

# Employee Compensation & Benefits During Closures & Furloughs

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As business closures increase due to the COVID-19 pandemic, employers are faced with questions about compensation and health benefit coverage for their employees. Government relief measures may provide compensation for businesses and individuals in certain situations. In other cases, existing rules on employee rights will apply.

Paid leave may be required for some employees by federal or state law. Also, some state insurance regulators are requiring insurance carriers to provide policyholders with additional flexibility regarding premiums and coverage, and some carriers are making similar changes independent of state requirements.

This Compliance Overview provides a summary of the issues that employers may encounter when terminating or suspending employment due to COVID-19

## LINKS AND RESOURCES

- Families First Coronavirus Response Act [text](#)
- COVID-19 and the Fair Labor Standards Act [Questions and Answers](#)
- DOL unemployment insurance [guidance](#)

## Employee Compensation

- Employees are generally not required to be paid for time spent not working.
- Exceptions apply to exempt employees who work for part of a workweek and employees eligible for paid leave.
- Employers may provide paid leave beyond what is required.
- Employees may be eligible for expanded unemployment benefits.

## Employee Benefits

- Whether employees remain eligible for benefits while not working depends on the terms of the plan.
- Benefit eligibility may also depend on the reason the employee is not working.
- State or carrier guidelines may provide additional flexibility for group health plans.

## **Furloughs**

A furlough is a way for employers to deal with a reduction of work. During a furlough, employees remain on the employer's payroll but their hours of work are reduced. Typically, employers establish furloughs by asking employees to work fewer hours or by asking them to take unpaid time off.

Employers should be careful when furloughing employees who are exempt from the Fair Labor Standards Act (FLSA). The FLSA requires that exempt employees receive their weekly salary regardless of the number of hours they work during the week. However, the FLSA does not require employers to compensate exempt employees for any week in which they do not perform any work, so employers may elect to furlough exempt employees by reducing their work a week at a time.

Whether employee benefits are provided during furloughs will depend on the terms of each plan. In many cases, employees must work a specific number of hours to remain eligible for benefits. However, in some cases, furloughs may be treated differently than other types of hours reductions. During the COVID-19 pandemic, some insurance carriers and state regulators are providing additional flexibility to help employers maintain coverage for employees on furlough.

## **Layoffs**

Layoffs can be structured in several different ways. A layoff is typically a temporary separation from payroll. Most often layoffs take place when there is not enough work for employees to perform. Employers use layoffs, rather than terminations, because they believe the conditions leading to the reduction in work will change. Employers that use layoffs generally intend to recall employees who are laid off once enough work becomes available. However, layoffs can also be permanent.

As with furloughs, whether a laid-off employee remains eligible for any employee benefits will depend on the terms of each plan. If employment is terminated, eligibility will generally also be terminated, subject to any continuation coverage requirements. Employees may be able to collect unemployment benefits if they meet their state's eligibility requirements.

## **Continued Health Care Coverage**

Employers may continue active group health care coverage for laid-off employees or furloughed employees if this is allowed by the terms of their health plan. For example, a health plan may indicate a minimum number of hours employees must work to be eligible for coverage and instructions for how to account for short-term leaves of absence, whether paid or unpaid.

Employers may have the option of amending their plan's terms and conditions if they do not allow for a continuation of benefit coverage. However, if applicable, employers should check with their third-party insurer or administrator before amending the terms and conditions of their health plans. Employers that expand coverage outside the terms and conditions of the plan without consent from the insurer (or stop loss carrier) face significant financial exposure.

In addition, during a layoff or furlough, employers may choose to pay the employee share of premiums, in full or in part. Employers that pay for employee premiums will need to comply with any applicable cafeteria plan rules and nondiscrimination requirements to ensure favorable tax treatment.

## **COBRA and State Continuation Coverage**

During a layoff, and depending on the terms of the health plan, employees may have the right to maintain their health insurance coverage through the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). Both termination of employment and a reduction in hours of service that causes a loss of eligibility for coverage are considered COBRA-qualifying events, that would entitle an employee (and any covered dependents) to elect up to 18 months of COBRA continuation coverage.

COBRA applies to employers with 20 or more employees, but many states have adopted similar versions of this law for employers with fewer employees. These state laws generally apply to insured group health plans.

Group health plans can require qualified beneficiaries to pay for COBRA continuation coverage, although plan sponsors can choose to provide continuation coverage at reduced or no cost. The maximum amount charged to qualified beneficiaries cannot exceed 102% of the cost to the plan for similarly situated individuals covered under the plan who have not incurred a qualifying event.

## **Affordable Care Act (ACA) Employer Shared Responsibility Penalties**

Terminating group health coverage for a full-time employee during a layoff or furlough may trigger an employer shared responsibility penalty for applicable large employers (ALEs) if the employee is still considered to be employed by the employer. This is more likely to be an issue for ALEs that use the look-back measurement method. Individuals who are determined to be full-time employees for a stability period must be offered coverage for the entire stability period as long as they remain employed.

In addition, ALEs that elect to maintain coverage during a furlough or layoff must ensure that the coverage remains affordable, as defined by the ACA, to avoid penalties. Depending on the circumstances, this may require a continued or increased employer subsidy, whether on active or COBRA coverage.

## **Wages under the FLSA**

In general, the FLSA applies only to hours actually worked. This means that employers are not required to compensate their employees for any hours they are not working, including layoffs and furloughs. However, as mentioned above, exempt salaried employees must be paid their full weekly salary, regardless of the number of hours they work each week.

In an effort to promote social distancing, federal and state governments have been encouraging individuals to work remotely as much as possible. An employer's responsibility to comply with FLSA and state wage and hour requirements does not change merely because an employee is working offsite.

However, employers should consider the following issues when instituting remote work practices:

- It may become easier for employees to work additional hours if they are working remotely. Employers will need to establish accurate time-keeping practices to ensure compliance with overtime wage payment requirements.
- Employees working on critical infrastructure may see an increased number of on-call hours of work. Employers should consider how these situations impact their compensation structure.
- Employers should also ensure that employee break and meal times are respected as required by law. Accounting for meal and break periods is another reason to implement accurate time-keeping practices.

## The Families First Coronavirus Response Act (Families First Act)

As part of [sweeping legislation](#) signed into law by President Trump on March 18, 2020, two laws were enacted that provide workers with paid leave for reasons related to the coronavirus (COVID-19) pandemic. One of the new leave provisions, the “Emergency Family and Medical Leave Expansion Act,” allows **12 weeks of partially compensated FMLA leave** to care for a child whose school or child care facility has been closed due to COVID-19. The leave applies only to workers who have been employed by their current employer for 30 days.

The other new law providing employee leave, the “Emergency Paid Sick Leave Act,” requires employers to provide up to **80 hours of paid sick time** to employees in specified circumstances, including:

- A quarantine or isolation order for the employee or someone the employee is caring for, or medical advice to self-quarantine;
- When the employee has symptoms of COVID-19; or
- The closure of the employee’s child’s school or child care facility.

Employers with 500 employees or more are **exempt** from the laws, and employers may exclude employees who are **health care providers** and **emergency responders**. The legislation also allows for future regulations exempting businesses with **fewer than 50 employees** from providing leave for child care reasons if the leave would jeopardize the viability of the business. The new employee leave mandates take effect on April 1, 2020, and expire on Dec. 31, 2020.

## Unemployment Compensation

Employers that continue health coverage for laid-off or furloughed employees do not automatically jeopardize their employee’s eligibility for unemployment benefits.

The Families First Act encourages states to waive limitations on UI benefits (such as waiting weeks and work-search requirements) for COVID-19-related claims. The Act also provides federal funds to help states pay for increased UI claims caused by the outbreak. Specifically, the U.S. Department of Labor has indicated that states may allow for UI benefits where:

- An employer temporarily ceases operations to prevent employees from coming to work due to COVID-19;
- An individual is quarantined with the expectation of returning to work after the quarantine is over; and

- An individual leaves employment due to a risk of exposure or infection, or to care for a family member affected by COVID-19.

The DOL has also clarified that an employee is not required to quit in order to receive benefits due to COVID-19.

While each state administers a separate unemployment insurance program, all states follow the same guidelines established by federal law. Employees are encouraged to contact their state's unemployment insurance program for questions regarding eligibility and benefits during these unprecedented times.

## Mass Layoffs

Mass layoffs take place when plants or businesses shut down and multiple employees are laid off at the same time. The federal [Worker Adjustment and Retraining Notification \(WARN\) Act](#) requires employers with 100 or more employees to provide at least 60 days' advance written notice of any plant closing or mass layoff that affects 50 or more employees at a single site of employment.

Given the rapidly changing nature of the COVID-19 pandemic and its effect on businesses, relief from the advance notice requirements may be available. It may not be possible for employers to satisfy the required notice period when businesses must be shut down unexpectedly.

In fact, the WARN Act allows employers to provide fewer than 60 days' notice when an **"unforeseeable business circumstance"** exists. This exception still requires employers to give as much advance notice as possible. As with most exceptions, employers will need to prove that they have met required conditions for it to apply.

A circumstance is unforeseeable when it is caused by some sudden, dramatic and unexpected action or condition that is **outside the employer's control**. An unanticipated and dramatic major economic downturn or a government-ordered closing of an employment site that occurs without notice may each be considered a business circumstance that is not reasonably foreseeable. The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise commercially reasonable business judgment, and this is measured by whether the same judgment would be used by a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that may affect demand for its products or services.

Some states have also adopted similar versions of the federal WARN Act, which usually apply to smaller employers or smaller layoffs. Many of these states have provided a waiver from their advance notification requirement if the layoffs are caused by COVID-19. Employers are urged to check with their local agencies to determine whether they are subject to state WARN requirements, and whether waivers for their situation have been authorized.