law practice group at Moritt Hock & Hamroff in Garden City. “For many, their answer might have been different before the CARES Act.”

Finalized March 27, the sweeping federal legislation includes a \$600 weekly incremental benefit for people who are eligible to receive unemployment benefits under state law, through July 31. Coupled with New York State’s weekly unemployment maximum of \$504, an eligible worker who is let go can receive up to \$1,104 in benefits each week.

“Many employers are good-hearted and well-intentioned and are really trying to do the best they can under the circumstances for their employees,” Trafimow said. “You might have an hourly employee who is making \$18 per hour working 40 hours, but now you can only use her for 10 hours. If you push her down to 10 hours, she’ll only be getting \$180 per week. So she might be better off on unemployment. So the question becomes, ‘Do I want to structure my layoffs so that I lay off half my employees, and they can get unemployment, and keep the other half working enough hours so they are better off working, rather than

reducing everybody down to where they’re all worse off?’”

Put another way, Trafimow said, an unintended effect of the CARES Act is that it may incentivize well-meaning employers to lay people off.

“No one likes to lay off employees, but a lot of people will be eligible for \$1,104 in unemployment benefits and may actually be earning more than they would as an employee, which makes the employer’s decision to do so a little easier,” said Mark Reinhartz, a member in the Garden City office of Bond, Schoeneck & King who concentrates his practice on labor and employment law. “The employer might say, ‘I’m hoping this will be temporary; I’m going to lay these people off rather than reduce their pay’ (or hours).”

However, there is another piece of the CARES Act that may serve to counteract any unintended consequences: the Paycheck Protection Program.

With this piece, eligible employers can

apply for a loan to cover payroll (and other expenses), and the payroll portion will be forgiven as long as current staffing levels are maintained. “The loan essentially can be converted to a grant,” Trafimow said. “The intent of that provision is to incentivize employers to not lay people off, and I think the hope is that the incentive will be enough so we will not see the CARES Act result in more unemployment rather than less.”

One option for cutting expenses is to cut hours across the board, which shares the pain and keeps everyone working.

“Most people want the security of knowing they have a job – whether they’re working in it now or are coming back to it after a temporary furlough – and that they have health insurance in case something goes wrong,” said David Tauster, an associate in the labor and employment practice group at Nixon Peabody, which has offices in Jericho.

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There is no legal definition of the word “furlough.”

“It can be another name for a layoff, or it can be a situation where employers continue offering full benefits in anticipation of bringing employees back on when things pick up,” Tauster said. “Most benefits carriers are going to relax the minimum hours required to keep people on the plan. But you have to figure out who’s paying for coverage. I have seen furloughs ranging from, ‘OK, we plan to bring you back when this crisis blows over, and you’ll get your COBRA notice’ to those who are giving fully paid benefits.”

By and large, Tauster is seeing more furloughs than permanent layoffs.

“Most employers are not using this as an opportunity to cut fat,” Tauster said. “They don’t know what to do, other than they can’t keep everyone on payroll right now, and they’re hoping to bring everyone back.”

Whether it’s better to furlough some employees and keep others working full-time, or to reduce everyone’s hours, is going to depend on a company’s particular circumstances, Trafimow said.

“A company may have critical employees that will still be very busy, and it may not make sense to reduce their hours,” Trafimow said. “You may have to reduce their pay, but you’re not going to want to reduce their hours. But if you have a department where it would not be a detriment to the



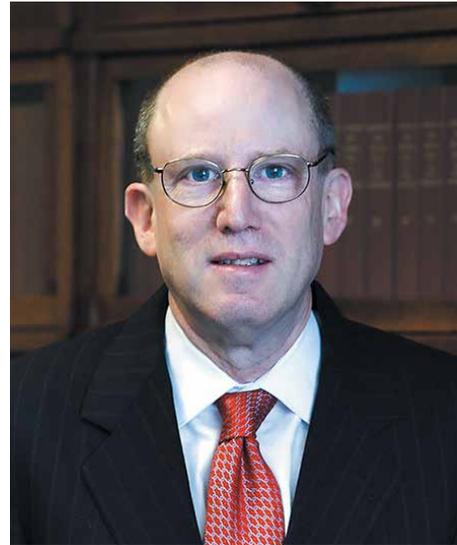
**A. JONATHAN TRAFIMOW:** Many employers are well-intentioned and want to do right by their employees.

company to reduce employees’ hours, you might do it across the board in that department to be fair.”

### Avoiding discrimination

Employers should keep in mind with furloughs or layoffs that all the rules about nondiscrimination must be followed.

“Employers may be fully justified in doing a reduction in workforce, but if they implement it in a discriminatory



**MARK REINHARTZ:** Because of the CARES Act, employees who are laid off can be eligible for up to \$1,104 in weekly benefits.

manner, they risk liability under anti-discrimination laws,” Trafimow said.

Tauster noted one trap an employer can fall into.

“An employer who has an employee who is a performance concern might say, ‘I can put him on furlough right now, wink wink, and not bring him back,’” he said. “I would say make the decision now, lay that employee off. If you don’t take action on a bad employee when you can, you may have to explain later on why you didn’t bring him back. It’s a lot easier to justify the action when it happens rather



**DAVID TAUSTER:** When cutting salaries, employers must be mindful of the minimum wage and the minimum threshold for exempt employees.

than to say, ‘I lied about the furlough; he’s a bad performer.’”

Whether they lay off workers or reduce their hours or pay, employers should provide employees with written notice, Reinhartz said.

Under New York State’s Worker Adjustment and Retraining Notification (WARN) Act, private-sector employers with more than 50 employees must file

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## Ones to Watch Law



**AMY BEDELL**



**LORRAINE STACKNOWITZ BOSS**

### Amy Bedell

Partner  
Lewis Johs

Lewis Johs in Islandia elevated Amy Bedell to the partnership earlier this year. The attorney focuses on complex litigation and appeals in all areas of civil defense, from medical malpractice and nursing home litigation, to insurance coverage disputes and municipal, premises and general liability actions. Prior to joining Lewis Johs, Bedell practiced for several years as a commercial litigator, and served as a habeas law clerk to the Hon. Joanna Seybert, the Hon. Arthur D. Spatt and the Hon. Denis R. Hurley in the U.S. District Court for the Eastern District of New York.

### Lorraine Stacknowitz Boss

Partner  
Forchelli Deegan Terrana

Lorraine Stacknowitz Boss is a recent addition to the partnership at Forchelli Deegan Terrana in Uniondale. The attorney, who came aboard as a partner in the firm’s tax, trusts and estates practice group, is also a certified public accountant and holds an LL.M. in taxation from New York University School of Law in addition to her law degree from St. John’s University School of Law. In the two decades before she joined Forchelli Deegan Terrana, Boss practiced at Brosnan & Hegler in Garden City.

### Daniel Levin

Special Counsel  
Goldberg Segalla

Daniel Levin joined Goldberg Segalla’s Garden City office as special counsel in the global insurance services group earlier this year. The attorney focuses his practice on the defense of insurance coverage matters and appellate advocacy and post-trial practice. He has more than 20 years of experience counseling major property-casualty insurers on coverage and claims-handling issues as both in-house and outside counsel, and he has provided coverage opinions on liability and first-party issues in the areas of maritime and aviation insurance. He earned his Juris Doctor from University of Chicago Law School.

### Gregory Pond

Partner and Co-Chair of Trusts and Estates Practice Group  
Certilman Balin

Partner Gregory Pond co-chairs the trusts and estates practice group at East Meadow-based Certilman Balin. The attorney practices in every aspect of estate planning, administration and litigation, including contested wills, accountings and valuation disputes. He also advises clients in matters related to probate and administration of estates, small business transactions and real estate matters. He is also an adjunct professor at his alma mater, St. John’s University. Earlier this year, Pond was named to the board of directors at Life’s WORC, a Garden City nonprofit serving people with intellectual disabilities and autism.

### Neera Roopsingh

Associate  
Sahn Ward Coschignano

A new member of the legal team at Sahn Ward Coschignano in Uniondale, Neera Roopsingh is an associate focusing on zoning and land use planning, municipal law and legislative practice, and litigation and appeals. Prior to joining Sahn Ward, Roopsingh gained experience in municipal and governmental matters by serving as a deputy town attorney for the Town of North Hempstead. Roopsingh, a graduate of Albany Law School of Union University, served as executive editor for research and writing for the Albany Law Review.

### Amy Silver

Partner  
Rivkin Radler

Amy Silver recently joined Uniondale-based Rivkin Radler as a partner in the real estate, zoning and land use practice group. The attorney’s experience includes a wide range of commercial real estate transactions, including office; retail; restaurant and industrial leasing; subleasing for landlords, tenants, sublandlords and subtenants; acquisition and disposition of commercial buildings; and the representation of U.S. and international financial institutions, funds, property owners, banks and investors in real estate financing. Silver came to Rivkin Radler from Lazer Aptheker Rosella & Yedid in Melville, where she was a partner.

■ BSTARZEE@LIBN.COM



**DANIEL LEVIN**



**GREGORY POND**



**NEERA ROOPSINGH**



**AMY SILVER**

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a WARN Notice 90 days before closing a plant. They must also issue notice when there is a layoff that affects either 33 percent of the workforce (at least 25 workers) or 250 workers from a single employment site. In certain circumstances, the 90-day advance period may be waived, but employers still have to file the notice, Reinharz said.

## Salary cuts

Outside of a collective bargaining agreement or other employment contract, employers are free to cut employees' salaries at will, but with certain caveats.

"You have to account for minimum

## 'YOU HAVE TO ACCOUNT FOR MINIMUM WAGE AND MINIMUM EXEMPT SALARY.'

wage and minimum exempt salary," Tauster said.

If an exempt employee falls below the exempt salary minimum, that employee has to be reclassified as non-exempt, which makes the employee eligible for overtime. While there are not too many people currently working overtime, there are other considerations, such as a requirement that this individual's hours be tracked.

"It's an easy trap to fall into right now,"

Tauster said.

Employers must also give employees written notice of the new pay rate, Trafimow said. This is a requirement under the Wage Theft Prevention Act of 2011.

## Communication

If the furloughs or pay cuts are temporary, employers should let their employees know this without making any promises.

"The one thing you don't want to do is give assurances; you don't want to make guarantees," Tauster said. "Make it clear to employees that the plan is that it's temporary, but by the same token soften the language to preserve flexibility, so that if something changes you will have that

flexibility."

When letting employees go, "advise them of their rights to apply for unemployment and provide them with the phone numbers and websites to contact," Reinharz said.

"Employers should let employees know that they're a valued member of the company's community and that this is something that is unavoidable given the pandemic's impact on the company," Trafimow said. "It was true pre-pandemic as well that when you terminate employees you always want to do it with dignity and respect and by treating them with as much professionalism as you can under the circumstances and with sensitivity to all the stresses the employees may already be going through."

## Some companies are hiring, increasing pay

While employers announce pay cuts and layoffs in record numbers, companies like supermarkets, drug stores and banks are hiring and/or issuing temporary pay increases or bonuses to retain and show appreciation for front-line staff.

Rite Aid announced this week it is actively seeking 5,000 associates for full- and part-time roles, including cashiers, pharmacy technicians and distribution associates. The drug store chain also announced a \$2 per hour pay hike for hourly associates at least through May 2 and \$1,000 bonuses for current retail store managers. Also, associates' employee discounts were increased to 35 percent through the end of April.

Target also recently announced that hourly employees would be paid \$2 more per hour at least through May 2 and that store department supervisors would get bonuses ranging from \$250 to \$1,500.

Walmart said in March it was looking to hire 3,750 associates in New York to work in stores, clubs, distribution centers and fulfillment centers, in addition to giving cash bonuses to every hourly associate employed before March 1.

Wakefern Food Corp., whose stores include ShopRite, announced a temporary \$2 per hour pay hike for associates, in addition to a plan to beef up hiring in retail and warehouse areas.

M&T Bank was one of several banks announcing temporary pay hikes or bonuses for public-facing employees.

"We made the decision to temporarily increase payment for employees unable to work from home by 15 percent per hour to acknowledge and thank them for their commitment to our company and customers," said Rick Reustle, metro market manager for retail banking for M&T Bank. "The dedication these employees have shown in the face of this crisis is inspiring. Thanks to them, we are able to provide essential banking services in these uncertain times."

— BERNADETTE STARZEE



**That some achieve great success, is proof to all that others can achieve it as well.**

*Abraham Lincoln*

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