

# CLIENT ALERT: Furloughs as a Response to Coronavirus

As employers face seemingly endless employment-related decisions as a result of the novel coronavirus (COVID-19) pandemic, many have asked about furloughs and what a furlough entails.

An employee furlough may be thought of as an employer-initiated period of time during which time an employer may tell an employee that their services are not needed. A furlough involves reducing the hours, days, weeks, or other periods of time that an employee may work. Some may use the term “temporary layoff” when describing a furlough, although a temporary layoff may also refer to the end of the employment relationship. Historically, furloughs often come during temporary employer slow or shut down periods. For example, some manufacturers may institute employee furloughs for the holiday period in December. In response to the coronavirus, employers view furloughs as a possible alternative to terminating the employment of employees.

An employer may institute a furlough company-wide, or it may select certain employees or groups of employees for furlough. The decision to furlough some employees should be analyzed in the same manner as any other employment decision – for example, an employer should not make selections based on an employee’s race, religion, gender, age, or other protected class.

Typically, during a furlough, an employee is not paid wages, as the employee is not performing any work. For non-exempt employees (hourly) this is fairly straightforward. For exempt employees (salaried), federal and most state laws require a minimum salary for each pay period. If an exempt employee performs work during any portion of a workweek, the employee must be paid their salary for that week. Failure to do so jeopardizes the employee’s exempt status. When an exempt employee provides no services in a workweek, it may be unpaid.

Employers must be vigilant that when an employee is furloughed to ensure the employees are not working in any capacity. This includes the employee not checking email and voice mail. When instituting a furlough, employers should set clear expectations with employees. While this is simpler for some positions (e.g., waitstaff of a restaurant cannot work when the restaurant is closed), it is more complicated for others (e.g., an employee who may be able to work from home or has email access on their phone). Employers should therefore inform employees (exempt and non-exempt) that work is not authorized during the furlough period without advance written approval. Employees may be offered the opportunity to use vacation or other paid time off to receive income during the furlough.

Employers should consider whether an anticipated furlough triggers a notice requirement. The federal WARN Act and many states’ mini-WARN statutes contain provisions requiring advance notice (60 days under the WARN Act; different periods under state laws) prior to an employment loss. The furlough may be considered an employment loss under these statutes. These laws also look to the duration of the layoff, size of the layoff, and size of the employer to determine whether notice and other provisions apply. There are exceptions under the WARN Act and state mini-WARN, although it remains an open question as to whether the current pandemic may fit within those exceptions.

Employers should also analyze the impact of a furlough on employee benefits, and whether a reduction in hours may be deemed a qualifying event for the purposes of COBRA. Employers should be mindful of state laws which require the payment of accrued, but unused vacation pay at the termination from employment. The longer a furlough goes on, the more likely it may be deemed a separation of employment, which would trigger the duty to pay accrued, but unused vacation time in some states (to the extent the employee did not exhaust those benefits during the furlough).

Unemployment benefits are a state-run benefit and states each have different standards, waiting periods, and eligibility requirements. The current pandemic may result in the waiver of the waiting

period, making unemployment benefits more readily available than they might have been previously. Employers should direct employees to contact their local unemployment office or website for updated information on the availability of unemployment benefits during the pandemic.

Finally, employers should also be mindful of various legislative responses on the federal and state level pending to address the economic impact of the pandemic. Those laws may impact unemployment, sick leave entitlement, leave options, and other aspects of the employment relationship – including the impact of a furlough on an employer and employee.

We strongly recommend employers work with MBJ counsel to ensure the steps taken today comply with their legal obligations.

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