



UPDATED: 3/25/20 with DOL Guidance



# FURLOUGH, LAYOFF, REDUCTION IN FORCE NEW FEDERAL LEGISLATION

COVID-19: CHANGING OUR PATH BUT NOT OUR PRACTICE... ACT IN GOOD FAITH, BE CONSISTENT, AND DOCUMENT.

# TODAY'S AGENDA



Our commitment to you in these difficult times



Decision / Timing



What is the difference between Furlough, Layoff, and Reduction in Force



Families First Coronavirus Response Act (FFCRA)



Questions

# DIFFICULT TIMES – TAKE CARE OF YOURSELF

We at HR Answers, Inc. are committed to continually supporting your organization through these difficult decisions and times. We have done our best to digest a mountain of information, from reputable sources, and hope you will find it understandable and useful. While there are years of practice and litigation results to rely on when discussing furlough, layoff, and reduction in force the same if not true for Families First Coronavirus Response Act (FFCRA). The information provided here is based on what would be most beneficial to employees as this seems to be the intention of the Federal Act and is almost always the outcome of NW region courts.

In these difficult times we often forget to take care of ourselves. Focusing on the problem, the plan, the solutions can be a full-time plus job. Please take care of yourself and let us know how we can help.



**DECISION / TIMING**

# CONSIDERATIONS

- How do you provide stability to employees?
  - Even if the decision isn't positive, they need to be able to plan
- How much reduced revenue will your organization experience?
- How much reduced cash flow will your organization have?
- How much increase will there be in mandated benefits?
  - Due to FFRCA there will be increased cost for mandated benefits beginning April 2<sup>nd</sup>
    - Up to 80 hours of *additional* paid sick leave (paid at a reduced rate)
    - Up to 12 weeks of protected leave (10 weeks will be paid at a reduced rate)
- What is the likely duration of the pandemic and financial recovery?

# DECISION MAY CHANGE

- Give yourself the ability to make a decision and change the decision
- You may choose to start with Furlough and change some, or all, to layoff at some point
- Be careful not to give employees decisions whiplash



**FURLOUGH**

**LAYOFF**

**REDUCTION IN FORCE**

# FURLOUGH

- A Furlough is an alternative to layoff and is used when a temporary interruption of work happens.
- Employees are required to work fewer hours or rotate periods of time off without pay.
- During a furlough employers need to be careful regarding the impact on FLSA.
  - Non-Exempt (eligible for overtime) employees: should be instructed that they are not to work additional hours to make up the difference between their regular schedule and their furlough schedule.
  - Exempt (not eligible for overtime) employees:
    - It is typically best to rotate furlough exempt employee for a full work week. Instruction should be given to exempt employees that they are not allowed to work at all, email, phone, voice mail or other remote work during this time.
    - If a reduced schedule, impacting each work week, is determined to be best for exempt employees this will result in the impacted employees being non-exempt for that work week and the non-exempt instruction should be provided.
- Employee health insurance benefits are typically continued during these types of reduction.
- The FFCRA would apply to these employees.



# LAYOFF

- A layoff is a temporary separation from payroll
- An employee is laid off because there is not enough work for employees and the employer believes that this condition will change
- Laid off persons are recalled as the reason for the layoff resolves
- Laid off persons will typically receive Unemployment Insurance Benefits, when the qualification criteria is met (check state specific information about current changes in qualification and timelines)
- Laid off persons will no longer receive insurance benefits and information such as COBRA notices should be sent consistent with any other separation process (check insurance plan documents)
- FFCRA will not apply to these persons

# REDUCTIONS IN FORCE

- A Reduction in Force is a permanent separation from payroll
- An employee is reduced because there is not enough work for employees and the employer believes that this condition will not change
- A person reduced from the organization will typically receive Unemployment Insurance Benefits, when the qualification criteria is met (check state specific information about current changes in qualification and timelines)
- Reduced personnel will no longer receive insurance benefits and information such as COBRA notices should be sent consistent with any other separation process (check insurance plan documents)
- FFCRA will not apply to these persons

# SUMMARY OF DIFFERENCES

Action	Definition	Employer Insurance Continuation	FFRCA Applies	UI Benefits
Furlough	Some continued or intermittent work	Yes	Yes	Depends on the amount of reduction
Layoff	No work until recall	No, follows typical separation process	No	Yes, if meeting the qualification criteria*
Reduction in Force	No work, no recall anticipated	No, follows typical separation process	No	Yes, if meeting the qualification criteria*

\* Qualification determinations are made by the state specific governing body. Some waivers and qualification criteria have changed due to COVID-19. Please review the information provided by the state specific governing body.

## NEXT STEP... SELECT EMPLOYEES

- Choose how employees will be selected. This is a system of measurement based on facts that can be supported by documentation already in place.
  - Acceptable methods include:
    - Seniority-Based Selection
    - Performance-Based Selection
    - Job Classification/Status -Based Selection
    - Skills-Based Selection
    - Combination Criteria Ranking – Based Selection

## NEXT STEP... AVOID ADVERSE ACTION/DISPARATE IMPACT

- Once employees are selected review protected class status to ensure the process has not unintentionally impacted one protected group over another disproportionately.
- If using a system as indicated on the previous slide you will have the data to substantiate an appropriate process.

# NEXT STEP... REVIEW WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT REGULATIONS

- Both federal and state laws exist to provide notice of layoffs under certain circumstances. It is important to note that some states have relaxed or suspended these provision considering the pandemic.

## Exceptions to Federal WARN Act

- **Faltering Company** - covers situations where an organization has sought new capital or business to stay open and where giving notice would ruin the opportunity to get the new capital or business and applies only to plant closings.
- **Unforeseeable Business Circumstances** - applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.
- **Natural Disaster** - applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

## NEXT STEP... SEVERANCE PACKAGES AND ADDITIONAL SERVICES

- Severance package – review for consistency based on the same analysis used for the employee selection or develop a “blanket” package
- Additional services may include;
  - Employee Assistance Program (EAP) services
  - List of resources identifying employment leads
  - Information about filing for Unemployment Insurance
  - List of Public resources with helping with food, utility bills or other basic life needs
  - Payment of COBRA

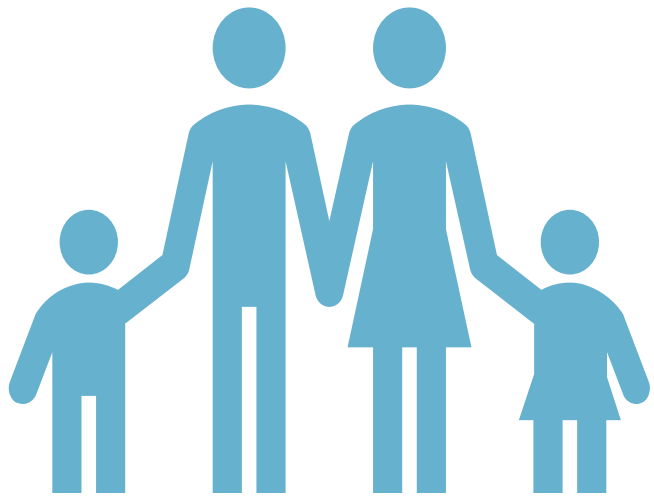
## NEXT STEP... REVIEW OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)

- If providing severance, with a release of claims to employees 40 years of age or older
  - Maintain compliance with waivers and waiting periods
- This should be part of your timing decision as well



# NEXT STEP...

- Communicate
  - Verbal communication through appropriate social distancing methods
    - Virtual meetings
    - Phone calls
  - Documented communication as a follow-up to verbal communication
    - Include the specifics from each step of the process outlined in the previous slides
  - Communicate with those who will remain as well



**FAMILIES FIRST  
CORONAVIRUS  
RESPONSE ACT (FFCRA)**

## FFCRA PROVIDES ADDITIONAL BENEFITS

- The Act has several added benefits. We will focus on the benefits that employers will need to provide to qualifying employees.
- Two additional provisions:
  1. Implementation of Emergency Paid Sick Leave (E-PSL)
  2. Implementation of Emergency Family and Medical Leave (E-FMLA)

## EMERGENCY - PAID SICK LEAVE (E-PSL)

In *addition* to the leaves already in place through local specific requirements and company generosity, *up to 80* additional hours of paid sick time shall be made available in the following 6 qualifying instances:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. (no similar conditions are currently specified).

PAY IS NOT THE SAME FOR ALL OF THESE QUALIFYING EVENTS

# EMERGENCY FAMILY AND MEDICAL LEAVE (E-FMLA)

- Expanded coverage in comparison to FMLA
  - Covers employers with fewer than 500 employees (FMLA covers 50 or more employees)
  - Employee eligibility occurs at 30 days of employment, prior to the designated leave (FMLA eligibility is 1,250 hours during the 12 months prior to the leave)
  - Protected leave remains up to 12 weeks, however, a portion of the leave is partially paid
  - Additional qualifying event: “Allows an employee who is **unable to work or telework to care for the employee’s child** (under 18 years of age) if the **child’s school or place of care is closed** or the **childcare provider is unavailable** due to a public health emergency.” (same as 5. on E-PSL)

Note: Small businesses with *fewer than 50 employees* may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth. Criteria for exemption is expected in April.

## PAY DURING AN E-PSL AND E-FMLA

- Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:
  - 100% for qualifying E-PSL reasons #1-3, up to \$511 daily and \$5,110 total;
  - 2/3 for qualifying E-PSL reasons #4 and 6, up to \$200 daily and \$2,000 total; and
  - Up to 12 weeks of paid sick leave and expanded family and medical leave paid at 2/3 for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

## PAY DURING AN E-PSL AND E-FMLA

- A part-time employee is eligible for leave for the number of hours that the employee is *normally scheduled* to work.
- If a regular schedule is not worked, you must determine the schedule by averaging the hours and employee was scheduled to work, per day, over the 6 months preceding the need for leave.
  - If the employee has not worked for 6 months, you will use the number of daily hours that were anticipated to be worked at the time of hire.
- Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the first two weeks of partial paid leave.
- **IN ALL CASES** – the pay provided **cannot be less** than the greater of your locations or federal **minimum wage**.



QUESTIONS





<https://hranswers.com/covid-19/>



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