

EMPLOYER Q & A

FURLOUGHS AND REDUCTION OF HOURS IMPACT TO BENEFITS

Furloughs

1. What is the difference between a furlough and a layoff?

When an employee is *furloughed*, employment is continued even though there is a period of unpaid leave. The employee is expected to return to work in the near future.

- A furlough is not considered a termination of employment. However, you may still need to provide certain notices to employees about their change in status.
- Employees are still likely be eligible for unemployment benefits and may be eligible for the expansion of paid sick leave benefits under the Families First Coronavirus Response Act (Act), if the employer is a “covered employer” under the Act.

A *layoff* involves a termination of the employment relationship.

- A layoff may be for a temporary duration or permanent.
 - A temporary layoff occurs when an employer closes down completely but intends to re-open in the not-to-distant future (generally within six months), at which time it will rehire the laid-off employee.
 - In a permanent layoff, there is no intention to rehire the employee.
- Because there has been an actual termination of employment, a qualifying event under Internal Revenue Code (Code) Section 125’s change in status rules has occurred. An employee enrolled in an employer’s group health plan will be immediately eligible for COBRA continuation coverage, and depending on the state, also accrued vacation/PTO may need to be paid out.
- The laid-off individual should also be eligible for unemployment insurance; however, because he or she is no longer employed, they most likely will not be eligible for benefits under the Act.

2. What steps should an employer take should it want to furlough all or part of its work force during the COVID-19 public health emergency?

It is important that employers notify its employees in writing, describe the circumstances necessitating the furlough, and specify to the best of its knowledge at the time, an anticipated return to work date.

- Employees should also be informed of the impact to their benefits, including what benefits might still be available to them, either through their employer or through federal and state resources. As indicated above, employees on furlough should be eligible for unemployment insurance as well as benefits under the Act. Many states, including California, also have waived the waiting period for unemployment benefits.
- If only part of your workforce will be on furlough, it is important to be able to show staff selection is not being done for a discriminatory reason. We recommended proper documentation of the business reason to support the decision to furlough certain employees, such as those that perform non-essential services, and not others.
- A layoff or furlough could trigger a 60-day advance notice requirement under the federal WARN Act as the Cal-WARN Act (California’s equivalent). Other states may have their own version of the WARN Act as well. On March 17, Governor Gavin Newsome signed an [Executive Order](#),

implementing important temporary modifications to Cal-WARN to assist employers in the current crisis, including waiving the 60-day advance notice requirement.

3. In a furlough situation as it pertains to the COVID-19 public health emergency, what does the term ‘temporary’ mean as far as expected duration?

There is no hard and fast time period. This will ultimately be determined by the specific facts and circumstances, the length of the COVID-19 public health emergency, the employer’s policy, and the insurance carrier’s (including the stop-loss carrier’s) specific requirements.

4. Can benefits continue to be offered during a furlough?

Yes, in a furlough situation, employees are not considered terminated employees and can be offered benefits as long as they are still eligible for coverage in accordance with the terms of the plan document.

- To continue benefits during a furlough, provisions in the plan document may need to be amended to ensure the benefit plan’s eligibility terms are complied with.
- With respect to continuation of medical benefits, see also Question 13 regarding compliance with the Affordable Care Act (ACA)’s employer shared responsibility provisions.
- An employer should be consistent in their treatment of specific groups of employees within furloughed classes to avoid potential disparate treatment and discrimination.

5. Can the employer charge the employee their portion of the premium? If so, can an employee pay it back once returned to work?

Yes, this is similar to the employee being on an unpaid leave of absence. Employers may still hold employees responsible for the employee’s portion of the benefit premiums that are missed due to loss of wages during the furlough period.

- In addition to instituting a pay-as-you go option during the furlough period, the employer could have a policy that either invoices the employees for the premiums due upon return or enter into a written agreement with the employee to make “catch up” contributions upon their return to work.
- Attached is a sample Employee Authorization for Payroll Deduction form that may be used to document catch up contributions (*ThinkHR Sample Form Available*).

6. Can employees make changes or terminate their benefits as a result of a furlough?

A furlough will not result in a qualifying event that would allow for changes in coverage under Code Section 125’s change in status rules, unless it either affects eligibility for coverage, or unless an employee experiences another qualifying event such as enrolling in another group health plan or obtaining certain other coverage, such as Medicaid or CHIP during the furlough period.

- To the extent that an employer offers a dependent care flexible spending account (DFSA), shutdowns in schools and other child-care facilities likely will trigger a qualifying event for employees to change their contributions to DFSAs, regardless of whether a furlough also occurs.
- Certain benefits may not be subject to Section 125’s rules if they are being paid for outside the cafeteria plan on a post-tax basis and can be changed as the plan documents permit.

7. If the leave of absence transitions from a temporary furlough to a temporary or permanent lay-off, are benefits terminated?

Yes. The employee may then be eligible for COBRA as in a typical termination situation. Note also that in some states, accrued vacation or PTO must be paid out at this time.

8. Can the employer end coverage for employees while on furlough?

A furlough is expected to be of a temporary duration, so depending upon the length of the furlough, the employer's policy or agreement with the employee, and carrier requirements, it may be appropriate to terminate the employee's coverage and classify the furlough as a layoff.

- For those employees who lose health coverage during a furlough, they must be offered COBRA continuation coverage.

9. Is a furlough a COBRA qualifying event?

A furlough is not a COBRA qualifying event unless it results in a loss of group health coverage. If so, the employer must issue COBRA notices and allow affected individuals to elect COBRA continuation coverage. As indicated above, if the intent of the employer is to offer coverage during a furlough, plan documents may need to be amended to permit this (upon carrier approval).

Temporary Reduction of Hours to Part-Time Status

10. Can benefits continue to be offered if eligibility would be lost due to a temporary reduction of hours?

Yes. Most carriers will allow a continuation of health benefits during a temporary status change as long as this is written into the plan documents and applied consistently to all benefit enrolled employees. Approval should also be obtained from the stop loss carrier, if applicable.

11. Can employers terminate benefits?

Yes, if the employee ceases to satisfy the benefit plan's eligibility requirements as a result of the reduction in hours, a qualifying event has occurred under Code Section 125.

12. How does a reduction of hours impact compliance with ACA's employer shared responsibility provisions?

For medical benefits, eligibility may/or may not be lost if hours are reduced. This will depend on the length of time hours are reduced and the methodology used to track employee hours under the ACA's employer shared responsibility provisions.

- Under the look-back measurement method, medical benefits may be protected by the stability period in place at the time of the temporary reduction in hours. An employee's hours are tracked over a standard measurement period and if the employee works an average of at least 30 hours per week during this period, he or she must be offered coverage for a standard stability period, regardless of the number of hours worked in that stability period, or else the employer could potentially be subject to a penalty. The stability period most often corresponds to the benefit plan's plan year and must be equal to, or greater than the standard measurement period. Non-medical benefits are not protected by ACA, so those may generally be terminated the first of the month following the status change, depending upon the eligibility provisions in the plan document.
- Under the monthly measurement method, medical benefit eligibility is determined on a month to month basis, so the employer can terminate benefits when an employee reverts to part-time status and offered COBRA at that time.

13. If terminated or laid-off, can employers subsidize COBRA premiums?

Yes, however discrimination rules do apply, and it is recommended to be consistent in the treatment of similarly situated employees.

- Employers should also consider providing these employees information on the applicable unemployment options that may be available to them as a result of the layoff.

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