

COVID-19: FURLOUGH CONSIDERATIONS

A furlough is the temporary reduction of an employee's paid hours or the requirement for an employee to take a certain amount of time off without pay. Furloughs are an alternative to layoffs; they are designed to temporarily reduce labor expenses while retaining employees on a temporary leave status. Furloughs are most commonly implemented due to:

- Disruptions in business
- Lack of work available
- Negative budget situations

The temporary nature of furloughs is seen as a better alternative to layoffs when employers are experiencing a significant downturn but anticipate business will improve. Employers who are unable to redeploy employees -- through a temporary labor pool, for example -- can consider instituting furloughs, which reduces the need to rehire employees when situations improve.

The COVID-19 pandemic offers a scenario for implementing furloughs across certain segments of the workforce. However, there are key considerations to understand when evaluating the use of a furlough. Careful assessment of broader implications within and outside the organization should be made, including review of current benefit plan designs, employment contracts and collective bargaining agreements. An attorney should review federal and state regulatory compliance.

Employer Considerations

Identifying Impacted Populations

Employers should first consider which populations can be considered for a furlough action. Employers need to be careful to target full populations of jobs as opposed to individuals to avoid any risk of inequity or discrimination and to avoid risk of compromising the regulations of exempt status employees under the Fair and Labor Standards Act (FLSA) (*see section on regulatory and compliance considerations*). If the employer has identified targeted furlough jobs within collective-bargaining units, the institution should review its collective bargaining agreements to see what management rights provisions are outlined; negotiated terms and conditions may need to be worked out with a union.

Identifying Type of Furlough

Furloughs are typically a temporary reduction of an employee's paid hours, a temporary reduction in an employee's pay, a requirement for employees to take time off without pay, or a combination of these circumstances. Furloughs should be set for a specific period with a clear plan on the timing to reassess when business operations are predicted to change. Employers should identify the furlough action that best suits the impacted populations and ensure actions comply with regulatory requirements, such as FLSA and state laws. Certain states have implemented medical leave laws applicable to COVID-19.

Furlough Examples:

1. Employers may choose to furlough employees in targeted non-exempt roles to a reduced schedule (i.e. working one day a week with 8 hours of pay instead of their normal 40 hours of pay each week)
2. Employers may choose to require employees (exempt and non-exempt) to take time off without pay. In this case, employers must be careful when furloughing exempt employees not to jeopardize their exempt status under the Fair Labor Standards Act (FLSA).

Benefits Continuity

Employers need to decide how they are going to continue to support their employees through the furlough with reduced compensation and/or benefits.

Health Insurance Coverage

It is typical during a furlough for employers to continue to offer health insurance coverage to impacted employees, as benefits eligibility within plan designs allow. If employees continue to remain eligible under the employer's health plan, employers will need to determine if alternative arrangements will need to be made for employee contribution payments. If an employer elects to furlough through a reduction in hours to a point where employees will no longer meet eligibility requirements, employers need to offer continuation of coverage through COBRA.

Retirement Plans

Employers need to consider whether a furlough will cause a "partial termination" under qualified plan rules, triggering 100% vesting for impacted employees. During a furlough, employers will need to evaluate plan rules on continuing employer contributions. An organization's ERISA counsel should be consulted when evaluating retirement plan impacts.

Paid Time Off

The accrual of Paid Time Off (PTO) is typically discontinued while an employee is in a furloughed status. Employers should consider, however, that when the furlough ceases, the employee's furlough time typically counts toward years of service. This allows the employee to resume accruing on the applicable schedule when they return to their normal work status. Employers should determine if furloughed employees will be allowed to use accrued and unused PTO prior to going to an unpaid status. In some states, the use of PTO to cover a furlough period will disqualify an employee from receiving unemployment income until the use of PTO is exhausted. Some employers are allowing employees to cash out accrued PTO banks prior to placing them in a furloughed status to help with financial impacts. Some state laws (e.g., California) will treat a break in service from a furlough-like a termination to require final pay of all accrued leave benefits. Employers should seek to understand what is allowed by applicable state laws, and consult with legal counsel for more information on federal and state laws and regulations.

Regulatory and Compliance Considerations

Fair Labor Standards Act

Employers carefully need to design a furlough action that complies with FLSA regulations. Reducing pay or hours for non-exempt employees is simpler to administer under FLSA regulations; hours can be reduced as long as non-exempt employees are paid for the hours worked and pay is at least the applicable federal or state minimum wage (note – reducing hours may still have benefits or time off implications). Employers need to be careful, however, when furloughing exempt employees not to risk employees' exempt status under FLSA. With any reduction to non-exempt or exempt status, the employer should strictly enforce the "no-work rule" during periods where employees are not expected to work.

Two options can be considered for furloughs impacting exempt employees:

1. *Employers can require full week absences.* An employer must pay an exempt employee their full predetermined salary for any week in which employees perform any work regardless of the number of hours worked. Some of the pay can be in the form of paid time off, as long as the exempt employees receive their full week salary. If an employee does not work in a week, however, the employer is not required to pay the employee for that work week.
2. *Employers can reduce an exempt employee's pay and hours.* As long as pay and hour reductions are in response to a longer-term economic situation, employers can make adjustments to an exempt employee's pay and hours. Employers need to carefully articulate this adjustment in order not to jeopardize exempt status; the hours reduction needs to be broadly enforced. In this scenario, an employer would reduce an exempt employee's salary by a percentage that would apply to all employees with the same job.

The Worker Adjustment and Retraining Notification (WARN) Act

The WARN Act requires employers of 100 or more employees to provide 60 days' notice before a mass layoff or plant closing of at least 50 employees. A furlough, while not a layoff, could trigger the WARN Act if an employer is not careful in setting the period of the furlough within the allowed time. The WARN Act is not triggered if the furlough is less than 6 months or if employees' hours have not been reduced by 50% or more in a 6-month period. Some exceptions exist within the WARN Act for mass layoffs caused by natural disasters or unforeseeable business circumstances; however, it is unclear at this time if COVID-19 qualifies under these exceptions. Employers also need to check to see if the state has a "mini-WARN" act and understand the implications under such acts.

Employee Rights and Protections

Furloughed employees may qualify for weekly unemployment payments from the state in which they work. Employers should direct their employees to their state's eligibility requirements. Additionally, based on what employers decide to do with continuing pay and/or benefits, they should communicate to impacted employees why they may or may not be eligible for

unemployment. Employers may also choose to communicate additional support that may be available to furloughed employees through itself, the CARES Act or other relief programs. For example, some employers have built up funds to be made available and the CARES Act provides additional support, such as by waiving the 10% penalty on withdrawing up to \$100,000 from employer-sponsored retirement accounts if younger than age 59.5. Furloughed employees should also be made aware that they can look for other employment during this time.

Resources

Unemployment DOL General Info: <https://www.dol.gov/general/topic/unemployment-insurance>

DOL Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues: <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs>

Stimulus Relief Bill Information: <https://www.congress.gov/bill/116th-congress/senate-bill/3548/text>

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Access other educational resources on our [COVID-19 resource page](#). For more information, [contact us](#).