

# Comparing Paid Leave

*Furloughs and Layoffs During the Coronavirus Pandemic*

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April 8, 2020



	Unpaid temporary furlough (involuntary leave of absence)	Layoff (termination of employment)	Paid leave (short-term or extended paid leave)
<b>Eligibility issues</b> (medical, dental and vision plans particularly)	<p>Be aware of the many potential wrinkles to eligibility and furloughs.</p> <p>Check plan document. If furlough is very short-term there is rarely significant concern; even plans providing for eligibility only for employees in active service will often continue coverage through the end of the month. For extended furloughs, the plan's eligibility rules will dictate extended coverage. See <b><i>Affordable Care Act employer mandate – medical coverage</i></b>, below. Furlough might not trigger a loss of eligibility under plans that tie eligibility to ACA full-time employee status.</p> <p>If the plan's eligibility rules do not provide for continued eligibility, the employer must offer COBRA. If the employer wants to provide for continued eligibility, a plan amendment would be required, but the amendment could occur later; obtain carrier or reinsurer consent, however.</p> <p>If eligibility terminates and the employee returns at the end of the furlough, it's likely the plan's terms will not impose a new waiting period.</p> <p>If eligibility continues during furlough, consider following FMLA rules for payment of contributions (employees have option to suspend coverage, pay as they go, or employer can pay premium for the employees and recoup it upon the employee's return. Consider using COBRA's 30-day grace period for premium payments</p>	<p>Eligibility is typically straightforward. Coverage will generally terminate, absent a provision providing eligibility during a layoff, which is rare.</p> <p>If there is no continued eligibility provided for under the plan, employer must offer COBRA due to layoff. If the employer wants to provide for continued eligibility, a plan amendment would be required, but the amendment could occur later; obtain carrier or reinsurer consent, however. Another option is to subsidize COBRA. See COBRA section below.</p> <p>When the employee returns following the layoff, the plan's terms likely impose the waiting period again. If the employer wants to provide for waiver of the waiting period, a plan amendment would be desirable, if not outright required, but the amendment could occur later; obtain carrier or reinsurer consent, however.</p>	<p>Eligibility is typically straightforward. Plan likely will provide continued eligibility without any change, particularly where the leave is Family Medical Leave Act leave. An amendment may be needed to extend coverage beyond FMLA. If the employer intends to extend coverage in this way, obtain approval from the carrier or reinsurer, as applicable.</p>

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<b>ACA employer mandate issues</b>	<p>For furloughs, be aware of the many potential wrinkles under the ACA employer mandate.</p> <p>If the employee is in a stability period for which the employee must be treated as an ACA full-time employee (based on average hours per week or month over the prior measurement period), and eligibility is based on ACA full-time employee status, eligibility should continue even where the employee's hours of service drop to zero.</p> <p>Note that recently hired full-time employees have their ACA full-time employee status measured month to month until they've been employed through an entire standard measurement period. If the plan ties eligibility to ACA full-time status, these employees will lose eligibility during furlough and would need an offer of COBRA. If the employer does not desire loss of eligibility, a plan amendment is required. The amendment could occur later; obtain carrier or reinsurer consent, however.</p> <p>If coverage terminates for the employee while on furlough the employer may trigger ACA employer mandate penalties for failure to offer minimum essential coverage to at least 95% of its ACA full-time employees and their children.</p> <p>On the other hand, if eligibility continues, but pay is reduced, the coverage offer might become unaffordable and create the potential for ACA employer mandate penalties, unless the employer is using the federal poverty level or rate-of-pay affordability safe harbors.</p> <p>If the employee returns from furlough more than 13 weeks (26 weeks for educational institutions) after the unpaid furlough begins, the employee may be treated as a new hire for ACA employer mandate purposes. Accordingly, a new waiting period may be imposed if the plan so provides.</p> <p>If eligibility continues during furlough, but coverage terminates because the employee failed to pay premiums, the employer will be treated as having made the offer of coverage, for ACA employer mandate purposes.</p> <p>Note also that zero hours of service per week for an extended furlough during the current measurement period will affect the employee's ACA full-time employee determination for the ensuing stability period (e.g., the 2021 plan year). If the employer wants to protect the employees it must amend the plan to credit the employee with deemed hours of service, for plan eligibility purposes, for the period of furlough. The amendment could occur later; obtain carrier or reinsurer consent, however.</p>	<p>Eligibility is typically straightforward. Coverage will generally terminate, absent a provision providing eligibility during a layoff, which is rare.</p> <p>If there is no continued eligibility provided for under the plan, employer must offer COBRA due to layoff. If the employer wants to provide for continued eligibility, a plan amendment would be required, but the amendment could occur later; obtain carrier or reinsurer consent, however. Another option is to subsidize COBRA. See COBRA section below.</p> <p>When the employee returns following the layoff, the plan's terms likely impose the waiting period again. If the employer wants to provide for waiver of the waiting period, a plan amendment would be desirable, if not outright required, but the amendment could occur later; obtain carrier or reinsurer consent, however.</p>	<p>Eligibility is typically straightforward. Plan likely will provide continued eligibility without any change, particularly where the leave is Family Medical Leave Act leave. An amendment may be needed to extend coverage beyond FMLA. If the employer intends to extend coverage in this way, obtain approval from the carrier or reinsurer, as applicable.</p>

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<b>COBRA issues</b>	<p>Be aware of more wrinkles or potential wrinkles with furloughs than with paid leave or layoffs.</p> <p>If eligibility continues under the terms of the plan, COBRA need not be offered unless the employee's status quo changes in an adverse way (e.g., the employee is charged more than the active rate).</p> <p>If eligibility continues during furlough, consider following FMLA rules for payment of contributions (employees have option to suspend coverage, pay as they go, or employer can pay the premium for the employees and recoup it upon the employee's return. Consider using COBRA's 30-day grace period for premium payments.</p> <p>If eligibility terminates due to reduction in hours, offer COBRA. The employer may subsidize the COBRA premium (the subsidy is tax free). The employer will want to communicate that this action is taken specifically in relation to the coronavirus pandemic.</p> <p>Note that if the subsidy ends while the employee is still on furlough, the termination of the subsidy does not trigger a HIPAA special enrollment right (to leap to a spouse's plan, for example), but is a special enrollment right for ACA marketplace coverage.</p>	<p>Straightforward application of COBRA, in nearly all cases.</p> <p>COBRA must be offered due to termination of employment.</p> <p>The employer may subsidize the COBRA premium (the subsidy is tax free). The employer will want to communicate that this action is taken specifically in relation to the coronavirus pandemic.</p> <p>Note that if the subsidy ends while the employee is still on furlough, the termination of the subsidy does not trigger a HIPAA special enrollment right (to leap to a spouse's plan, for example), but is a special enrollment right for ACA marketplace coverage.</p>	<p>Paid sick leave typically does not trigger a loss of eligibility, unless the reduction in active hours results in a loss of eligibility. FMLA leave is protected leave, and the employee has a right to continue coverage during FMLA leave.</p> <p>COBRA must be offered as of the end of the FMLA period if the employee fails to return from FMLA leave (absent continued eligibility for coverage under the terms of the plan).</p>

**Section 125**  
**cafeteria plan issues**

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<p>Be aware of more wrinkles or potential wrinkles with furloughs than with paid leave or layoffs.</p> <p>A furlough is a cafeteria plan qualifying event if it affects eligibility for coverage or the employee represents that the employee is leaving to other minimum essential coverage elsewhere.</p> <p>Mere financial hardship is not a qualifying event. However, the risk to the employer of offering an accommodation (allowing the employee to drop coverage) under these circumstances, is low.</p> <p>If the employee loses eligibility and returns within 30 days, the employee's pretax elections are restored. If the employee returns after 30 days, the employer may allow the employee to make new elections.</p> <p>We think health flexible spending account elections could be handled as during FMLA leave: The employer may allow the employee to prepay (pretax) for the period of furlough, make after-tax contributions during furlough, suspend coverage during the furlough (claims incurred in that window would not be reimbursable), or the employer could fund the employee's FSA premium and recoup it upon the employee's return.</p> <p>Dependent care FSA elections can be changed (i.e., contributions reduced or terminated) where the child's child care or school closes and the employee obtains a different child care provider, even if it is the employee. When the child care or school reopens, and the child returns to child care or school, the elections may be changed again.</p>	<p>Pretax elections cease, but it is permissible for the plan to allow pretax contributions from severance pay, to pay COBRA premiums, for example.</p> <p>An employee who is terminated while a health FSA account balance is in a positive position (the employee has contributed more to that point in the year than the amount of reimbursement from claims), the employee may elect COBRA on the health FSA, but only to the end of the cafeteria plan year.</p>	<p>IRS regulations do not contemplate election changes due to paid leave.</p> <p>It is permissible to deduct pretax contributions from sick pay or other paid leave payments.</p> <p>Dependent care FSA elections can be changed (i.e., contributions reduced or terminated) where the child's child care or school closes and the employee obtains a different daycare provider, even if it is the employee. When the child care or school reopens, and the child returns to child care or school, the elections may be changed again.</p>

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<b>Short-term disability issues</b>	<p>If employee's expected return date is less than 30 days from date of furlough, coverage will likely continue without any change.</p> <p>However, review eligibility language focusing on actively at-work requirements and continued eligibility during a leave of absence. Amend the plan if necessary. If short-term disability is offered as merely a payroll practice, the employer can easily modify the program to cover employees on a coronavirus-related furlough.</p>	Coverage will terminate.	Coverage will generally continue during paid leave, but watch actively at-work requirements. Coverage during a period of disability may cease without a plan provision extending coverage beyond the FMLA period, for example.
<b>Long-term disability/group-term life insurance issues</b>	<p>If employee's expected return date is less than 30 days from date of furlough, eligibility will likely continue without any change.</p> <p>However, review eligibility language focusing on actively at-work requirements and continued eligibility during a leave of absence. Amend the plan if necessary.</p>	Coverage will terminate.	<p>Coverage will generally continue during paid leave. However, review eligibility language focusing on actively at-work requirements and continued eligibility during a leave of absence. Amend the plan if necessary.</p> <p>Coverage typically continues during paid FMLA leave. Afterwards, coverage will continue, if at all, under the terms of the policy.</p>
<b>Unemployment compensation issues</b>	Unemployment compensation is administered by the states. Unpaid furlough typically triggers entitlement to benefits, but unemployment compensation rules vary by state. Some states are modifying unemployment compensation rules to eliminate waiting periods for furloughs related to the coronavirus.	Laid-off employees are typically eligible for unemployment compensation. Some states are modifying unemployment compensation rules to eliminate waiting periods for layoffs related to the coronavirus.	An employee is typically not entitled to unemployment compensation when on paid leave or while receiving sick pay.

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<b>WARN Act issues</b>	<p>The federal WARN Act contains exceptions for furloughs by small employers (fewer than 100 employees), furloughs involving fewer than 50 employees at a single location, furloughs lasting for less than six months, and furloughs due to unforeseen circumstances. See the U.S. Department of Labor's <a href="#">Employer's Guide</a>.</p> <p>State mini-WARN laws are similar, but because they are not identical, they may cause issues for mass furloughs.</p> <p>WARN laws require advance notice of the mass furlough or pay and benefits for the notice period, where adequate notice cannot be supplied.</p>	Same rules as apply to furloughs, at left.	Not applicable.
<b>Retirement benefit accrual issues</b>	401(k) elective deferrals and employer matching contributions will stop. There is no distributable event. Hardship distributions are permissible under the recent CARES Act. Loans are available, and at increased limits, pursuant to the CARES Act. CARES Act-authorized changes may be implemented prior to a formal plan amendment.	401(k) elective deferrals and employer matching contributions will stop. The termination of employment is a distributable event. The CARES Act waives the 10% excise tax for early distributions, for distributions related to the coronavirus, on amounts up to \$100,000. The CARES Act rules apply to individuals with specific coronavirus-related issues. CARES Act-authorized changes may be implemented prior to a formal plan amendment.	401(k) contributions will generally continue, as will employer matching contributions.
<b>FMLA issues</b>	<p>If FMLA was scheduled to begin prior, or was scheduled to occur during the furlough, time off during the furlough should not be allocated against the employee's FMLA leave entitlement.</p> <p>An employee on FMLA should not be targeted for furlough. Furlough of an employee on FMLA is permitted if the employee is part of a nondiscriminatory group the employer puts on furlough.</p>	<p>FMLA entitlement ends with layoff.</p> <p>An employee on FMLA should not be targeted for layoff. Layoff of an employee on FMLA leave is permitted if the employee is part of a nondiscriminatory group the employer lays off.</p>	For employers with fewer than 500 employees, the Families First Coronavirus Response Act provides expanded FMLA protection. <a href="#">See our Alert</a> .
<b>State-mandated paid sick leave issues</b>	Employment has not terminated so employee would be entitled, if meeting eligibility criteria, to any state paid or mandated sick leave. Whether the employer is obligated to make payment will depend on state law.	Whether a laid-off employee is entitled to state paid or mandated sick pay will depend on the specific state laws.	Some state laws may require mandated sick pay to be paid before or in addition to any other accrued employer-provided benefits.



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