



Layoffs, Furloughs and Unemployment

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Overview

Layoffs and Furloughs

Achieving cost-savings by
reducing payroll costs

Civil Service Layoffs

Requires special notice and
hearing requirements

Unemployment

Special COVID-19 benefits and
regulations in place

WorkShare Program

State program offers an
alternative to layoffs

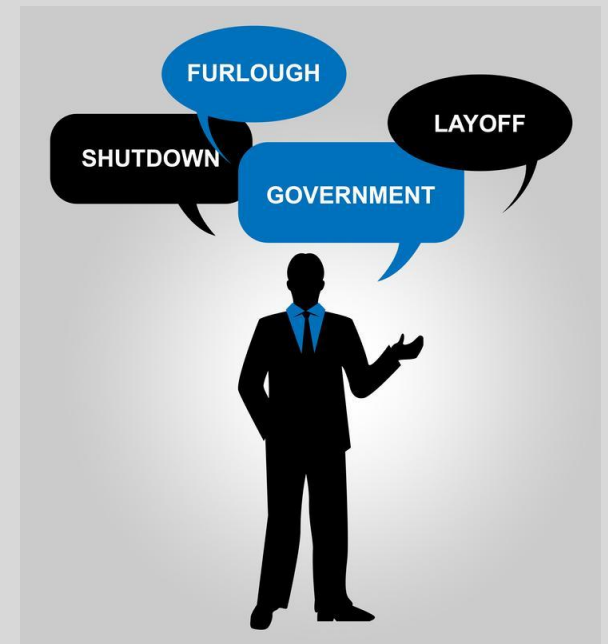
Plan and Document

Proper planning is key to
minimizing liability

Layoffs, Furloughs and RIF

- Layoffs, furloughs, and reductions in force are three methods of achieving cost savings by reducing payroll costs.
 - A **reduction in force** (RIF) occurs when a position or positions are eliminated without the intention of replacement.
 - Generally, a **layoff** is an unpaid separation or termination of an employee without any identified or foreseeable expectation of rehire or return (although Massachusetts has certain reinstatement rights for laid-off civil service employees).
 - **Furloughs** (also referred to as “**standby status**”) are an alternative to layoffs that allow you to retain staff you cannot afford to pay. A furlough is a temporary period of unpaid (either voluntary or involuntary) leave.

Often RIFs and layoffs are used interchangeably (or layoffs are viewed as the means of accomplishing a RIF) because the result is the same: someone losing their job.



Layoffs v. Furloughs

- When an employee is **laid-off**, he or she is removed from the employer's payroll and the employer is required to pay the employee all of their earned wages, including vacation time, at the time of the layoff.
- During a **furlough**, an employee remains on the payroll but is not permitted to perform any work and there is usually a mutual expectation that the employee will return to work at the end of the furlough period.
 - Furloughs can take several forms: a predetermined length of time, reduction of hours, reduction of pay, or taken sporadically as "furlough days."
 - Recent [guidance from the AGO](#) confirms an employer may "furlough" an employee without terminating the employment relationship. An employee who is furloughed may maintain participation in their employer's health insurance plan, vacation time, creditable service for retirement, and other benefits. This means that unlike a layoff, a furlough does not trigger a payout of earned wages, including vacation time, because the employment relationship continues. Furloughs most closely resemble an unpaid leave of absence.
 - **Furloughed employees not eligible for FFCRA leave benefits.**
- COSTS TO CONSIDER: Unemployment Insurance, Contractual Payouts (layoffs only), Overtime

Reducing Hours and Wages

- *Is it illegal to reduce the wages or number of hours of a non-exempt employee?*

No. The FLSA does not preclude an employer from lowering a non-exempt employee's hourly rate, or from reducing the number of hours the employee is scheduled to work, as long as the covered employee continues to be paid at least applicable minimum wage for hours, including OT hours, actually worked.

When dealing with union employees and those with individual employment agreements there are additional rights and considerations that need to be acknowledged and addressed. The terms of the collective bargaining agreement or employment contract should be followed.

- *What about wage and hour reductions for exempt employees?*

It is a little more complicated to reduce wages for salaried (exempt) employees, although prospective changes are generally allowed. A threshold issue to decide is whether you want the employee to retain exempt status. For salaried exempt employees, to remain exempt from overtime under the FLSA, the weekly salary must be at least \$684 (\$35,568 per year), otherwise the employee should be transitioned to an hourly position and paid based on hours worked. Note: doctors, lawyers, and teachers are not subject to FLSA salary requirements and reductions in salary for these folks will not result in loss of exemption

Generally, under the FLSA, an exempt employee must receive their full pay for each workweek in which the employee performs any amount of work. If a salaried employee performs a minimal amount of work (e.g. checking emails) during a furlough, the salaried employee must receive their full pay for the entire week. Conversely, exempt employees do not need to be paid for any work week in which they do not perform any work. As such, employers are generally encouraged to implement furloughs for exempt employees in full-week periods and make prospective changes in schedule and pay with advance written notice. Clearly instruct these employees that they are not allowed to perform any work during a furlough, unless previously approved by the employer.

Special furlough rule for salaried exempt public sector employees: According to US DOL guidance, reductions in pay for employees of public agencies that are furloughed will not “disqualify an employee from being paid on a salaried basis, except in the workweek in which the furlough occurs and for which the employee’s pay is accordingly reduced.” (29 C.F.R. 541.710; WHD Fact Sheet #70). In other words, a salaried public employee not will lose their exempt status entirely because of a temporary reduction in pay that would otherwise violate the salary-basis test during a budget related furlough.

The furlough or temporary reductions must be bona fide and not part of a strategy to evade the salary basis requirements.

Bargaining Obligations

- *Is there an obligation to bargain with unions over layoffs and furloughs?*

Yes, in most cases at least impact bargaining will be required if these decisions will affect unionized employees. While you may not always need to bargain over the decision to lay off employees, you must bargain in good faith over the impacts of implementing that decision.

- *How do I start the process?*

If contemplated reductions will involve or impact unionized employees, provide a notice of the contemplated reductions sufficient to give the union a reasonable opportunity to exercise their rights to bargain. Impacts of layoffs might include criteria for selection for layoffs (if not already established by law or contract), possible alternatives to layoffs, and the economic impacts of any layoffs on employees. Do not propose or discuss layoffs or furloughs as part of successor contract negotiations; keep separate from main table bargaining.

Review all applicable policies and agreements (CBAs, personnel by-laws and other personnel policies and procedures) to make sure you are clear on the parties' rights and responsibilities. CBAs may contain specific bargaining requirements and restrictions that must be observed. State and federal laws and regulations should also be reviewed in light of COVID-19 related legislation being passed and financial incentives available to certain employers for maintaining pre-COVID-19 staffing levels.

- *What is my obligation to furnish information? What about while we are under a stay-at-home advisory?*

In the face of layoff notices, unions are within their rights to request information; it is important that employers respond quickly and fully to requests for relevant information.

- *I need to act quickly and cannot bargain. How do I raise the Economic Exigency Defense?*

Employers wishing to rely on economic exigency must establish: (1) circumstances beyond its control require imposition of a deadline for negotiations; (2) the union was notified of these circumstances and the deadline; and (3) the deadline imposed was reasonable and necessary.

Civil Service Layoffs



Governed by MGL c. 31, sections 39-41; PAR Rule 15



Civil Service employees must be afforded notice and a hearing pursuant to s. 41



Lack of funds is just cause to eliminate a position



Required notice shall include:



- the action contemplated
- specific reason(s) for such action
- copy of MGL c. 31, sections 39-45
- hearing date and time (7 days' notice required)

Employee shall be given a full hearing concerning the reason(s) before the AA or hearing officer appointed by AA.

Employee who takes voluntary demotion waives right to hearing or appeal; disabled veterans have special status.

Unemployment

“The Department of Unemployment Assistance (DUA) is moving swiftly to implement **three new public benefit programs that will expand unemployment eligibility; temporarily increase weekly benefits for all claimants; and allow additional categories of people to claim unemployment benefits.** The move, the largest expansion of assistance for the Commonwealth’s workforce since the Great Depression, follows new guidance from the federal government regarding the CARES Act.”

(Source: <https://www.mass.gov/info-details/update-massachusetts-department-of-unemployment-assistance-announces-guidance-on-cares>)

- Employees who had to leave work because of COVID-19 should be able to get Unemployment Insurance.
- Employees who had their hours cut because of COVID-19 may be able to get some Unemployment Insurance.
- Employees who are furloughed are eligible for Unemployment Insurance.
- Employees out of work due to temporary shutdown are eligible for Unemployment Insurance.

Recipients of regular unemployment benefits, Extended Benefits (EB), Pandemic Unemployment Assistance (PUA), and Pandemic Emergency Unemployment Compensation (PEUC) are eligible to receive an additional \$600 per week in Federal Pandemic Emergency Compensation (FPUC).



Unemployment, cont.

- **How will Pandemic Unemployment Assistance (PUA), Federal Pandemic Unemployment Compensation (FPUC), and Pandemic Emergency Unemployment Compensation (PEUC) be funded?**

All benefits and administrative expenses of these programs will be 100% federally funded, so they will be paid for without additional contributions from employers who pay into the unemployment insurance fund.

- **What funding does the CARES Act provide for short-time compensation programs, also known as Work Share?**

100% federal funding will be provided for short-time compensation paid to an individual up to 26 times the weekly benefit amount, including dependents' allowances, for weeks of unemployment beginning on or after the date of enactment of CARES and ending on or before 12/31/20. However, this provision will not apply to short-time compensation paid to employees hired on a seasonal, temporary, or intermittent basis.

- **Does the CARES Act provide any unemployment relief for governmental entities and non-profit organizations that ordinarily pay the full amount of benefits awarded to former employees?**

50% federal funding will be provided for benefits paid by reimbursable nonprofit and governmental entities for weeks of unemployment ending between 3/13/20 and 12/31/20. In addition, USDOL will work with states to allow flexible interpretations of provisions of state law relating to timely payment and assessment of penalties and interest.

(Source: <https://www.mass.gov/info-details/update-massachusetts-department-of-unemployment-assistance-announces-guidance-on-cares>)



WorkShare Program

The WorkShare program offers an alternative to layoffs due to the disruptions caused by COVID-19.

Employers divide available work between affected employees in a department or working group instead of laying off one or more workers. Employees work the reduced hours at their regular rate of pay and collect partial unemployment benefits to offset the wages lost as a result of the reduced hours.

For example, an employer reduces hours for its employees in the Recreation Department by 20% instead of laying off 20% of its employees. Under the WorkShare Program, employees receive 80% percent of their weekly salary from their employer for hours worked, and they receive 20% of their weekly unemployment insurance benefit amount.

WorkShare Program Q & A

- ***How does it help employers?***

WorkShare allows employers to retain their employees by avoiding layoffs and allows them to quickly resume regular operations once the disruptions caused by COVID-19 resolve.

- ***What employers are eligible for the WorkShare Program?***

All Massachusetts employers, including government entities, are eligible to participate in the WorkShare program. Government employers who reimburse the Department of Unemployment Assistance (DUA) in lieu of contributions will be billed the amounts paid by the Commonwealth in unemployment benefits on a dollar-for-dollar basis.

- ***What are the Employer's responsibilities under WorkShare?***

Employers are required to maintain benefits for participating employees, such as health insurance and retirement benefits. Employers must also keep track of the hours that a participating employee works each week. Additionally, employers need to provide all documentation, records, or other information to DUA that is necessary to verify and administer the WorkShare plan.

- ***What employees can participate in WorkShare?***

Participation in a WorkShare program is voluntary for employees. All full and part-time permanent employees may participate, but temporary and seasonal employees are excluded.

For employees covered by a collective bargaining unit, the union or employee organization must agree to the WorkShare plan. The WorkShare plan will need to include signatures of the appropriate union officials. We recommend involving the union early in the process.

Workshare Program Q & A, cont.

- *Can exempt employees participate in a WorkShare plan?*

Yes, provided that both the employee's hours and pay are reduced, and the minimum weekly salary requirement under the FLSA is met. Also keep in mind that as part of a WorkShare plan an employer must keep track of their employee's hours, which is not typically done with salaried or exempt employees.

- *What needs to be included in a WorkShare plan?*

WorkShare plans need to be approved by the DUA. Employers must certify that the reduction in hours is part of a plan in lieu of or necessary to avoid layoffs. Plans are valid for up to fifty-two (52) weeks.

Employees who participate in a WorkShare plan must be part of the same department, group, or unit. At least two employees must be listed on a plan. Employees may only be listed on one plan; however, an employer may submit multiple WorkShare plans for different departments or job functions. Employers should carefully consider the scope of their potential WorkShare plan and specifically identify which groups will be affected.

The reduction in hours must be shared equally by all employees in the department or working group, and fall between 10% and 60%.

- *What happens if an employee does not work the set amount of hours under the plan?*

Once DUA approves a WorkShare plan, participating employees must work the number of hours outlined on the plan each week. If an employee works fewer than the set amount of hours listed in the plan, the employee may substitute paid leave for the missed hours. However, if an employee does not substitute leave for the missed hours then the employee may not be eligible for WorkShare benefits that week. Employees are not permitted to work more than their set hours as it may jeopardize the employer's eligibility for WorkShare program. Employers are responsible for reporting any discrepancy in the number of hours worked to DUA.

- *What about discontinuing a WorkShare plan?*

Employers may discontinue an approved WorkShare plan at any time. Employers should also be aware that DUA may revoke a WorkShare plan for good cause, which may include an employer's failure to comply with the requirements of the plan, or any other conduct or occurrences that are intended to defeat the purpose and effective operation of the plan.

DUA Guidance Re: Unemployment Benefits for Employees Returning to Work



- Guidance addresses questions related to the effect returning to work will have on employees' unemployment benefits and employers' obligations.
- Topics include:
 - the effect on unemployment of an employee's refusal to return to work;
 - recommended practices for communicating return-to-work offers to employees;
 - how to report unreasonable refusals of return-to-work offers;
 - what employees should do when they return to work;
 - potential obligations of employees who receive back pay; and
 - the effect of COVID-19-related unemployment benefits on an employer's experience rating.

Unemployment Insurance Benefits and Returning to Work: Guide For Employers

<https://www.mass.gov/info-details/unemployment-insurance-benefits-and-returning-to-work-guide-for-employers>

Plan and Document

- *Where do I start?*

The first and most important step is proper planning. Gather information that demonstrates and supports the need to make staff reductions and make sure this information is clear and can be easily understood and shared when discussing the need to reduce payroll costs with elected officials, employee organizations, and non-union employees.

Consult collective bargaining agreements and town personnel by-laws regarding the authority for layoffs or reductions in force and be clear on what your rights and obligations are generally and with specific groups. Consult labor counsel with questions on collective bargaining issues, civil service rights (including hearing requirements), and notice requirements.

- *What steps can I take to help minimize liability?*

Do your homework (see above). In addition, take the time to consider alternatives so that you can demonstrate that you have acted fairly and considered options for minimizing layoffs or furloughs. Use objective criteria in your selection process, and document all steps taken, information presented and all communication – formal and informal – with union leadership. Anticipate questions or concerns and prepare or discuss responses with supervisors in advance; work with supervisors to give them the tools they need and advise against making stray comments. Where appropriate, consider offering a severance to certain staff members in exchange for a release.



THANK YOU!

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Health & Safety



COVID-19 Resources

- [10 Steps to Minimize Liability When Reducing Staff](#)
- [EEOC Guidance and Q & A re: EEO Laws](#)
- [PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE ADA \(updated March 22, 2020\)](#)