

Questions Related to Furloughs

The main **difference between a furlough and a layoff** is that a **furlough** allows workers to retain their jobs, at least for the time being. The general expectation is that an employee will return to work following a furlough (often a period of a few weeks or a month), although not always. A **layoff** results in an employment termination. Although some layoffs are temporary, there is less expectation of recall to work.

Furlough—Furloughs are mandatory time off from work with no pay. They generally are implemented by employers as a cost-saving measure during tough economic times or otherwise slow periods for a business. An employer can permit or require an employee to use vacation time during a period of furlough. An employer also can refuse to permit an employee to use vacation time during a furlough.

While no one wants to be out of work, furloughs can be beneficial to either employers, employees, or both, depending on the specific circumstances:

- **Avoiding layoffs:** Even though employees are not receiving paychecks during a furlough, they have more assurance that they will have jobs in the future. This can provide some level of comfort, especially if employees know the furlough will be for only a short period of time.
- **Reduces rehiring needs:** While there's no guarantee that all furloughed employees will return, employers can be fairly confident that they'll have experienced workers ready to return as soon as the doors re-open for business.
- **Furloughed employees are eligible to apply for unemployment benefits while on furlough.**
- **Furloughed employees are able to stay on the employer's medical insurance and other benefit plans at the level that they currently participate in, provided they remain eligible under their employer's plan.** They must pay their share of the monthly premiums but the employer must continue to fund its share of the premiums. Payment arrangements between the employee and employer may also be arranged in circumstances where an employee cannot afford his share of the premium while on leave.
- **The No Work Rule:** A furloughed employee can't so much as take a phone call or answer e-mails. If a salaried employee does any work while on furlough, the employer must pay them the equivalent of their salary for the entire workweek. If an hourly employee works while on furlough, the employer must pay them for the time worked. Payment for time worked must be paid in the pay cycle in which it is worked. Payment may not be postponed until the employee returns to their regular work hours.

Layoff—A layoff results in an employment termination. Employers must pay all wages, including accrued but unused vacation time, on the day of the layoff. Employees will lose benefit eligibility and must apply for COBRA (or mini-COBRA) to continue their health insurance and will be responsible for the entire premium, plus an administrative fee. Employees may file for unemployment benefits. While laid-off employees sometimes are brought back to their jobs, it's less likely to be the case.

Reduction in hours—A dentist may alter a non-exempt employee's schedule. An employee whose schedule is reduced may be eligible to collect unemployment benefits for any lost wages. Before

reducing an employee's hours, please understand that you may impact benefits eligibility. We encourage you to discuss this scenario with your insurance broker.

An employer that temporarily alters the work schedule of an exempt employee and reduces their compensation accordingly risks losing the exemption status. We encourage you to seek more detailed advice on this subject.

Questions from Members on Furloughs and Layoffs

1. Because of the three-week shutdown, my non-exempt/hourly hygienist will not be working and therefore will be furloughed. She will apply for unemployment insurance. She is over 65 and so I pay 90% of her Medicare. My question is, if she is furloughed, do I still have to pay the 90% of her Medicare bills?

Response: Yes. We recommend that you continue to pay benefits just like you would with an employer-sponsored plan.

2. How do you suggest dealing with the possibility of furloughing all clinical employees and paying the business staff if they are working on a part-time skeletal schedule?

Response: A layoff or furlough is not an all or no one policy; however, caution is advised around any decision that may be perceived by an employee as being discriminatory. If you need the business staff to be working part time, that is fine. They will be eligible to apply for unemployment benefits for the reduction in their wages due to their reduced hours.

3. Dental hygienists are completely not seeing any patients, and dental assistants are staying home and if they are asked to assist during an emergency, are then coming in to work. Can they still be considered to be on furlough?

Response: Individuals collecting unemployment are required to report their work status to unemployment each week. Employees who are called to assist during an emergency still are considered on furlough, but the amount of unemployment benefits that an employer pays staff may serve to reduce the amount of unemployment benefit that an individual receives for that week.

4. Would it be better to put everyone on furlough, keep track of the minimal hours worked by business personnel and dental assistants, and compensate them for these hours when the office reopens?

Response: This is a definite **NO**. Wage and hour rules and regulations require that employees be paid for time worked in the pay cycle that it is worked. As such, payments for hours worked while the office is closed cannot be delayed until the office reopens.

5. Can a furlough date be made retroactively?

Response: The furlough can be retroactive to the last day that an employee was paid for services.

6. An associate dentist gets a base salary and then we calculate her collections each month. If her collections are over the base, she gets an additional money. If it is under, she still receives her salary. Does the owner have to pay her salary for the furloughed time off (e.g., two weeks)? She is on call for the office.

Response: An employer is not required to pay for “on-call” time if the employee is not required to be at the employer’s premises and if the employee is able to effectively use this time for his or her own personal purposes. An employer has no obligation to pay an employee their wages while they are on furlough unless they work during the week. Employers are responsible for paying furloughed workers for any time worked while on furlough. Non-exempt (hourly) employees must be paid for any hours worked. Exempt (salaried) employees must be paid their full weekly salary if they work *any* portion of the week.

7. My employer contacted our office this morning stating although hourly paid hygienists will be furloughed at least until April 6, 2020, and that he would pay us our regular/average weekly pay for the next two weeks, but when returning to work that must repaid. He is not requiring us to use sick or vacation time. It seems this is basically an advance on our paychecks, correct? Is this legal? Any advice would be appreciated.

Response: An employer can advance money in the form of a loan if both the employee and employer agree to the terms of the loan (in writing is strongly recommended). If the employer agrees to pay employees for time not worked, that is fine but employees cannot be expected to repay those payments.

8. If you furlough all your employees, do you need to then call them all back to work or can you keep the less-needed workers on furlough?

Response: An employer may bring employees back to work on an as-needed basis and is not required to have all employees return to work at the same time. Caution must be exercised around job discrimination, particularly if you are allowing certain employees to return to work while keeping others on furlough.

9. Can the employer select particular employees to furlough, so as not to discriminate?

Response: Yes, but caution must be exercised around job discrimination, particularly if you are laying off certain employees while furloughing or continuing the employment of others. You cannot lay off an employee because of certain protected characteristics (e.g., age, race, religion, or gender).

10. If I furlough employees, do I have to pay them for holidays that they normally get paid for that fall during the furlough period, such as Patriot’s Day in April and Memorial Day in May?

Response: No, an employer does not have to pay for holidays while an employee is on furlough; however, we recommend you review your specific employee policies around holidays. If your policy is unclear about whether an employee has to be actively working in order to receive holiday pay, you should clarify this when you notify employees about the furlough.

If the employee is an exempt (salaried) employee and the holiday falls in a week in which the employee did work, employers must pay salaried employees their full weekly salary if they work any part of the week.

11. Could the MDS please help guide us with what this means since a furlough is probably not likely at this point?

Response: If you need to reduce your payroll expenses, at least temporarily during this period of office closure, you have several options to consider:

- Furlough some or all of the employees if the shutdown is expected to be temporary
- Lay off some or all of the employees
- Reduce employee hours
- Reduce employee pay without reducing employee hours.

Although it may not result in a significant expense reduction, you of course can continue to pay employees without requiring them to report to work. You also may require employees to use their unused vacation time for days they are not working.

12. I am furloughing an employee and willing to continue to contribute to her health insurance; the employee pays a portion of the health insurance. The employee is asking if she is eligible for MassHealth rather than continuing to contribute her portion to current insurance.

Response: Given that the employee is covered under an employer's plan, she may not be eligible for MassHealth but we would recommend that you contact MassHealth to confirm.

13. If an employee is furloughed, can the employer pay the employee's portion of the health insurance or waive the employee's need to pay the employer?

Response: The employer can choose to waive or advance the employer's share of the insurance premium, but it must do so for all employees on unpaid leave. If the plan is to reimplement an employee contribution to the plan after the furlough, we would recommend that this temporary change for a specified period be documented in writing to all furloughed employees. We suggest that you review your plan documents for any issues around furloughs. Certain plans also have issued furlough-related guidance.

14. Are we allowed to show "favoritism" to a particular employee to come in on an emergency basis? Are we supposed to rotate who gets called in?

Response: There is no requirement that employees called in for emergency procedures be called in on a rotating basis; however, caution must be exercised around job discrimination, particularly if you are allowing certain employees to come in to work while keeping others on furlough.

15. As a salaried/exempt employee, I have now learned (through this webinar and another dental flyer circulating) that I need to be paid for this full workweek. How is my employer required to pay me? Can my employer require me to use my vacation time for the remainder of my full workweek and

then this will be considered a full week of pay? Or are they required to pay out my regular salary without requiring me to use any paid time off?

Response: As a salaried/exempt employee, your employer is required to pay you for the full workweek if you work any part of it, but the employer may require you to use PTO for any days that you did not work in that week in order to pay you for the full workweek.