



## UNEMPLOYMENT AND LAYOFFS DURING THE COVID-19 PANDEMIC

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**In the wake of the Coronavirus pandemic, employers are facing serious decisions about how to keep their businesses afloat. With payroll topping the list of costs for most employers, many companies are having to consider some type of furlough or layoff of their employees. This is especially true for business impacted by local government shutdowns. Here are some general considerations for employers thinking about a Coronavirus-related layoff or furlough.**

### **What is the difference between a furlough and a layoff?**

The Texas Workforce Commission (TWC) considers a furlough a type of temporary layoff. A furlough typically requires employees to work fewer hours or take a short-term mandatory leave. For example, a furlough could mean reduced hours by all or certain groups of employees. It could also mean staggered work weeks by furloughing one group of employees during week one and another group during week two, and alternating back and forth. Employers must be careful when furloughing exempt employees so that they continue to pay them on a salary basis and do not jeopardize their exempt status under the federal Fair Labor Standards Act (FLSA). A furlough that requires a full workweek of leave is one way to accomplish this because the FLSA says that exempt employees do not have to be paid for any week in which they perform absolutely no work. Depending on the type of furlough, employees may technically remain employed and be able to retain their benefits through the company's group health plans. Employers should talk with their insurance brokers or carriers about how a furlough would impact their group coverage. The general idea behind a furlough is that the majority of employees share some hardship as opposed to a few employees losing their jobs completely.

A layoff occurs when employees are separated from employment because the employer has no more work available, eliminated the employee's position or closed the business. A layoff can be permanent or temporary. A temporary layoff occurs when the employee is separated from employment because there

is not enough work for the employee, but the employer believes this condition will change and intends to recall the person when work again becomes available. Employers should talk with their insurance brokers and carriers about how long they can or should keep laid off employees on their group health plans and when COBRA coverage would apply.

### **Are there alternatives to a layoff?**

Yes. The TWC is encouraging employers to consider Shared Work Plans as an alternative to mass layoffs. Under a Shared Work Plan, the employer reduces hours or furloughs workers, but the employees still qualify for partial unemployment benefits to supplement their income.

The eligibility requirement for a Shared Work Plan in Texas are:

- The percentage of reduced hours can be different for different individuals, as long as the reduction in normal weekly hours ranges from 10 percent to 40 percent each week, depending on plan specifications. The range of hours worked may vary under Shared Work rules. TWC calculates the number from the number of hours you specify as normal full-time employment. The figure may differ for various plan participants;
- The reduction in hours must apply to at least 10 percent of the employees in an affected unit;
- A shared work plan must describe how the employees will be notified in advance of the plan, if possible;
- A shared work plan must be an alternative to layoffs and you must provide an estimate of the number of employees who would be laid off if you do not participate in a shared work plan;
- If you currently provide fringe benefits, you must continue to provide these benefits for the employees in the shared work plan. Fringe benefits include health insurance, retirement benefits, paid vacation, holiday or sick leave, or other employee benefit;
- Employees participating in a shared work plan may participate in training, such as employer-sponsored training or TWC-approved training, to enhance their job skills;

Employers wanting to implement a Shared Work Plan, can submit an application online in Texas.

Employers can visit the [TWC website](#) for more information or to submit a plan. Other state unemployment agencies may have similar programs. Employers in other states should consult their local state agency website for more information.

### **Will my employees qualify for unemployment benefits if my business has to conduct a furlough or layoff?**

Probably yes. To be eligible for unemployment benefits, the person must be either unemployed or working substantially reduced hours through no fault of his or her own. This would include a furlough (depending on how substantial the reduction in work hours is) and a layoff. Employees may also qualify for partial unemployment benefits through a Shared Work Plan.

**What is the process to apply for unemployment?**

Employees can submit applications for unemployment on the Texas Workforce Commission website.

The Texas Workforce Commission also allows employers to submit a Mass Claim Request on behalf of their employees to streamline the unemployment benefit claims process. For employers conducting large layoffs (that do not intend to dispute employee claims for unemployment benefits, this can be a useful tool to get employees their benefits faster and reduce the company's administrative burden of being inundated with a written notice of application for every single employee who applies for benefits on his or her own.

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**When will employees start receiving benefits?**

In response to the Coronavirus pandemic, Texas Governor Abbott suspended the one-week waiting period for Texas employees seeking unemployment benefits. This means that workers who qualify for benefits will start receiving benefits immediately after their claim is approved.

**Will my unemployment insurance tax account be charged back and will my rates go up?**

Maybe. The TWC has stated that companies subject to a mandatory shutdown by government authorities may seek protection from chargebacks under Section 204.022 of the Texas Labor Code. So those companies that have been forced to close due to a government order (some examples in North Texas include restaurants, gyms and theatres) will be protected from chargebacks.

Section 204.022 of the Texas Labor Code also allows employers to seek protection from chargebacks when a layoff is "based on a disaster that results in a disaster declaration by the governor." On March 13, Texas Governor Abbott declared a state of disaster for all counties in Texas because of the COVID-19 pandemic. The TWC has not issued guidance on whether it will allow all businesses conducting COVID-19-related layoffs to seek protection from chargeback (i.e., what its interpretation of "based on a disaster" is). However, employers may be able to argue that their tax accounts are not subject to chargeback for layoffs based on the pandemic. Employers should carefully document that any COVID-19-related layoffs are, in fact, based upon the pandemic and/or a government shutdown order, as applicable, if they wish to seek protection from chargeback in the future.

Shared work benefits paid out under an approved Shared Work Plan are typically not charged back to the employer's account if later reimbursed by the federal government. With the federal government considering aid to state unemployment agencies, some of these benefits could be reimbursed, which would mean the employer's account would not be subjected to chargeback.

**Can I conduct a layoff after April 2 if I have employees on protected leave under the new Families First Coronavirus Response Act?**

Yes. Under the new law, the general rule is that an employee has to be restored to the same or equivalent position when the leave expires. However, there is an exception to this rule when the position held by the employee at the time the leave started no longer exists because of economic conditions or changed operating conditions of the employer that affect employment that are caused by the Coronavirus pandemic.

If business conducts a layoff of employees on Coronavirus-related leave because their positions (or equivalent positions) no longer exist, the business must make reasonable efforts during a one-year period to restore the employees to the same or equivalent position. That one-year period begins the earlier of: (i) the date when the qualifying need related to pandemic concludes; or (ii) the date that is 12 weeks after the date on which employee's leave commences.

Because we have no guidance yet on how the new law will be enforced or interpreted there may be additional risk associated with a layoff of employees on protected leave. If you are considering a layoff of employees on protected leave, consult with an employment attorney to talk through the risks and the most up to date information available.

If you have questions or would like to discuss further, please contact our [Labor, Employment and Benefits team](#).

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Labor and Employment

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