

## UNDERSTANDING FURLOUGHVS VS. LAYOFFS AMID COVID-19

As business, in many sectors, continues to slow in response to COVID-19 coronavirus employers are naturally asking questions about how they can reduce operational costs by implementing furloughs and/or layoffs. In making these difficult decisions, it is important to know the difference between the two and how either course of action will impact your workforce.

These two terms can be used interchangeably; however, the main difference between a furlough and a layoff is that the furlough provides for the employee to return to their job. A furlough is a company-initiated mandatory absence from work for a defined period of time, with no pay. A layoff is a temporary or permanent separation from payroll, and, although a recall to work may be anticipated, it is not guaranteed. Here are some common questions and answers to consider when evaluating these options:

**Question:**

Do I have to pay my employees while they are on a furlough?

**Answer:**

Furloughs have different wage and hour impacts depending on whether the employee is exempt or non-exempt.

- Non-Exempt – Hourly employees
  - Must be paid for all hours worked. Non-exempt employees do not need to be paid if they are not working.
  - Employers can require non-exempt employees who are not working due to furlough to utilize paid time off or vacation to provide wages during this time.
  - Non-Exempt employees may also be eligible for unemployment benefits through state unemployment agencies.
- Exempt Employees
  - The main concern for employers when furloughing exempt employees is maintaining compliance with the salary basis requirement. For the employer to not pay exempt employees during a furlough, exempt employees must be off work for a complete payroll week.
  - When furlough is less than a full workweek, or the employee performs any work during that week (including remote work and checking their email), the employer must pay the exempt employee's full weekly salary.
  - Exempt employees may also be required to use paid time off or vacation during furlough.
  - Exempt employees may also be eligible for unemployment benefits through state unemployment agencies.

**Additional pros and cons for furloughing employees include:**

- Employers have more flexibility in determining the extent of the furlough (i.e., will work only be reduced by a day or two each week, or will work be reduced in full-week increments). Keep in mind that exempt employees must be paid unless the furlough is for a complete week or weeks at a time.
- Employers have less risk of losing talented employees. While on furlough, employees can collect unemployment and not have to be actively seeking other employment.
- Furloughs are more likely to lead to employee good will and retention than a layoff depending upon the length of the furlough.
- Employees have the responsibility of applying for and working with the unemployment system.

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| <b>Question:</b> | What if I did a layoff instead?  |
| <b>Answer:</b>   | Although you do not have to pay wages to employees who are separated from employment due to a layoff, employers should be aware of other associated costs. Typically, a layoff is a longer term or permanent separation from payroll, where a return to work date is unpredictable or not determined. As such, employees (both exempt and non-exempt) must be paid out any wages and/or earned, unused vacation time at the time of separation, and they will generally be eligible to receive unemployment benefits through state unemployment agencies.  |
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| <b>Question:</b> | Will my employees be eligible for unemployment benefits?   |
| <b>Answer:</b>   | Both furloughed and laid-off workers may be eligible for benefits through state unemployment agencies. The seven-day waiting period to file for benefits has been waived for claims arising out of coronavirus-related circumstances.  |
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| <b>Question:</b> | What should I tell my employees about filing for unemployment?   |
| <b>Answer:</b>   | Employers should provide the same information to laid off and furloughed workers that they would typically provide to separating employees in the normal course of their business (i.e., state-required unemployment pamphlets and directions for online claim filing). Additionally, recent state guidance regarding unemployment claims related to coronavirus encourages employees to state that their lack of work is a result of COVID-19 impacts. As such, it is recommended that employers that are planning a layoff or furlough as a result of the current health crisis specifically notify employees, in writing, that the decision to lay off or furlough workers is because of COVID-19 and provide them information about their recall status. |
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| <b>Question:</b> | Can I furlough my unionized employees?   |
| <b>Answer:</b>   | An employer's ability to furlough unionize employees depends on what the collective bargaining agreement says. If the employer wants to use a method that is not outlined in the agreement, the employer will have to assess its management rights clause, and if it has not reserved the right to implement a furlough, the employer will have to bargain with the union about it.  |

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**Question:**

What about the WARN Act?

**Answer:**

When an employer with 100 or more employees furloughs or lays off workers, the federal WARN Act and state mini-WARN statues may require the employer to provide advance notification to employees. However, not all layoffs trigger these requirements, and some exceptions may apply. Temporary layoffs of less than six months are not considered to be employment losses under the federal WARN Act, and the same is true under many state mini-WARNs. Additionally, federal WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period. Even in cases where the Act's notice requirements would otherwise apply, there is also a specific exception from the notice requirements for business closures that arise out of "unforeseeable business circumstances." This exception may apply to the current health crisis, although the determination would likely require fact-specific analysis. Employers are advised to notify employees of a layoff with as much advance notice as possible given the circumstances.

**Question:**

How will a furlough or layoff impact my employee benefits (i.e., health insurance)?

**Answer:**

To the extent that benefit plans base eligibility on hours worked, a furlough could result in eligible employees becoming ineligible. If you are a covered employer under the Affordable Care Act (i.e., an employer with 50 or more employees), furloughed employees who are eligible during their measurement period would remain so during the stability period — regardless of whether a furlough occurred during that time. With a layoff, employees would lose eligibility as of the date of separation of employment. COBRA would then be offered, if applicable. Employers are encouraged to consult their plan document and with their carriers to determine how long employees who are not actively working may remain covered. Once coverage terminates, COBRA notices must be sent.