

A grayscale microscopic image of a highly textured, porous surface, possibly a biological or geological structure, with a teal rectangular overlay on the right side containing text.

Compliance Matters: Layoffs, Furloughs, and Recalls

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Webinar 101

- You will get a copy of the slides and a recorded version of the webinar within about 24 hours
- We would love to hear from you in the polls!

Agenda

- Layoffs
- Furloughs
- Recalls
- Avoiding Lawsuits: Selection Criteria are Key

Layoffs
(they're really just terminations)



Final Paychecks

- Timely, per state law
- Include PTO, if necessary
- Don't include illegal deductions



Notice Requirements: Unemployment Insurance

- Notify employees of their right to file for unemployment insurance
- Determine if you have any UI obligations
- Gold Star: Provide additional info, FAQs, guides, and links to make their filing experience a little less stressful

Notice Requirements: Continuation of Benefits

- If you outsource COBRA, notify the administrator within 30 days (then they have 14 to send the COBRA Election Notice). State “mini-COBRA” likely applies, even if federal COBRA does not.
- If you self-administer, you have 44 days (send by first class mail to their last known address).
- Gold Star: Provide the Election Notice at layoff, if possible, as well as information about health insurance marketplace options, which may be more affordable than COBRA



Health Insurance Marketplace Options

If an employee is furloughed

Depending on the status of coverage from the employer, employees may qualify for a Special Enrollment Period. They may also be eligible for a premium tax credit to help pay for Marketplace coverage.

If an employee elects for COBRA continuation coverage

- Employees may still qualify for a Special Enrollment Period due to loss of coverage. They have **60 days** after loss of pre-COBRA job-based coverage to enroll in Marketplace coverage. They may qualify for premium tax credits.
 - Even after 60 days, an employee enrolled in COBRA continuation coverage, may qualify for a Special Enrollment Period if their COBRA continuation coverage costs change because the employer stopped contributing.
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For More Gold Stars, Provide Resources

- State unemployment insurance department
 - Governor's website for updates on government orders
 - State health department and CDC for health safety guidance
 - Local food banks or other charities
 - Renters' resources
 - Information about Marketplace insurance options
-

Comply With WARN (if applicable)

The Worker Adjustment and Retraining Notification Act (WARN) requires employers to provide notice 60 days in advance of certain mass layoffs. This notice must be provided to affected workers (or their representatives), the state dislocated worker unit, and the appropriate unit of local government.

- Applies to employers with 100 or more “full-time equivalent” employees
- Does not apply to layoffs of less than six months
- There is an exception for unforeseen business circumstances (this is a judgment call that can be tested in litigation)
- If using the exception, employers must still provide as much notice as possible

Check for state “mini-WARN” **laws** that may apply at a lower employee count or have different requirements.

Furloughs
(a lot like terminations)



Furlough v. Layoff: The Differences

- During a furlough, an employee is still “on the books.”
- PTO payout, if applicable, will generally not be required if you intend to recall the employee (provide a recall date or condition, e.g. the end of the stay-at-home order)
- The last paycheck received is not a final paycheck, so can be provided on your regular payroll schedule



Furlough v. Layoff: The Similarities

- Employees will be eligible to apply for unemployment insurance
- Employees may lose health insurance coverage, unless the furlough is very limited in duration or your plan allows it

Will Furloughed Employees be Eligible for Health Insurance?

Review your group policy or plan document. If the plan limits eligibility to employees who are regularly scheduled to work 30 hours or more per week and states that coverage ends when the employee ceases to be eligible (unless protected by the FMLA or similar law), then reduced hours or furloughs will cause the employee to lose coverage.

Plans must be administered according to their terms, so the employer cannot continue reporting the employee (and dependents) as active on its eligibility file to the carrier.

Can We Keep Covering Them Somehow?

Employers that want to continue eligibility for employees who have had their hours reduced or been furloughed should contact their carrier regarding options to amend the policy.

Many carriers are agreeing to changes, and a number of states are requiring carriers to give employers the option of maintaining active coverage for furloughed or reduced-hours employees.

What if We Use the ACA Look-Back Method?

Some applicable large employers (those required to offer health insurance or else pay a penalty under the ACA) use a look-back measurement method to determine eligibility for group medical coverage.

If using that method, then employees who are deemed full-time employees for a stability period will not lose eligibility during that stability period even if they are furloughed or their work hours are cut (if they remain employed).



Notice Requirements: Continuation of Benefits

Follow the same procedure regardless of why they lose their benefits (whether furlough, layoff, temporary layoff, termination for cause, etc.)

Notice Requirements: Unemployment Insurance

- Notify employees of their right to file for unemployment insurance
- Determine if you have any UI obligations (like filing on a furloughed employee's behalf)
- Gold Star: Learn about *partial unemployment* eligibility and *work share programs* in your state



For More Gold Stars, Provide Resources

- State unemployment insurance department
 - Governor's website for updates on government orders
 - State health department and the CDC for health safety guidance
 - Local food bank or other charities Renters' resources
 - Information about Marketplace insurance options
 - Employee Assistance Program (EAP), if you have one and furloughed employees are still eligible to use it
 - Contact information for your payroll and HR people who can answer additional questions
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Keep in Touch

- Any visibility into your plans and thought process will help
- Communicate weekly
- Share what you know, even if it's not much

POLL #:

**Which best reflects your
outlook for your business over
the next three months?**

POLL #2

**What topics would you most
like to learn more about in
future webinars?**

Recalling Employees
(this part is more fun)

Rehire After a Layoff: Paperwork

- Treat them like a brand-new employee with respect to offer letters, benefits, reporting to the state, and most new hire information
- They should fill out the new W-4
- A new I-9 is not necessary if they are rehired within three years of completing their original, but fill out **Section 3** for rehires.





Recall From Furlough: The Offer Letter

- Cover any change to their position, pay, reporting structure, or responsibilities
- List steps you are taking and policies you are implementing to keep the workplace safe
- Indicate how they should confirm (or deny) that they will return; provide a deadline for their response



Recall From Furlough: Benefits

You should be able to restore employees' benefits on the first of the next month without a waiting period.

Employees Who Don't Want to Come Back

Depending on their reasons for not returning, they may or may not qualify for continued unemployment insurance benefits. They probably *will* continue to get benefits if:

- They are high-risk and you cannot accommodate them sufficiently
- They have children to care for whose schools are closed because of COVID*
- They are caring for people who are sick or quarantining because of COVID*
- You are not offering a workplace that meets safety guidelines

You can report them to the state if you believe they are planning to commit UI fraud by declining an offer of employment when they don't have good reason to do so. Some states are creating reporting systems for this purpose.

*Complicated by FFCRA leaves – hoping for government guidance soon

**Avoiding Lawsuits:
Selection Criteria are Key**

A close-up photograph of several yellow and one red gummy bear on a wooden surface. The gummy bears are translucent and have a slightly irregular, bear-like shape. They are scattered on a light-colored wooden surface with a visible grain. The background is a soft, out-of-focus greyish-blue.

Choosing Whom to Layoff, Furlough, or Recall

Unless you're letting everyone go or bringing everyone back, you'll want to document why certain people were selected. Consistent well-documented use of non-discriminatory selection criteria is essential.

Consider Business Needs

- How many people do you need to operate right now?
- Will you be reopening with significantly reduced capacity?
- What does the world post-lockdown look like for your industry?
- Do you need new skill-sets to help you adapt for future business success?
- If your business survived 2008-2010, what products or services were most and least resilient?

Create Job-Related Criteria

After you have a sense of which departments or how many people from each department you'll be letting go or calling back, turn your focus to individuals.

Potential Criteria:

- Unique or difficult-to-replace skill sets
 - Overall performance
 - Seniority
 - Demonstrated ability and willingness to do work outside of their usual assignments
-



Documentation: Beyond Performance Reviews and Write-Ups

- History of tardiness, documented by the login system
- Production or sales numbers, evidenced by pay stubs that show total production or commissions
- Emails or messenger conversations that never made it to “the file”
- Written requests that were not followed up on



Double Check for Bad Reasons

- Disability
- High-Risk Conditions
- Age
- Prior Use of Leave
- Pregnancy
- Sex, sexual orientation, religion, race, etc.

Do Not Consider

- Age, 40+ (potential sneak attack via “disparate impact” if you are cutting high earners first)
 - Disability or high-risk conditions
 - Use of leave or requests for reasonable accommodations
 - Pregnancy
 - Sex, sexual orientation, religion, race, color, citizenship or immigration status, military status, or other characteristics protected by state or local law
-



Don't Do Employees Any Unasked-for “Favors”

It may be tempting to hold off on calling back employees who are older or who have disabilities or conditions that make them high risk.

But *it's not your job* to make health decisions for them.

Deciding to not bring an employee back based on age or disability would be a clear case of discrimination.



Do Grant Reasonable Accommodations

- Last to be recalled
- Extended unpaid leave (even when everyone else has returned)
- Working from home
- Wearing additional PPE
- Taking additional hygiene and cleaning breaks



Compassion is Legal

If an employee has a good reason to either return ahead of others, or stay away longer, feel free to consider it.

(Particularly if they have a high-risk family member.)

Return to Work Checklist

Return to Work Checklist



Posting and Policies

- Post the Families First Coronavirus Response Act (FFCRA) poster in a visible place. Where employees will remain working from home, send by email or post to Company intranet or employee website.
- Review and revise hiring practices and policies:
 - Have staffing needs changed?
 - Do you need to change benefits or pay to become more competitive?
 - Use remote interviewing techniques as much as possible.
 - Update onboarding practices.
 - If you are recalling only some workers that were laid-off or furloughed, ensure your practices for determining who to recall do not discriminate against any group of employees.
- Review and revise leave policies:
 - Know how the FFCRA affects your previous policies and practices.
 - Consider implementing PTO/vacation rollovers, grace periods, and revise guidelines for usage if vacation is forfeited if not used by year end.
 - Consider implementing or revising bereavement leave policies.
 - Ensure that all employees have access to and an understanding of all leave policies that may apply to them.
- Review and revise work from home and child care policies.
- Update work travel policies in light of any new orders in your state and any new practices being implemented in the workplace to keep employees/customers safe.
- Review rehire/reinstate provisions for your benefit policies (eligibility/waiting periods).
- Distribute all new or revised policies to all employees.

Health and Safety

- Explain company policies and procedures related to illness, cleaning and disinfecting, and work meetings and travel.
- Educate employees on how to reduce the spread of COVID-19 at home and at work (follow Centers for Disease Control and Prevention recommendations).
- For employees returning to a worksite, make sure they understand what's expected of them in the workplace. For example, must they wear face masks or face coverings? Will protective items and hand sanitizer be provided? Are workplace hours different? Will you be taking employees' temperatures each day when they arrive? Is teleworking or staggered shift work allowed/encouraged?
- Ensure that all employees who are currently ill or have contact with an ill family member stay home (follow CDC recommendations for length of time).

- If an employee becomes sick at work, send them home.
- Promote safe social distancing in the workplace by encouraging employees to:
 - Remain at least 6 feet away from each other.
 - Email, message, call, or video call rather than meeting face to face.
 - Clean computer equipment, desktops, phones, and workstations often.
- Provide hand sanitizer, cleaning supplies, and face masks or face coverings (where appropriate/necessary) and no-touch disposal receptacles.
- Discourage handshaking.
- Place posters throughout the business to encourage social distancing and hand hygiene.

Best Practices

- Be aware of any local public health or other orders related to COVID-19 that may affect your business.
- Ensure your workplace cleaning company is up to date on current methods of safely removing COVID-19 hazards.
- Communicate frequently and as transparently as possible with employees:
 - Provide expected timelines for recalling/rehiring employees.
 - Provide returning employees with recall or offer letters.
- Train managers on dealing with employees that may face increased personal challenges during this time, such as bereavement and loss, childcare and school-cancellation challenges, financial stress, and other dependent care and support needs.
- Offer flexibility wherever possible and adjust workloads to be reasonable.
- Be prepared to quickly investigate and stop discriminatory speech or acts in the workplace.
- Consider contracting with an employee assistance program (EAP) if you do not currently have one.
- Designate a workplace coordinator who will be responsible for COVID-19 issues and their impact at the workplace.
- Develop a plan to operate if absenteeism spikes or if another shelter-in-place or stay at home order occurs in the future:
 - Implement a plan to continue essential business functions.
 - Implement flexible work schedules and leave policies.
 - Cross-train employees on performing essential business functions.
- Develop emergency communications plans, including a way to answer workers' concerns.
- Communicate your appreciation and welcome employees back to work.

Quick Start Guide: Deciding Who to Recall from Furlough or Layoff

Quick Start Guide

DECIDING WHO TO RECALL FROM FURLOUGH OR LAYOFF

Deciding which employees to return to the workplace following a furlough or temporary layoff, and in what order you'll call them back, will require an individualized analysis for each organization. For those who aren't sure where to start, we provide this as a starting point.

Company Needs

First, think about overall operations in the future. How busy do you expect to be? It's best to slightly underestimate need; if employees stop their unemployment insurance (UI) claims only to be sent home again after a few days, their continuity of income may suffer. It's also easier administratively if you only need to furlough and then recall an employee once. And, you can always recall more employees once you're certain the need exists.

Think about whether there are parts of the products and services you offer that will be more or less important in the future. For instance, a bakery might have very little event catering in the next few months, but may need more delivery drivers. If your company went through the Great Recession, how were you impacted by the economic downturn at that time? Which departments and types of jobs were most essential as business resumed? Which were least essential?

Forecasting future staffing needs will likely require a lengthy discussion amongst the organization's leaders as well as a willingness to change course as business — and the economy itself — fluctuates.

Individual Employee Selection

Once you've settled on a general staffing plan, you'll need to decide which employees you want to return first. Establish one or more criteria for return. You don't have to adhere perfectly to the criteria you choose, but the more closely you follow your system the easier it will be to explain decisions to employees (or government agencies or lawyers) who may be unhappy with your approach. If you deviate from your system, be sure to take good notes on why you did so. Some potential criteria for employee selection include:

- **Unique or difficult-to-replace skill sets.** Business needs will likely dictate when you bring back individuals with special skills, but you may also want to make a point to reach out to these people sooner than later to ensure that they will be available when you need them.
- **Overall performance.** Preferably, performance-based decisions will be based on written documentation you already have, such as performance reviews, production metrics, disciplinary actions, or a history of attendance/tardiness issues. If performance — whether good or bad — has not been previously documented but will still be the basis of your decision, you should take the time to create that documentation now.

is a simple, objective reason that can ways in the employer's best interest te with the skills you need most in the

usual assignments. These are uncertain nd clean the bathroom or make a delivery on past actions or by asking employees ntly outside their job description.

but are not standouts in any area. ur reasoning. All criteria used should be

protected classes is illegal: race, color, gration status, military status, and eck state law.

n particular that employers may fall into.

ees who are 40 or older. Older nate the highest earners from your ct those over 40. If you are considering decisions.

not inviting them back. This should y age tells you that they need an : request. Failing to bring an employee intentions — will be a clear case of age

a similar state law may apply and cover

to protect their employees. But it is not hir known or perceived disabilities and use to offer employees a return to discuss safety issues or accommodations. their health — that decision is between

u should engage in the Americans with Disabilities n also must not affect your decision about whether to

employees, a similar state law may apply and cover

ed leave, whether recently or in the distant past, does ted leave with a reliability problem (for instance), would have otherwise, will constitute retaliation to state-mandated sick leaves, leaves under the ncy Paid Sick Leave and Emergency FMLA under the mber of leaves that are protected by state law, such

it may feel like a mass furlough is the perfect assume that their motives won't be questioned. an outsider to your business. Document what you s, as well as why each employee was chosen before

time to communicate that plan to everyone as the on't communicate with the other half, they'll hear and emailing you frantically for more information. message from the outset and put people's mind at

, you should communicate that decision to each of heir next job opportunity. Stringing someone along 'ing them back will result in ill-will. In the era of when many businesses will be fighting to rebuild their sion, especially toward those who will no longer be

