Introduction

In the wake of California’s Executive Order, Shelter-In-Place employers are left making difficult decisions such as furloughs, temporary office and location closings, and short-term layoffs. A furlough involves reducing the days or weeks that an employee may work. A layoff can be temporary or permanent. Employers may also consider reducing the daily hours of some employees.

The following guidance is designed to help address some common questions that employers have and inform employers of different areas of concern involved with furloughs and temporary shutdowns and layoffs.

What’s the difference between a furlough and a layoff?

Neither term has any specific legal definition. In widespread usage, “furlough” describes a situation in which the employee’s hours are reduced, or not working at all. Still, the employee has not been terminated and remains eligible for benefits. It also suggests a short-term break in service where the employee is expected to return to work in the near future. A “layoff,” by contrast, refers to a termination of employment for economic or business restructuring. The employment relationship is ended, not merely paused.

FURLOUGHS

**What are the pros and cons of furloughing employees?**

**The pros:**Furloughed employees are more likely to return to the company when invited back. Employers may be able to continue employees’ insurance coverage while they are on furlough without initiating COBRA and requiring an employee to pay premiums (but check with your insurance broker to ensure that such is permissible under your health insurance plan). Employees may also be eligible for unemployment benefits through the Employment Development Department (EDD).

**The cons:** Employers will likely have to pay out accrued vacation or PTO on the employee’s last day before the furlough, as the Division of Labor Standards Enforcement takes the position that a furlough lasting more than two weeks amounts to a termination of employment. If a furlough were to run longer than two weeks, “waiting time penalties” might be owed if furloughed employees were not provided final paychecks on the last day of work. Extended furloughs may also trigger notice obligations under the WARN Act, as discussed below. The other significant negative of furloughing employees is that they technically remain employees and can apply for paid federal sick leave and or extended Family and Medical Leave Act leave under the new federal law on or after April 2, 2020.

**What is the effect of furloughs or reduced hours?**

Employers generally can schedule non-exempt employees for fewer days or hours without liability concerns. Employers do not need to pay non-exempt employees for time not worked. Exempt employees involve a more complicated analysis when considering furloughs or reduce hours as an alternative to layoffs. Employers should be aware that under federal law and most state laws (California included), exempt employees must be paid the same minimum salary for each pay period. Moreover, if an exempt employee performs any work during a workweek, that exempt employee must receive their entire salary that week. Failure to compensate an exempt employee for a week where any work is performed jeopardizes that employee’s exempt status. If an employer furloughs an exempt employee for an entire workweek, however, then no salary is owed for that full week, and the employee’s status is not affected.

When employees are furloughed, employers should expect that they will not work, including checking email and voicemail. An exempt employee is entitled to pay for any workweek in which they perform any work. Employers should, therefore, inform employees that work is not authorized during the furlough period without advance written approval. Employers also should notify non-exempt employees about the same issue as non-exempt employees generally are entitled to compensation for performing work when not in the office. A signed policy indicating the types of activities that require supervisor approval and the company’s expectation for recording any time spent on such activities is something employers should seriously consider.

**Are furloughed employees entitled to unemployment benefits?**

Unemployment benefits will vary by state, and there may are also be waiting time periods in place before benefits are provided. In California, the executive order waives the seven-day waiting period due to the Coronavirus impact. Employers may be able to structure furloughs to maximize unemployment benefits to employees. For example, some states such as California, have work-sharing programs that allow employees with reduced hours to receive unemployment benefits even if they do not meet the standard requirements for unemployment eligibility.

LAYOFFS

**If I lay off employees prior to April 2, 2020, will they be eligible for the new paid federal sick leave and extended paid FMLA benefit?**

No. The new law does not go into effect until April 2, 2020, and their termination of employment will have occurred before then.

**If I lay off employees, will I need to provide advance notice under the WARN Act?**

WARN notices may need to be provided, but companies will not need to wait 60 days to lay off employees under the current executive order. If an organization has had 75 or more employees (including turnover) in the last year and 50 or more employees are laid off, notice will need to be provided under California’s WARN Act to each affected employee (or to their union if they have one), to the Local Workforce Development Board, and the chief elected official of each city and county government. Those notices have detailed requirements, and the recent Executive Order added two new components: the notice must state that the reason for the layoff is Governor Newsom’s order and the notices to employees must advise them of their right to apply for unemployment benefits.

If the layoff affects fewer than 50 employees, WARN notices may not need to be issued. However, be aware that under California’s WARN Act, when 50 or more employees are laid off in any 30-day period notice must be provided. Additionally, layoffs of more than 50 employees in a 90-day period for the same reason (such as the Coronavirus) will trigger federal WARN notice obligations retroactive to the first layoff.

**If I lay off employees, what must I pay them?**

Laid off employees must be paid their wages through the date of termination and their accrued vacation or PTO balance. Commissions that are calculable must be paid at that time as well. If commissions are not calculable on the date of termination, they must be paid when they become calculable.

**Must I provide severance pay?**

No. There is no legal requirement to provide severance pay. In most cases, it will make no sense to do so if the company plans to reinstate the employees when their office(s) can be reopened. Severance pay might be a good idea if an employee will be separated permanently. If that is the plan, the company should obtain a signed release at the point of separation.

**If I lay off employees, will they be eligible for unemployment benefits?**

Yes. California recently eliminated the week-long waiting period for unemployment benefits so they are available starting on the first day of unemployment.

**If I lay off employees, must we continue providing them health insurance?**

Each laid-off employee must receive a COBRA notice, but if employees elect COBRA continuation coverage, they will have to bear the cost.

**Can I reduce the salary or hourly pay of employees who remain working at the organization?**

Yes. Companies are required to (1) provide advance notice prior to the pay period in which the reduction becomes effective, (2) pay hourly employees at least the minimum wage of $13.00 per hour, and (3) pay exempt employees at least $54,080 annually.

****Summary****

Employers facing the need to reduce workforce as a result of Coronavirus should think through all the possibilities, and be as transparent as possible with staff. Chances are good that staff members being furloughed or laid off now will be needed back at work in the near future. Employees need to believe that this short-term solution will ensure a long-term, mutually beneficial relationship. They will need to believe their employer is making the right decision and taking the best care of them possible while ensuring business continuation for the organization.

Additional Resources

California requires employees affected by furloughs or reduction in hours or salary be provided with a Change in Status Notice. One has been enclosed for your use.

Employer information for filing WARN notices, Forms and more information can be found at EDD.CA.gov [https://www.edd.ca.gov/Jobs\_and\_Training/Layo](https://www.edd.ca.gov/Jobs_and_Training/Layoff_Services_WARN.htm)