

Workforce Reductions: Advice and Guidance for Employers and Employees

Introduction

It is always a difficult decision to furlough or lay off employees. As the COVID-19 crisis deepens, there may be increased need for solar companies to carefully address these challenges. To help companies navigate the process, SEIA has developed this brief overview on what companies should consider. The overview will touch on the differences between furloughs and layoffs and guidance and steps in making these hard choices.

Note: This guide is written for background purposes and not intended to provide legal advice. The guide does not go over every nuance of federal and state laws. For a more detailed application for your specific situation, please consult a legal professional.

Furloughs, Layoffs & Reductions in Force

Companies often use these three terms interchangeably to describe a reduction in the number of employees. However, each term has its nuances and it important to understand the differences between each option.

Furloughs are temporary, unpaid leaves for employees that can be due to an employer's unique circumstances or broader events. The leave may be short-term or long-term, but the intent is for the furloughed employees to come back to the company or have their hours restored once the employer's circumstances stabilize. Furloughed employees continue to receive their benefits and pro-rata salary. In some states, affected employees are eligible for unemployment benefits proportional to their reduction in hours. This arrangement is referred to as a Work-Share program. The recent Families First Coronavirus Response Act includes funding for states to establish or expand Work-Share programs.

Layoffs are when an employer terminates an employee but there is an understanding that the employee is eligible for rehire if the employer's situation improves. When the employee is terminated, they are eligible for unemployment benefits, paid time off (PTO) payouts, and COBRA health care benefits.

Reductions in Force occur when an employee is terminated, and the company does not intend to fill the position because either the position or department has been eliminated. Like a layoff, affected employees are eligible for unemployment benefits, paid time off (PTO) payouts, and COBRA health care benefits.

Conducting Furloughs

For furloughs and reduction of payment, considerations include whether the employee is hourly or exempt, if the furlough is voluntary or mandatory, and the schedule or timeline. Under federal guidelines, a company may reduce the number of hours an hourly employee works and only pay them for hours worked.

Exempt employees – salaried employees in administrative, professional, and executive positions who make a certain amount per week – must be paid for the entire week if they worked any part of the week or were ready, willing, and able to work but did not have any work assigned to them. However, an employer may reduce the salary of an “exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements” and the employee still meets the minimum salary requirements. See [Department of Labor guidelines here](#).

Workforce Reductions: Advice and Guidance for Employers and Employees

Conducting Layoffs

Conducting layoffs is a difficult decision and process for employers. It is important for businesses to have a plan so that the layoff is conducted in a thoughtful, compliant manner. Employers should consider these steps:

Employee Selection

Evaluate the businesses' future structure and needs when identifying which employees to retain or let go. Some factors to consider include performance, skill sets, and experience. Protected characteristics such as leave status, whistle-blower status, race, gender, age (40 or older), national origin, and genetic information should be avoided. Some states have protected characteristics in addition to those protected under federal law. Review the list of selected employees to check if a disparate impact exists. If a protected class makes up a disproportionate number of the affected employees, you should review and substantiate the list.

WARN Notices

Depending on the size of the company and number of employees terminated, or sometimes even furloughed, the business may have to give advanced notice to the state under the Worker Adjustment and Retraining Notification (WARN) Act. The state will coordinate with the business to provide information to workers about employment and retraining services and give affected workers sufficient time to prepare for the job transition.

Companies with at least 100 employees and plans to lay off at 50-499 employees (excluding part-time employees) at one site, assuming the layoffs affect least 33% of the employees, must send a WARN notice to the appropriate state office at least 60 days before the terminations start. Layoffs of 500 employees or more automatically trigger WARN notices.

The WARN Act's 60-day notice requirement has three exceptions: 1) faltering company; 2) unforeseeable business circumstances; and 3) natural disaster. The faltering company exception is narrowly construed and applies when the company is finding new capital of business to stay afloat and giving the WARN notice would ruin that opportunity. The unforeseeable circumstances exception applies to developments a business could not have reasonably expected at the time notice should have been provided. The natural disaster exception concerns closures due to natural disasters such as earthquakes and floods.

Note that states may have their own WARN-style laws which may have additional requirements or apply to smaller companies or layoffs.

Older Workers

The Older Worker Benefit Protection Act (OWBPA) regulates the use of releases of age discrimination claims in exchange for severance. This applies to employees 40 years old or older. Releases must be knowing and voluntary and meet the following requirements:

- In writing;
- Written in a manner calculated to be understood by the worker;
- Specifically refers to rights or claims arising under ADEA;
- Contain no mandatory waiver of claims arising after date of execution;

Workforce Reductions: Advice and Guidance for Employers and Employees

- Provide something more than what the employee is entitled to;
- Advise the employee to consult an attorney;
- Give the employee 21 days to decide; however, this time is increase to 45 days when two or more older workers are being laid off; and
- Give 7 days for the employee to rescind the agreement.

In addition, during a layoff, the company must provide in writing identify the targeted employees, and secondly, the affected employees must be informed in writing.

- Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
- The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Severance, Payouts, and Other Benefits

Companies often provide severance packages to laid off employees. While federal law does not require severance packages, such packages can help reduce the likelihood of lawsuits. States may have their own severance requirements. Severance packages may cover topics like salary, vacation, health benefits and counseling.

Some states, such as California, require employers to pay out unused paid-time-off (e.g., vacation time) to employees laid off while other states do not mandate such payouts. In addition, employers should also review their employment contracts' provisions regarding paid-time-off payouts.

Employees affected by layoffs or reduction in hours may have the right to continue their health benefits under a group health plan for a minimum of 18 months under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). The employer must have had at least 20 employees. Some states have their own COBRA-style laws that apply to businesses with fewer than 20 employees.

Executing Layoffs

The meeting with the affected employees will not be easy. Employees may have many emotions: anger, confusion, and fear. It is important that the employer be sympathetic, prepared, and professional. The employer should be ready to walk through the reason for the layoff, COBRA benefits, outplacement services, severance package, and rehiring process. Other topics that should be addressed include unemployment benefits and other programs for laid off individuals.

During this time, you should consider explaining to the remaining employees that the layoffs occurred, the reason for the layoffs, and the company's financial position and future plans. Other employees will be worried and it is important to maintain honest, transparent communications.

Unemployment Benefits

While each state's unemployment benefits program is different, the recent Coronavirus bill passed on March 18th directs states to ease eligibility requirements and expand access for workers affected by Coronavirus layoffs.

Workforce Reductions: Advice and Guidance for Employers and Employees

State Specific Considerations

Each state has their own laws regarding layoffs and unemployment which may impose more requirements on businesses than federal laws. This section will touch on some key states with their own notice requirements (a.k.a., mini-WARN Act).

Some states have WARN-like laws that apply to smaller companies or layoffs. Below is a list of some key states with mini-WARN Acts in place. Please note that there may be additional requirements to each state law.

California recently [suspended its WARN notice requirements](#). Otherwise the law applies to covered establishments that employ or have employed at least 75 employees (both full and part-time). The notice requirements are triggered when there is either a plant closing or a layoff of 50 or more employees during a 30 day period.

Hawaii's [law applies to companies](#) with at least 50 employees that lay off at least one employee at a single site of employment.

Illinois's [law applies to companies](#) with at least 75 employees who lay off at least 33% of employees and at least 25 employees or 250 or more employees

New Hampshire's [law requires companies](#) to file a notice when layoffs will affect at least 25 employees

New Jersey's law currently follows the federal law except that severance requirements apply if a company fails to provide sufficient notice. Starting July 19, 2020, [the law targets companies](#) with 100 or more employees (both full and part-time). Notice requirements are triggered when 50 or more employees are laid off, presumably state-wide. In addition, notice is increased from 60 to 90 days and severance is mandatory in all layoffs.

New York's [law applies to businesses](#) with 50 or more employees in the state. Notice requirements are triggered by 1) closings affecting at least 50 employees; 2) layoff affecting the greater of 25 employees or 33% of the workforce; or 3) layoffs of at least 250 employees.

Tennessee's [law applies to companies](#) employing 50 to 99 individuals and the notice requirements become effective when the employer terminates at least 50 employees.

Wisconsin's [law applies to companies](#) with at least 50 employees in the state. A business closing or mass layoff triggers notice requirements. A business closing is a closing of either one site or multiple facilities in the same municipality that affects at least 25 employees. Mass layoff is the great of 25 employees or 25% of the workforce or at least 500 employees.

Some states require notice to state agencies but not to employees or may encourage, but not require, notices to employees:

- **Georgia** [requires companies](#) laying off 25 or more employees on the same day for the same reason to contact the Georgia Department of Labor.
- **Maryland** has [voluntary guidelines](#), similar to WARN Act, for providing notice when layoffs occur. In addition, Maryland employers have to [notify their local Office of Unemployment Insurance](#) when laying off 25 or more employees for a common reason for periods in excess of 7 days.
- **Ohio** companies who lay off at least 50 employees within a seven day period must provide the state with notice of the layoffs, number of affected employees, and date of the layoffs