Employers Facing the COVID-19 Challenge: Furloughs and Layoffs—A Labor Economics View

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The current economic crisis resulting from the novel coronavirus (COVID-19) and the cascading effects on small and large businesses will result in employers terminating workers across industries and occupations through company reorganizations, furloughs, and layoffs due to lack of work. In this paper, we examine data and analysis issues that labor economists typically encounter when analyzing company reorganization decisions. We begin by providing an overview of current workforce trends and then provide insights into the process that researchers can use to analyze company reorganization decisions and reduction-in-force decisions.[1]

LABOR MARKET LANDSCAPE – MARCH 2020

The current employment landscape at the end of March 2020 has changed, most likely irrevocably, from the landscape that existed in February 2020. In February 2020, the Bureau of Labor Statistics (BLS) stated:

> Unemployment rates were lower in February in 8 states, higher in 1 state, and stable in 41 states and the District of Columbia. ... Eleven states had jobless rate decreases from a year earlier, 1 state had an increase, and 38 states and the District had little or no change. The national unemployment rate, 3.5 percent, was little changed over the month but was 0.3 percentage point lower than in February 2019.2

The juxtaposition of the February 2020 report from the BLS with the current news cycle regarding the employment situation is jarring in the face of the COVID-19 pandemic and subsequent effects on large and small businesses. On February 27, 2020, the Department of Labor released the number of unemployment claims for the week of February 22, 2020:

> The advance number of actual initial claims under state programs, unadjusted, totaled 199,093 in the week ending February 22, a decrease of 10,245 (or -4.9 percent) from the previous week. The seasonal factors had expected a decrease of 17,322 (or -8.3 percent) from the previous week. There were 203,091 initial claims in the comparable week in 2019.

1 For a more detailed description of the analysis process, including data availability, statistical methods, and special considerations, please see: Janet Thornton, PhD, and Fredrick Holt, PhD, "Weathering the Economic Downturn: Economic and Statistical Analysis for Layoffs," EEO Insight 1:3 (2009).

2 See Bureau of Labor Statistics, "State Employment and Unemployment Summary – February 2020" (March 27, 2020), available at: https://www.bls.gov/news.release/laus.nr0.htm

> The advance unadjusted insured unemployment rate was 1.4 percent during the week ending February 15, unchanged from the prior week. The advance unadjusted number for persons claiming UI benefits in state programs totaled 2,063,550, a decrease of 35,492 (or -1.7 percent) from the preceding week. The seasonal factors had expected a decrease of 24,266 (or -1.2 percent) from the previous week. A year earlier the rate was 1.5 percent and the volume was 2,126,207.3

As of March 26, 2020 (reflecting the week of March 21, 2020), the number of unemployment claims in a single week had climbed to over 3.2 million:

> In the week ending March 21, the advance figure for seasonally adjusted **initial claims** [emphasis in original] was 3,283,000, an increase of 3,001,000 from the previous week's revised level. This marks the highest level of seasonally adjusted initial claims in the history of the seasonally adjusted series. The previous high was 695,000 in October of 1982.[4]

Further, as of April 2, 2020 (reflecting the week of March 28, 2020), the number of unemployment claims had increased by the highest level of initial claims since the BLS began collecting these data:

> In the week ending March 28, the advance figure for seasonally adjusted **initial claims** [emphasis in original] was 6,648,000, an increase of 3,341,000 from the previous week's revised level. This marks the highest level of seasonally adjusted initial claims in the history of the seasonally adjusted series. The previous week's level was revised up by 24,000 from 3,283,000 to 3,307,000. The 4-week moving average was 2,612,000, an increase of 1,607,750 from the previous week's revised average. The previous week's average was revised up by 6,000 from 998,250 to 1,004,250.5

The differences between the number of unemployment claims in February 2020 and the end of March 2020 foreshadow the likelihood of a large increase in the rate of unemployment as the economy adjusts to the loss of business caused by the COVID-19 pandemic. In addition, recent news has highlighted the number of furloughs that are being implemented by large companies, such as Macy's and Gannett Co.6 While employees who are "laid off" are essentially terminated and less likely to be recalled to their current jobs, furloughed employees may be recalled when the economic environment improves.

National, state, and municipal unemployment rates are the product of job losses occurring across industries as employers review their balance sheets and the demand for their goods and services. Firms in every major industry have shed portions of their workforces through layoffs, with certain sectors, such as the restaurant industry, being especially hard hit. However, there is a shift in employment opportunities to businesses, such as Walmart and CVS, that are struggling to maintain at-home deliveries.7 Both private- and public-sector employers may find it necessary to lay off employees due to potential budget cuts caused by decreased tax receipts from businesses and individuals. As this brief overview shows, many employers may find it necessary to assess their options, understand their workforce situations, and make informed employment decisions, including reorganizing the company to meet current business needs. Company reorganizations may include furloughing employees, laying off employees, or installing partial pay cuts.

In today's economic climate, employers will continue to assess their economic viability and strategize regarding the need to retain trained workers while controlling labor costs. In this paper, we offer insights in order to explain the key data and statistical issues that employers encounter when analyzing these decisions.

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3 Department of Labor, "Unemployment Insurance Weekly Claims," News Release (February 27, 2020), available at: https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200361.pdf.

4 Department of Labor, "Unemployment Insurance Weekly Claims," News Release (March 26, 2020), available at: https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200510.pdf.

5 Department of Labor, "Unemployment Insurance Weekly Claims," News Release (April 2, 2020), available at: https://www.dol.gov/ui/data.pdf.

6 Maxwell Tani, "Gannett Announces Pay Cuts and Furloughs Across Entire Media Company," The Daily Beast (March 30, 2020), available at: https://www.thedailybeast.com/gannett-announces-pay-cuts-and-furloughs-across-entire-media-company; Aishwarya Venugopal, "Macy's, Kohl's, Gap turn to mass furloughs as virus crisis deepens," Reuters (March 30, 2020), available at: https://www.reuters.com/article/us-macy-s-layoff/macys-to-furlough-nearly-130000-employees-as-virus-keeps-stores-shut-idUSKBN21H2I7.

7 One bright spot is the increased hiring among firms that provide household goods and services, such as Wal-Mart, CVS, Amazon, grocery stores, and pizza chains. See David Gelles and Michael Corkery, "Help Wanted: Grocery Stores, Pizza Chains and Amazon Are Hiring," The New York Times (March 22, 2020), available at: https://www.nytimes.com/2020/03/22/business/coronavirus-hiring-jobs.html; and Andrew Soergel, "Walmart, CVS, Others Hiring More Than 800,000 Workers During Coronavirus Outbreak," U.S. News & World Report (March 25, 2020), available at: https://www.usnews.com/news/economy/articles/2020-03-25/walmart-cvs-others-hiring-more-than-800-000-workers-during-coronavirus-outbreak.

DESCRIPTION OF ADVERSE IMPACT ANALYSIS FOR COMPANY REORGANIZATIONS WITH REDUCTIONS-IN-FORCE

Adverse impact analyses typically measure the effect of employment decisions on individuals protected under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and/or Title I of the Americans with Disabilities Act (ADA) in addition to applicable state laws. Employers often ask labor economists to conduct statistical analyses of reduction-in-force or layoff decisions to determine whether statistical evidence of adverse impact exists against one or more legally protected group(s) of employees, as defined by age, race/ethnicity, gender, and/or disability status.8 It is highly recommended that, regardless of the analysis conducted, such analysis be conducted at the direction of company personnel, such as the head of Human Resources, in concert with both inside and outside legal counsel and under the auspices of attorney-client privilege and/or the work product doctrine.

FACTORS CONSIDERED

Several cases provide context regarding the factors that employers consider as the basis for their layoff decisions.9 These cases focus on the business needs of the enterprise and contextualize the layoff decisions within economic factors facing the employer, such as market forces (including the COVID-19 pandemic), product decisions, and mergers/acquisitions. For example, when a product line is discontinued, a corporation may not need as many employees with a particular skill-set. When designing an adverse impact study, labor economists take into account these business needs and other relevant factors.10 We determine the scope of the layoff analysis by asking the "Who," "Where," "What," and "When" of layoffs:

"Who" is and is not subject to layoff?

Labor economists are interested in gathering the workplace characteristics of the layoffs and determining which departments, units, business lines, job skills, etc. are subject to layoff and which may be exempted.

"Where" are the layoffs occurring geographically?

It is useful to understand which facilities or locations are affected, including whether the entire facility is being closed.

In the case of facility closings, it is also useful to learn if employees are offered continued employment at other sites. Knowledge of this information assists in properly identifying the groups of employees to analyze.

"What" factors will be used to decide whom to layoff?

Factors may include prior performance evaluations, the ability of employees to supervise others, employee job knowledge, and other human capital characteristics that distinguish the experience and qualifications of the employees.

The appropriate factors to consider, and the weight to give to each factor, may vary depending on the type of jobs affected.

"When" will the layoffs occur?

Some firms conduct layoffs as a single event, while others implement layoffs in phases.

Understanding the timing of the layoffs assists in appropriately grouping employees together for analysis, as employees may enter or leave a workforce over time.

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8 For example, if the percentage of employees that are age forty or older among those considered for layoff is 50%, then we would expect that, on average, 50% of the employee layoffs would also be age forty or older, if the impacted employees had a similar likelihood of being laid off. If 80% of the laid-off employees are age forty or older when we expected 50%, then the next step in the analysis is to determine if this difference is statistically significant. In other words, we determine if this difference could simply be a random occurrence. Generally, social scientists and the courts conclude that differences between two groups (e.g., minority compared to non-minority) are statistically similar when the difference, in terms of the number of standard deviations, is less than approximately two (or three) standard deviations. Courts adopted this standard in voting rights cases (e.g., Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272 (1977)) and carried the standard over to equal employment issues in such cases as Hazelwood School District v. U.S., 433 U.S. 299, 308 n.14 (1977) and Teamsters v. U.S., 431 U.S. 324; 97 S. Ct. 1843 (1977). A difference that is less than two (or three) standard deviations is consistent with a greater than 5% (or 1%) probability of that difference occurring by chance. When the differences are smaller than two (or three) standard deviations, then they are typically considered to be "statistically insignificant." Conversely, social scientists and the courts typically conclude that differences are statistically dissimilar when the number of standard deviations of the difference is greater than approximately two (or three) standard deviations (or the probability of chance occurrence is less than or equal to 5% (or 1%)]. When the differences are as large as two (or three) standard deviations or larger, they are considered to be "statistically significant."

9 For example, see Meacham v. Knolls Atomic Power Laboratory (554 U.S. 84 (2008)), a disparate-impact claim under the ADEA involving the layoff of thirty-one employees, thirty of whom were age forty or older. The Supreme Court held that employers bear the burdens of both production and persuasion when employing the "reasonable factors other than age" (RFOA) defense (pp. 5–17). In addition, see Diaz v. Eagle Produce Limited Partnership (521 F.3d 1201 (2008)), where the Ninth Circuit Court of Appeals reversed in part summary judgment because the employer "did not provide a facially legitimate explanation" for the discharge of one of the plaintiffs, who had greater experience than several substantially younger workers (p. 1215).

10 In the face of mass layoffs that are widespread across a company, no statistical analysis may be required due to the lack of employees being kept on the payrolls.

Determining the answers to these key questions guides the employer and the labor economist in the identification of "similarly situated" employee selection pools. The labor economist needs to have an understanding of which employees are "at risk," how "at risk" employees are grouped for layoff purposes, and the factors that influenced the selections (e.g., performance, skills, qualifications). Absent accurate and thorough record-keeping, a seemingly simple question such as "Who was considered for layoff?" may be difficult to answer. Failure to properly define the similarly situated employee pools may result in groupings of employees who are not similarly situated or groupings that fail to include similarly situated employees. It is difficult to overstate the central role of defining the similarly situated employee pools in the implementation of a sound adverse-impact analysis for a layoff.

CONCLUSIONS

The COVID-19 virus is having an unprecedented impact on the economy, including furloughs and layoffs leading to high unemployment insurance claims and, relatedly, rapidly increasing unemployment rates. This paper has attempted to provide insight as to how labor economists think about and implement an adverse impact analysis for a layoff. By observing a few important guidelines, employers may ameliorate matters when embarking on a layoff and facing its consequences. Maintaining this information allows labor economists to analyze the layoff decisions to determine if there are differences among demographic groups in the layoff rate. The following are practical suggestions to assist with the process:

1. Develop written policies about how layoffs are to be conducted.
2. Delineate specifically which employee groups will be affected, which factors will be used to determine whom to layoff, and develop measures of productive work.
3. Document the groups of employees that were compared when deciding whom to layoff.
4. Collect and retain complete and accurate data on the layoff process.

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