

# Where Do We Go From Here: An Employer's Guide to Options for Weathering the Storm

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Where do we go from here? That question is on the mind of nearly every American and it is a critical question for business leaders, as more than 80 million Americans are being asked to stay at home to help curb the spread of the novel coronavirus (COVID-19). We have compiled several options business leaders may consider when resolving that question, particularly with regard to their efforts to balance the long-term health of their company versus their immediate commitment to their employees.

## Option: Mandatory Accrued PTO or Vacation Use

Employers may require employees to use their accrued paid time off (PTO) or vacation time to ensure they are paid at a full rate. This option is minimally disruptive to the employer-employee relationship, but it comes with a definite expiration date (*i.e.*, the employee will eventually run out of accrued PTO).

### Practical Considerations:

Employers must be mindful of the differences between nonexempt and exempt employees. For hourly employees who are entitled to overtime (nonexempt employees), except as limited by state or local law, employers may force employees to exhaust their accrued PTO and vacation. Additionally, employers may restrict employees' ability to accrue PTO or vacation going forward.

For employees who are not subject to overtime pay requirements (exempt employees), employers can take the same action as with nonexempt employees with one notable caveat: exempt employees are entitled to their full salary for completing any work during a

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workweek, regardless of the number of hours or days of work they completed. In practical terms, that means an exempt employee who exhausts her vacation or PTO time with three days remaining in a week must be paid her full salary.

Importantly, an exempt or nonexempt employee's exhaustion of employer-provided paid leave will not affect their rights to receive paid sick leave or Family Medical Leave Act (FMLA) leave under pre-existing state laws or the Families First Coronavirus Response Act (FFCRA).

### **Option: Voluntary Unpaid Leave of Absence**

Employers may ask employees to partner with them to ensure the long-term viability of the company by voluntarily taking unpaid time-off.

#### **Practical Considerations:**

Employers are free to request that both exempt and nonexempt employees take voluntary unpaid leave that would not otherwise be protected by the FMLA or a state or local equivalent. However, exempt employees **must** take unpaid leave in full-day increments. Additionally, employers should be mindful of the caveat discussed above concerning the requirement that exempt employees be paid their full weekly wage for any week in which they complete work. Employers may temporarily modify their unpaid leave policies to accomplish this goal.

### **Option: Temporary Reduction in Hours or Pay**

This option allows employers to keep employees working, albeit with a reduction in pay or hours that allows employers to reduce payroll costs.

#### **Practical Considerations:**

Employers must be mindful of the differences between nonexempt and exempt employees. For nonexempt employees, employers are permitted to enact prospective wage and hour reductions so long as the reductions do not bring the employees' wages below the applicable minimum wage requirements. Employers who chose this option should be mindful of state and local laws that might require an advance notice period before a wage or hour reduction can become effective and should include a notice period as a practical employee relations matter.

For exempt employees, things can be a bit more complicated because employers must balance the need to reduce wages and hours with the goal of maintaining the employees' exempt status. The Fair Labor Standards Act (FLSA) requires employers to pay exempt employees the same weekly salary for any workweek during which they perform work without regard to the number of hours worked. Put into practice, this means an employer owes an exempt employee wages for an entire workweek even if the employee only worked three out of five days during the week due to a pandemic related office closure. Employers who violate that requirement risk loss of an employee's exempt status and liability for retroactive and prospective overtime pay.

There is a narrow exemption that applies to prospective reductions in wages and hours that are occasional and related to long-term business needs so long as the employee receives the minimum exempt weekly salary required to maintain exempt status (currently \$684). However, neither the FLSA nor the U.S. Department of Labor's guidance concerning the statute defines "long-term" in this context, so it is very important to consult with an attorney before reducing an exempt employee's wages. Employers may also simply choose to have exempt employees alternate workweeks given that the FLSA does not require employers to compensate exempt employees for weeks during which they complete no work.

### **Option: Furlough**

Furloughs are typically short-term forced or voluntary unpaid leaves where employees remain employed but complete no work. Employees typically maintain benefit eligibility during furloughs. Employers should refer to the details of their employee health plan(s) and benefit policies to determine employee benefit eligibility during a furlough.

Furloughs help employers reduce payroll expenses while allowing employees to keep their jobs and potentially remain eligible for benefits.

### **Practical Considerations:**

Employers may furlough nonexempt employees for hours, days, or weeks. Exempt employees must be furloughed for an entire workweek (and furloughs should not begin in the middle of a workweek) in order to maintain their exempt status.

Furloughs may trigger certain notice obligations under the federal Worker Adjustment and Retraining Notification Act (WARN) or a state equivalent. Under the federal law, furloughs that last for a more than six months are considered an "employment loss" that could trigger compliance with the law. Accordingly, employers must plan carefully and consult with counsel to ensure WARN compliance.

### **Option: Layoff or Reduction in Force**

We have encountered some employers who are confused about differences between the terms furlough and layoff, which are often used interchangeably to describe a temporary program designed to reduce payroll costs. As discussed above a furlough is a temporary reduction in hours that is not accompanied by a loss of employment. A layoff, by contrast, typically describes an actual employment termination with the possibility of re-hire at some point in the future. A reduction in force is similar to a layoff except that there are no plans to re-hire the employee at a future date.

Layoffs and reductions in force help employers reduce payroll and benefit costs during times of economic of business difficulty.

### **Practical Considerations:**

Layoffs or reductions in force can be complicated, and can have unintended consequences if they are not well thought out and executed. Proposed layoffs or reductions in force must always be analyzed to determine whether the federal WARN Act or a state equivalent requires certain advance notices to employees. The company will also want to attempt to frame the employment action in a manner that will allow it to argue that no notice was required under WARN's unforeseeable business circumstances exception.

Layoffs and reductions in force also trigger employer obligations under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA) or state equivalents because they typically result in a loss of benefits. Layoffs and reductions in force may also trigger vesting requirements for qualified defined contribution retirement plans (e.g., 401(k)s or Employee Stock Option Plans).

Layoffs or reductions in force may also trigger employer obligations to structure severance agreements and materials to be compliant with the Older Workers Benefit Protection Act (OWBPA), which imposes certain requirements concerning employees who are 40 years of age or older. A valid release of age claims under the OWBPA also contains numerous other requirements when two or more employees are laid off such as an additional review period (45 days) and an attachment setting forth such information as the unit or ages of the employees considered for the layoff.

#### **Other Things to Think About:**

**Disparate Treatment and Impact Concerns:** Employers should carefully analyze their potential liability for discrimination under federal, state, or local antidiscrimination laws with the assistance of counsel before implementing any of the foregoing options. A plan that disproportionately impacts members of a protected class (e.g., women, workers over 40, people with disabilities, racial or ethnic minorities) creates potential exposure for employers. Employers should carefully document their analysis and the business need for their decisions with respect to the application of the options discussed in this Alert.

**Unemployment Eligibility:** Employees who are underemployed (*i.e.*, employees whose hours and wages have been reduced without a corresponding loss in employment) are typically not eligible to receive unemployment benefits. Given the impact of the Covid-19 pandemic, some states have enacted emergency unemployment rules that permit individuals to obtain benefits in situations where they otherwise might not have. Accordingly, as a practical employee relations matter, employers should consult counsel to determine whether unemployment benefits might be available to employees whose hours and wages have been reduced. Employers whose employees are not eligible for unemployment benefits due to underemployment should evaluate as best they can whether they can reasonably anticipate the resumption of the business to full strength at the end of a period of underemployment.

**Contractual Obligations:** Employers should review employee personnel files to determine what, if any, obligations they have to employees based on employment or other contractual agreements. Employers may have obligations concerning notice, severance, and guaranteed pay that could be violated by implementing an across-the-board measure. Employers always have the option to renegotiate such agreements, but it is essential that any such amendments be properly negotiated and documented in order to ensure that they are

enforceable.

**State and Local Law:** Employers should always consider the impact of various state and local laws before implementing any of the options discussed in this Alert. In the District of Columbia, for example, employers who involuntarily terminate an employee are required to pay the employee's final wages within one working day of the termination. If the employer's PTO or vacation policy provides for the payment of accrued leave upon termination, the employer would also need to include that amount as wages paid on the employee's final paycheck. As a practical matter, that means an employer who anticipates a temporary downturn in business and who wants to hold as strong a cash position as possible may be in a better position to rebuild the company if they force employees to use accrued PTO (thereby stretching out payments over the course of days, weeks, or months) than if they lay off employees (thereby giving rise to liability for a lumpsum payment the next working day).

**Considerations for Service Members:** The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects job rights and benefits for veterans and members of Reserve components who are employees or prospective employees in the civilian space. USERRA is an important consideration for employers of impacted service members and reservists in light of the activation of the National Guard. As COVID-19 continues to spread across the country, we can likely anticipate more activations of reservists and Guardsmen, which would implicate employer obligations under USERRA. The law and its requirements are often misunderstood by business leaders and human resources professionals. Accordingly, we strongly recommend that employers seek the advice of counsel to determine their obligations with respect to employees who are called to service as a result of COVID-19 or otherwise.

**Shared Work Programs:** Some states offer and encourage the use of shared work programs that allow employers to reduce an employee's normal weekly hours by a given percentage while permitting eligible employees to supplement the lost income with "Shared Work Unemployment Benefits." Texas, for example, has such a program and recently encouraged employers to consider the program in place of layoffs.

**More Help on the Way?** As of the date of this Alert, negotiations have been stalled on an economic stimulus package that would provide some benefit to qualifying businesses. While changes to the current draft of the Senate bill, called the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), are inevitable given the deadlock, the current proposal would make loans available to small businesses that are being impacted by COVID-19, including sole-proprietors, independent contractors, and some non-profits. These loans are intended to stabilize the workforce, allowable uses include payroll support, such as employee salaries or paid leave, insurance premiums, and mortgage payments. The bill currently requires that employers make good-faith representations that these monies would be used to retain workers and maintain payroll before receiving the funds.

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