



# THE WORKPLACE WORD

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## Furloughs Are a Potential Alternative to Layoffs

In today's economic climate, employers are looking for ways to reduce their labor costs without terminating their valued employees. One potential way to do that is to implement a furlough: a temporary, but mandatory, unpaid leave for employees.

Furloughs are grabbing headlines in this economic environment. Perhaps one of the most prominent instances occurred recently in the public sector when Governor Arnold Schwarzenegger mandated unpaid furloughs for many of California's state employees.

The private job sector appears to be following suit. While furloughs can be an attractive option for employers looking to reduce payroll expenses, they can also present a host of legal complications for employers. Careful consideration is advised for employers looking to implement this latest cost cutting measure in the workplace.

Some of the issues an employer should consider before implementing a furlough include:

### 1. Ensure that furloughed employees are not working

Employers should ensure that the time off is truly a furlough—employees should not work during any furloughed time off. When announcing a furlough, the company should make clear in its communication that employees may not perform any work activities, including use of company phones, checking or sending e-mail communications, or retrieving voicemail and/or returning work-related calls. This can be a monumental challenge, particularly for employers whose employees regularly use a Blackberry or have remote access to their e-mail and/or voicemail. Employers should inform furloughed employees that they may be disciplined if they perform *any* work during their furlough.

If non-exempt employees do work during a furlough, they must be paid for the time worked. Thus, it is important to enforce the no-work rule. A furloughed non-exempt employee is entitled to payment for work performed based on the amount of time worked (e.g. hourly calculation). Legal counsel should be consulted if you have any uncertainty with regard to compliance as they relate to these points, or if an exempt employee is involved.

### 2. Length of time employees are allowed to utilize their furlough days

Employers should carefully detail their expectations with regard to employees and how they choose furloughed time off. Employers must consider their overriding need to protect their business needs and interests, while still taking advantage of the economic benefits of a furlough. This means that employers should require pre-approval of all furlough days.

Another business consideration is whether non-exempt employees will be allowed to utilize furlough time in blocks or solely in one-day increments. It is perfectly lawful



under federal law to limit non-exempt employees to taking furlough days one day at a time.

### 3. Treatment of vacation hours during furlough

Companies have options with respect to vacation during a furlough. Some companies may require employees to use vacation, PTO or other time during the furlough. Other companies may prohibit employees from using those benefits to allow themselves to reduce labor costs during the furlough. Still other companies may allow employees the option of whether or not they wish to utilize benefits during their time off.

State and local laws may impact whether or not an employer is allowed to utilize one or more of the above options, and employers should consider consulting with legal counsel.

### 4. Exempt employees and furloughs

While furloughing exempt employees is possible, it can present some complex legal issues, and can possibly even affect the employee's exempt status under the federal Fair Labor Standards Act. If you are considering implementing a furlough of exempt employees, employers should consider consulting an employment attorney before implementing this decision.

### 5. Impact of furloughs on employee health care

Employers should familiarize themselves with any reduction in hours provision(s) in their health care plans. Generally, health care coverage under most plans is linked to a minimum number of worked hours per week. If a furlough brings the affected employees below the required number of hours for coverage, the reduction in hours provision may be triggered, requiring COBRA notification. In advance of any planned furlough announcement, employers should confirm the requirements of their plan coverage.

### 6. Availability of job-sharing programs through state unemployment insurance agencies

Some states, including Arizona and California, have programs that allow employees to collect unemployment benefits for the days that they are furloughed. The benefits are generally a proportionate amount of the weekly amount they would have received, *i.e.*, if furloughed for 2 days in a week, they

would receive 40% of their weekly benefit amount for that week. These programs lessen the impact of furloughs on the employees and can be an attractive option for employers. Employers must apply for eligibility under these programs.

### 7. Qualification for Family and Medical Leave

There are some considerations involved in furloughs that may not be obvious to a given company. One example is whether furloughed hours should be counted toward determining whether an employee is eligible for coverage under the Family and Medical Leave Act ("FMLA"), and specifically whether they have worked the 1,250 hours required for FMLA eligibility.

For all employees, only actual hours worked count towards FMLA eligibility. Thus, furlough hours do not count toward the FMLA-eligibility threshold.

### 8. Treatment of H-1B Non-immigrants

For those companies that employ H-1B non-immigrants, it may come as a surprise to know that these employees may not be furloughed. When a company files a petition to employ a foreign national as an H-1B worker, the company makes certain attestations to the federal government, including a promise to pay the individual a certain amount per month/per year. Subjecting these foreign nationals to a furlough would necessarily violate this prior promise and jeopardize the employee's H-1B status.

### Conclusion

In the end, while a furlough may be a very attractive option for employers forced to cut costs in the current economic climate, when undertaking implementation of a furlough, it is important to ensure compliance with all applicable laws.

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