

## CHECKLIST FOR FURLOUGHS

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- Length:**
  - How long do you want the employees to be off work?
  - What is possible for various categories of employees and the most advantageous given some of the other necessities identified below?
  - Although not entirely clear, some states such as California, seem to have restrictions on length of a temporary layoff or the labor department will consider the employee terminated from employment, and eligible for all final wages including accrued vacation/PTO pay. In other states, the furloughed employee may be eligible for unemployment insurance (covered below).
  
- Exempt employees:**
  - Consider the effect the length of time the furlough will have on the status of salaried exempt employees, both under federal and state law. Because of the salary pay requirements, generally exempt employees must be furloughed in week-long increments and those weeks must coincide with the employers' defined workweek. Some states may have additional requirements for monthly compensation. See e.g., California Labor Code §515(a) (monthly minimum).
  - Are there checks and balances in place to ensure that no work is completed during the furlough period?
  - Employees must be given strict instructions that they are not to do **any** work (including, making business phone calls, checking voicemail, reading/writing/deleting emails, drafting documents, stopping by the business to "check on things" or engage in business related communicates with other employees who may or may not be on furlough).
  - Employers may furlough exempt employees for shorter periods than a week and may reduce pay a commensurate amount, but should not make such commitments for specific lengths of time and should not contractually guarantee a reduced work week. This effectively is a reduction in pay and would allow exempt employees to continue to work on the furlough days off. *But see, Alawar v. Tricon Well Serv., LP*, 397 F.Supp.3d 873 (W.D. Tex. 2019)(finding employer's one time "roll back" of exempt salary raised fact issue on whether the employer met the salary basis test).
  
- Labor Management Issues:**
  - Does the Company have any existing Collective Bargaining Agreements?
  - If so, review any applicable provisions within the CBA for ability to implement furlough or procedural requirements before implementing a furlough (or annual plant shut-downs).
  - If there is no discussion of furloughs, then there is likely an obligation under Section 8(a)(5) of the NLRA to advise the union and negotiate, if the union requests. For these and other reasons, discussions with the union may need to precede a furlough situation.
  - If not unionized, has the Company recently been subject to recent union efforts or might it be a target for union organizing?

- Ensure that the furlough program is applied uniformly and consistently and does not target or adversely impact union organizers because of their pro-union activities.
- Consider whether the furlough program might lead to union organizing or employees to consider third party representation.

☐ **Contracts:**

- Some employees with individual contracts may have certain provisions within the contract that state how much they would be earning in any particular year or other potential promises regarding benefits.
- Review individual contracts to determine whether a forced unpaid furlough would materially modify the contract – and/or whether additional consideration is needed to modify the terms of employment provided in that agreement.

☐ **Notice Issues:**

- The law does not seem to be clear on this issue in the various states, but in practicality, an employer must give notice of the furlough.
- Furloughs that are completely unpaid may be interpreted as reductions in pay depending on the agreement or offer letter when hired. If there is a chance that an unpaid furlough would be a change in pay, state laws regarding notice of changes in rate of pay must be followed.
- How much notice is required under state law and how much should be provided? As much as 30 days are required in states like Missouri, but even where not required, and where possible provide at least one pay period in advance notice of the unpaid furlough – likely more if a vacation policy needs to be changed and implemented.
- Employers should determine whether additional consideration is needed for modification to the terms of employment provided in any vacation/PTO policy.
- If furlough period is longer, determine length of notice to provide the employee to return to work – i.e. whether employees who fail to return to work within two business days after notification or scheduled return date will be terminated from employment.
- In any notice of the furlough for at-will employees, confirm that employment is at-will and that there is no guarantee the employee will be recalled to the same exact position or an equivalent position.

In summary, notice issues of concern are (1) the notice required to change a vacation policy to allow for forced use of vacation or prohibit vacation that has already been accrued during a furlough period, which in some states is determined as wages or accrued vested benefits and (2) whether a furlough constitutes a change in pay, requiring notice in many states.

☐ **WARN and Other Peculiar Notice Obligations:**

- The federal WARN requires employers, with 100 or more employees, to provide 60 days' notice before a "mass layoff" or a "plant closing" to the affected employees, unions and local and state government officials.<sup>1</sup> Fed-WARN is usually not going to be an issue unless there are going to be at least 50 "employment losses" at a single site of employment (along with other factors) if the furlough is less than six months' duration

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<sup>1</sup> 29 U.S.C. §§ 2101 *et. seq.*

and there are no other employment terminations at any of the sites where furloughs are planned.

- Furloughs or temporary layoffs of less than six months' duration are simply not deemed to be "employment losses" with the meaning of Fed-WARN.<sup>2</sup>
- Look to additional, local notice requirements under mini-WARN state statutes. There are approximately thirtenn jurisdictions where mini-WARN laws are of substance and which need to be analyzed in more detail: California, Delaware, Hawaii, Illinois, Iowa, Maine, New Hampshire, New Jersey, New York, Tennessee, U.S. Virgin Islands, Vermont, and Wisconsin.
- There are a number of states that have peculiar notice obligations where the number of layoffs, temporary or permanent, exceed certain threshold numbers: Kansas, Maryland, Massachusetts, Minnesota, North Carolina, Oregon, Philadelphia, PA, and South Carolina.
- The following states have specific requirements regarding larger layoffs, but are not WARN-like: Alabama, Connecticut, Georgia, Massachusetts, Nevada, New Hampshire, North Carolina, Ohio, and Rhode Island.

**Unemployment Benefits:**

- Unemployment benefits will vary by state and there may be waiting time periods in place before benefits are provided. Consider reviewing unemployment eligibility in the various states where operations will be impacted and including some sort of statement within the furlough notice.
- Consider looking into whether "partial" unemployment claims are permitted where the workweek is simply shortened for non-exempt employees or various other combination of periodic furloughs may provide benefits to employees.
- Will operations be impacted in any of the 11 states where "work share" programs are permitted? If so, consider looking into those programs with the local unemployment agency.
- Consider how additional pay (such as forced use of vacation) may impact unemployment benefits, if at all.
- While furloughs may be a short-term solution, consider the long term impact on how contribution rates may increase after any furlough period.

**Leave of Absences:**

- Are any of your employees or a large number of potentially impacted on FMLA or state-equivalent leave of absence or other type of leave?
- Consider whether the state or federal law will allow you to count the furlough time against this employees FMLA (or other state leave law) time?
- Under some state laws (such as state equivalent of FMLA), where an employer's business activity has temporarily ceased for some reason and the employees are not expected to report for work for 1 or more weeks, the days the employer's activities have ceased may not count against the employee's leave of absence entitlements.

**Vacation/PTO/Holidays:**

- Will the Company allow vacation/PTO time to be used? Or will it force or prohibit the use of vacation/PTO during furlough?
- Does the Company vacation/PTO policy address furloughs at all?

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<sup>2</sup> 29 U.S.C. § 2101(a)(6).

- If the policy is not specific enough to interpret such employer control over vacation, it may be best to revise the policy in advance of any furlough and provide notice to employees of the modified policy. An employee could have a contractual right or a right under state law if the policy does not expressly permit the employer to compel use of already accrued PTO.
- If PTO is being used to satisfy local mandatory sick leave obligations, forced use of PTO during a furlough could be problematic.
- How far in advance of the furlough must an employer give notice of a vacation/PTO policy change will be dictated by state law.
- Whether additional consideration, beyond continued employment, to change a policy/term of employment will be dictated by the policy or Handbook provisions and/or state law.
- Signed acknowledgements of any policy change will likely assist in disagreements that employees detrimentally relied on the original policy or other potential claims.
- If the Company is allowing use of vacation/PTO time, the Company will also need to decide what to do with the employees who have insufficient banks of vacation/PTO to cover entire workweeks, or entire days. One option is to have a policy of allowing employees to “borrow” against future vacation bank, although this type of policy could leave the employer in a difficult position if layoffs are later required or if the employee terminates employment with a large negative balance.
- The Policy must be clear that the employer will not recover a negative PTO balance from anything other than future PTO accruals. Any policy allowing an employer to recoup a negative balance from final salary payments may violate the salary basis for exempt status.
- Will the furlough period occur during a time where there is normally a scheduled paid Company Holiday?
- Determine whether the Company will pay only for the holiday that week, and how that payment relates to exempt employees pay?
- Depending on the length of the furlough, whether forced use of vacation or cashing out of vacation has any negative tax implications for employees. This might help decide how long the furlough period needs to be.
- Determine whether during a furlough period any vacation time will continue to accrue, and how that is affected by use of vacation, unpaid furlough and by length of furlough. For example, if vacation is accrued per pay period, and the employee worked only one workweek during the pay period and the other week was unpaid, whether the employee would continue to accrue the entire vacation amount for the pay period. Would that be different if the employee were allowed to use some vacation/PTO to cover “part” of that unpaid workweek?
- For employees who have already scheduled and received advanced approval for vacation, which then happens to be during furlough period, whether such vacation pay should still be available, an exception to any prohibition of vacation pay during furloughs.

**Other Benefits:**

- Are the impacted employees covered under the Company's insurance plans such as medical, dental, life?
- If so, consider the practical implications of an unpaid workweek or more on such deductions for medical premiums, 401k plans, loans, garnishments.

- Whether during any furlough period, the employee will have earned enough wages to cover those deductions.
  - If not, how will the employer resolve the amount owed or allow for any makeup contributions to plans like 401k?
  - Employers may alert employees (possibly in the notice regarding the furlough) that they are able to change the percentage of 401k contribution upon return if employees are trying to save a certain amount of money or maximum amount of money for retirement per year.
  - Flexible spending account deductions are usually based on a specific annual amount that is deducted in even amounts depending on the number of pay periods in the year. If a furlough period covers one entire pay period, then employers need to determine whether employee contributions need to be “made up” with higher deductions in subsequent pay periods and how to go about that upon returning from furlough.
  - Most benefit plans require that employees be actively at work for benefit continuation or that employees work a minimum of a certain number of hours per week (usually around 30 or 32) to be eligible for benefits. It may be necessary to speak with the Company’s benefit plan representatives to make exceptions for furloughed employees.
  - Depending on length of furlough, and whether the Company plans to continue benefit premium payments, it may be necessary to offer employees COBRA benefits.
- Immigration:**
- Do you employ any H1-B Visa holders?
  - If yes, H1-B Visa holders have minimum salary requirements and must be paid the full salary promised in the visa petition documents, even if US workers are being asked to take time off without pay or the equivalent.
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- Discrimination/discipline:**
- Depending on length of furlough, determine whether the Company wants to or thinks it should try to prohibit work for other employers, which may be driven by type of work the employee engages in during furlough – whether it is a conflict of interest – and/or state law restrictions on prohibiting off-duty conduct.
  - Furloughs should not be implemented or used as a means of disciplinary action or a permanent means for separation of employment or indefinite periods of time.
  - Ensure that furloughs are not disparately impacting one group of employees in a particular protected category, i.e. older workers.
- Uniformed Services Employment and Reemployment Rights Act (USERRA):**
- USERRA imposes affirmative obligations on public and private employers to provide employees with leave to serve in the military.<sup>3</sup>
  - USERRA also requires employers to reinstate employee returning from military leave and to train or otherwise qualify those returning employees.<sup>4</sup>
  - The Act requires that employers not discriminate against an employee because of past, present, or future military obligations.<sup>5</sup>

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<sup>3</sup> 38 U.S.C. §§ 4301 *et seq.*

<sup>4</sup> 38 U.S.C. §4312(h); 20 C.F.R. §1002.139.

<sup>5</sup> 38 U.S.C. §4311(b).

- Employers must ensure that when deciding who is to be furloughed and when, employees with standing military orders to deploy or those who are returning from military duty are treated equally to all other employees. Failure to reinstate an individual following a period of military service is one of the most common complaints under USERRA.