

Staffing Considerations in Connection with a Temporary Office Closure

In an effort to support our members' practices and to summarize some of the more frequently asked employment related questions as a consequence of the COVID-19 pandemic, we have assembled this Q&A. Please note that this guidance is not a substitute for legal advice, and we recommend that you seek appropriate legal counsel for answers to more specific questions.

1. Do I need to pay my staff during this shut down?

Employers must be mindful of an employee's exempt (salaried) or non-exempt (hourly) status.

An employer is obligated to pay an **exempt (salaried) employee** their entire salary for the work week if the employee performs any work during the week, including work completed remotely or if the employee works only a partial week.

Non-exempt (hourly) employees must be paid for all work performed whether performed onsite or remotely. Hourly employees are not entitled to compensation unless company work has been performed. (Reviewing and responding to company emails are considered work for the company.)

Thus, if you are forced to close your business temporarily due to COVID-19 issues, you are not required to pay **non-exempt employees** for hours the non-exempt employees do not work, even though they may have been scheduled to work.

2. Staff reductions:

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 employees if the shutdown is expected to be temporary
- Lay off some or all employees
- Reduce 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.

3. What is the difference between these options?

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 receive 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 their share of the premiums. Payment arrangements between the employee and employer must be arranged.

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 work week. 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 benefits 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.

4. Which staff can I lay off?

The law generally presumes that all employees are employed at will unless they can prove otherwise, usually through written documents relating to their employment or oral statements that you, the employer, has made.

As such, you, as the employer, do not need good cause to terminate an employee's employment and employment can be terminated at any time, for any reason (except for a few illegal reasons). Exceptions to this might be if you have signed an employment contract that promises job security with an employee, then that employee is not employed at will.

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).

5. Employer responsibilities when laying off an employee(s)

- I. Massachusetts law requires that the employer give laid off employees all wages owed, including accrued but unused vacation. If the company lays off an employee, the employee **must be paid all wages owed on his or her last workday**, not at the end of pay cycle. (Note: Furloughed employees may be paid all wages owed on the regular pay date at the end of the pay cycle.)
- II. **Vacation time** that has been earned is considered salary in Massachusetts and **must be paid out on the day the employee is laid off**, not on some future date. As such, laid-off employees are entitled to all vacation time that has accrued but that has not been used. (Not required if an employee is being furloughed but the obligation to ultimately pay that employee unused vacation time remains and must be paid if the employee is ultimately laid off or may be used by the employee after they return to work.)
- III. Before laid-off employees leave the company, they must be given a brochure on how to file for unemployment benefits in Massachusetts. (Not required when an employee is put on furlough, but many employers do provide this brochure to furloughed employees.)
- IV. The company must notify a laid-off employee of their rights to continue health insurance coverage. This is typically done after the employee leaves, when the employer or a benefits provider sends out a “COBRA notice,” which provides information to the employee about their rights to continue their health insurance coverage. The cost of COBRA is 102% of the full monthly premium for such coverage. Employers are not obligated to fund any part of the cost of health insurance once an employee is laid off.

6. Can an employer choose to pay severance to employees being laid off?

Yes, but it is advisable that employers implement a standard plan for all laid-off employees (e.g., one week for every year of service) to avoid discrimination issues.

7. If staff chooses to voluntarily not work, do I need to pay them?

No, unless the employee is an exempt employee and works at any time during the course of the week.

8. Can I mandate that my staff come into work for emergency care?

While each situation is different, and a generalized fear of contracting COVID-19 is not likely to justify a work refusal in most cases, employers may want to conduct a thorough review of the facts before any disciplinary action is taken against an employee who refuses to perform his or her job for fear of exposure to COVID-19. Employers are encouraged to be flexible with respect to attendance in connection with this rapidly changing situation. The need to stay home because an employee is sick or to care for a sick family member is covered under the Massachusetts sick leave law.

9. Is an employer required to document the layoff or furlough in writing with each employee and must they meet with each employee in person to notify them of any change in employment?

No documentation required, but it is suggested that a simple letter be distributed so that everyone is on the same page and understands what is happening. Employers do not have to meet with employees in person to notify them of a change in employment status—telephone conferences or email is fine.

10. Are there are hardship loans available?

Unemployment benefits are available for any employee who is laid off or put on furlough. We are not currently aware of any hardship benefits for employers although legislation is under consideration for employers impacted by these closures due to the COVID-19.

11. Can I pay employees during some period of shutdown and then lay off or furlough staff on an unpaid basis if the shutdown continues?

Yes.

12. Do I need to treat all employees the same (i.e., lay off everyone or just lay off one person)?

A layoff 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.

13. Can I rehire staff that I previously laid off?

Yes.

14. Can staff qualify for assistance if they are still technically employed?

As stated above, furloughed and laid-off employees are eligible to apply for unemployment benefits.

15. Employee Confidentiality

While non-infected staff and personnel should be notified of possible exposure to the virus, employers should not release the names of infected employees or those who are suspected of infection. Employees have common law privacy rights in their medical information, and there are numerous statutory limitations and restrictions on the disclosure of an employee's medical information. Therefore, even in a pandemic situation, employers should exercise significant care with respect to safeguarding medical information.

According to the U.S. Centers for Disease Control and Prevention (CDC), employers should inform fellow employees of their potential workplace exposure, but only to the extent necessary to adequately inform them of the potential exposure, while maintaining confidentiality under the Americans with Disabilities Act (ADA) (i.e., **without revealing the infected individual's name** unless otherwise directed by the CDC or applicable public health authority). Employers may communicate to non-exposed employees generally that there has been a potential COVID-19 exposure, without sharing additional identifying information. Employers also may be able to communicate to appropriate non-employees (e.g., patients, vendors, and others with whom the employee may have come in contact while working) that there was a potential COVID-19 exposure, again without sharing identifying information. In all cases, time and circumstances permitting, employers may find it helpful to coordinate with state or local health authorities for guidance and direction regarding the scope and content of disclosures.

Employers also should evaluate any applicable state privacy law or state "mini-ADA" laws to ensure they do not contain different or additional requirements or provisions.

16. Could COVID-19 be covered by workers' compensation if contracted by an employee?

Workers' compensation claims and procedures are based on state laws and vary from state to state. Therefore, employers may want to consult with workers' compensation counsel on this question. Generally, however, state workers' compensation laws require an employee to prove that they

contracted the illness in the course and scope of employment and that the illness is caused by a hazard recognized as peculiar to a particular employment. Some states specifically exclude from coverage contagious diseases resulting from exposure to fellow employees or from a hazard to which the ill employee would have been equally exposed outside of their employment.

17. Final Thoughts

Information regarding COVID-19 is constantly being updated and released by official organizations such as the CDC, World Health Organization (WHO), and Occupational Safety and Health Administration (OSHA). Employers should take active measures to keep abreast of the changes and monitor their policies accordingly. Updated guidance will be provided by the MDS to members as more information becomes available.

For additional details, we refer you to the Department of Labor's reference guide at <https://www.dol.gov/agencies/whd/pandemic>.

The MDS will also be presenting the webinar "[Staffing Questions in Connection with a Temporary Office Closure](#)" on Wednesday, March 18, at 12 pm during which our attorneys from Goulston & Storrs will discuss the details of the issues surrounding staffing concerns in connection with office closures during this pandemic. If you still have questions after reading this Q&A, please submit them to membership@massdental.org by 9 a.m. on March 18 with the subject line "Staffing Question," and we will do our best to address them during the webinar.