

Weathering Coronavirus: Furloughs, Layoffs or Pay Cuts?

By Allen Smith, J.D.

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Businesses that are seeing significant revenue losses due to the coronavirus pandemic are weighing some stark options: furloughs, reductions in hours and pay cuts, or layoffs. Furloughs often are the best option for those that can afford them. But for some, layoffs will be unavoidable.

A furlough is a mandatory, temporary, unpaid leave. A layoff is a full separation from the company.

Furloughs help companies weather a financial storm in a number of ways, said Jie "Jasmine" Feng, an assistant professor in the Rutgers School of Management and Labor Relations in Piscataway, N.J. "Unlike layoffs, furloughs reduce labor costs without adding new costs such as severance packages and outplacement services," she said. When business improves, "employers do not have to pay for recruiting, selecting, socializing and training new employees because the furloughed workers can pick up where they left off."

Feng added, "Unfortunately, furloughs bring financial and psychological hardship to the affected workers."

Unemployment Benefits

Businesses that opt for furloughs should encourage workers to apply for unemployment benefits on the first day of the furlough, said Denise Drake, an attorney with Polsinelli in Kansas City, Mo. This "ensures the employees will receive the maximum compensation possible. Even an employee who uses vacation time or personal time [during the furlough] may qualify for unemployment benefits."

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Usually there is a one-week waiting period before an employee is eligible to receive any unemployment benefits. But, Drake said, "many states have benevolently waived this one-week waiting period for job losses suffered due to the pandemic." California and New York have waived their one-week waiting periods, and Texas has waived its 10-day waiting period.

WARN Act

Any employer considering layoffs or a furlough must carefully consider:

- All state and local laws.
- The state emergency declarations and laws issued under the pandemic.

- Federal law, including any relief package (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Senate-to-Vote-Soon-on-Coronavirus-Paid-Leave-Mandate.aspx).
- Notice obligations under the Worker Adjustment and Retraining Notification (WARN) Act (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/layoffs-written-notice.aspx).

The WARN Act requires advance notice when a mass layoff or plant closing occurs that results in employment loss for a requisite number of people. "It is important to know the applicable thresholds for WARN Act coverage," said James McDonald Jr., an attorney with Fisher Phillips in Irvine, Calif. The federal WARN Act covers employers of 100 or more full-time employees and layoffs of 500 or more employees. It also covers employers of 50 to 499 employees if those workers constitute at least one-third of the workforce.

An "employment loss" is defined to include not only terminations but also furloughs that last for more than six months and significant reductions in hours. "So a furlough may trigger the WARN Act's advance-notice requirements and those imposed by state WARN Acts if the furlough is conducted for a longer time period and affects enough people," said Molly Batsch, an attorney with Greensfelder, Hemker & Gale in St. Louis.

California has offered some relief from its state WARN Act due to the coronavirus, according to *The National Law Review* (<https://www.natlawreview.com/article/california-offers-relief-state-warn-act-requirements>).

Wage and Hour Considerations

The main concern with furloughs from a wage and hour standpoint with is maintaining compliance with the salary-basis requirements for salaried, exempt staff, Drake said. When a furlough is for one or more full workweeks, federal law does not require payment of the predetermined weekly salary. When a furlough is for less than one full workweek and a salaried, exempt worker performs any work during that week, the employer must pay the exempt employee's full weekly salary.

During a furlough, an employer should collect any mobile devices it has furnished to workers, if possible, to lessen the chance an employee will work off the clock, Drake recommended.

Layoffs

Some companies will have to resort to layoffs.

"Employers are more likely to permanently lose laid-off employees, and layoffs can also have more-significant implications for company morale than furloughs," said Isaac Mamaysky, an attorney with Potomac Law in New York. "Since coronavirus is a temporary event, which will hopefully come under control in the coming months, furlough is the better response for many employers."

But if employers decide to lay off workers, they must select whom to lay off (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/layoffs-selection-criteria.aspx). If a workforce is not unionized or when unions don't specify how people are to be selected (e.g., last in, first out), many employers prefer using performance-based criteria for layoffs in order to retain their highest performers. However, some believe layoffs shouldn't be used to try to weed out poor performers.

"The challenge is that performance-based decisions can also be the most subjective, which makes them most susceptible to subsequent legal challenges," Mamaysky noted. "If employers use performance-based criteria for layoffs, then decisions should be made based on documented performance reviews that have already been conducted rather than ad hoc evaluations conducted for purposes of making layoff decisions."

He added, "Ideally, decisions can be based on the most objective elements of those reviews, such as numerical performance scores, rather than supervisors' free-form narratives."

Reduced Hours, Pay Cuts

Employers generally have the flexibility to offer hourly employees fewer hours and workdays, Mamaysky said. But employers can't reduce weekly hours and correspondingly reduce compensation for exempt employees. Employers must pay exempt employees the same amount for each pay period in which they work, regardless of how many hours they work. Employers can have exempt employees work fewer pay periods while fully paying them for each pay period in which they work.

The U.S. Department of Labor explains that employers are also allowed to make a bona fide reduction of an exempt employee's salary "during a business or economic slowdown" if such a reduction is not related to the "quantity or quality of work performed" and is in place for a significant period.

Tom Gies, an attorney with Crowell & Moring in Washington, D.C., cautioned that in some instances, employees may no longer be eligible for the employer's health insurance if their hours are reduced significantly, which would make them eligible for COBRA health insurance.

Join the Society for Human Resource Management and the U.S. Department of Labor (DOL) for a Twitter chat hosted by @ePolicyWorks on March 25 at 2 p.m., using the hashtag #EPWChat to provide input as the DOL develops guidance on the Families First Coronavirus Response Act. Or participate online at <https://ffcra.ideascale.com> (<https://ffcra.ideascale.com/>) from March 23 through March 29.

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