

Employment in the Shadow of COVID19:**

Last week, we were focused on trying to anticipate dealing with sick employees in the workplace or developing work-from-home policies (we can still provide that guidance if you need it). In two days, everything changed. Now, small businesses are trying to figure how—or if—to keep the doors open.

Many retail and service businesses are closing temporarily. Others are open but business has slowed to a crawl. The focus has therefore shifted to how to furlough or lay off employees.

Notice to Employees. If you have fewer than 100 employees the federal WARN Act that governs notice of layoffs does not apply to your business so you do not have to meet those 60 day notice and other requirements. If you have fewer than 75 employees, the California WARN Act does not apply. If you are more than 75 (bodies, not full time equivalents), you may need to give up to 60 days' notice of a layoff of 50 or more of your workers within a 30 day period.

Options for Employers. As a California employer, you have the option of reducing hours for current employees, not scheduling employees without pay or formally laying off temporarily or permanently with no notice. You should give as much notice as you can, however, as a good practice. The current situation may require you to act quickly and there is no legal prohibition from doing that. If employees come in and you send them home, you will owe reporting time pay so wherever possible, contact employees before they come to work or advise them at the end of the work day not to return the next day.

What you do and how you do it differs depending on whether the employees are exempt (salaried) or non-exempt (hourly). Exempt employees must be paid at least twice minimum wage based on a 40 hour week regardless of the number of hours they actually work or the business is open. In 2020, that is \$49,920/year (\$960/week) for businesses with 25 or fewer employees, \$54,080/year (\$1040/week) for businesses with 26 or more employees. So, you can reduce your expectations for exempt employees and reduce their pay but if they work at all in any week, they must be paid at least the amounts above.

Non-exempt (hourly) employees may have work hours reduced, be formally laid off temporarily or permanently, or told not to come to work without pay. If they

have vacation or PTO they can use that, though, so you will need to be prepared with the cash to pay that out in regular payroll.

Unemployment Insurance benefits may be available to your workers during the coronavirus crisis, even for reduced hours. Here is the most current information available for the California EDD:

“You are encouraged to apply for Unemployment Insurance (UI) benefits if you are unemployed, which includes reasons such as:

- Your hours are reduced due to the quarantine.
- You were separated from your employer during the quarantine.
- You are subject to a quarantine required by a medical professional or state or local health officer.”

In addition to being eligible, the recent declaration of State of Emergency provides that the waiting period for benefits (usually 7 days after separation) is waived. More info here: https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm.

Partial-Week Furloughs are when an employee’s workweek is reduced. Partial-week furloughs are allowed in California. Salary reductions for exempt employees should be done in *advance* of the furlough so they are not “deductions” from an exempt employee’s salary for missed work days but rather a change in employment terms. Advance reductions in salary to reflect business needs does not disturb the salary basis for an employee’s exemption as long as the minimums are met. Avoid day-to-day or short-term deductions from an exempt employee’s salary. Reductions should be made for a substantial period of time as an adjustment to address longer term economic forecasts than as short-term reaction to transitory business conditions.

Full-Week Furloughs will not result in exempt employees losing the exemption. To be done properly, the furlough must have the salaried employee not performing any work during the defined workweek during the furlough. An exempt employee who performs *any* work at all must be paid for the full week. Further, reasonable advance notice must be given to exempt employees before the furlough begins. As with the partial-week furlough, the employee’s salary cannot dip below the minimum salary threshold for exempt employees.

A furlough should not be too long and have a clearly defined return-to-work date. If the furlough is too long or if no return date is designated, it could be deemed a termination, entitling the employee to all final wages immediately, including accrued vacation or PTO. California law does not require employers to pay out accumulated sick leave upon separation—just accrued vacation or PTO.

Other Issues Implicated By Furloughs or Temporary Layoff: If any of your employees (usually exempt managers) have employment contracts, you need to check those. You may have to pay those employees regardless of whether your business is operating. Executive contracts typically have severance provisions that may be triggered with salary reductions over a certain threshold. You may need to negotiate with those employees to deviate from the contract terms. Also check your employee handbooks. Does the company's benefits plan include a definition of eligible employees that may be implicated by furloughs?

Layoff is a separation of employment so requires the employer to pay out all final wages and any accumulated PTO. For a mid-size workforce with multiple employees with significant accumulated PTO, that can be expensive. Note that a "temporary" layoff only avoids that result if there is a definite return date that is within one pay period (for most employers, two weeks). Otherwise, it is a termination and accumulated PTO must be paid out. Again, sick leave does not have to be paid out upon separation unless it is part of an integrated PTO system that does not distinguish between sick leave and other leave. Separated employees must be given the state EDD unemployment pamphlet, available for download here: https://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf. Observe all rules for termination (give written notice of change in status, provide any applicable benefits information such as COBRA, shut off access to the company's information, obtain return of company property if applicable). Explain that you fully expect (if you do) to rehire but you have been advised that this is the best policy.

Labor & Workforce Agency has developed a chart to show benefits available for employees affected by coronavirus: <https://www.labor.ca.gov/coronavirus2019/#chart>.

Questions? Call us. We're monitoring information, which is changing quickly. 805-225-1773; janeheath@sloconflictmanagement.com.

*** Conditions are changing hourly so while this advice is as accurate as it can be now, be alert to changing conditions that could affect it, especially with respect to government action, both locally and on the federal level.*