

Employer Information for Furloughing Employees

What is the difference between a furloughing and laying off employees?

- A Furlough is a forced, unpaid leave of absence where an individual remains an employee. Furloughed employees have an expectation that they will return to work upon a certain date or a certain condition being met. Furloughed employees typically are able to retain their benefits, including access to healthcare and life insurance.
*Any employee subject to a contract and/or union representation will need their contract re-negotiated.
- A Lay-Off is when the employer/employee relationship is terminated. Laying off an employee requires a longer process, similar to firing an employee.
- Federal and State rules regarding “firing” an employee apply to both furloughed and laid off employees, including anti-discrimination laws.

What can an employee do during a furlough?

- Employees who have been furloughed are absolutely banned from doing any work for their employer. This includes checking emails and/or taking phone calls. Even a few minutes may trigger a requirement to pay the employee. To protect itself from well-meaning employees, the employer may restrict an employee’s access to work accounts and devices.
*Recommend restricting access and/or providing the employee with a letter which clearly states they are being furloughed and as such are prohibited from completing any work on behalf of the employer.
- Furloughed employees have the right to seek new employment. However, employees may still be bound to employer policies regarding outside employment and/or second jobs.
*Recommend including applicable policies or reference to applicable policies in an instructional letter to the employee.
- Employees who have been furloughed may still apply for unemployment compensation benefits, but should be careful to abide by any disqualifications, restrictions and reporting requirements.
- Employees may still be able to continue their health and/or life insurance benefits, dependent upon the employer policy and the relevant insurance plan.
- Employees may be able to use their paid time off during a furlough, dependent upon the employer policy.

What laws are applicable to furloughing an employee?

- Fair Labor Standards Act (FLSA) – Defines exempt v. non-exempt employees
 - Exempt employees – must receive fixed pay if complete any work on behalf of the employer. Employer can reduce salaries.
 - Nonexempt employees – Need to compensate employee for hours actually worked.
- National Labor Relations Act (NLRA) – Collective Bargaining
 - Obligates an employer to negotiate terms and conditions of the employee furlough policy with unions.
- Equal Employment Opportunity Commission – Non-Discrimination
 - Selection of furloughed employees should be completely neutral and should not target specific groups of people based on age, sex, race, disability, religion, etc.
- Workers’ Compensation Laws

- Employees who have sustained work-related injuries may be eligible for additional benefits under workers' compensation laws.
- Family Medical Leave Act (FMLA) and Families First Coronavirus Response Act (FFCRA)
 - Additional care and consideration may be necessary for employees receiving FMLA benefits.
 - FFCRA is the emergency law effective as of April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020. See the Department of Labor and Industries Questions and Answers web site for additional information and to determine if the FFCRA applies to your situation.
- Consolidated Omnibus Budget Reconciliation Act (COBRA)
 - A furloughed employee may fall below required minimum hours to meet benefit eligibility and benefits may cease. Employees should be provided with a COBRA notice upon termination of group health benefits.
- Unemployment Compensation
 - Under Pennsylvania law, a furloughed employee may be eligible for unemployment compensation during the time they are not working.
 - Employees should refer to all unemployment compensation laws in applying for benefits and comply with all reporting requirements.
 - Employees should be aware of changes to the Unemployment Compensation operations/requirements during the COVID-19 outbreak in 2020.
 - Employers that close as a result of COVID-19 impacts will be granted relief from charges and the employers' unemployment tax rate will not increase.
- WARN ACT - Requires employee notice under specific conditions.

What are the furlough Notice requirements?

- Employers who place employees on furlough should provide a notice letter containing the following:
 - The letter should be formal in nature and include the date, employee's name, and employee's address as well as a salutation.
 - The first paragraph should clearly state the purpose of the letter and include the employee's position, department and reason for the furlough as well as any changes to employee benefits. It is advisable to include that this furlough does not reflect any dissatisfaction with job performance.
 - The central paragraphs should outline details regarding the furlough leave including explaining what a furlough is, an expected length of time (or determining factor), and employee benefits during the furlough.
 - The closing paragraph should offer a way for the employee to get in touch with the employer and end on a positive note.
 - It is important to include that the employee should not complete any work during the furlough period and provide guidance on restricted access and/or retrieval of employer owned devices.

*Prepared by: Hannah R. Suhr, Esq., Law office of Andrew H. Shaw, PC
(hannah@ashawlaw.com; 717-243-7135)*