



During this time of financial uncertainty resulting from the COVID-19 outbreak, businesses are being forced to close operations and analyze whether to furlough or terminate some or all of their employees. We understand that these are especially stressful decisions for employers, so we prepared this guide to help employers understand the legal issues and implications associated with furloughs.

WHAT IS A FURLOUGH?

A furlough is a temporary leave of absence required by an employer which generally occurs during economic downturns. Employees are not paid during a furlough but may continue to be eligible for benefits subject to certain plan restrictions.

WHAT LEGAL ISSUES MUST EMPLOYERS CONSIDER BEFORE A FURLOUGH?

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. Employers must be aware that furloughed employees will almost certainly file for unemployment when the furlough begins. However, employers may be able to seek chargeback protection for employees terminated as a result of the global pandemic based on Texas Unemployment Compensation Act provisions relating to employee separations due to disasters resulting in a formal disaster declaration.
2. **Benefit Plans** – Employers should review their formal benefit plan documents to determine which benefits can be offered to employees while they are furloughed. This includes all insurance plans and 401(k) plans. Many benefit plans have a minimum number of hours per week which an employee must work to be eligible for coverage, so a careful analysis is required.
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.
4. **Discrimination / Retaliation** – Employers must be careful who they decide to 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 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 furloughed, employers can skip this step.
5. **WARN Act** – The WARN Act is implicated for any furlough of six months or longer. However, the WARN Act does not apply to a furlough not anticipated to last for more than six months at its outset if: (1) business circumstances worsen and that was not foreseeable; and (2) notice is given at the time that it becomes reasonably foreseeable that the furlough will last beyond six months.

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6. *Family and Medical Leave Act* – The FMLA offers job protection to employees who are on approved medical leave. However, employers can still furlough employees who are on FMLA leave. If an employee is scheduled to take or is currently taking FMLA leave, the employer should still provide the employee with the same notice provided to those employees not on FMLA leave. To be clear, the FMLA does not offer protection to employees who would otherwise be subject to a furlough or RIF.
7. *Union Employees* – If an employer's workforce has unionized employees, the employer must review and comply with its obligations under any collective bargaining agreement.
8. *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, 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 while not receiving income from furloughed employees.
9. *Employee Handbooks* – In addition to an employer's PTO policy, employers must also be mindful of and comply with other policies in their employee handbooks, such as temporary layoff or furlough policies. Again, such policies can be revised or modified by the employer.

FURLOUGHS VS. LAYOFFS

1. *WARN Act* – If an employer chooses to terminate employees rather than furloughing them, they should be aware of the WARN Act's notice requirements for mass layoffs. An employer is also required to give advance notice required by the WARN Act if it has a series of small terminations or layoffs, none of which individually would be covered under the Act, but which would collectively add up to numbers that would require notice. An employer is not required to give the required notice if it can show that the individual events occurred as a result of separate and distinct actions and causes, and are not an attempt to evade the WARN Act's requirements. The WARN Act also contains an important exception to providing the full sixty days' notice when the layoffs are "caused by business circumstances that are not reasonably foreseeable as of the time that notice would have been required." To read more about the WARN Act and its notice requirements, please [click here](#).
2. *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 (including those who are furloughed), expands Family and Medical Leave Act coverage, and offers related tax credits to employers. Considering the requirement of the FFCRA's paid sick leave requirements, employers may want to consider terminating employees rather than furloughing them because furloughed employees would be entitled to paid sick leave and the expanded FMLA benefits. [Click here](#) to read more about the FFCRA.
3. *Unemployment* – Employers will certainly face unemployment claims in the event of a layoff and, as a result, be subjected to charge backs from the state. If an employer is considering reducing hours, be aware that a significant reduction in hours can also trigger unemployment liability. However, reduced hours may help an employer avoid the cost of training new employees after this pandemic ends. Employers must be mindful of those costs in this setting.
4. *Severance / Release Agreements* – In the event that an employer is required to make layoffs, it should consider offering some severance payment to employees in exchange for a release of all claims the employee may have against the employer. Of course, this assumes that the business can afford to make such a payment.

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 [here](#).

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