



FURLOUGHS AND LAYOFFS

COVID-19: A Deep Dive Into The Pros, Cons, and Best Practices for
Implementing Furloughs and Layoffs

March 25, 2020

LEGAL DISCLAIMER

FURLOUGHS AND LAYOFFS



This communication and any accompanying documents are intended for educational and informational purposes only, do not constitute legal information, and should not be relied on as such.



While we hope that you will learn a lot today, we are not attorneys, and the information should not be construed as legal advice. If you are seeking legal advice, you are encouraged to consult an attorney.

PURPOSE

Explain the pros, cons, and best practices for implementing furloughs and layoffs as a result of the COVID-19 crisis.



COMPONENTS

1

Differences Between
Furloughs And Layoffs

2

Pros and Cons of
Implementing Furloughs

3

Pros and Cons of
Implementing Layoffs

4

Best Practices for
Implementing Furloughs and
Layoffs

5

Q & A

DEFINITIONS



Furlough

A temporary reduction in hours of work or weeks of work. Situations might include: an employee or group of employees work only 10 hours in a week, employees work every other week, or the company closes for 2 weeks. It usually involves an estimated return date and time frame for the furlough duration.



Layoff

A layoff is a separation of employment, potentially with the intention of rehire. Employers with 100 or more employees should review their requirements under the WARN Act. Under the WARN Act, a temporary layoff means that the employer expects to rehire the employee generally within six months. A permanent layoff means that the employer does not have an anticipated rehire date.



LAYOFFS VS. FURLOUGHS COMPARISON



“Furloughs are meant to be temporary — employees are expected to return to work when the organization is ready — whereas layoffs result in a separation of employment.”

	FURLOUGH	LAYOFF
EMPLOYMENT	Remains employed with the company.	No longer employed with the company.
STATUS	Meant to be a temporary arrangement.	May be temporary but could be permanent.
HOURS	A temporary reduction in hours of work or weeks of work.	No worked performed due to termination of employment.
PAY	Exempt Employees- Full days or full weeks worked (with restrictions/specifications). Non-Exempt Employees- Only hours worked, and possibly reporting pay.	No pay due to termination unless a severance package is offered.
PAID TIME OFF	Employees can use paid time off benefits such as vacation, PTO, etc. to offset their income during furlough.	Paid time off benefits may be paid out depending on Company policy.
HEALTH INSURANCE	Refer to health plan document, ACA measurement/stability periods, and/or contact insurance broker to determine if health insurance benefits continue or if COBRA/State Continuation is triggered.	Employee may be eligible for COBRA or State Continuation coverage.
UNEMPLOYMENT	Eligible to apply in certain states and waiting period may be waived.	Eligible to apply for unemployment benefits.



PROS AND CONS OF FURLOUGHS

PROS

- Allows employees to remain employees of the organization and avoid complete layoffs.
- Allows employees to continue to work as needed by the employer such as reduced work schedules, alternating work weeks, etc.
- Employees may be eligible for the Emergency Paid Sick Leave Act/Emergency Family and Medical Leave Act during weeks that they are not furloughed (*please note that we are still seeking clarification to determine how and if employees may be eligible*). However, employees cannot draw both unemployment and emergency leave pay at the same time.
- Gives employers flexibility while still possibly providing employees with optimal pay and benefits.
- Reduces rehiring needs.
- Saves compensation costs for employers.

CONS

- The employer would need to collect the employee's portion of health insurance premiums or may elect to cover the full premium amount if health insurance benefits are maintained. If COBRA or State Continuation is triggered and the employee and/or qualified beneficiaries are eligible, the employer will need to ensure that paperwork/election forms are provided to employee.
- Employees who were not furloughed may need to take on additional work and returning workers may feel overloaded when they return.
- Furloughed employees may seek additional work elsewhere and could possibly not return. May lose high performing employees.
- It may take time to get organizational productivity back up and running to previous levels.
- Interrupted work may cause a disruption in innovation and continuous improvement.
- Possible lowered morale for employees. Employees may begin to fear layoffs or that the furlough may not solve the problem in the long run.
- If a furlough is unpaid (and they are unable to seek additional means for income) employees will likely be stressed about money.

PROS AND CONS OF LAYOFFS

PROS

- Employers could elect to continue to contribute towards the cost of health insurance premiums for COBRA or State Continuation.
- Reduces overhead costs associated with payroll and benefits so the organization can continue to operate.
- When conducted based on performance, it ensures that your organization retains high performing employees. This could lead to improved morale and higher productivity in the workplace.
- When conducted based on seniority, it ensures that your organization retains experienced employees.

CONS

- COBRA/State Continuation coverage is usually expensive for individuals due to the loss of employer cost sharing.
- May increase workload of remaining employees.
- May cause a decrease in employee morale.
- Employees would not be eligible for the Emergency Paid Sick Leave and Emergency Family and Medical Leave Expansion benefits.
- May prompt remaining employees to start seeking employment elsewhere due to uncertainty.
- May negatively affect the reputation of the company.
- May result in a decrease in organizational productivity, customer service, efficiency, etc.
- If applicable, it could result in additional costs in severance packages and rehiring new employees in the future.
- Possible legal ramifications if the employee claims discrimination, harassment or unlawful termination.
- Employers with 100+ employees should review their requirements under the WARN Act.

FURLOUGH BEST PRACTICES

01

BEST PRACTICE

COMMUNICATE CLEARLY

Make sure that your communication with employees is clear and consistent, and documented in writing. Communicate the furlough as a team effort to sustain the organization.

02

BEST PRACTICE

ENFORCE NO WORK RULE

Ensure that you are enforcing the no-work rule during the furlough. All non-exempt employees must be paid for all work performed for the company and exempt employees must be paid according to the FLSA guidelines.

03

BEST PRACTICE

CONSULT AN ATTORNEY

To ensure fair and legal furlough practices, make sure that you consult with an experienced attorney. Make sure that your organization's actions with regards to furloughs are legal, ethical, and compassionate.

01

BEST PRACTICE

SHOW COMPASSION

How you treat people really matters. Be kind and dignified to the people who are laid off and the people who remain. Give employees the news in-person and in private.

02

BEST PRACTICE

GIVE A SEVERANCE

If possible, offer your laid-off employees a severance package. Severance pay is usually equivalent to a week or two of pay for each year of service. It can be viewed as a thoughtful gesture during these tough times.

03

BEST PRACTICE

CONSULT AN ATTORNEY

To ensure fair and legal layoff practices, make sure that you consult with an experienced attorney. Make sure that your organization's actions with regards to layoffs are legal, ethical, and compassionate.

TALKING POINTS FOR LAYOFFS

Remember to be sincere when giving the news to your employees:

- We hope you and your family are doing ok in the face of the unprecedented challenges caused by the Covid-19 pandemic.
- As you know, in order to slow the spread of the virus, various government offices have ordered many businesses to stop providing all non-essential services, and this has negatively affected our business.
- This government mandate has quickly impacted our business environment and has dramatically reduced the revenues at our company, to the point that substantial short-term personnel adjustments have become necessary.
- We initially took the following steps to limit our exposure and to attempt to keep the business operating at acceptable levels.
- Unfortunately, all personnel on this call are being temporarily laid off by the company, with today being the last day of work.
- The company will offer immediate assistance in helping you apply for unemployment compensation benefits.
- You will be paid through [date] on the [pay date] via [direct deposit, live check, pay card].
- You will hear separately from one of our business partners who will provide information about benefits continuation options under COBRA.
- We have every hope that this will be a short-term set back and that we will gradually restore our operations to pre-pandemic levels in the near future, but of course, that will be determined by external factors, beyond the control of our company.
- We will be in touch with you in the future as return-to-work options become available.
- We are very sorry to share this news, but we encourage you to persevere. We will get through this.

TALKING POINTS FOR RETAINED EMPLOYEES

Remember to be sincere talking to your employees:

- We hope you and your family are doing ok in the face of the unprecedented challenges caused by the Covid-19 pandemic.
- As you know, in order to slow the spread of the virus, various government offices have ordered many businesses to stop providing all non-essential services, and this has negatively affected our business.
- This government mandate has quickly impacted our business environment and has dramatically reduced the revenues at our company, to the point that substantial short-term personnel adjustments have become necessary.
- We initially took the following steps to limit our exposure and to attempt to keep the business operating at acceptable levels.
- Each of you is being retained and will keep your job to help the [leadership team] run the business in this smaller-scale operating environment.
- We appreciate your commitment and dedication during these difficult times.
- As you would expect, several of your co-workers will be laid off out of business necessity. We will be talking to them shortly to explain how the down-sizing will affect them.
- We have every hope that this will be a short-term set back and that we will restore our operations to pre-pandemic levels in the near future, but of course, that will be determined by external factors, beyond the control of the company.
- If you have any questions, please direct all of them to [designated contact], and I will consult with the [owners, Board,...] as needed.
- Stay safe and stay well. We will get through this.

1

Is it legal for an employer to reduce the wages or number of hours of a non-exempt hourly employee?

The FLSA requires that all covered non-exempt employees receive at least the applicable Federal minimum wage for all hours worked. In a week in which employees work overtime, they must receive their regular rate of pay and overtime pay at a rate not less than one and one-half times the regular rate of pay for all overtime hours. The Act does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work. Please note that some states have special requirements for advance notice of pay reductions.



2

Does an employer need to pay an hourly employee for a full day of work if he or she was scheduled for a full day but only worked a partial day due to lack of work?

The FLSA does not require employers to pay non-exempt employees for hours they did not work.



3

Can an employer make prospective reduction in pay for a salaried exempt employee due to the economic downturn?

An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to an exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least \$684 per week. On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long-term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.



4

Can an employee still be on-call or performing work at home during a furlough day?

Whether on-call time is hours worked under the FLSA depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time).

For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait." An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is allowed to leave a message where he/she can be reached is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties and must be paid as such.



5

What things should I be considering when implementing layoffs or furloughs?

- **WARN Act**

Employers have the right to implement layoffs. For employers with over 100 employees, the WARN Act applies. These employers should review any requirements they may have under this act and/or consult with an attorney to determine any exceptions due to the public health emergency. Please note that some states may have mini-WARN laws or other similar requirements that may apply as well.

- **FLSA**

Employers must be careful with reduced work schedules during a furlough and they must ensure that they are following wage and hour laws carefully for an exempt employee.



5

Continued...

- **EEOC**

Employees should be selected for furloughs or layoffs based on job responsibilities, without regard for any discriminatory practices. You cannot issue a furlough or layoff based on an employee's race, age, gender, religion, nationality, disability, or genetic information.

- **NRLA**

The NRLA requires union employers to negotiate terms and conditions with the union about employee furlough.

- **Employee Contracts**

Employees may have contractual rights to compensation or paid-leave benefits. Make sure the terms and conditions listed in employee contracts do not limit furloughs.





THANK YOU

Please contact TPC Vision,
if you have any questions.

