

Compliance Matters: Layoffs, Furloughs, and Recalls

Presented by
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Webinar 101

- You will get a copy of the slides and a recorded version of the webinar within 24 hours
- Please use the Q&A box for questions (not Chat)
- We would love to hear from you in the polls!

POLL #1

What types of COVID-19 related resources would be most helpful to you and your business?

POLL #2

How would you describe the current state of your HR department as a result of COVID-19?

Agenda

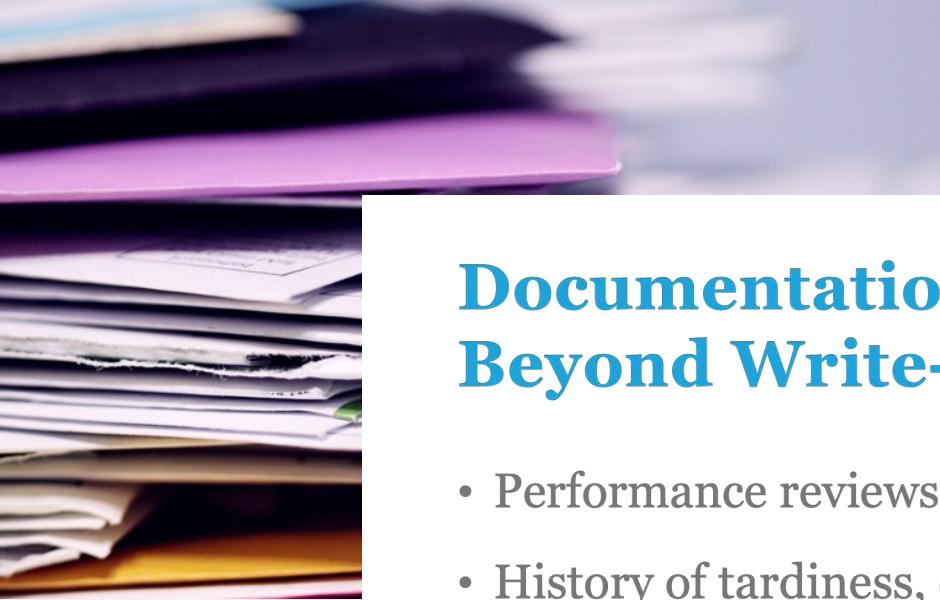
- Layoffs: Termination Tips and Traps
- Furloughs: Employment Limbo
- Recalls: Paperwork and Deciding Whom to Bring Back

Layoffs (they're really just terminations)



Documentation is Key

Unless you're letting everyone go—or everyone doing a particular job—you'll want to document why certain people were selected.



Documentation: Beyond Write-Ups

- Performance reviews (relativity matters)
- History of tardiness, documented by the login system
- Production or sales numbers, evidenced by pay stubs that show total production or commissions
- Emails or messenger conversations that never made it to “the file”
- Written requests that were not followed up on



Double Check for Bad Reasons

- Disability
- High-Risk Conditions
- Age
- Prior Use of Leave
- Pregnancy
- Sex, sexual orientation, religion, race, etc.



Final Paychecks

- Timely, per state law
- Include PTO, if necessary
- Don't include illegal deductions

Notice Requirements: Unemployment Insurance

- Notify employees of their right to file for unemployment insurance
- Determine if you have any UI obligations
- Gold Star: Provide additional info, FAQs, guides, and links to make their filing experience a little less stressful



Notice Requirements: Continuation of Benefits

- Provide COBRA or Mini-COBRA notices
- Gold Star: Provide information about the applicable health insurance marketplace, which may be more affordable than COBRA



Health Insurance Marketplace Options

If an employee is furloughed

Depending on the status of coverage from the employer, employees may qualify for a Special Enrollment Period. They may also be eligible for a premium tax credit to help pay for Marketplace coverage.

If an employee elects for COBRA continuation coverage

- Employees may still qualify for a Special Enrollment Period due to loss of coverage. They have **60 days** after loss of pre-COBRA job-based coverage to enroll in Marketplace coverage. They may qualify for premium tax credits.
- Even after 60 days, an employee enrolled in COBRA continuation coverage, may qualify for a Special Enrollment Period if their COBRA continuation coverage costs change because the employer stopped contributing.

Comply With WARN (if applicable)

The Worker Adjustment and Retraining Notification Act (WARN) requires employers to provide notice 60 days in advance of certain mass layoffs. This notice must be provided to affected workers (or their representatives), the state dislocated worker unit, and the appropriate unit of local government.

- Applies to employers with 100 or more “full-time equivalent” employees
- Does not apply to layoffs of less than six months
- There is an exception for unforeseen business circumstances (this is a judgment call that can be tested in litigation)
- If using the exception, employers must still provide as much notice as possible

Furloughs (a lot like terminations)



Once Again, Documentation is Key

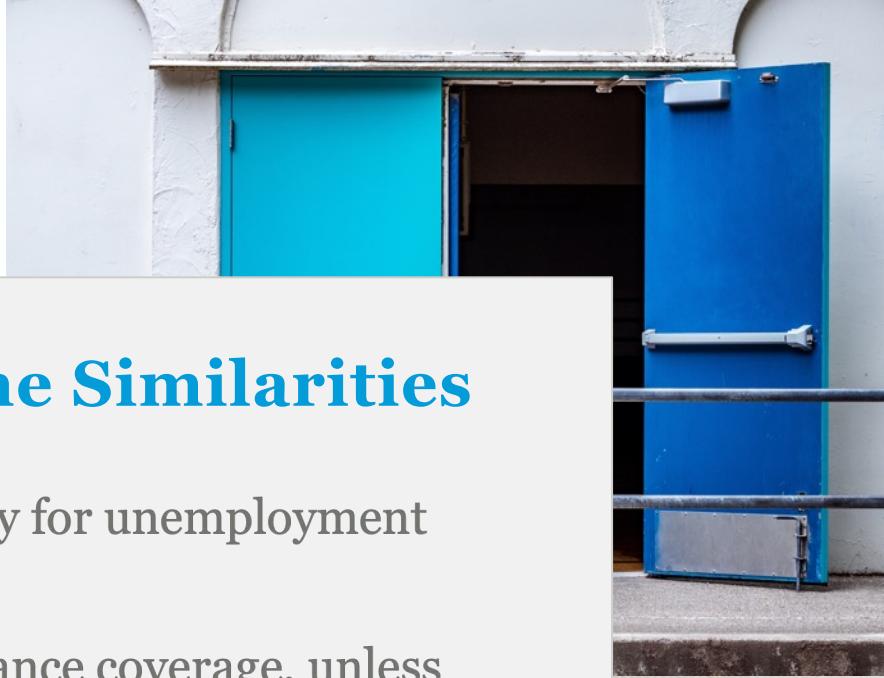
Unless you're furloughing everyone—or everyone doing a particular job—you'll want to document why certain people were selected.

Furlough v. Layoff: The Differences

- During a furlough, an employee is still “on the books.”
- PTO payout, if applicable, will generally not be required if you intend to recall the employee (provide a recall date or condition, e.g. the end of the stay-at-home order)
- The last paycheck received is not a final paycheck, so can be provided on your regular payroll schedule

Furlough v. Layoff: The Similarities

- Employees will be eligible to apply for unemployment insurance
- Employees may lose health insurance coverage, unless the furlough is very limited in duration or your plan allows it



Will Furloughed Employees be Eligible for Health Insurance?

Review your group policy or plan document. If the plan limits eligibility to employees who are regularly scheduled to work 30 hours or more per week and states that coverage ends when the employee ceases to be eligible (unless protected by the FMLA or similar law), then reduced hours or furloughs will cause the employee to lose coverage.

Plans must be administered according to their terms, so the employer cannot continue reporting the employee (and dependents) as active on its eligibility file to the carrier.

Can We Keep Covering Them Somehow?

Employers that want to continue eligibility for employees who have had their hours reduced or been furloughed should contact their carrier regarding options to amend the policy.

Many carriers are agreeing to changes, and a number of states are requiring carriers to give employers the option of maintaining active coverage for furloughed or reduced-hours employees.

What if We Use the ACA Look-Back Method?

Some applicable large employers (those required to offer health insurance or else pay a penalty under the ACA) use a look-back measurement method to determine eligibility for group medical coverage.

If using that method, then employees who are deemed full-time employees for a stability period will not lose eligibility during that stability period even if they are furloughed or their work hours are cut (if they remain employed).

Notice Requirements: Continuation of Benefits

- Provide COBRA or Mini-COBRA notices
- Gold Star: Provide information about the applicable health insurance marketplace, which may be more affordable than COBRA (see slide in layoffs section)



Notice Requirements: Unemployment Insurance

- Notify employees of their right to file for unemployment insurance
- Determine if you have any UI obligations (like filing on a furloughed employee's behalf)
- Gold Star: Learn about *partial unemployment* eligibility and *work share programs* in your state



For More Gold Stars, Provide Resources

- State unemployment insurance department
- Governor's website for updates on government orders
- State health department and/or the CDC for the latest health safety guidance
- Local food bank or other charities that may be assisting those in need
- Renters' resources
- Information about Marketplace insurance options
- Employee Assistance Program (EAP), if you have one and furloughed employees are still eligible to use it
- Contact information for your payroll and HR people who can answer additional questions



Keep In Touch

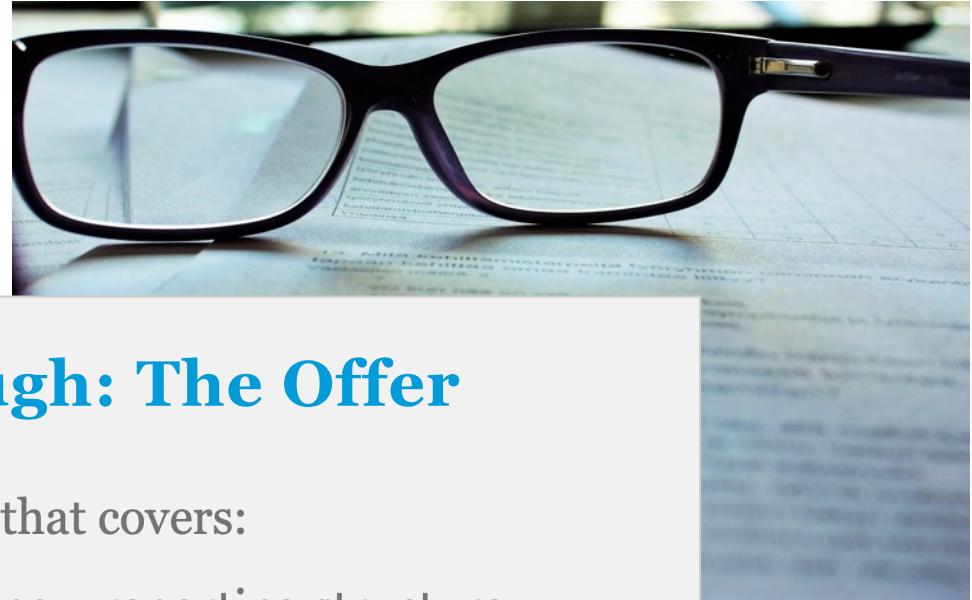
- Any visibility into your plans and thought process will help
- Communicate weekly
- Share what you know, even if it's not much

Recalling Employees (this part is more fun)

Rehire After a Layoff: Paperwork

- Treat them like a brand-new employee with respect to offer letters, benefits, reporting to the state, and most new hire information
- They should fill out the new W-4
- A new I-9 is not necessary if they are rehired within three years of completing their original





Recall From Furlough: The Offer

Provide an offer of recall letter that covers:

- Any change to their position, pay, reporting structure, or responsibilities
- Steps you are taking and policies you are implementing to keep the workplace safe
- How they should confirm (or deny) that they will return; provide a deadline for their response

Recall From Furlough: Benefits

Consult the terms of your health insurance plan (or your broker) about how to get furloughed employees who lost coverage back on your plan.





Choosing Whom to Recall

If you're bringing everyone back, *high five!* Carry on. If you're bringing some people back but not others, tread carefully.

Consider Business Needs

- Will you be reopening with significantly reduced capacity?
- What does the world post-lockdown look like for your industry?
- Do you need new skill-sets to help you adapt for future business success?
- If your business survived 2008-2010, what products or services were most and least resilient?

Create Job-Related Criteria

After you have a sense of which departments or how many people from each department you'll be calling back, turn your focus to individuals.

Potential criteria might include:

- Unique or difficult-to-replace skill sets
- Overall performance
- Seniority
- Demonstrated ability and willingness to do work outside of their usual assignments

Do Not Consider

- Age, 40+ (potential sneak attack via “disparate impact” if you are cutting high earners first)
- Disability or high-risk conditions
- Use of leave or requests for reasonable accommodations
- Pregnancy
- Sex, sexual orientation, religion, race, color, citizenship or immigration status, military status, or other characteristics protected by state or local law



Don't Do Employees Any Unasked-for “Favors”

It may be tempting to hold off on calling back employees who are older or who have disabilities or conditions that make them high risk.

But *it's not your job* to make health decisions for them. Deciding to not bring an employee back based on age or disability would be a clear case of discrimination.



Do Grant Reasonable Accommodations

- Last to be recalled
- Extended unpaid leave (even when everyone else has returned)
- Working from home
- Wearing additional PPE
- Taking additional hygiene and cleaning breaks



Compassion is Legal

If an employee has a good reason to either return ahead of others, or stay away longer, feel free to consider it.

(Particularly if they have a high-risk family member.)



Documentation – Still Key!

Unless you're recalling everyone—or everyone doing a particular job—you'll want to document why certain people were selected.

Upcoming Webinars



► Workplace Health & Safety Post COVID-19

Thursday, May 21, 2020

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Audience: HR, Business Owners

9:00 AM PT / 12:00 PM ET As businesses prepare to reopen offices and workplaces, ThinkHR is getting thousands of questions regarding the responsibility to provide safe and healthy working environments. Join us for our upcoming webinar on Thursday, May 21st as Kara Govro, Senior Legal Editor, discusses what employers...



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Thursday, June 4, 2020

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Audience: HR, Business Owners

10:00 AM PT / 1:00 PM ET Based on overwhelming feedback from over 20,000 HR professionals, there's increasing demand for guidance and support on COVID-19 related compliance. Over the next few weeks, ThinkHR will be exploring a number of compliance-related topics through webinars and white papers. Join us for our...

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Thank You

