



## **Furloughs, Layoffs and RIFs — Best Practices in Policy Development in the Wake of COVID-19**

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**Q&A with Presenters Carolyn Pellegrini, Esq. and Ira Shepard, Esq.**

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### **General Questions**

#### **What are the differences between the terms furlough, layoff, and RIF?**

A furlough is a company-initiated, short-term, temporary leave of absence. A furlough is not a separation from employment and generally does not trigger actions necessary upon a termination (e.g., COBRA, payout of unused PTO if applicable, etc.). Employees on furlough often remain on the employer's benefit plans.

A layoff and or reduction in force by contrast are generally long term and often a permanent separation of employment depending on the specific terms described by the institution in the layoff or RIF notice.

#### **What was the origin of the statistics provided in the presentation?**

The statistics included in slide 12 stating “only 20% of students are confident that they will still be able to attend their first-choice school. Nearly half reported that they were now potentially more interested in taking an online program or course” were drawn from the Art & Science Group LLC, Student Poll, March 2020. Full results of the poll can be found here: <https://www.artsci.com/studentpoll-covid19>.

Figure 1: Major revenue categories for public universities (slide 14) and Figure 2: Major revenue categories for private universities (slide 15) were excerpted from a publication by the Brookings Institution. The publication can be found here: <https://www.brookings.edu/blog/brown-center-chalkboard/2020/04/21/coronavirus-poses-serious-financial-risks-to-us-universities/>.

The pie chart showing costs by category (slide 16) was taken from the University of California System budget for 2014-2015. All of the University of California System budgets can be found here: <https://www.ucop.edu/operating-budget/budgets-and-reports/current-operations-budgets/index.html>.

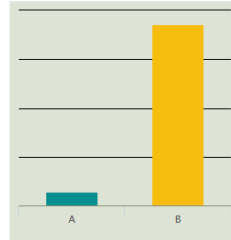
#### **What was the source of the poll data?**

The poll results that showed on sides 17-20 were live polls answered by the webinar's participants. The poll results are below:

## Poll Question #1

Has your college or university issued definitive plans on what the fall semester will look like in terms of dorms usage, and return to in room teaching or conversion all or part to virtual learning?

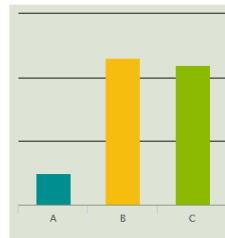
7% -63 A  Yes  
93% -876 B  No



## Poll Question #2

If your answer to question 1 was no, when do you expect plans to be issued?

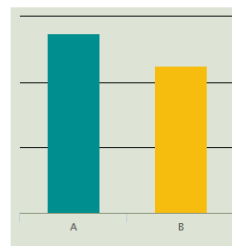
10% -88 A  By the end of May  
46% -410 B  By the end of June  
44% -391 C  Do not know



## Poll Question #3

Has your college or university already announced and implemented some sort of austerity plan including either furloughs, RIF's, salary freezes, or salary reductions?

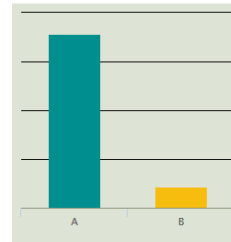
55% -483 A  Yes  
45% -397 B  No



## Poll Question #4

If your answer to question 3 was No, do you expect to be called upon to recommend and or execute on one or more of the austerity options in the near future?

89% -547 A  Yes  
11% -70 B  No



### Furloughs

#### **Are furloughs and salary reductions an option for both private and public employers?**

Yes. As always, make sure you review all applicable documents before instituting either. Also consider restrictions imposed if there are any collective bargaining agreements involved.

#### **Should you give advance notice of the furlough or can it start at any point?**

Whether you have to give notice and the amount of notice that must be given depends upon state law. That is because the furlough will affect pay and certain states have required notice periods for pay changes. Also check if you have an applicable collective bargaining agreement as to any notice or bargaining obligations.

#### **Can furloughs possibly be a percent of FTE or reduced schedule?**

Yes. Reduced schedule is only applicable to non-exempt employees. See answer to next question for more details.

#### **Can exempt employees be furloughed in less than weekly increments?**

Yes and no. Generally, exempt employees' compensation cannot be tied directly to the hours/days that they perform work. Doing so converts them to non-exempt employees. However, an employer is free to reduce an exempt employee's salary by (for example) twenty percent, and also tell the employee that they need not report to work/perform work one day per week. An institution that chooses to do so must be wary of whether the increment it chooses will place the previously exempt employee below the weekly salary threshold and, thus, convert them to a non-exempt employee. If an exempt employee loses the exemption, the employee should be treated the same as other non-exempt employees.

**Can we institute a mandatory 80-hour furlough in which employees choose the days on which they wanted to take their furlough time?**

Yes, this is permissible. However, be aware that depending upon how employees take the time, a previously exempt employee may be converted to non-exempt for one or more weeks and they should be treated accordingly.

**If an employee is on a longer-term furlough (1 month or more) can we disable an employee's email access to ensure they won't be checking work email?**

Yes.

**Is it practical to request a signature of bi-weekly staff agreeing not to perform any work?**

Whether it is practical is up to the employer. It is certainly permissible.

**Are furloughed employees eligible for FMLA?**

No. Furloughed employees are not active employees. Therefore, they would not be eligible for FMLA.

**If you are continuing health insurance coverage during a period of furlough, why would you need to give COBRA notice?**

You likely would not need to provide a COBRA notice because there is no loss of coverage. However, you are encouraged to confirm with your insurance provider.

**Why would we pay employee health premiums while on furlough?**

Each institution must make the choice that is best for it. Some institutions are choosing to pay employee portions of premiums so that those on furlough remain covered. It is certainly not required.

**Are furloughs required to include continuation of health benefits?**

No. Whether benefits are continued is at the employer's option. However, many employers furloughing employees choose to maintain health benefits for administrative reasons (COBRA notices) and employee morale.

## **Collective Bargaining**

**If we are considering something like a temporary decrease in salary for all employees making more than a certain amount, how and when do you recommend engaging with our unions?**

The best way to approach the union is to have a specific plan to present. The union is likely going to be resistant to any decrease in pay for their members, so having hard numbers to back up the need for austerity measures, the kind of decrease you're suggesting, and what effect that

decrease will have on their membership (number of members effected, the extent to which take home pay will be effected, etc.) will be helpful in making your case that a change must be made.

**Will a freeze on a cost of living adjustment create bargaining issues?**

Yes. Rate of pay is a mandatory subject of bargaining. You should consult the applicable collective bargaining agreement and counsel before making any changes.

**For unionized employees, is the expectation that when a salary reduction or salary freeze is implemented, when things go back to normal, salary changes will be done retroactively?**

Again, wages are a mandatory subject of bargaining (unless waived). You must bargain with the union over salary reductions and salary freezes. What happens when the environment returns to normal will likely be part of those negotiations.

**We have at-will employees that follow a bargaining union contract and get the same benefits. When they are laid off, do we have to follow the union contract?**

Likely no. If they truly are at-will employees, they are not entitled to benefits under the contract. Nonetheless this cannot be definitively answered without more facts. Please seek counsel.

**Unemployment Benefits**

**Is it ok to provide employees with a link to the unemployment website, without providing any representation regarding eligibility?**

Yes.

**Can you explain the impact on unemployment benefits and cost-saving if they are self-funded?**

The CARES Act contains provisions for relieving some of the burden on self-funded employers. In broad terms, those are as follows:

- Employers are not responsible for funding the \$600 weekly benefit enhancement
- Employers are not responsible for funding extended benefits – i.e., the additional thirteen weeks on top of regular entitlement
- Employers are entitled to apply for a reimbursement from the state for a portion of the benefits they are required to pay

The exact impact of unemployment benefits and cost-savings for self-funded employers is going to be state specific and fact-specific.

**My state has a shared work program where employed can work and receive partial unemployment. Is this the same as furlough?**

No. A furlough is a change to an employee's work schedule and compensation. The change may or may not render the employee eligible for partial unemployment compensation benefits. Under a shared work program, an employer develops a plan by which multiple employees share a reduced number of hours so that they are still receiving wages, but also qualify for partial unemployment compensation benefits.

**Paid Time Off**

**Can an employee be required to use PTO before applying for unemployment compensation benefits?**

Yes and no. An employer can modify their policy to require that employees use their accrued PTO during the furlough. However, an employee can apply for unemployment compensation at any time. The employee will have to report to unemployment compensation that they received compensation for the days that they used PTO. This will likely render them ineligible for benefits for the week.

**Is an institution required to allow employees to use paid time off?**

No, an institution does not have to allow employees to use their PTO during a furlough. This should be made clear to the employees in the furlough notice to them. It may be a modification of the employer's existing PTO policy. Consult with counsel regarding whether the PTO policy needs to be amended.

**Salary Reductions**

**What is an across-the-board cut and what are its pros and cons?**

An "across-the-board cut" describes a cut that affects all employees equally. For example, announcing that all salaries will be reduced by twenty percent is an across-the-board cut. On the other hand, announcing that salaries for those making less than \$100,000 will be reduced by ten percent, while salaries for those making more than \$100,001 will be reduced by 20% is not an "across-the-board cut." An across-the-board cut ensures that all employees are being treated exactly the same. However, an across-the-board cut may have a disproportionate effect on lower earning employees.

**What is the requirement under the CARES Act to keep people employed?**

This continues to be an outstanding question. The CARES Act states that "[the institution] shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus." Additionally, the Higher Education Emergency Relief Fund FAQs state that "The CARES Act requires each institution that accepts funds from the HEERF, including funds used to pay emergency financial aid grants, to continue

to pay employees and contractors to the greatest extent practicable based on the unique financial circumstances of each institution[.]”

Institutions should document the reasons for the decisions they make and consult with counsel.

**Can we reduce faculty salaries if they volunteer to do so?**

Maybe. If your faculty are not unionized, you likely can do so. If your faculty are unionized, the institution cannot change the salaries of faculty—even if they volunteer—without consulting the union.

**Reduction in Force**

**If you decide you need a RIF, can employees appeal? How can we avoid that?**

There are ways in which employees can contest reductions in force (e.g., discrimination claims, flaws in the process). The best way to avoid these situations are to put a plan in place with the appropriate selection criteria, train those who are making the decisions about who will be affected by the reduction in force, and review those decisions to ensure no discrimination.

**Does the 60-day rule apply for WARN? Does it meet the natural disaster test?**

The 60-day notice provision under the WARN Act may apply. Whether it applies will be a fact-specific inquiry. The “unforeseen business circumstances” exception may also apply.

**Can you explain the special skills under the reduction in force slide?**

Under the selection criteria for reductions in force, we listed “special skills.” This refers to the need to examine whether certain employees need to be retained because they possess some sort of special skill that other employees do not have or that would be difficult for the institution to find on the job market.

**We have two locations in the same city. Does each one count as a separate location in relation to WARN?**

Maybe. In determining whether two locations are a single site of employment, the courts will examine the locations’ geographic proximity, whether they are used for the same purpose, and whether they share the same staff and equipment.

**Early Retirement / Exit Incentive Plans**

**Can you provide any information on how to implement a voluntary separation incentive program?**

A voluntary separation incentive program (often referred to as VSIPs) must be based on a plan with concrete objectives (e.g., reducing salary and wages, minimizing involuntary terminations,

etc.), have clear rules about eligibility that are not based solely upon age (e.g., years of service + age, certain classifications of employees, those who started before a particular date, etc.), and a determination about what benefits will be offered (e.g., a separation payment, health benefits for a particular period of time, continuation of tuition benefits, etc.). You may also have to carve out eligible groups. For example, senior administrators may meet the eligibility rule, but you don't want them to separate, so you do not offer it to them.

**What do exit incentive programs typically entail? Is it usually a one-time payout, a percentage of pay, or some other monetary incentive?**

There are any number of incentives that can be offered; however, a payout is the most common. Payouts can be calculated any number of ways (years of service, current salary, etc.). Most involve a one-time payout, but they may be paid out over time.

**What do you think about offering a voluntary exit incentive program, but you put in the requirements that the institution can deny an employee's request submitted in response to the voluntary incentive program?**

I would suggest that you carve out those who the institution does not want to participate in the program to the extent you are able. You should also reserve the right in the program to deny certain applications for the program based on business needs (e.g., if you offer it to all custodial personnel and they are all eligible and all elect to take it, you'll need the discretion to be able to deny some elections because you still need custodial personnel on campus).

## **Attendee Responses**

### **Scenario 1**

**University XYZ - Maintains all current operations for teaching, living, and residence operations with strict applicable social distancing and imposition of other health and safety rules.**

**Enrollment drops 30%**

**What does HR recommend regarding workforce actions?**

Several days of furlough for all staff and faculty, and salary freeze

Salary freeze

Furloughs

Voluntary furloughs for the fall semester followed by non-voluntary furloughs. Salary freeze across the board.

Consider closing a residence hall. Furlough staff

Deliver more online classes for students

Salary freeze and possibly furloughs

Reduce salary expense by 20% through a mix of salary freeze and furloughs.

Recommend targeted furloughs for jobs directly related to student enrollment levels

Determine which positions are mission critical. Consider hiring freeze first, salary freeze next, furloughs next, layoffs as last resort

Institute a furlough as well as voluntary restructuring from full year positions to academic year positions.

Assess changes in residence hall occupancy, class sizes, etc. to determine if cuts in those areas make sense.

Furlough student services roles until we know what the next semester looks like.

I think adaptability is the solution in all the issues we face unexpectedly. Need to be calm and stand as one unit. Understand and react proactively.

End all temporary employee and probationary employee appointments first.

Form committee, evaluate essential functions and review plans for furlough if necessary while maintaining communications to all employees throughout all levels.

Look at food service reductions. Reductions in force of housing staff, and related student support positions. Less use of adjunct faculty. Look at class sizes and scheduling. Look at salary freezes or reductions. Pension contribution reduction. Early retirement incentives.

Cut Non- personnel area travel, purchasing, move to soft offerings, consider foundation funding (Small scale)

What dollar amount is equal to 30% as a way to frame the problem and know the scope of solution needed. Use a decision-making matrix to ensure equity, cultural alignment and financial responsibility. Create options: everyone takes a pay cut; early retirement (highest salaries are the long-term employees), RIF

Furloughs, salary reductions

Create incentive package for employees to take early retirement.

## **Scenario 2**

**University QRS - Converts teaching situation to small, in-person classes, cancels all large lectures and events.**

**Limits dorm capacity to 50%. Enrollment drops 50%**

**What does HR recommend regarding workforce actions?**

For university example of enrollment drop, possible solution = temporary across board salary reduction for high-salary employees, excluding unionized employees AND short-term (< 6 mos.) furlough of other employee groups

I would first recommend evaluating income and expenses to determine what the current shortfall is. I would also recommend evaluating estimated future shortfall. Once that was completed, I would first recommend salary and hiring (for non-essential positions) freezes, and reducing non-essential spending. Following that, I would then recommend furloughs and RIFs if necessary.

Furlough

Layoff 35% of employees.

Layoffs and salary reductions

Would look at pay cuts since the classes must be covered.

Furloughs, salary reductions

Hybrid classes (online/in-person). Salary freeze

Furlough, Salary Freeze and Reduction in force

### Scenario 3

University ABC - Shuts down in-person teaching for the fall semester and converts entirely to online learning.

Dorms are closed. Enrollment drops 80%

What does HR recommend regarding workforce actions?

RIFs

RIF, Salary reduction

Reduction in force

RIF

A combination of all options

Reduction in force.

RUN!