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Furloughs, Lay-offs and Terminations During COVID-19

What's the difference between a furlough and/or a lay-off and a termination?

Termination usually means a permanent cessation of employment for some reason (which could be lack of work, business closure, poor performance by an employee or voluntary departure by an employee).

A lay-off usually means a cessation of employment that is intended (or hoped) to be temporary, but may become permanent if certain things happen (for example, the business is forced to close because it can't pay rent) or don't happen (such as not getting a loan to meet expenses). The lay-off period is generally unpaid.

A furlough usually means a temporary cessation of employment (similar to a lay-off), with an anticipation that the employee will be returned to work at some time in the future. It is usually seen with seasonal employees (people who work at sports arenas during the sports season, or people who are brought on during holiday seasons or other peak times). The furlough period is generally unpaid.

How should an employer decide whether to furlough, lay-off or terminate employees in light of COVID-19?

During this difficult and trying time, employees' health and safety are of utmost importance to employers. After determining that it is best for the employer and its employees to temporarily

close its business, many employers have to determine whether the employer's economic circumstances require cost-cutting measures, and what those measures need to be.

If the employer has already made all the non-personnel cost-savings decisions that are feasible and reasonable to keep a business running, then the employer has to decide whether it needs to eliminate all of its employees, or just some of them.

Frequently, the employer will determine that some essential staff must stay on payroll, either to keep the business running currently or to ensure that the business will be able to "ramp up" again once the crisis has passed. and that other employees will have to be released. The employer then has to decide whether to furlough, lay-off or terminate employees.

Above all, it's in the employer's (and the employees') best interests to make and implement these decisions in a way that is respectful of the employees. If the intention is to bring back furloughed or laid-off employees, it is important for future employment relations that the employees feel as though they were treated fairly.

What should an employer consider generally in deciding whether to furlough employees or keep them on payroll in light of the available benefits because of COVID-19?

Aside from the decisions as to whether to keep specific employees or not, there are financial considerations to be made by an employer in determining whether to maintain staff on payroll, or to furlough/lay-off employees and allow them to collect unemployment.

Under the CARES Act, some employers whose businesses are fully or partially suspended by government order due to COVID-19 may be eligible to receive an Employee Retention Credit. If an employer puts its employees on unpaid furlough to allow them to collect unemployment insurance benefits, then the employer generally will be saving the amount of the wages that might have been paid. Some employers may choose to pay the equivalent of health care and other benefits contributions for these employees. There may be future repercussions for employers who have increased numbers of unemployment claims made against them. Usually, this would result in an increase in the unemployment tax rate applied to the employer, which would create higher costs to the employer. It is unclear right now if the New York state

legislature will be enacting legislation that provides that employer tax rates will not be affected by COVID-19 furloughs.

Employers should consult with their accountants and/or tax advisors as part of their economic decisions.

What other factors should employers consider in making furlough decisions?

Employment actions – coronavirus-related or not – may not be taken for discriminatory reasons. Employers should consider whether their decisions to keep some employees and furlough others may discriminate against employees who fall into a protected class, or whether they may have a disparate impact against a protected class of employees, or whether they may be seen as retaliatory against employees who may have engaged in protected activity. The key is to document all legitimate business reasons as to why particular employee were chosen to be furloughed.

Does the employer have to give WARN Act (or state mini-WARN Act) notice of the lay-off because of COVID-19?

If the employer is laying-off (or terminating) sufficient numbers of employees as to implicate the WARN Act, providing notices under the WARN Act that the temporary lay-off might become permanent (or at least greater than six months) is necessary.

What are an employer's responsibilities to furloughed employees with respect to pay?

Generally, furloughs (and lay-offs) are unpaid. If unpaid, Furloughed employees should be instructed that they are **not** to do **any** work while on furlough. They should also be instructed that they may be disciplined for performing unauthorized work. At the same time, these unpaid furloughed employees should be instructed that, if they do perform any work while on furlough (to maintain a client relationship, for example), they **must** self-report that time on a regular basis so that the employer can properly pay them. If an exempt employee who has been furloughed does any work in a given work-week, most often the employer must pay that employee's full salary for that week. Likewise, if a furloughed non-exempt employee does any work, the employer **must** pay the employee for the hours that the employee worked.

Are furloughed or laid-off employees eligible for unemployment insurance benefits?

Yes, so long as they are unpaid by the employer for all or part of their regular pay. Employers should provide the furloughed/laid-off employees with the necessary information to allow them to claim unemployment insurance benefits.

Can a furloughed employee be paid for unused vacation or other PTO?

That depends on whether the employer has a policy that permits a *terminated* (or separated) employee to be paid for unused vacation or other paid time off. If vacation time has to be earned before it can be taken, then the employer may not be required to pay a furloughed employee unearned, unused vacation time.

What about the new Emergency Paid Sick Leave and Extended FMLA benefits? Are furloughed employees entitled to those?

Generally, no. If an employee has been furloughed because the employer does not have enough work or business, then the employee is not eligible to use EPSL or EFMLA benefits. This is because the employee's inability to work does not fall under one of the coronavirus-qualifying events for EPSL or EFMLA benefits – even though the coronavirus may have been the reason that the employer has no work or business for the employee to perform.

Must an employer continue to provide group insurance benefits to furloughed employees?

No. To determine if an employer may provide continued coverage, the employer should check with its provider. The employer could determine that it wants to provide continued coverage or to pay for COBRA continuation of benefits premiums, but it is not required. If benefits cease for furloughed employees, employers should provide the same information to furloughed employees as they would to terminated employees concerning rights to elect to continue health care coverage under COBRA, as well as their rights (if any) to continue coverage under life insurance and/or long-term disability insurance policies. Employers should check with their plan administrators to determine this information.

For morale purposes, employers may want to continue health insurance benefits for employees who have been furloughed, if they are financially able to do so. Employers should check with their insurance carriers to determine what is allowed under the plan.

What else should employers tell (or not tell) furloughed employees?

If the employer thinks (or hopes) that the furlough will be temporary, the employer should let employees know that at this point the plan is for only a temporary period of unemployment. However, the employer should avoid making any promises or guarantees, and should be candid about the possibility that the furlough/lay-off may become permanent.

It's important to reiterate – employers need to treat employees with dignity, sensitivity and professionalism. The employees need to know that they're valued by the employer, that the furlough/layoff is not about them, and that the situation is unavoidable given the pandemic's impact on the company. Regardless of whether the employer is able to have the employees return to work or not, the employees need to feel as though they've been treated fairly.

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