

COVID-19: CONSIDERATIONS FOR RETAILERS ON EMPLOYEE FURLOUGHS IN U.S. AND CALIFORNIA

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As an alternative to laying off employees, many retailers may be considering furloughs – unpaid leaves or drastic reductions in work hours or work schedules – that allow them to retain employees and possibly continue to provide certain benefits. Retailers should be aware that furloughs still likely trigger notice requirements under state WARN laws, and in California may be considered a termination of employment requiring payment of final wages.

This post provides an overview of furlough considerations with respect to unemployment benefits, WARN laws, possible termination implications, reduced hours or work share, use of vacation time, and benefits.

Unemployment Insurance

Furloughed employees, as well as many employees with reduced hours, are eligible for unemployment insurance benefits. In California, Governor Newsom's [Executive Order N-25-20](#) removes the waiting period to receive benefits. More information on filing for unemployment benefits is available [here](#).

WARN LAWS

The federal Worker Adjustment and Retraining Notification (WARN) Act requires employers with at least 100 employees who lay off at least 50 employees to provide advance notice of the "employment loss." However, furloughs of less than 6 months do not qualify as an employment loss under the federal law. At least 20 states have WARN laws, and the laws vary from state to state.

California's WARN law, which applies to employers with 75 or more employees who lay off at least 50 employees, applies to furloughs exceeding a "de minimis" amount of time. The California Court of Appeal has held that a four- or five-week furlough is not de minimis, but did not otherwise provide guidance on what is de minimis.^[1]

Governor Newsom's [Executive Order N-31-20](#) temporarily suspends the 60-day notice requirement for those employers that give written notice to employees and satisfy other conditions. The order does not suspend the WARN law in its entirety, or for all employers. More information is available on the [COVID-19 web page](#) of the California Employment Development Department (EDD).

TERMINATION IMPLICATIONS

In California, a furlough may be considered a termination of employment requiring payment of final wages. California's Division of Labor Standards Enforcement (DLSE) took the position in opinion letters in [1996](#) and [1993](#) that a furlough will not be considered a termination – provided that a return to work date is specified, and it is either within the payroll period, or within 10 days. Any termination of employment in California requires that the employer pay final wages on the date of discharge, or be subject to substantial penalties.^[2] The California Chamber of Commerce is [seeking clarification](#) from the California Labor Commissioner on final pay rules for furloughs caused by the COVID-19 crisis.

PARTIAL FURLOUGH AND WORK SHARE

Reduced work hours or partial furlough, where an employee works a reduced amount of hours or alternate weeks, may be an option that avoids termination implications and allows an employee to continue to receive benefits.

California's [Work Sharing Program](#) allows employers to retain trained employees but reduce their hours and wages, which can be partially offset with unemployment insurance benefits. At least 10 percent of an employer's workforce must be affected, and their hours must be reduced by at least 10 percent, but not more than 60 percent. More information is available on EDD's [Work Share Program](#) web page.

Retailers should be aware that while hourly employees can be paid based on the reduced number of hours that they work, salaried employees must be paid their full salary for any week in which they do any work.

Reduced hours may also have implications for benefits, as discussed below.

PAID TIME OFF

As stated above, if a furloughed employee is considered to be terminated under California law, all final wages, including accrued vacation and PTO, must be paid at the time of discharge.

If a furlough does not amount to a termination of employment, the DLSE's [1993 letter](#) states that employers can continue to follow their internal policies and procedures concerning when vacation and PTO can be taken. Employees may want to take advantage of this to cover the furlough, and many employers are encouraging them to do so.

BENEFITS

A reduction in hours or furlough may affect an employee's ability to remain on the employer's plan. An employer may be able to amend the terms of the group health plan to permit coverage to continue. Employers with both insured and self-insured plans should coordinate with any third-party insurer or third-party administrator when implementing any amendment. Employers generally may opt to cover or reduce premiums of furloughed employees who continue coverage.

A furlough or a reduction in hours that causes loss of health insurance likely requires issuance of COBRA notices advising that the employee can continue to receive health coverage if they timely elect to do so and pay the required premiums. Employees who lose coverage can also apply to receive health insurance under the Affordable Care Act. For more information or to apply, click [here](#).

[1] *International Brotherhood of Boilermakers, etc. v. NASSCO Holdings Inc.*, 17 Cal. App. 5th 1105 (2017) .

[2] Cal. Labor Code §§ 201, 203.

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