

COVID-19/CORONAVIRUS – EMPLOYER CONCERNS AND QUESTIONS MARCH 20, 2020 UPDATE – UPDATE #6

WHAT EMPLOYERS NEED TO KNOW

LAYOFF AND FURLOUGH GUIDANCE CONSIDERATIONS

There are a number of potentially applicable federal, state, and local laws and regulations that apply to employment decisions and workplaces. While there is no one-size fits all answer for every scenario, below we've provided some guidance as to some common concerns and questions many employers and their employees may be experiencing.

Please note that the guidance sets out what restrictions or requirements might exist. Often, however, employers remain able to choose and shape what policies and practices they think are best for their organization given the circumstances and particular situations.

Lind Jensen Sullivan & Peterson welcomes your inquiries to address specific questions, and will do our best to provide answers. Please remember that differing facts and situations may call for different answers, particularly as developments continue to change in response to the COVID-19 Crisis.

GENERAL REMARKS

What is a furlough?

A furlough is an alternative to a formal layoff. An employer furloughs its employees when it requires them to work fewer hours or to take a certain amount of unpaid time off from their regular schedule of work. There are many different examples of furloughing employees, i.e. reducing an employee's hours each week, requiring employees to take periods (a week or two a time) of unpaid leave throughout the year.

An employer should note that when furloughing an exempt employee it must carefully manage compensation so that the employer can continue to pay them on a salary basis and not ending up altering their exempt status under the Fair Labor Standards Act (FLSA).

An employer may require all employees to go on a furlough, or the employee may exclude some employees from a furlough if they provide essential services to the organization.

A furloughed employee stays on the payroll. Under most circumstances, a furloughed employee will remain eligible to receive employer-provided benefits. Please contact your benefits provider to ensure that you have a complete understanding of the “qualifying events” that may trigger an employee’s loss of coverage. If your provider considers the reduction in hours a “qualifying event” under your benefits plan, then you must meet COBRA notice requirements.

What is a layoff?

A layoff is a temporary separation from payroll. An employee is laid off because there is not enough work for the employee to perform. With a layoff, the employer anticipates a potential change in the organization’s work flow so that the employee may eventually be called back to work.

Employees are able to collect unemployment benefits while on an unpaid layoff. Employers may allow laid-off employees to keep receiving benefits (i.e., health and dental insurance coverage) for a specified period of time as an incentive for the employee to subject to an immediate recall back to work. Employers may also decide to terminate benefits as part of the layoff and must then meet COBRA notice requirements.

A laid-off employee does not stay on the payroll. Whether or not to continue benefits to a laid-off employee is a decision an employer must make depending on its own individual circumstances and consistent with its benefits plan. If your provider considers the temporary layoff a “qualifying event” under your benefits plan, then you must meet COBRA notice requirements.

What is a reduction in force (RIF)?

A reduction in force (RIF) is when an employee’s position is completely eliminated by the organization due to certain conditions within or outside the organization and there is no intention of re-instating that position. It is a permanent elimination of the job position.

An employee terminated because of a RIF is a permanent and complete separation from the organization.

A layoff may result in a RIF if conditions do not warrant an organization bringing laid-off employees back to work.

An employee subject to a RIF does not stay on the payroll. Benefits are typically terminated and the employer must meet COBRA notice requirements.

GENERAL STEPS TO TAKE FOR A FURLOUGH

1. **Determine the reasons why a furlough is necessary.**

Determine if the organization's needs, services, or work have changed due to internal and external conditions.

2. **Consult your handbook or other written employment practices documents.**

Ensure that any practices, procedures, or guidelines in the organization's handbook or similar employment practices documents are met. For nonexempt, hourly employees, you can reduce their shifts as your organization's needs change.

Follow the organization's existing policies in terms of employees accessing and using vacation time, and perhaps consider relaxing your requirements regarding sick time - e.g., let them access those banks even though they may not necessarily be sick.

3. **Know and comply with the Fair Labor Standard Fair Labor Standards Act (FLSA).**

Generally speaking, an employer can reduce the hours of hourly employees without violating the FLSA. For exempt (or salaried) employees, it is more complicated. Under the FLSA, exempt employees must receive their full salary in any week in which they perform any work, subject to limited exceptions. They are not required to be paid their salary in weeks in which they perform no work. One way to furlough exempt employees and meet the requirements of the FLSA would be to place your exempt staff on a "one-week-on, one-week-off" schedule. In considering this option, employers should make sure that furloughed exempt employees remain compensated at or above the FLSA-minimum required to qualify as an exempt employee. Otherwise, the employee may fall outside the exemption and subject to the FLSA's overtime provisions.

Our employment team is ready to assist you with any furlough questions you may have about an employer's obligations arising under the FLSA.

4. **Set and communicate expectations during the furlough.**

Set the expectation that furloughed employees will not work during the furlough. This includes checking email and voicemail. Exempt employees are entitled to full compensation for any work week in which they perform any work, and nonexempt hourly employees are entitled for compensation for the time they perform work. If the employees perform any work or services during the furlough, the employer has an obligation to pay them. As a practical matter, you will want to be able to communicate general status updates to your temporarily laid off or furloughed employees. The best solution may be to make sure your written instructions to temporarily laid-off or furloughed employees are clear that they are not to perform

any work but may check email or voicemail solely for updates on the organization's current situation or handling.

Communicate the organization's handling of benefits and how that will work during the layoff.

5. Develop and communicate the furlough plan.

To the extent an organization can, depending on the circumstance or condition necessitating the furlough, develop both a short-term and long-term objective for the furlough and how that objective may impact both the organization's and the status of the furloughed employees' ability to come back to work.

6. Inform employees about unemployment compensation benefits.

In Minnesota, furloughed employees are entitled to receive unemployment compensation. On March 16, 2020, Governor Walz signed Executive Order 20-05 that permits workers who are "not able to work directly or indirectly as a result of COVID-19." Here is a link to the Executive Order:

https://mn.gov/governor/assets/2020_03_16_EO_20-05_Unemployment_Insurance_tcm1055-423379.pdf

The Executive Order waives the usual waiting period, so temporarily laid off or furloughed employees can apply online. More information can be found at DEED's website:

<https://mn.gov/deed/newscenter/covid/workers/>

GENERAL STEPS TO TAKE FOR A LAYOFF OR RIF

1. Determine or select which employees are subject to the layoff or RIF.

Employers can use a number of factors to determine which employees should be temporarily laid-off or permanently reduced from the work force: 1) the importance of the employee's job position to the organization's goals, objectives, services, and work; 2) the employee's job performance; 3) the employee's knowledge and skills; and 4) seniority, among other factors. See "Managing the Layoff Process During the COVID-19 Crisis," below, for a more thorough discussion of some of the more common objective selection criteria used by organizations to identify employees subject to a layoff.

By aligning the future goals of the organization with the best selection process, the organization will be able to determine its success going forward.

2. Keep the decisions objective, legitimate to the business of the organization, and non-discriminatory.

Do not base any layoff or RIF decisions on discriminatory or subjective reasons. Be familiar with the identified protected classes of employees in both federal and state statutes. Similarly, do not factor in an employee's leave status or if the employee recently engaged in statutorily protected conduct. Do not use an employee's whistleblowing or protected reporting as consideration for the layoff or RIF separation.

An employer must be able to identify, explain, and document the objective and legitimate business basis for its decision to layoff an employee or eliminate an employee's position.

Identify the segments of your organization that are most affected by the present disruptions to the economy. Document whether the need to engage in the layoff arises out of a general reduction in revenue (either to a business segment or the organization as a whole) or is the result of a shortage of work for a particular category of employees within the organization. In addition to demonstrating the business justification for the layoff, the process of working through these issues provides an opportunity for organization leaders to think critically about the challenges that the organization faces, weigh the available options, and choose the path that puts the organization in the best position moving forward.

3. Consult your handbook or other written employment practices documents.

Ensure that any practices, procedures, or guidelines in the organization's handbook or similar employment practices documents are met. Many organizations already have established policies and procedures that lay out the organization's plan for, e.g., how employees will be selected, what benefits they might be entitled to, etc.

4. Make sure to comply with the Federal and State Worker Adjustment and Retraining Notification (WARN) Act Regulations.

Depending on the size of staff being laid off, an employer could potentially be subject to the federal requirements under the Worker Adjustment and Retraining Notification (WARN) Act.

[https://www.doleta.gov/programs/factsht/WARN Fact Sheet updated 03.06.2019.pdf](https://www.doleta.gov/programs/factsht/WARN_Fact_Sheet_updated_03.06.2019.pdf).

Minnesota has a state version, sometimes called a "mini-WARN" statute as well.

<https://mn.gov/deed/business/starting-business/basics/plant-closings.jsp>.

Normally, these would require an employer doing a large layoff to provide 60 days' notice to affected employees. However, the WARN Act permits shortened notice for "unforeseen business circumstances." Given the recent proclamations by the President, the Governor, the Minnesota Commissioner of Health, and the Minnesota Commissioner of the Department of Employment and Economic Development (DEED) in response to the COVID-19 crisis, it seems likely that the coronavirus pandemic constitutes an "unforeseen business circumstance."

There are three general exceptions when notice is not required, but otherwise would be: (1) "Faltering Company" (which applies to plant closings only); (2) "Unforeseeable Business Circumstances" (which applies to plant closings and mass layoffs), and (3) "Natural Disaster" (which applies to plant closings and mass layoffs). Each exception is extremely fact dependent. Under the Unforeseeable Business Circumstances exception, the inquiry is whether an event or business circumstance precipitating the employment loss is "reasonably foreseeable" at the time notice should have been given. If the event/circumstance is caused by a sudden, dramatic, and unexpected action or condition outside an employer's control, that likely satisfies the "unforeseeable" definition.

Please note that in general the need still exists to advise state and local governments (e.g., the Dislocated Worker Program) of the layoffs to facilities the government's ability to step in and provide placement and retraining services.

5. Make sure to comply with the Older Workers Benefit Protection Act (OWBPA) and Regulations.

If release of claims involving age discrimination are used in the layoff or RIF and in consideration of a severance package, the release must comply with OWBPA.

Generally, under the OWBPA, an employer needs to provide separated employees age 40 and over a consideration period of at least 21 days when one older employee is being separated, and 45 days when two or more older employees are being separated. Additionally, employees must receive a revocation period of at least 7 days.

The OWBPA also requires other specified notice obligations for a RIF or voluntary exit incentive program when multiple employees are subject to a RIF.

6. Determine whether or not to give the separated employee a severance package.

A severance package is not required. Recognize that the use of a severance package may lessen risk to future employment claims by the separated employee. Know and implement your state's required criteria if electing to do a severance.

7. **Inform the employees and your organization about the layoff or RIF.**

Meet personally with the employee to be separated and explain the reasoning for the layoff or elimination of the job position. Be prepared to explain the reasons for the layoff, the severance package, if applicable, COBRA election procedures, unemployment information, and other potential services that may be available.

Notify the remaining employees of the layoffs or RIF. You may consider explaining the organization's current status and position and reinforce its commitment to the remaining employees and the overall goals and objectives of the organization.

MANAGING THE LAYOFF PROCESS DURING THE COVID-19 CRISIS

As an employer, if you believe that you may be in a position to conduct layoffs now—or at some time in the foreseeable future—begin planning now, as implementing an effective layoff requires as much pre-planning as possible. The organization needs to ensure that it conducts its layoffs in a way to minimize its exposure to legal risk, and retains the staff necessary to maximize its chances of success going forward.

Here are examples of some the questions you are or likely may be facing:

A. We have decided that we need to engage in targeted layoffs (as opposed to mass layoffs) due to the outbreak and a reduced demand for services. Where do I start?

Employers engaged in targeted layoffs should apply objective selection criteria to determine who is subject to the layoff, including seniority, performance, job classification or job knowledge and skills. An employer should not consider criteria such as leave status or protected conduct (i.e., whistle-blower), and should avoid selection criteria based on subjective traits (i.e., protecting “favorite” employees, etc.) that might give rise to the appearance of discriminatory bias in the selection process.

Even under the best of circumstances, when employers have the luxury of time to carefully consider and orchestrate their downsizing plans, it is nearly impossible to carry out a “risk-free” layoff. Employing objective selection criteria to determine which employees are subject to layoffs can be an employer's strongest defense to potential claims of discrimination or retaliation.

B. Can we ask for volunteers to be laid off or take early retirement?

Asking for volunteers to be laid off may be part of a multi-layered approach to conducting a layoff and can limit the need for a larger involuntary reduction.

The benefit to a voluntary lay off is that you can avoid some of the negative feelings surrounding a layoff based on other factors. It can help employee morale and help employees, to a degree, plan their fate. However, when you are asking for volunteers to be laid off, there is generally an incentive to volunteer – such as a severance package. If

you are not in a position to provide an incentive to those volunteering, consider whether asking for volunteers would provide any benefit to your organization.

If you chose to go this route, take time to define the contours of your voluntary layoff plan and make contingencies based on potential employee responses. Among other things, you should identify who will be eligible to volunteer. Is it all employees? Or only certain staff in certain departments. In addition, create a process to determine whose “application” for layoff will be approved that uses objective criteria, in the event that you end up with more volunteers than you needed. The key is to consider what the volunteer process will look like from start to finish. Anticipate issues that might arise and how they may impact your organization. Transparency with your employees and thorough documentation of your decisions is vital.

In all stages of a volunteer layoff be conscious not to target any particular group of employees for voluntary layoffs, as doing so may create grounds for a claim of discrimination by an employee who is a member of a protected class.

C. What objective criteria should we use to determine which employees are subject to layoffs?

There is no one-size-fits all set of objective selection criteria that an employer should use to identify employees subject to layoffs, although there are a handful of commonly used benchmarks. Each has benefits and drawbacks that an employer should consider before deciding how best to proceed.

1. Employee Seniority.

Employee seniority (i.e., “last hired/first fired”) is a commonly used selection criteria because it is inherently objective; the employees with the shortest tenures are the first to be subjected to a layoff. Layoffs conducted using this criteria carry a lower risk that older employees will bring claims for age discrimination, but it does not provide protection against potential discrimination claims brought by employees falling into some other protected groups.

There are a few practical drawbacks to using this criteria. For example, it may force employers to lay off high performing (but younger) employees, retain employees with outdated skill-sets, and expose the organization to potential worker shortages since the remaining cohort of employees may be at higher risk of complications due to COVID-19 infection.

2. Employment Status.

Identify employees subject to layoff on the basis of their status as either a part-time or full-time employee. Employers may wish to shelter their full-time staff from an initial round of cuts by laying off part-time and contingent employees first.

Employers should be mindful of potential disparate impacts to protected classes, in the event that employees in particular protected classes may disproportionately work in a part-time or contingent capacity. Employers should also be aware that, unless their workforce consists of a large number of part-time or contingent employees, cutting part-time and contingent staff may not be sufficient to meet the financial needs of the organization. If so, then employers using this option may need to engage in a tiered approach, laying off part-time and contingent employees first and then using another option to determine which full-time staff will be subject to layoffs.

Conversely, if an organization is dependent on part-time and contingent employees to perform critical job functions that full-time staff does not regularly perform, then it may need to consider alternative selection criteria.

3. Merit-Based Selection.

This selection method focuses on employees' documented performance, and ranks employees on a (preferably numeric) scale from lowest to highest performing employees in each job category in which the employer is implementing layoffs. The principal benefit of this benchmark is that it allows the organization to retain its highest performing employees, which may ultimately put it in the best position to succeed going forward.

One of the major risks in using this benchmark is the potential for bias to creep into the selection process. Employers wishing to use a merit-based selection process must ensure that it has had a robust personnel review process, with documented performance reviews for all employees throughout the organization. Even if your organization has had such a process, manager bias in the personnel review process can distort individual employees' performance ratings.

There are also practical difficulties to employing this selection method as it can be difficult to evaluate the relative performance of employees within the selection pool, who may not have the same job functions or even work within the same department. Employers should exercise caution when designing a merit-based selection process to ensure that the organization retains enough employees to carry out all critical job functions necessary to the effective operation of the business.

4. Skills-Based Selection.

Certain employees or classes of employees have skills that may be critical to the future success of the organization. Identify the highest performing teams within your organization which will help identify the particular skill-sets that are indispensable to the organization.

Employers should document the reasons that specific skill-sets are important to the future of the organization. Employers should also note that it often causes organizations to retain younger employees with in-demand and versatile skills, and to lay off older employees who have not kept pace with the changing demands of the workplace. Older

employees are protected from discrimination by the Age Discrimination in Employment Act, and care must be taken to avoid disparate impacts against all protected categories of employees.

5. Multiple Ranking Matrix.

Also known as “rate and rank,” this selection method entails the creation of a numerically-based scoring matrix that combines aspects of some (or all) of the individual selection criteria already discussed, often with “weights” attached to the benchmarks deemed most important to the organization, so that each employee’s final “score” provides an objective measure of their relative value to the organization. Specific considerations that an employer might choose to weigh include, among other things:

- Long term potential and attitude (as measured in documented performance reviews);
- Skills, knowledge and versatility (as measured in documented performance reviews);
- Education and experience levels;
- Quantity and quality of the employee’s work over time;
- Attendance history; and,
- Tenure with the organization.

Effective implementation generally requires the employer to perform a thorough evaluation of each employees’ personnel record and performance history, and the development of a multi-factorial scoring system that weights the relative importance of each employee’s strengths and weaknesses.

While this method often provides the most effective and robust method of evaluating and ranking employees who are subject to layoff, it requires a great deal of pre-planning and manpower to review, rate, and rank employees. This amount of forethought and manpower may not be available in a time of crisis.

Our employment team is ready to assist you with any questions you may have about an employer’s obligation arising under the FFCRA, ADA, or other laws.

GENERAL REMINDERS

The COVID-19/Coronavirus pandemic is fluid. Guidance is changing often as developments occur. We strongly recommend monitoring of credible information sources such as the:

Center for Disease Control - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Minnesota Department of Health - <https://www.health.state.mn.us/diseases/coronavirus/index.html>

OTHER EMPLOYMENT GUIDANCE AND CONCERNS

For related guidance and questions about other employment topics related to COVID-19, please see Lind Jensen Sullivan & Peterson's earlier guidance:

<http://www.lindjensen.com/news/>

WORKERS' COMPENSATION CONCERNS

For related guidance and questions about workers' compensation concerns related to COVID-19, please see Lind Jensen Sullivan & Peterson's separate guidance:

<http://www.lindjensen.com/covid-19-and-workers-compensation-in-minnesota/>

If you have any employment or other questions regarding the ongoing COVID-19 pandemic as it relates to your employees, please do not hesitate to contact our employment team at Lind Jensen Sullivan & Peterson by email or phone (612) 333-3637.

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