



During this time of financial uncertainty resulting from the COVID-19 outbreak, businesses are being forced to close operations and decide whether to furlough or layoff some or all of their employees. We understand that this is an especially stressful decision for employers, so we prepared this guide to help employers understand the legal issues and implications associated with furloughs and reductions in force (RIFs).

#### WHAT LEGAL ISSUES MUST EMPLOYERS CONSIDER BEFORE A FURLOUGH OR RIF?

1. **Unemployment** – An employee is generally entitled to unemployment benefits from the state when an employee is: (1) terminated without cause, (2) forced to work reduced hours, or (3) furloughed. Of course, employees who are subject to a RIF will file for unemployment benefits. However, employers must also be aware that furloughed employees will almost certainly file for unemployment when the furlough begins. This will increase an employer's unemployment taxes in the future, but there may be some relief from states on this front. While we are awaiting an interpretation from the Texas Workforce Commission, Texas law allows for the TWC to completely or partially forgive unemployment chargebacks in the event of a disaster declaration – such as the current COVID-19 disaster.

Employers should also be aware that the CARES Act provides employees an additional \$600 per week in unemployment pay (through July 31, 2020) and expands unemployment coverage for workers to 39 weeks from 26 weeks. For more information on the CARES Act's impact on unemployment benefits, click [here](#).

2. **Benefit Plans** – If an employee is laid off as part of a RIF, the employee will only be entitled to COBRA benefits at the employee's expense. Furloughed employees are different though, because they are technically still employed. Employers should review their formal benefit plan documents to determine which benefits can be offered to employees while they are furloughed. This includes all medical insurance plans and 401(k) plans. Many benefit plans have a minimum number of hours per week that an employee must work to be eligible for coverage, so a careful analysis is required. Some brokers are already conceding that the insurance companies are not going to apply these rules to exclude coverage for employees who are temporarily ineligible because of a furlough or a reduction in hours.
3. **Overtime** – Employers have to analyze the exempt status of their workforce before furloughing employees to avoid liability under the Fair Labor Standards Act. Exempt employees must be paid their salary for the full workweek when the furlough begins, if they worked any hours during that week. If exempt employees are not paid their full salary, the employer risks losing those employees' exempt status. An employer, however, does not have to pay non-exempt employees any wages once the furlough begins with limited exceptions. Employers also need to carefully review the salary thresholds for the various overtime exemptions. Failure to pay employees the minimum salary basis as required by each exemption will result in a loss of an employee's exempt status and significant exposure for unpaid overtime.
4. **WARN Act** – This federal law requires employers to provide written notice at least 60 calendar days in advance of covered plant closings and mass layoffs. Generally, the WARN Act applies to mass lay-offs and requires an employer with 100 or more employees to provide a 60-day notice before laying off more than 50 employees at a single site or more than one-third of

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the employees altogether at a single site, assuming that total is over 50. However, there are also WARN Act implications in a furlough situation. An employer must also give 60-days' notice in the event that an employer furloughs 50 or more employees for six consecutive months.

However, there are some exceptions that may allow an employer to give less than 60-days' notice in the event of a RIF or mass furloughs. This law is fairly complicated and detailed but we can provide guidance on it and help you navigate its provisions if you are contemplating a RIF or furlough of 50 or more employees. You can also access our legal alert on the WARN Act [here](#).

5. **Discrimination / Retaliation** – Employers must be careful who they decide to lay off or furlough, making sure to consider the risk factors of an employee who is a member of a protected class, has made a recent workplace discrimination claim, or has recently participated in an investigation into a workplace discrimination claim. Further, employers should ensure that all laid off or furloughed employees do not fall into the same protected class—such as all over-40 employees, all men, etc.—much like the process used to decide which employees may be subject to a reduction in force or layoff. Of course, in the event all employees are either laid off or furloughed, employers can skip this step.
6. **Union Employees** – If an employer's workforce has unionized employees, the employer must review and comply with its obligations under any collective bargaining agreement prior to instituting a RIF or furlough.
7. **PTO** – Employers must be mindful of the requirements of their own PTO policies. If an employer has a PTO policy that requires the payment of PTO for any absence or upon termination, employers should consider revising those policies to avoid having to pay out PTO during this crisis. Employers could consider instituting a temporary PTO policy for the duration of the pandemic. This will certainly help alleviate the financial concerns of paying out PTO in the event of a RIF or having to pay PTO to furloughed employees.
8. **Employee Handbooks and Agreements** – In addition to an employer's PTO policy, employers must also be mindful of other policies in their employee handbooks, such as temporary layoff or furlough policies. Employers also must carefully scrutinize any "cause" or "no cause" termination provisions contained in an employment agreement with a specific employment term to ensure that they do not end up dealing with a lawsuit for breach of contract.
9. **The Families First Coronavirus Response Act (FFCRA)** – On March 18, 2020, President Trump signed the FFCRA into law. The FFCRA offers paid sick leave to employees, expands Family and Medical Leave Act coverage, and offers related tax credits to employers. As explained in the Department of Labor's recent [guidance](#), neither terminated nor furloughed employees will be eligible for any benefits under the FFCRA. You can read more about the FFCRA [here](#).

If you have any questions about the legal issues associated with furloughs or layoffs or how to notify your workforce about these decisions, please [contact us](#).

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