

COVID-19 Layoff and Furlough Checklist

DECIDE ON LAYOFF OR FURLOUGH

Furlough: Reduction in hours/pay, usually for a fixed period of time. Employment relationship continues. Benefits usually continue and may be required to remain in place.

Layoff: Termination of the employment relationship, either temporarily or permanently.

See [Employer Guidelines: COVID-19 Furloughs and Layoffs](#)

FURLOUGH CHECKLIST

- Create a Plan** – Furloughs can vary in structure. Employees may have consecutive days, weeks, or months of non-duty, may be off-duty for designated weeks each month or a designated day each week. Some employers may allow employees to decide which days to take off while on furlough.
- Select Which Employees to Furlough** – Choose employees based on clearly defined criteria and document the business reasons for furloughing specific employees or groups of employees. Consider whether to solicit volunteers first. If not all employees are involved, conduct an adverse impact analysis to ensure that involuntary furloughs do not disproportionately affect members of protected classes under employment discrimination laws.
- Union Employees** – Check the bargaining agreement(s). In a unionized workforce, employers may be required to negotiate over the impact of furloughs, including the schedule and terms of the furlough, and there may be terms of the bargaining agreement limiting or governing furlough/recall processes.
- Determine Eligibility for Continued Benefits** – Determine employees' continued eligibility for benefits (*e.g.*, group health insurance benefits (including medical, dental, vision, hearing, etc.), life insurance benefits, disability benefits, retirement benefits (including 401(k) and 403(b) plan participation), health club or transportation reimbursements, cell phone or vehicle allowances, childcare benefits or stipends, use of company vehicles, etc.) under existing plan documents, insurance contracts (where insured), and applicable law. Employers may consider amending benefit plans to address employee eligibility, such as the hours worked threshold, or to reduce or eliminate some benefits where permitted by law to do so. Employees who lose eligibility for health benefits as a result of the furlough may be eligible for COBRA continuation coverage (or mini-COBRA coverage, adopted by some states), which employers can choose to subsidize, in whole or in part. Employers should consider implications under the Affordable Care Act's employer mandate. State and local laws may limit employers' ability to withhold paid time off benefits.
- Determine How to Handle the Employee Portion of the Cost of Benefits Coverage** –Employers could decide to pay 100% of the cost or premium for group health plan and other benefits coverage during the unpaid furlough. Alternatively, employers could look to their FMLA policies for guidance on how to administer the employee portion

of the cost or premium for coverage. In general, employers could continue to contribute toward coverage at the current rate and require that employees prepay for such coverage (which may not be practical here), continue to pay for coverage during the furlough through means other than payroll deduction, or reimburse the employer for the employee portion of the cost or premium upon return from the furlough.

- Provide Required Leave Benefits** – Employees may be eligible for continued use of leave benefits. Check the terms of employer-sponsored leave programs, including PTO and vacation leave, to see if employees can use these benefits during furloughs, or consider clarifying that such benefits will or will not be made available. State or local mandated leave benefits also may be relevant, particularly with governments amending these benefits during the COVID-19 pandemic to expand the permissible uses.
- Comply with Notice and Reporting Requirements** – The Worker Adjustment and Retraining Notification Act (WARN)—which generally requires 60 days’ notice to employees, bargaining agents, and state and local dislocated worker units—can be triggered by covered employers reducing the hours of work for 50 or more workers at a single location by more than 50 percent for each month in any six-month period. Exceptions may exist for unforeseen business circumstances and natural disasters, in which case notice still must be given as soon as possible. Certain states have mini-WARN Acts that impose different requirements. In addition, some states may require notice to employees of their rights for unemployment benefits or have other reporting requirements.
- Provide Written Communications to Employees** – Employers should provide employees with written communications that explain the furlough process, timing, and terms. Consider communicating, at a minimum, the following information:
 - **Duration and Schedule** – Specific information about the expected duration of the furlough and, if applicable, the schedule of reduced work hours the employer is authorizing the employee to work.
 - **Statement About Unauthorized Work** – Explicitly inform employees that they are not permitted to perform unpaid work or to work during unauthorized periods. Details about the use of company e-mail, computers, and technology systems during the furlough period should be included.
 - **Paid Time Off** – Specify whether and how employees may access paid time off during the furlough period.
 - **Changes in Company Policies** – If the furlough requires changes in existing company policies, communicate those changes in conjunction with the furlough notice.
 - **Benefits Eligibility** – Explain how the furlough impacts employee eligibility for benefits and, if applicable, provide required notice regarding COBRA eligibility. If employees will need to pay out of pocket for their share of benefits coverage while on furlough, the specifics for how and when these payments are due should be included.
 - **Identify a Company Contact Person to Address Furlough Issues** – Identify a company contact person to communicate information about the furlough and provide that person with access to all relevant data and decision making information necessary to answer questions and provide information.
- Ensure that Employees are Compensated Properly While on Furlough**
 - **Hourly Employees** – Employers are responsible for paying hourly employees for every hour worked—whether authorized or not. Have a plan to track hours worked and ensure that employees are all paid in accordance with law.

- **Exempt Employees** – Exempt employees can only have their pay reduced for weeks in which they work under limited circumstances. Furloughs for exempt employees generally should be done a workweek at a time to avoid losing their exempt status. Exempt employees can volunteer to take individual days without pay if their decision to do so is *completely voluntary*, which should be documented in writing. Exempt employees cannot be permitted to perform any work during any period of unpaid furlough. For furloughs involving only a reduction of hours, employers should reduce the percentage FTE of salaried employees and correspondingly reduce their weekly salary to account for the reduced hours under the furlough.

- Comply with State Law Notice or Reporting Requirements** – Employers should make sure to comply with any requirements under state law to provide notice to employees of their rights for unemployment benefits or any reporting requirements that states may impose.

LAYOFF CHECKLIST

- Create a Plan** – Address at least the following:
 - When will the layoffs occur?
 - How and by whom will they be communicated?
 - How many employees will be laid off?
 - Will voluntary layoffs be used before involuntary layoffs?
 - Are the layoffs intended to be permanent or temporary?
 - How much notice will employees be given?
 - Will employees' pay or benefits continue after their last day worked?
 - Will different rules apply to different groups of employees?
 - What notice or bargaining obligations exist for unionized employees?
 - How will return of property be handled?
 - How will termination of employee access to systems and locations be addressed?
- Select Which Employees to Layoff** – Choose employees based on clearly defined criteria and document the business reasons for selecting specific employees or groups of employees. Consider whether to solicit volunteers first. If not all employees are involved, conduct an adverse impact analysis to ensure that involuntary layoffs do not disproportionately affect members of protected classes under employment discrimination laws.
- Union Employees** – Check the bargaining agreement(s). The same considerations noted above for furloughs also apply to layoffs. In some cases, a bargaining agreement may prohibit layoffs altogether (“no layoff” clause), in which case the employer either will need to bargain with the union or rely upon an exception to the duty to bargain, such as the “compelling economic exigency” doctrine. Also consider benefit liabilities the collective bargaining agreement could impose. For example, if an employer is obligated to contribute to a multiemployer pension plan, consider whether the layoff could constitute a withdrawal event, which would enable the plan to impose withdrawal liability on the employer.

- Determine When Pay and Benefits Will End** – Determine when employees’ pay and benefits will end under existing plan documents and applicable law. In addition to employees’ rights to continue their health benefits under COBRA (and mini-COBRA laws adopted by some jurisdictions), they may have rights to convert other group benefits to individual plans (*e.g.*, life insurance). Decide whether to subsidize employees’ COBRA benefits for some period of time. State law may require the pay out of accrued but unused paid time off at termination.
- Severance and General Releases** — If severance pay or other consideration is being provided after termination, decide whether to seek a general release. All releases must be “knowing and voluntary” to be effective. Remember that layoffs of two or more employees may constitute a “group termination program” under the Older Workers Benefit Protection Act (OWBPA), triggering special procedural requirements to get a release of federal age claims, including a 45-day consideration period, seven-day revocation period, informational disclosures with a list of employees in the decisional unit, and advice to consult counsel.
- Comply with Notice or Reporting Requirements** – The Worker Adjustment and Retraining Notification Act (WARN) may require 60 days’ notice of layoffs for employers with at least 100 employees when at least 50 employees at a single location are laid off for a period of six months or more or a location or operational unit with at least 50 employees is completely closed. Layoffs that occur within a 90 day period may be grouped together when counting the number of employees impacted. Exceptions may exist for unforeseen business circumstances and natural disasters; notice must be given as soon as possible. Certain states have mini-WARN Acts that impose different requirements. In addition, some states may require notice to employees of their rights for unemployment benefits or have other reporting and notice requirements at termination.
- Consider Whether to Waive Non-Compete Provisions** – Consider whether to waive any non-compete provisions to which an employee may be subject.
- Provide Written Communications to Employees** – Provide employees with notice of the impending layoff either in-person (if still present at the workplace) or through written communications, including layoff packages. If employees no longer are present at work, consider how to communicate the decision to layoff in a manner that employees have an opportunity to ask questions. Let them know to whom additional questions should be addressed in the written communications.

At a minimum, employers should provide employees with the following information:

- Date of termination
- Length of layoff, if only for a specific period
- Last day of pay
- Whether paid time off will be paid out
- When benefits end and how they can be continued or converted to individual plans (or reference separate COBRA and other notices that will be provided regarding the continuation of group health benefits)
- Whether severance will be provided and, if so, whether a release will be required
- How employees can return company property and obtain their personal property, if not in person
- Recall rights, if required by a collective bargaining agreement

- Notice of unemployment rights, if required
- Reminder of any agreements signed by the employee that contain covenants, such as non-competition, confidentiality, non-solicitation, and intellectual property
- A company contact person for questions

Comply with All State Pay Requirements – States may require that final pay be provided at the time of termination or another specific point in time, including pay for accrued and unused paid time off, if applicable.

Arrange for Return of Property –

- **Return of Company Property** – Provide employees with an easy way to return critical company property such as laptops, files, etc., such as a prepaid shipping label or arrange for curbside pickup by a courier. Have employees certify that all files, data, and documents on personal devices have been deleted and no company information has been retained.
- **Return of Employee Property** – Make arrangements for employees to retrieve their personal property from the work location as promptly as possible. If the work location is open, arrange a time for the employee to come in and pick up property when it will not be disruptive or make arrangements to pack up and ship the employees' property. If the work location is closed by government shutdown, arrange for return of property when available.

Terminate Employee Access – Cut off employee access to company systems, financial assets, and facilities at the time of termination.