

EMPLOYEE FURLOUGHS AND LAYOFFS

During this challenging time for employers, many practice owners, and leaders will need to re-evaluate their business and make difficult staffing decisions that reflect the significant reduction in elective patient encounters and procedures. Some of these decisions are likely to include the implementation of employee work furloughs.

BSM has developed this resource with assistance from [Amanda J. Shuman, Esq. of DangerLaw, LLC](#), to provide our clients some basic information and considerations that may be helpful.

It is important to keep in mind that individual state laws and guidelines will vary and that policies are changing rapidly. [Practices should seek additional guidance from their HR attorney.](#)

DEFINITIONS

1. What is an **employee furlough**?

- A furlough is either an enforced period of time off work OR a period of reduced work hours. In both cases, furloughs are typically used where available work is at a reduced level. A furlough can be with or without pay.
- A decision to place an employee on furlough is typically made when the circumstances are expected to be temporary and there is an intention to retain the employee.

2. What is a **temporary layoff**?

- The terms *furlough* and *temporary layoff* are often used interchangeably in small or medium-size businesses.
- An employee who has been furloughed or temporarily laid-off and who is hoping to collect unemployment benefits (see below) would typically need documentation showing that they were furloughed. In most cases to be eligible for benefits a furloughed employee would not have to show that they are seeking other work because they are technically still employed.
- An employee who is furloughed would not have to go through the onboarding process with their employer again once work is available.

3. What is a **permanent layoff**?

- In a permanent layoff, the employee is terminated because of budgetary or operational considerations (including lack of available work). There is no intent to rehire the employee.
- Should the employer decide to rehire the employee in the future, this person would go through the new hire application and customary onboarding process.

ABOUT EMPLOYEE FURLOUGHS

1. How does a furlough affect **non-exempt (hourly) employees**?

- When an employee is placed on furlough, the staff member may work reduced hours. For example, a staff member who works 40 hours may be asked to work a reduced schedule of 24 hours per week.
- Alternatively, the practice may not need the employee to work at all during the furlough. If available, the employee can use paid time off (PTO) during the furlough in order to continue to receive a paycheck. Otherwise, the employee will be off without pay. In this case, the employee remains on payroll but does not receive any pay.

2. How does a furlough work for **exempt** (salaried) employees?

- Particular care should be taken when considering furloughing exempt employees.
- By Fair Labor Standards Act (FLSA) definition, a salaried, exempt employee must be paid for an entire week if any work is performed during that week.
- For an employer to place a salaried, exempt employee on furlough, the employer must specifically request that the employee take the entire week off without pay and ensure that the employee does not work during this period.
- The practice may consider a reduction in salary if it is determined the practice still needs the employee to work. However, a reduction in salary may only be made prospectively and CANNOT be done retroactively. The practice should not make any promise or suggestion that the salary reduction is only temporary. Salary reductions should be applied to an entire class or group of employees and should not be tied to a reduction in hours. The practice should also be sure that the reduced pay does not compromise federal or state requirements for exempt status, and that the required number of days of notice are provided to the employee before making the change. These requirements will vary by state.
- Be sure to document any salary change in writing.

3. How do you handle employees with **employment contracts**?

- If an employee has an employment contract, the practice should consult with their HR attorney to ensure they handle any planned changes according to the contract provisions.
- The contract will likely need to be amended by mutual agreement (employer and employee).
- If the practice and the contract employee cannot come to mutual agreement on new terms, the result may be separation per the contract terms.

4. How does a furlough affect eligibility for **unemployment benefits**?

- Furloughed employees can typically collect unemployment benefits, and states may waive waiting periods to assist people out of work during emergency situations. The purpose of unemployment benefits is to help the employees bridge the financial gap until they can resume full-time work. Still, this type of arrangement will vary by state.
- Some states have also implemented work-sharing programs. Work sharing is a type of unemployment insurance (UI). The program allows an employer to reduce the number of hours an employee works during a week, while unemployment compensation makes up some of the difference in income. This arrangement helps employees to not suffer as much financial hardship during a furlough. Your practice HR attorney or your state's unemployment office will provide details of your state's offering and eligibility requirements.
- If a full-time furloughed employee is required to take several weeks off without pay, the practice should encourage the staff member to file for unemployment benefits right away. In most cases states will not allow employees to file for unemployment until after they have consumed any paid leave benefits, such as paid-time-off (PTO) or vacation. However, some states are now allowing employees to file for unemployment prior to having completely consumed their PTO or vacation.
- Practices should consult an HR attorney with state-specific knowledge and experience with these issues.

5. Does **everyone** at the company have to be furloughed?

- No. Depending on business needs, individual departments or positions may furlough only some employees while other employees continue to work.

For example, furloughing members of the clinical team, while administrative staff continue to work, may be appropriate when the practice is unable to see patients.

6. For how long can a company furlough an employee?

- The maximum amount of time that a company should furlough an employee is one year. Therefore, employers should implement employee furloughs only if they plan to recall the employee back to normal work within one year.
- If a company intends to furlough an employee for a longer time, they should consider whether a permanent layoff would be more appropriate.

EMPLOYEE BENEFITS DURING A FURLOUGH

1. How long can a practice maintain employee health benefits for furloughed employees?

- Employees on furlough (whether reduced or zero hours) may still be eligible for health benefits. Practices should review their insurance contract and contact their broker and/or carrier to clarify the eligibility requirements.
- Practices needing to furlough or temporarily lay off employees as a result of emergencies should stay informed of evolving changes to policy requirements.
- In the practice's contract with their insurance carrier, the practice likely selected options and periods for management of medical benefits during leaves of absence, furloughs, temporary layoffs, and changes to part-time status.

As an example, if a practice selected to offer three months of employee benefits during a leave of absence or temporary layoff, this would be the upper limit for continued paid benefits. This option would typically be used when the practice expects the employee to return on or before the end of their leave period.

- Practices should also be aware that state and federal rules may require benefits to be provided for a specific length of time while the employee is on leave.

2. Are 401(k) benefits affected by a furlough?

- A reduction in workforce could cause a 401(k) plan to breach "partial termination" rules. A partial termination is when an employer reduces its workforce (and plan participation) by 20%. Employers should consider whether "partial termination" rules have been triggered with respect to 401(k) plans. If a partial termination occurs, all participating employees who had a separation from employment during the applicable period must be fully vested in the account balance or their accrued benefit, to the extent funded.
- Typically, only employment terminations are counted toward the reduction threshold. A furlough of employees likely would not trigger partial plan termination rules. Practices should review their 401(k) plans with their financial advisors to be sure they are complying with IRS rules.

3. How are Paid Time Off (PTO) or vacation benefits affected by a furlough?

- If an *hourly* employee is furloughed (or quarantined in an emergency situation), the employee may use paid leave or vacation time for any partial weeks not worked to bridge the gap in loss of pay.
- If an *exempt* employee is furloughed (or quarantined in an emergency situation), the employee may use paid leave or vacation time for any partial weeks not worked as long as the employee is paid their full weekly salary.
- The employee may also be entitled to paid sick leave under the employer's policies or Federal or State law.
- When placing employees on furlough, the practice should evaluate PTO balances for employees since these represent a liability to the organization. Wherever possible, furloughed employees should be encouraged to use any accrued PTO during their leave, thus reducing the company's liability if a furloughed employee chooses not to return to work.

4. What are some of the **potential challenges of a furlough** for either the practice or impacted employees?

- Long-term periods of reduced or zero pay can be an economic and psychological hardship on the employee.
- HR duties to manage the administration for furloughed employees may increase, including but not limited to the oversight of work hours, employee communication, benefits, and return-to-work dates.
- The practice maintains the expense of employee benefits.
- Employees may look for other employment while furloughed.

COMMUNICATIONS & DEVELOPING A RECALL POLICY FOR FURLOUGHED EMPLOYEES

1. Create a **communication plan**.

- Keep furloughed employees engaged and informed of the practice's efforts to return to business as usual.
- Schedule meetings with staff who are working modified hours.
- If employees furloughed to zero hours are willing to conduct check-in phone calls, this can be a good touchpoint for keeping them informed.

2. Create a **policy for recalling employees from furlough**.

- Develop a written plan.
- Determine how long you plan to keep the furloughed employees on a recall list.
- Determine how much notice you will give the employees of the recall and if their role will be the same on return to work.
- Determine how tenure will be applied when an employee returns.
- Determine the priority for bringing staff members back to work or increasing their hours.
- Consider a gradual ramp-up as operations resume.
- Check with your insurance carrier(s) regarding eligibility requirements for returning employees.

For additional resources to aid your practice during this challenging time, visit <https://bsmconsulting.com/coronavirus-BSM-resources> or call us at 800-832-0609.

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