

Employer Guidelines:

COVID-19 Furloughs and Layoffs

Many employers are facing the need to implement furloughs or layoffs in light of the business closings and other economic stresses caused by the COVID-19 pandemic. Choosing what type of workforce reduction to implement can impact continuation of benefits and other employer obligations under state and federal law. A [checklist](#) for conducting layoffs or furloughs, along with other resources regarding COVID-19 issues, is available at [Ballard Spahr's Coronavirus Disease 2019 \(COVID-19\) Resource Center](#) under the Labor and Employment section.

What is a furlough?

Although federal and state laws typically do not define furlough for private employers, furloughs are temporary reductions in pay and hours, usually caused by economic or operational conditions. For example, an employee who is furloughed for two weeks would not work or receive their regular wages for that period of time.

Just reducing an employee's salary or rate of pay without reducing their hours or work generally is not considered a furlough. (Pay reductions are discussed below.)

How is a furlough different from a layoff?

When employees are furloughed, they are still employed. A layoff is a loss of employment on a temporary or permanent basis. Because employees are still employed during a furlough, many employer obligations may continue, including continued benefits.


How do furloughs work?

Employees typically are furloughed for a fixed period of time (*e.g.*, two weeks) or on a rolling schedule (*e.g.*, every other Friday or every other week). They remain employed and continue to be eligible for some or all benefits, depending on employer policies, a collective bargaining agreement, and/or applicable law.

Employers are not required to set a specific length of time for a furlough, but many employers find it necessary to lay off employees at some point when faced with an indefinite furlough.

Does health care coverage continue for employees who have been furloughed?

It depends on the terms of your group health plan document. For employers that have self-funded group health benefits, the employer can decide the extent to which health coverage (including medical, dental, vision, hearing, etc.) will continue during the furlough and amend its plan documents accordingly. For employers with insured group health plan coverage, the employer should review its insurance contracts and contact its broker or insurance company to discuss whether the insurer will continue to provide coverage, or whether it will treat the furlough as an event (like a layoff) that triggers the



termination of coverage. If group health coverage is lost due to the furlough, the COBRA continuation coverage rules or state mini-COBRA rules generally will apply. Employers subject to the Affordable Care Act's employer mandate will need to consider the implications of a termination of coverage and the reduction in employee hours under those rules.

If health insurance coverage will continue for employees during an unpaid furlough, how can employees pay for their portion of the health care premium?

Employers have some flexibility in how they will handle the employee portion of the cost or premium for health care coverage. An employer could decide that it will pay 100 percent of the cost of the coverage (the employer portion and the employee portion) during the furlough. Alternatively, the employer could look to its Family and Medical Leave Act (FMLA) policies to determine how to handle the employee portion of the cost or premium during an unpaid FMLA leave. In general under FMLA, employers continue to pay the employer portion of the cost of coverage and arrange to have employees prepay the premiums (an option that may be impractical in this context), have employees pay by check during the furlough, or have employees reimburse the employer upon return from the furlough.

How do retirement benefits (pension, 401(k), 403(b), etc.) work during a furlough?

Employees generally accumulate new benefits in a retirement plan based on service to the employer for which they are compensated. To the extent that an employee is on an unpaid furlough, new retirement benefits likely will not accumulate, though employers will need to check their retirement plan documents. In a 401(k) or 403(b) plan, employees generally can only contribute out of payroll, so if they are not being paid, they will not be able to make contributions. Similarly, employer matching contributions are based on employee contributions, so employer matching contributions will not continue if employee contributions cease. Also, unless the federal government grants relief, the failure to repay a 401(k) or 403(b) plan loan will result in the taxation of the entire outstanding loan balance by the end of the calendar quarter following the calendar quarter in which the loan repayment is missed.

How does a furlough affect other benefits (life insurance, disability insurance, flexible spending accounts, etc.)?

Employers will need to review their plan documents and insurance policies to determine the extent to which other benefits are continued during an unpaid furlough. An employer may be able to decide to pay 100 percent of any premium due for such coverage to have it continue during a furlough. In the case of a dependent care flexible spending account, the closure of day care centers and schools around the country likely triggers a mid-year change event for employees to change their rate of contributions.

Can employees receive unemployment during a furlough?

They may. Most states permit employees to receive unemployment, in whole or in part, if their work hours are reduced by a certain amount, often 20%, even if they remain employed. Many states have workshare programs that encourage employers to reduce employee work hours through a partial furlough, rather than lay them off, with unemployment benefits available for some or all of the lost wages. Many states are also expanding unemployment eligibility for the COVID-19 epidemic. See Resources: To see that latest developments by state, go to CareerOneStop, a website with unemployment compensation information for all 50 states, sponsored by the U.S. Department of Labor.

Is it better to furlough employees or lay them off?

No employer wants to be in the position of having to reduce its workforce or reduce employee compensation, but the current pandemic and economic consequences leave many employers with no other choice. Whether to do that through furloughs, layoffs, compensation reductions, or a combination thereof, depends on a number of factors. Consider the following:

- Both furloughs and layoffs of unionized employees may trigger obligations to bargain. Where the collective bargaining agreement (CBA) gives the employer the right to make these decisions without bargaining, employers may still have an obligation to bargain any impact that is not already addressed by the CBA. Where CBAs have layoff or furlough procedures, employers generally are required to follow them. The pandemic may trigger *force majeure* or impossibility clauses that give employers rights to void one or more contractual restrictions or take additional actions or allow employers to take actions based on exigent circumstances.
- Furloughs keep people employed while allowing employers to reduce payroll costs. They may make employees feel more valued than in a layoff situation and let them preserve their benefits.
- Furloughs allow employers additional flexibility to manage the needs of the business and respond quickly to business variations by increasing and decreasing employee work hours or days of work (*e.g.*, going from a one day a week furlough to a two day a week furlough or vice versa). Furloughs also allow employers quickly to get back up and running at prior workforce levels after the furlough ends.
- Furloughs spare employers the administrative burdens associated with terminating and rehiring employees, including providing required notices under state and federal law and ensuring that other federal and state requirements for employee terminations are satisfied.
- Employees on furlough may still be permitted to use paid time off under employer policies, reducing cost savings. In addition, some laws may limit employers from changing their policies to prohibit employees from using leave time they earned when those restrictions were not in place.
- Employees who are not permitted to use paid leave while on furlough may be resentful and disgruntled. Furloughs can also negatively impact worker morale, particularly if people feel that they are being implemented unfairly or available work and pay opportunities are not being distributed fairly.
- Layoffs may be less costly. Employers do not have to continue to pay for employee benefits and may not be required to pay out accrued but unused paid leave, depending on state law and employer policies. Where pay for accrued leave time is required, the cost should be factored in when determining the cost of layoffs versus other cost reduction strategies.
- Furloughed employees remain employed and generally count towards employee thresholds under state and federal law. This can impact what laws the employer is subject to and what requirements are imposed. Keep in mind that many employment laws, like the Family and Medical Leave Act (FMLA)¹, look at workforce levels over a period of time, not just a single date.

¹ The FMLA applies to governmental entities, schools, hospitals, and companies with 50 or more employees in 20 or more workweeks in either the current calendar year or in the previous calendar year. Temporary layoffs, therefore, will not immediately eliminate employer coverage under the FMLA, although employees who are laid off will not be eligible for FMLA leave.

- Employees on furlough generally continue to be eligible for leave under federal, state, and local law, including the newly enacted Families First Coronavirus Response Act (FFCRA) and FMLA, as well as state and local leave laws, when they otherwise meet the eligibility requirements. Employees who are laid off do not. More information about specific state legislative requirements in response to COVID19 are available at Ballard Spahr's [Ballard 360 Legal Tracker](#).
- Employees on furlough may still be eligible for health and welfare benefits and non-matching employer contributions under employer-sponsored retirement plans, even while on an unpaid furlough, as discussed above. See Resources: Employee Benefits Alerts.
- In some circumstances, an employer will be subject to an assessment under the Affordable Care Act if it does not offer health coverage that meets certain standards to a furloughed employee. Those assessments would not apply if the employee is laid off.
- Layoffs affecting at least 50 employees at a single location that are expected to last for at least six months may trigger notice requirements under the federal Worker Adjustment and Retraining Notification Act (WARN). Layoffs that occur within a 90 day period may be grouped together when counting the number of employees impacted. WARN can also 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 or closing a location or operating unit where more than 50 employees work. Exceptions may apply for unexpected business circumstances or natural disasters, but notice must still be given as soon as possible. Certain states have mini-WARN Acts that impose different or more stringent requirements.

How do furloughs impact employees' pay?


Employees generally do not receive their regular pay when they are furloughed. For non-exempt employees (those who are eligible for overtime), the Fair Labor Standards Act only requires that employees are paid for their time actually worked. Most exempt employees must continue to be paid a salary for every week in which they perform any work that is not subject to reduction based on the amount of work performed or they will lose their exempt status. Exempt employees do not need to be paid for weeks in which they perform no work, so exempt employees may be furloughed for a full FLSA workweek at a time without losing their exempt status when they do work.

In addition, exempt employees can volunteer to take one or more full days a week off without pay. The choice to do so must be ***completely voluntary*** and the employee must not perform any work during an unpaid furlough day. Exempt employees can also take partial days off, but the remainder of the day must be compensated through paid leave so the employee does not lose any pay for that day unless the employee is taking time off for a reason covered by intermittent leave under the FMLA. See Resources: U.S. Department of Labor Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues.

Some state laws may require specific notice of pay reductions or have different rules. Employers are required to comply with the rules that are most favorable to the employee. Other types of pay reductions are discussed below.

What is the impact of a furlough or layoff on employer obligations under the Families First Coronavirus Response Act (FFCRA)?

The FFCRA provides for paid leave benefits for specific reasons related to COVID19. It applies to private employers with fewer than 500 employees and public agencies regardless of size. Employers with fewer than 50 employees may be able to obtain a waiver.



We are waiting for guidance from the U.S. Department of Labor (DOL) on whether the number of employees will be measured on the date the FFCRA takes effect, which is no later than April 2, 2020, or at the time an employee requests leave. Depending on which date is used, layoffs that occur before that date could bring employers under the law's coverage or make them eligible for a waiver.

Employees who are laid off before the FFCRA takes effect will not be eligible for leave under its provisions. Employees who are furloughed may be able to take advantage of paid leave under the FFCRA if they otherwise meet the requirements. Until the DOL issues guidance, it is not clear whether employees who are furloughed on a full-time basis because there is no work available (due to a government-ordered shutdown of the business, for example) are eligible for leave. If they are, the employer will be required to pay the cost of the paid leave benefits under the FFCRA and recoup them through a tax credit. See Resources: Ballard Spahr's alerts on the FFCRA on the labor and employment page of the Ballard Spahr COVID-19 Resource Center.

Can employers reduce employees' salaries or pay rates as an alternative to layoffs or furlough?

Yes. Employers can reduce the pay of employees without reducing their work hours subject to certain limits. The pay for non-exempt employees cannot be reduced below minimum wage. Although the salary for exempt employees generally cannot be reduced based on lack of work, employers can make prospective reductions in the salary levels for exempt employees so long as they continue to earn at least \$684 per week for most categories of exempt employees. Exempt employees can also be converted to non-exempt and paid only for the hours they work. See Resources: U.S. Department of Labor Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues.

Some state laws may require specific notice of pay reductions or provide for different minimum wage or exempt salary thresholds. Employers must follow whatever provisions are most favorable for employees.

If an employee on furlough or layoff is called to military duty as part of the national mobilization of the National Guard, does the employee's status change under USERRA?

If the employee is on furlough, and thus still considered an employee, the individual should be converted from a furlough status to military leave. If the employee is laid off, and thus no longer employed, there is no change in status.

Once the decision has been made to implement furloughs or layoffs, they should be carefully planned, communicated and implemented to minimize liability under federal state and local laws. See the accompanying Checklist on Layoffs and Furloughs for details. [Ballard Spahr's Labor and Employment Group](#) is here to assist you and answer additional questions.

COVID-19 RESOURCES FOR EMPLOYERS

Ballard Spahr COVID-19 Resource Center.

<https://www.ballardspahr.com/practiceareas/initiatives/coronavirus-disease-2019-covid-19-resource-center>.

Ballard Spahr Legal Tracker: Coronavirus Legislation.

[Ballard 360 Legal Tracker](#).

Ballard Spahr: Employee Benefits Alerts and COVID-19.

<https://www.ballardspahr.com/alertspublications/legalalerts/2020-03-17-employee-benefits-and-furloughs-in-the-era-of-covid-19>.

U.S. Department of Labor Fact Sheet #70: 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>.

CareerOneStop – 50 State Unemployment Compensation Information (sponsored by the U.S. Department of Labor).

<https://www.careeronestop.org/localhelp/unemploymentbenefits/unemployment-benefits.aspx>.

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