

Planning for a Reduction In Force: Layoffs and Furloughs

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March 27, 2025

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Roadmap

- Alternatives to layoffs
- Layoff process considerations
 - Timing
 - Planning
 - Duty to bargain
 - Selection of affected positions
- Use of separation agreements
- Due process requirements
- Communications
- Benefit impacts (AWC Trust)



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Alternatives to Layoffs



- **Consider “hidden costs” of layoffs**
 - Leave cash outs, severance costs, increased workers compensation claims, loss of qualified personnel, rehiring costs
- **Other options**
 - Hiring and salary freezes
 - Wage reductions (prospective)
 - Voluntary leaves of absence
 - Early retirement incentive or resignation incentive
 - Unpaid furloughs – See handout

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Furlough vs. Layoff

Furlough is a temporary unpaid leave of absence during which the employment relationship is not terminated

- Accrued leave banks are generally not cashed out
- Employee may be covered by the employer’s insurance policies (employers should check with plan re: eligibility)
- Furlough can be temporary layoff (no work) or a reduction in hours/days per week, usually for specified period
- Employee may be eligible for unemployment benefits, even if working reduced hours. ESD website has guidance on furloughs and layoffs, and offers various programs to support affected employees (www.esd.wa.gov)

Layoff is a termination of the employment relationship; may be subject to recall rights

- Accrued leave banks are cashed out per employer policy
- Employee is terminated and eligible for COBRA coverage
- Employee is eligible for unemployment
- Severance may be offered in exchange for a release
- Nonexempt employee laid off and rehired within 12 months is entitled to restoration of their Washington state sick leave balance (unless fully cashed out)

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Duty to Bargain a Furlough

- **Review applicable personnel policies**
 - Personnel policies may be silent on the issue; however, an employer retains the inherent right to schedule work
- **Review applicable collective bargaining agreements**
 - In the absence of a waiver, the union has the right to bargain the decision and impact of a furlough



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Implementing a Furlough: Full workweek or partial workweek?

Furloughs may be in duration of full workweek or partial workweek

Full workweek furlough

- Employees receive no pay for the workweek
- Employer must ensure no work is performed
 - Consider suspending access to network/systems

Partial workweek furlough

- Non-exempt employees are paid only for hours worked
- Creates issues for exempt employees, as exempt personnel must be paid for their full salary in any workweek in which they perform work
- Advantage: Better supports continued operations

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Furlough Issues for Exempt Employees

Options for exempt personnel

- The furlough must be in a full workweek increment; employee is prohibited from performing any work during the workweek; or
- The employee must be required to use their accrued leave banks to make up for any hours furloughed during a partial week furlough to ensure they receive their full salary for the week; or
- Public employer exception for budget-required furlough: if a public employer implements a partial week furlough, the exemption will only be lost in the workweek in which the employee is furloughed. Must treat employee as non-exempt for that workweek.

Another alternative

- US DOL permits salary reduction and reduced workweek due to financial exigencies or to avoid layoffs (neither 9th Circuit nor WA has addressed)
- Ensure exempt employee is paid minimum salary threshold for each week (\$684 under FLSA, \$1499.40 under WMWA)
- Arrangement should be in place for extended period (6 months preferred)
- Source: DOL-WHD Fact Sheet #70

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Implementing Furloughs: Which positions or employees are impacted?



Unlike the case with layoffs, personnel policies and collective bargaining agreements generally do not dictate how furloughs are to be implemented

As with any significant employment action, the more predictable and transparent the employment actions and decision making causing these actions, the better








In the absence of applicable language, identify the procedure for determining which positions will be impacted by a furlough and why

Conduct risk analysis based upon FMLA, EEO, retaliation and whistleblower concerns

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Layoff Considerations – Timing

-  If represented employees will be affected, bargaining may be required
-  WARN Act (which requires 60 days' advance notice) – state and local government entities not covered unless entity “engages in business” (e.g., public transit and housing authorities, public utilities with independent governing body)
-  Policies and/or CBAs may establish process to follow
-  Employees with just cause protection may be entitled to Loudermill meeting
-  If subjective criteria used to make layoff decisions, ensure time to carefully review selections for adverse impact
-  If voluntary exit incentive is offered, give employees time to consider (45 days, if releases will be used)
-  If separation agreements will be used, need time to prepare

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Initial RIF Planning – Recommended Steps

- **Determine and document the business rationale for the RIF**
- **Determine the likely scope of the RIF**
 - Focus at this stage on work units, job classifications vs. individuals
 - Assessment will help in evaluating whether WARN Act may apply
- **Carefully review all CBAs, personnel policies, and individual contracts to assess employer's rights and obligations**
 - Scope of duty to bargain?
 - Any existing processes to guide RIF?
- **Determine whether you will offer voluntary exit incentives and/or severance (along with separation agreements)**
- **Pay attention to “skimming” issues if work will be reallocated**
- **Consider hiring and/or pay freeze**
- **Develop communication strategy**

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Layoffs – Duty to Bargain

- If layoffs under consideration would affect union-represented employees, must evaluate scope of duty to bargain
- Layoffs have been recognized as mandatory subject of bargaining, absent a contractual waiver
 - Essential to carefully review your CBA
 - If CBA is silent, employer must bargain decision to implement layoffs and related issues (e.g., notice, selection criteria, severance, bumping, recall)
 - Management rights clause may give employer the right to implement layoffs, but details may still need to be bargained
 - Confer with labor counsel, as bargaining obligation is very fact-specific
- Be proactive in communicating with union(s)
 - Be transparent about financial and operational impacts
 - Help union understand how more immediate layoffs may reduce the financial drain and protect employer's financial health when this crisis is over

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Selection of Employees for Furlough/Layoff

Key Considerations

- CBAs and policies
- Operational needs
- Risk of wrongful termination claims (discrimination, retaliation, etc.)

Use of Objective/Non-Performance-Based Criteria

- Examples: selection strictly by seniority, job classification, skills/certifications
- Advantages: reduces risk of discrimination claims; union will likely support this approach
- Disadvantage: employer may lose better performers

Use of Subjective/Performance-Based Criteria

- Examples: selection based on assessment of performance, teamwork, attitude
- Advantage: retention of best performers
- Disadvantages: greater risk of claims; need to invest effort in making and supporting assessments relied on

Use of different criteria for different work units may be justified

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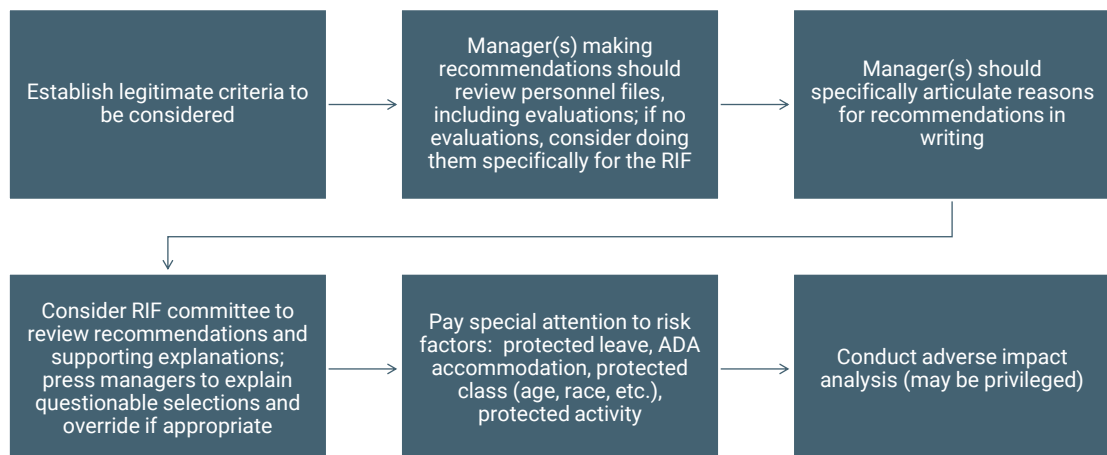
FAQ: What if an employee is on leave?

- **FMLA**
 - Does not preclude layoff for reasons unrelated to leave
- **PFML**
 - Does not preclude layoff for reasons unrelated to leave
 - PFML regulation requires written notice to employee on leave and statement that health benefits will be maintained/paid for duration of PFML leave, despite no restoration to employment (WAC 192-700-010)
- **Caveat: Use extra care to ensure managers did not consider employee's protected leave in making layoff decisions**

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Reducing Risk Where Furlough or Layoff Selection Involves Subjectivity



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Voluntary Layoffs – Consider Unemployment Eligibility

- **Potential win-win:** an employee would like to be laid off to get unemployment, which reduces employer's need to impose layoffs
- **Problem:** May be treated as a voluntary resignation, which makes individual ineligible for unemployment
- **To preserve eligibility (WAC 192-150-100):**
 - Employer must announce in writing that it plans to implement layoffs and that employees may offer to be among those included;
 - Employee offers to be laid off; and
 - Employer takes "final action" by accepting the offer
 - Critical: Employer must reserve the right to reject an employee's offer, retaining ultimate control over who will be laid off
 - As a general rule: be clear that the state makes determinations about benefits eligibility and amount
- **If objective is to avoid cost of unemployment claims, employer should retain NO control over who accepts voluntary layoff**

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Use of Releases

- **Using separation agreements with a release reduces the risk of claims**
- **Key Issues**
 - Consideration: employee must be offered something of value to which employee is not already entitled upon separation
 - Gift of Public Funds: Obtaining a release should avoid gifting issue because employer is receiving value
 - Duty to Bargain: Employer must coordinate with union to avoid ULP for failure to bargain or direct dealing
 - OWBPA: Special rules when employee is age 40 or older
- **See handout**



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Use of Releases – Consideration Examples

- **Severance pay**
- **Leave cash out (beyond what CBA or policies require)**
- **Outplacement services**
- **Health benefit continuation**
 - May involve paying/reimbursing COBRA premiums for certain period or cash payment to obtain Marketplace coverage
 - COBRA payments approach
 - Pros: payments are not taxable wages; allows coverage under employer's generous plan; if employee becomes immediately reemployed, employer can avoid coverage cost
 - Con: May require ongoing administration to pay or reimburse
 - Cash payment approach
 - Pros: gives employee flexibility to use toward preferred plan (or to pay other living expenses); no ongoing employer responsibility
 - Cons: payment is subject to payroll taxes so net amount may be less than actual COBRA premium; payout made even if employee is quickly reemployed and does not need coverage
 - Sample agreements provided as handouts provide language for both options; employer could allow employee to choose

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Use of Releases – OWBPA Requirements

- **OWBPA = Amendment to federal Age Discrimination in Employment Act (ADEA); applies to employers with 20+ employees**
- **For a group RIF (involving 2 or more separations), if a release used with an employee age 40+ encompasses age discrimination claims, the release must:**
 - Be written in plain English
 - Refer to claims under the ADEA
 - Not waive future claims
 - Provide consideration
 - Advise the employee to consult with an attorney
 - Give the employee 45 days to consider (21 days if individual separation)
 - Give the employee 7 days to revoke after signing
 - Include required disclosures: "decisional unit," eligibility factors and time limits; and job titles and ages of all individuals eligible/selected for the program and individuals not eligible/selected for the program
- **See Schedule A to sample separation agreement for age 40+ employees**
- **For involuntary layoffs, review and revocation periods can occur after separation**
- **For voluntary exit incentive, need to allow up to 45 days in advance of separation**

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Use of Releases – OWBPA Requirements

“Decisional unit” refers to the class, group or work unit from which the employer chose the employees who would be considered for layoff or offered an exit incentive.

- In a RIF affecting an employer’s entire workforce, the decisional unit would be all employees of the employer
- If the employer only considered layoffs in a certain department, division or job category, then the relevant department, division or job category could be designated as the decisional unit
- Consider which management representative made selection decisions
- Example: Director of Finance was instructed to reduce budget by 20% and she determined which positions within Finance Department to eliminate. Decisional unit = Finance Department. Review of decisions by CEO/GM or HR would not expand decisional unit (unless CEO/GM directed that other positions in other departments should also be considered for layoff, in which case decisional unit must be expanded).

For involuntary layoffs, “eligibility factors” refers to factors used to select employees for layoff (e.g., performance, skills, reverse seniority)

- Sample language in Schedule A (in sample agreement) should be revised as appropriate to reflect factors you are using in the RIF

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Use of Releases – Decision Point



OWBPA requirements not necessary for employees under age 40. Employer can:

- Use different form of agreement for those under age 40 (see sample for under 40); or
- Use more complex OWBPA-compliant form of agreement for all laid off employees
 - This means under-40 employees would also get 45 days to review and 7 days to revoke

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Due Process (Loudermill) Requirements



Public employees with cause protection are entitled to notice and an opportunity to be heard (Loudermill meeting) before a final decision is made to terminate their employment

Levine v. City of Alameda (9th Cir. 2008) held that Loudermill requirements applied in layoff setting



Some courts have expressed the view that Loudermill has reduced application to terminations being made due to a financial exigency

Courts balance employee's interest and risk of erroneous termination against the fiscal and administrative burdens of additional procedural obligations

Limited cases analyzing this, so there is some risk in skipping due process



Best practice:

Notify those selected for layoff of the reason(s) for the RIF, criteria used to select, the fact that their position was selected

Offer opportunity to meet with manager

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Communicating the Layoff Decision

- **As discussed, may be affected by CBA, policies, Loudermill obligations**
- **Develop a communication plan**
 - Clear and consistent message
 - While in-person meetings are normally recommended, alternative approaches (virtual meetings) may be necessary for those on leave
 - Person(s) delivering message should have talking points or checklist to cover key points and stay on point
 - Convey compassion and respect
 - Ensure other supervisors are prepared
 - Prepare written information to provide to employee addressing timing, final paycheck, benefits, EAP, how to apply for unemployment benefits, etc.
 - Address return of employer property; removal of employee's belongings

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Will Layoff Be Effective Immediately or Delayed?

- **Considerations:**

- Operational needs (transition and wind-down support?)
- Loudermill and notice requirements
- Risk assessments
 - IT access
 - Property/equipment damage or loss
 - Workers' compensation claims
 - Security precautions
 - Diminished productivity
- Preservation of employee dignity



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Post-Layoff Issues

Ensure compliance with any recall rights under CBAs or policies

Laid off employees on military leave

- Employee on military leave retains recall rights even if he/she cannot resume employment due to ongoing military leave

Ensure no skimming of bargaining unit work as a result of reorganizing work (or have MOU to address)

Retain documentation regarding RIF process and decisions

- Legal claims may be asserted 3-6 years later

If later round of layoffs will be implemented, revisit WARN Act obligations (for employers subject to WARN Act)

Morale of remaining employees

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Benefit Considerations



choice | health | service

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Continuation of Benefit Coverage during Furlough or Layoff

- Before finalizing your furlough v. layoff decision, check with your health insurer(s):
 - Insurance carrier may have contract restrictions on hours worked to be eligible for benefits
 - Insurer may also be offering special contract options during COVID-19
 - Stop loss carrier (if self-insured) – Make sure to confirm in writing coverage for reduced hour workers

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For those insured through the AWC Trust

- Furloughed employees:
 - Employer continues health benefits (medical, dental, vision, EAP) for furlough duration
 - Provide furlough policy to staff
 - For life and disability benefits, the Trust has negotiated with Standard to allow coverage through June 30

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For those insured through the AWC Trust - Layoff

- Layoffs:
 - Termination of employment is COBRA Qualifying Event
 - 18 months of continued coverage (medical, dental, vision, EAP) at active rate paid by employee
 - If employer wishes to pay COBRA premium for all or portion of 18 months,
 - Recommend a Severance Agreement
 - Trust will bill employer directly
 - Transition to employee COBRA billing if Severance Agreement is less than 18 months
 - For life and disability benefits, the Trust has negotiated with Standard to allow employer-paid coverage through June 30

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Contact Trust staff with questions

Trust staff are here to help you:

- Email – benefitinfo@awcnet.org
- Phone – 1-800-562-8981

In cooperation with Summit Law Group, template policies & guidance:

- Website – wacities.org, click on Trust and log in as a Member

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Annoying But Necessary Notifications



Information provided during this webinar is not intended to be legal advice or opinion. Please consult your attorney for legal advice and guidance specific to your organization and circumstances.



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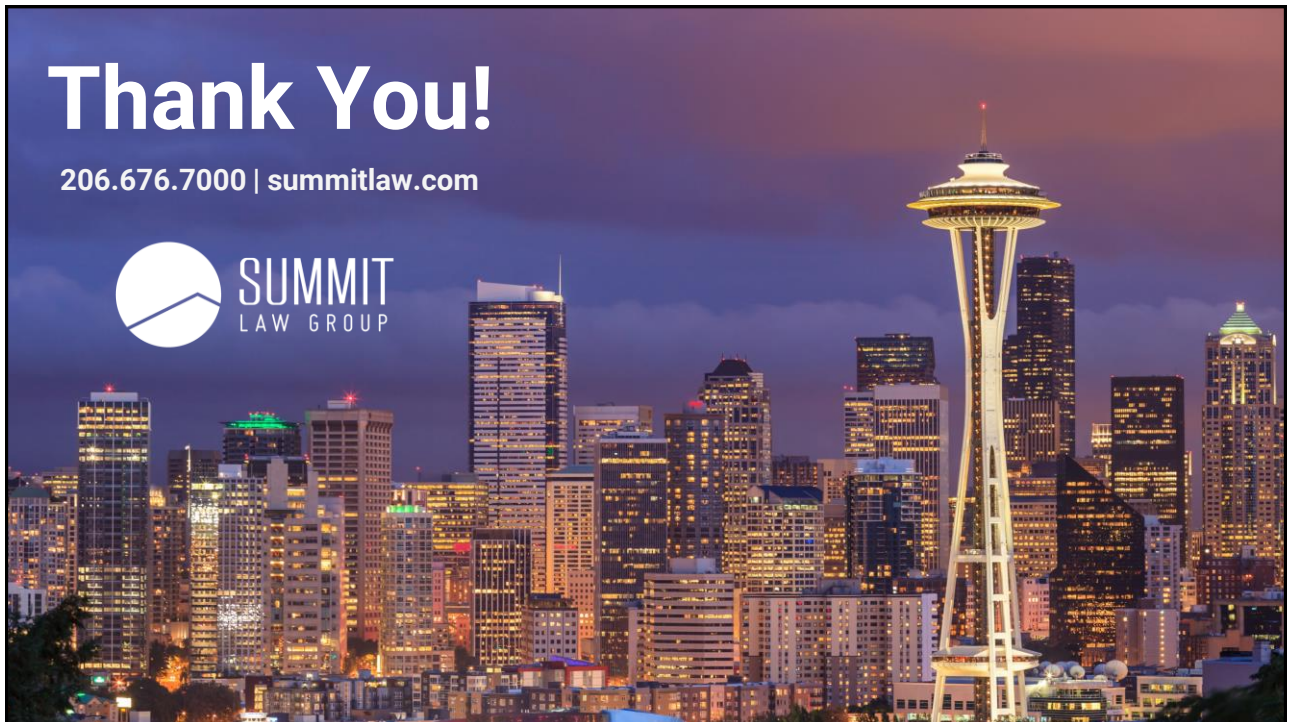
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