

What Should Employers Be Thinking About if Considering a Furlough or Lay-off?

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Federal WARN Act

Layoffs, reductions in force, and long-term furloughs (6 months or more) may implicate the federal Worker Adjustment Retraining Notification Act (WARN Act). The WARN Act requires that employers with 100 or more employees provide 60 days' advance notice of a temporary shutdown (or 60 days' pay in lieu of notice) if the shutdown will (i) affect 50 or more employees at a single site of employment and (ii) result in at least a 50 percent reduction in hours of work of individual employees during the month of the shutdown. However, 60 days' notice is not required if the shutdown is a result of a "natural disaster" or "unforeseeable business circumstances." Although the WARN Act does not specifically address whether a pandemic or potential pandemic qualifies as a natural disaster or unforeseeable business circumstance, the key factor for both is that the event was sudden, dramatic, and not foreseeable within the required notice period. Employers should note that, even if these exceptions apply to the COVID-19 outbreak, the employer is still required to give as much advance notice as is practicable. Employers accordingly should be prepared to communicate a temporary shutdown once a final decision has been made, even if the shutdown will not occur for several days.

State WARN Acts

Employers should also be mindful that many states have slightly different versions of the WARN Act, which may impose slightly different obligations than the federal one. However, some states are taking actions to waive the advance notice requirements of their WARN statutes given the current circumstances (notably, thus far, California).

Furlough

1. Communicating a furlough: A furlough typically refers to a period of mandatory unpaid time off for an employee. We recommend sending furlough information in writing, whether or not an oral conversation proceeds it.
2. Wage Concerns:
 - a. **Exempt Employees (generally salaried more senior-level employees):** Employers must pay exempt employees their full salary for any week in which they perform *any* work. For this reason, to effectively furlough exempt employees, an employer must instruct them to perform **no work at all** (including checking and answering emails). In addition, if a furlough begins in the middle of a work week, an employer must be sure to pay all exempt employees for the entire week.

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- b. **Non-exempt (generally hourly) Employees:** Employers need only pay non-exempt employees for “hours worked.” To the extent non-exempt employees are not working or are working reduced schedules, the law does not require that they be paid for more than the hours they actually work, subject to applicable paid time off policies and laws.)
- c. **Paid Time Off and Furloughs:** Employers generally must allow and can require employees to use accrued vacation time or personal time in order to be paid for any time off they are out of work during a furlough, although there are exceptions. In addition, non-exempt employees who may be working a reduced schedule and may use vacation or personal time accruals to receive their full-time wages, and exempt employees, who will be paid regardless for a part-time schedule, can usually be required to use accrued leave banks for time off. However, note that employers cannot require employees to use regular vacation time or personal time first if they qualify for the new federal sick leave entitlement.

Generally speaking, employers should not require employees to use their regular accrued sick time during a furlough. However, some states are expanding the reach of their statutory sick time to allow employees who cannot work because of COVID-19-related reasons to elect to use sick time during a period of furlough or office/business closure.

Importantly, beginning April 2, 2020, employees who are furloughed because of government quarantine or isolation orders and who work for covered employers may be eligible to receive an additional 10 days of paid leave pursuant to the [Families First Coronavirus Response Act](#).

- 3. **Unemployment Benefits:** Employees who are on leave, furloughed or working reduced schedules will generally be eligible for unemployment insurance benefits, and should be encouraged to apply for them with the relevant state unemployment agency. Rights to benefits will vary from state to state and are changing rapidly, but the federal CARES Act passed on March 27th significantly increased the number of eligible workers, the amounts that will be paid, and the duration of those benefits.
- 4. **Health Insurance Benefits:** Employees who are on unpaid leave, furloughed or working reduced hours may lose access to health insurance benefits. Generally, employer health plans require employees to work full time (usually defined as 30 or more hours per week, the maximum allowed under the Affordable Care Act) to participate in the health plan. For insured plans, the insurance policy generally has similar requirements. Plans and policies also generally (but not always) allow coverage to continue during unpaid leaves of absence that do not exceed a certain period. This period is generally longer for medical leaves of absence than for non-medical leaves. Employers should also remember that health plan coverage must continue for employees on FMLA leave on the same terms as for active employees, so long as the employee continues to pay the employee’s share of the premium. The new, partially paid FMLA child care leave is likely to significantly expand the number of employees on FMLA-covered leave.

Lay-offs

1. We recommend consulting legal counsel to ensure that a lay-off is done in a way that reduces potential legal claims for discrimination, etc. Employers should check the latest legislation as new legislation will be enacted on a daily basis at the federal level and at the state level.
2. Communicating a lay-off:
 - a. If the Company is providing severance, it should be in exchange for a release. Release language varies by state. Employers with 20 or more employees will have to comply with the Older Workers Benefits Protection Act and the Age Discrimination in Employment Act.
 - b. In the event the employer is not providing severance, it can use a template termination letter.

In either event, be sure to provide state-requirement information, if any, on unemployment benefits. Many states have changed their approach to unemployment benefits to allow employees out of work as a result of company shutdowns or furloughs to collect benefits.

If you have questions regarding these developments, please contact a member of the Labor, Employment & Benefits team.

For more guidance on issues related to the coronavirus pandemic, please visit our [COVID-19 resource center](#).

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