



A Hotel Owner's Perspective: Hotel Re-Opening – Owner Concerns (Part 2)

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Hotels are looking to re-open soon. Many have announced re-opening dates, and many have started. The hotel industry is beginning to see the shoots of reopening. We shall avoid a political discussion of whether this is wise or unwise at this time and address the politics between the owner and its operator or the owner, its operator and the franchisor whose brand standards are in play.

As the owner is paying the freight on any changes imposed by its branded operator or brand franchisor for both the re-opening plan (and there should be one) and the post-re-opening operations, there are questions to ask about a variety of re-opening topics, whose answers might shed some light on additional operating costs arising from new brand standards. This Installment addresses the employment changes and impacts, including impacts relative to severance.

In Part 1 (published on May 11, 2020), I stated "that the 'operational design' changes should be driving the 'organization chart' changes to a great extent, rather than vice-versa . . ." Assuming that the owner has received an outline of the 'operational design' changes, it is incumbent to understand the employment impact. An owner who is prominent in the locale of the hotel or has other businesses that affect the owner's reputation in the community may well need to understand the impact of organizational changes on that reputation. A board of directors of an owner has a fiduciary duty to the owner's shareholders and stakeholders to act on behalf of that owner. The human impact, as well as the cost impact, must be part of the fulfillment of the fiduciary duty, such that the operator's recommendations on termination and severance (not including decisions on which specific employees might be terminated) should be subject to the owner's approval.

Most branded management agreements and many third-party agreements provide that the operator makes all (or most) hiring and firing decisions, including those requiring the payment of severance. Though a management agreement may not be clear on this point, it is fair to interpret that provision as applicable to the decision to terminate one or two individual employees, rather than a wholesale termination. Moreover, these are highly unusual times and circumstances.

There may be legal and potential precedential issues that arise in the future if an owner pays more severance (due to brand policy) than required by statute. An owner or its board of directors should be fully informed on the decision-making process through the decision to terminate and pay severance. At a time like this, when re-opening may not result in immediate cash flow or return to pre-closure profitability, capital preservation is critical to being able to properly rebound from this crisis. Any

litigation on severance or wrongful termination on any grounds is likely to adversely affect the conservation of capital.

I submit that, unlike the ongoing operations, the decision-making authority in the re-opening process (including severance) should not be and is not ceded to the operator.

To have gotten to a point of re-opening, the Hotel will have closed and furloughed or temporarily laid off employees; some may even have made the layoffs permanent. With an unknown re-opening date and the claim of 'exigent circumstances' or 'unforeseeable business circumstances' that might be rationale for no WARN Act notifications, many employers will recall employees by reoffering employment to some, but they may not reoffer employment to all; jobs or positions may be eliminated, whether indefinitely or merely temporarily.

| Topic | Questions |
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| WARN Act | Implications Are 'exigent circumstances' or 'unforeseeable business circumstances' a circumvention of WARN Act notification requirements? If you terminated employees after or without a furlough and you reopen within a time certain after termination, is the claim of exigent circumstances valid? Is there potential WARN Act notification liability (e.g., 60 days of compensation and benefits) that might result? Are there penalties under the WARN Act if you terminated without appropriate notice or employee compensation? What is or might be the "time certain?" |
| Positions Eliminated | What positions have been eliminated? What is the operating change that permits this position to be eliminated? Will those who remain have more work to do than before? Or, is there a reduction or modification of services that makes the elimination supportable? |
| Layoffs (generally) | How is a layoff being determined? That is, why any employee as opposed to another? Are there operational changes that make a position or an employee unnecessary or redundant? Are concerns of age, sex, gender preference, race or other potential claim of employment discrimination being considered? |

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| Layoffs requiring severance | How is severance calculated? Are there brand policies that are being applied? Are there local statutes or ordinances that must be followed? If one of these is less expensive than the other, which governs? Does the brand treat an employee whose position has been eliminated differently from the employee who is declared to be redundant? |
| Benefits | Are costs of benefits included in the severance calculations? Are COBRA costs properly noted and COBRA offers being properly made? |

These are just a few issues that arise because of revamping operations and staffing resulting from closure and reopening.

I recommend that owners have their own labor and employment counsel review these questions and the recommendations for action that underlie them