GBS HR Consulting & Compliance

COVID 19 Employer Update: What Can I do if my Business Operations are Shut Down?

The evolution of the COVID-19 epidemic is constantly evolving. The information in this document is based on what known at this time. As things change, we will continue to update you as it affects employee benefits compliance rules.

We care about what is happening to each of you, your employees and their families and your business. In the wake of recent government-mandated closures, multiple business owners have been reaching for support.

Throughout the coming days and weeks, we hope to offer a calm voice of reason, help respond to common questions, and outline options and solutions to help you during this challenging time.

This installment is designed to help you navigate and balance your understandable concern for your business, compliance with benefits and employment laws, and your desire to limit any negative impact on your employees.

> **Employer Question:** Are immediate employee layoffs my only option?
>
> **Answer:** The short answer is No. There are options for business owners that can: 1) help protect employees, 2) safeguard cash, 3) reduce exposure to legal risk, and 4) protect operations. These four areas are discussed in more detail below.

1. Protecting Employees

Laying off employees may seem like the obvious solution to protect the company, and there may be exceptions, but generally a layoff could be a poor decision for a variety of reasons and could negatively impact both short-term and long-term success. A layoff could expose an employer to discrimination and retaliation claims, and it not only lowers employee morale, it also impacts employee benefits and limits the ability a company has to provide assistance. Under a layoff, impacted employees lose benefits either immediately or by the end of the month.

Consider a furlough instead of layoffs.

A furlough is a temporary unpaid leave of absence for reasons such as budget issues, a slow-down in business, or other non-discipline related issues. It can be voluntary or mandated. With a furlough, employees continue to hold/maintain their job, but are not paid. In this context, the word furlough could be used interchangeably with the phrase “unpaid leave”

A furlough or a period of unpaid leave allows employers to continue to provide benefits. In many cases, this option is a much a better long-term solution for employers. For more information and answers to specific questions about furloughs, please refer to the U.S. Department of Labor (DOL) recent FAQs.

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Steps to consider when contemplating a furlough

First, review the DOL FAQ referenced above to become familiar with common questions to make sure you are not running afoul of the rules.

Second, review your carrier contracts and their current leave policies, benefit eligibility policies, and plan documents and check your rights and obligations and to check to see if amendments to any of these documents should be made. As part of your communication with the carriers, consider discussing options to manage the expense of premiums. Potential options are listed here but remember that changes to premium structure should be adopted uniformly for all furloughed employees including executive.

- Keep the same pay structure percentages for premiums employer/employee. Typically, the carrier agreement will allow this for at least 60 days under the written contract.
- Require employees to pay the full premium (employer and employee side) following the current month.
- Elect to cover 100% of the premium for employees on furlough.
- Allow employees to pay double premiums when they return to work and when payroll deductions resume.
- Make an offer of continuation of coverage under COBRA event based on reduction of hours and initiate the COBRA on the first day of the following month.

Third, remember that because a furlough is like "unpaid leave" all benefits rules relating to unpaid leave come into play. For example, your written measurement method addresses in detail how to respond to unpaid leave under ACA employer shared responsibility rules. Make sure to refer to that policy and continue to follow it. For more information on completing this process, please contact us.

Fourth, don't forget about COBRA and FMLA.

- A reduction in hours accompanied by a loss in coverage is a COBRA qualifying event. During a leave, it will typically result in a reduction of hours, but depending on the circumstances it won't always result in a loss of coverage. If it is FMLA leave, the COBRA qualifying event does not occur unless the employee fails to return from the FMLA leave.
- For non-FMLA leave, if the leave results in a loss of coverage, then it is a qualifying event and COBRA must be offered. For example, under your ACA measurement method policy, if an employee has a reduction in hours but is locked in as full-time eligible during a stability period, there would not be a loss of coverage until the end of the stability period (if the employee loses full-time status for the next stability period because did not have enough hours of service during the measurement period). In this situation the employee will have a COBRA qualifying event (reduction in hours followed by a loss of coverage at the end of the stability period) and the triggering event (a reduction of hours) occurs no later than the last date of the measurement period. The COBRA maximum coverage period may be measured either from the date of the triggering event or–if the employer uses the delayed employer notice rule–from the date of the loss of coverage (the last day of the stability period).

Fifth, be aware of Unemployment (UE)

- Although we cannot speak for all states, we understand that many states allow furloughed employees to qualify for unemployment. Some employers have jumped quickly to lay off employees in order to trigger an unemployment event. Layoffs may

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not be the best course of action. Employees on furlough in most states also have the option to immediately apply for UE benefits. Please check your state laws because the final decision to approve or deny UE benefits is determined by the state.

- Additionally, recent federal bills have included policies to allow unemployment benefits for loss of hours due to reductions resulting from Covid-19. While none are yet law, this could offer significant relief. Be on the lookout for more information from GBS Benefits as soon as a new bill is signed into law. Until then, bills change content to such an extent that detailing it here would be conjecture.
- *For more information on state unemployment, see the National Conference of state Legislatures.*

Finally, because we are hearing from many of you, we think you may be interested to know about some of what others are implementing under the furlough option. Make sure of course to consult with your legal counsel if you have any questions or concerns about the rules and what is the best fit for you.

- Balanced Furloughs

  While some companies are implementing furloughs to all employees, other companies are "balancing" furloughs among their employees to continue some work operations and share hours among employees.

  - One plan requires one week of time off for each four weeks of duration in this healthcare challenge.
  - With another company, employees have been allowed to work together and balance the time off. Employees who can afford to stay out longer may opt-in to a longer furlough.

- PTO Donation Programs/Policies

  Many companies quickly adopted a PTO Sharing Policy *(for more information see our online resources located on myGBS - COVID-19 Resources)* to allow the free sharing of accrued and unused PTO.

2. Safeguarding Cash

Bonuses, Retirement and Cash Incentive Programs - A company can quickly tailor cash-driven plans to align with the global economic impact and the organizational need to guard cash. For example, carefully review current cash-based incentive plans. A cash-based sales incentive could be temporarily withdrawn due to economic pressure. Document your changes and be vigilant about communicating both verbally and in writing and apply the policy consistently to all employees.

Creative Operations - A restaurant client yesterday was hit by a localized shutdown. They already have plans in place for curbside delivery, Uber/Door Dash deliveries, frozen-food options and localized marketing.

Benefits Premiums - Employees on furlough can be given the option to continue benefits through the plan (typically 60 days) while on unpaid leave. The company can require the employee to cover 100% of the premium during this time in order to protect cash.

Balanced Furloughs - See the details above (in the Protecting Employees section) and consider an immediate plan to implement furloughs to all employees to reduce the entire payroll by 25% or more.

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3. Reducing Legal Risk

The WARN Act:

- Employers over 100 are regulated by the Worker Adjustment and Retraining Notification Act impacting plant closures or mass layoffs. WARN requires employers to submit to strict notice, retraining and benefits requirements when laying off, furloughing or terminating manufacturing plants.
- However, there is an exception to this rule where there is an extraordinary business circumstance or natural disaster. Legal advisors have commented that the COVID-19 virus could fall under either category. If so, the WARN Act would not apply.
- For more information on the WARN Act, click here.

Layoffs vs. Furloughs:

- Because of the nature of each of these options, the furlough process generally carries less legal risk than layoffs and reduces the chance of alienating employees. Discrimination and retaliation claims are on the rise. The risk of these claims can be reduced through a furlough program.

4. Protecting Operations

Adaptation - We have seen companies respond quickly to the COVID-19 outbreak through generosity, thinking outside the box, and common sense.

- For example, many companies quickly implemented policies to allow hardware, computers, monitors and even chairs to be taken to the homes of employees to set up impromptu office space and remote working arrangements.

The Bottom Line

The issues and corresponding laws are complex and can include a variety of options and pitfalls. Navigating it effectively can be challenging. Be sure to consult legal counsel before making major changes or decisions. Remember also that there are several bills at the federal level that have been introduced that could in the immediate future alleviate some concerns as well as provide relief in this unusual time.

GBS Benefits has partnered with Boost HR and Recruiting to assist you in this process. If you have the need to assess your risk in person through a live meeting and assessment, please contact Shawn Plowman at shawn.plowman@boostrecruits.com or call Shawn at 602.770.4079. There is a fee to conduct the in-depth assessment meeting with Boost HR.

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