

FURLOUGH VS. LAYOFF: DECIDING BETWEEN THE TWO

By Benton Toups

The unfortunate reality in these very strange times in which we find ourselves is that many businesses have a need to downsize. A common dilemma these businesses face is choosing between furloughs and layoffs. In this piece, I will provide some points of consideration in hopes that they aid employers in making the right choice.

WHAT'S THE DIFFERENCE?

The terms "layoff" and "furlough" are not statutorily defined terms and thus have no legal significance other

than their practical effect. Generally speaking, layoff refers to a group termination of a number of employees, with no specific expectation that the employees will be rehired. Furlough, on the other hand, generally refers to a temporary reduction in hours (sometimes to zero) of a group of employees, with the expectation that most will resume their normal schedules once conditions improve.

CONSIDER THE MESSAGE

A business that is downsizing should carefully examine its intent with respect to the affected employees. Is this a permanent measure, or does the organization expect to ramp back up? If the reduction is likely to be permanent, then a layoff seems more fitting. If,

however, the intent is to bring the affected employees back, or even if it is undecided, then characterizing the reduction as a furlough has advantages. Namely, while there is nothing preventing furloughed employees from seeking employment elsewhere, employees who consider themselves furloughed are probably less likely to look for replacement employment and thus are more likely to remain available if needed. A furlough may also have less negative effects on employee morale for remaining employees.

Note that a business can style the reduction as a furlough even if it is unsure about whether the affected employees will be returned to work. It is perfectly permissible to let the downsized employees know that the business *hopes* to bring them back and will contact them with an update at some definite point in the future.

WHAT ABOUT UNEMPLOYMENT?

Whether the reduction is styled a layoff or a furlough, there should be no difference in the affected employees' rights to collect unemployment. On March 17, 2020, Governor Cooper issued Executive Order 118, providing that individuals whose hours are reduced (even if not terminated) during this crisis are entitled to collect unemployment benefits. The Order also suspended the requirement that employees must actively look for another job in order to seek unemployment. Moreover, the federal CARES Act signed into law on March 27, 2020, provides for a \$600/week unemployment premium to be paid on top of the existing state maximum of \$350/week. The practical effect is that, at least for a period of time, employees who were making less than approximately \$50,000/year may actually see a pay *raise* if they are laid off or furloughed.

WHAT ABOUT EMPLOYEE BENEFITS?

In the event of a layoff, businesses will normally discontinue benefits just as with any other termination, and employees may elect to continue coverage under COBRA. In a furlough, however, that does not necessarily have to be the case, as oftentimes businesses will continue benefits for furloughed employees for at least some period of time. Benefits continuation has obvious benefits for the downsized employees, but it also benefits the employer who ultimately hopes to have the furloughed employees return to work, as the more connection the business maintains with the employees, the more likely they are to be available when the business is ready to resume normal operations.

BE MINDFUL OF EMPLOYEE HEADCOUNT

In many different contexts, the number of employees a business has will impact whether that business is subject to certain laws. For instance:

- Many anti-discrimination laws apply only to businesses with 15 or more employees.
- Most provisions of the FMLA apply to businesses

with 50 or more employees. Also, businesses with less than 50 employees may seek exemption from the paid leave requirements of the Families First Coronavirus Response Act ("FFCRA").

- Businesses with 500 or more employees are exempt from the paid leave requirements of the FFCRA and are ineligible for many of the small business loan opportunities created by the CARES Act, such as the very popular Payroll Protection Program loans.

Each of these statutes have different criteria on how employees are counted, but in some contexts, furloughed employees may be counted, while laid-off employees may not be.

DETERMINE SELECTION CRITERIA

Whether incorporating a layoff or furlough, businesses will need to establish legitimate, non-discriminatory criteria for determining which employees are selected. Businesses can also seek volunteers (more likely for a furlough than a layoff). Again, under the new federal unemployment benefits, employees making less than around \$50,000 may actually see a pay raise while furloughed.

TAKEAWAY

As with most situations, there is no one-size-fits-all solution to downsizing. The reality is that it is a painful process for everyone involved, perhaps more so than ever. However, the government has provided both employers and employees with tools for surviving what we all hope is a temporary state of affairs. It is my sincere hope that the next issue of this publication will contain an article on good hiring practices.



CRANFILL
SUMNER &
HARTZOG



Benton L. Toups is a partner in the Wilmington office of Cranfill Sumner & Hartzog LLP. Benton is a seasoned attorney whose practice focuses on Employment Law, Business Litigation and ERISA Litigation.