

Furlough or Layoff - Does it Matter?

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Question: Due to the current COVID-19 pandemic, we may need to consider ways to reduce payroll costs but want to do what is best for our employees and the future of the business. What should we consider when addressing these needs – furloughs or layoffs?

Answer: The answer depends on a number of business-related factors. Below are some options and factors to consider.

***Definition Note:** Many companies use these terms interchangeably. The label placed on the action is not likely to be legally determinative. Instead, the action itself will be the focus. For purposes of this discussion, we have defined them below.*

For additional information related to COVID-19, please see our comprehensive FAQs which are updated daily. <https://www.fisherphillips.com/resources-alerts-comprehensive-faqs-for-employers-on-the-covid>

Furloughs

Furlough: With furloughs, employees continue their employment – for example with either reduced hours or a reduced schedule (such as 3 days per week or working every other week). Some employers “furlough” employees for weeks or months. In those kinds of situations, for purposes of this analysis, see the Layoffs section below.

Selected issues to consider:

- a. **Families First Coronavirus Act Benefits:** Since a furlough does not mean employment has ended, an employee would be eligible after April 2, 2020 for Families First Coronavirus Act benefits as provided for in the new law. <https://www.fisherphillips.com/resources-alerts-congress-finalizes-covid-19-coronavirus-response-act>

If employees are sent home as a result of a government closure order after April 2, 2020, they would be eligible for the Emergency Paid Leave, but not Emergency Family Medical Leave because they are unable to work as a result of the closure order, which is not a qualifying reason for Emergency Family Medical Leave.

- b. **Fair Labor Standards Act (FLSA)¹:**
 - i. **Non-exempt employees:** It is lawful for an employer to reduce the number of hours worked each day or days worked each workweek.

¹ State wage and leave laws will vary and should be reviewed as well.

- ii. **Exempt employees:** Employers must take care when furloughing salaried exempt employees to avoid jeopardizing their exempt status under the FLSA. For salaried exempt employees, the salary basis test must be met for each workweek in which work is performed but is not triggered for workweeks in which no work is performed. Employers implementing a furlough should designate full workweeks prohibiting work during the period to rely on this exception.

An alternative to furloughing for full workweeks would be to lower a salaried exempt employee's pay on a prospective basis. We recommend making the pay adjustment for at least a quarter to demonstrate that under the FLSA it is a true resetting. To preserve the salary principles, the reset should be due to reduced business and not tied to a particular reduction in hours or days. As discussed below, certain states require advance written notice of a change in pay.

- c. **Unemployment Benefits:** A furlough could prevent or limit employees' unemployment compensation. Check with your state unemployment office.
- d. **Worker Adjustment and Retraining Notification Act (WARN):**
 - i. Federal WARN protects workers by requiring employers with 100 or more employees to provide at least sixty (60) calendar days advance notice of a plant closing and mass layoff affecting fifty (50) or more employees at a single site of employment. A layoff exceeding six (6) months could trigger WARN obligations.
 - ii. WARN notice would normally not apply if employers implement a furlough as defined above since the employee will not have an employment loss for more than six (6) months. With that said, be aware that if the furlough extends longer than 6 months, or the employee's hours are reduced by 50% or more during each month in the 6 month period, it is possible WARN could be triggered. See below.
 - iii. Some states have "mini WARN" acts that require different notice than the federal WARN Act.
- e. **Severance:** Severance is not typically implicated by furloughs.
- f. **Benefits:** In some cases, health insurance and other plan benefits may be impacted by a furlough. The employer should review its plan document to determine if and when benefits are impacted. The employer needs to determine whether a reduction in hours creates COBRA obligation or health insurance continuation issues under state law.
- g. **Wage Notice:** State law may require advanced written notice of a change in pay, hours, or other terms of employment.

Layoffs

Layoff: Typically, a layoff occurs when the employer decides to eliminate a position or group of employees. In some cases, the company may intend to recall those employees – sometimes referred to as a temporary layoff. While in other cases, it may be characterized as a permanent layoff (or reduction in force). But regardless of what it is called, active employment ends as of the layoff date.

Selected issues to consider:

- a. **Families First Coronavirus Act Benefits:** If an employer implements a layoff (whether temporary or long term), employees are placed out of work by the company's decision and therefore said employees would not be eligible for benefits under Families First Coronavirus Act.

While not specifically prohibited, it would be risky to terminate employees to avoid the obligations under the law. It is clearly unlawful to terminate employees who take leave. A company should be prepared to provide a business reason for this decision.

- b. **Unemployment Benefits:** Laid-off employees are normally eligible for unemployment benefits pursuant to state law. As a result of changes in the law in response to this pandemic, many states have eased the requirements for unemployment.
- c. **Worker Adjustment and Retraining Notification Act (WARN):**
 - i. If WARN applies, an employer needs to issue the employee, union and government notices required under the law. Even if the employer does not intend to layoff the employees for more than six (6) months, it may happen and trigger WARN obligations. Accordingly, employers should seek legal advice as to whether they can rely on certain exceptions under the WARN Act that may permit notice of less than 60 days and ensure communications with the employees regarding the layoff are legally drafted.
 - ii. Some states have “mini WARN” acts that require different notice than the federal WARN Act.
- d. **Severance:** Any severance plan or policy of the employer is likely to be implicated by layoffs, and the impact would be most extreme in the event of a large, mass layoff/force reduction.
- e. **Benefits:** A layoff is typically a separation that triggers a COBRA notice obligation or health insurance continuation issues under state law.
- f. **Policy Issues:** Additionally, the employer should review existing PTO/vacation or severance policies to determine whether additional benefits may be owed to employees on lay off status.
- g. **State Law:** Some states have laws that require notice, severance or create other obligations for employers when terminating or laying off employees.