

PBPA Podcast Transcript
Furloughs vs. Layoffs: Legal Considerations for
Nonprofit Employers Looking to Downsize
(30:20 minutes)



Sireesha ([00:01](#)):

The term furlough often pops up in the news during times of economic uncertainty. But what does it actually mean and how does it differ from a layoff? In this episode of the PBPA Podcast, we explore the key distinctions between furloughs and layoffs and why a nonprofit organization might choose one over the other. Joining us is Emily Borna, who will break down the nuances of each option, including potential legal risks and compliance considerations that employers should keep in mind.

Sireesha ([00:43](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:51](#)):

Emily Borna is a principal at the law firm of Jackson Lewis here in Atlanta. She has focused her practice on employment and labor litigation representing management. She has also been a dedicated volunteer with PBPA since 2012. Emily, thanks so much for being here today.

Emily ([02:13](#)):

Happy to join you.

Sireesha ([02:15](#)):

So let's start by setting up our terminology. Emily, can you walk us through what are the legal definitions of furloughs versus layoffs versus a reduction in force?

Emily ([02:27](#)):

Absolutely. And this is not just semantics, but it's important to understand the distinction between these terms for legal purposes. So for starters, a furlough is considered to be an alternative to a layoff. When an employer furloughs its employees, it's requiring them to work fewer hours or actually take a, a defined amount of time off without pay. So, for example, an employer may furlough its non-exempt employees one day a week for the remainder of the year and pay them for only 32 hours instead of a normal 40 hour work week.

Emily ([03:12](#)):

Another method of furlough is to require all employees to take a week or two of unpaid leave time at some point during the work year. And employers should be careful when furloughing exempt employees who are not eligible for overtime pay under the Fair Labor Standards Act so that they can continue to pay them on a salary basis and don't jeopardize their exempt status. When there are unapproved deductions from an exempt employee's salary, that can effectively convert them to non-exempt employees who are eligible for overtime. Um, and those wage hour claims can be substantial if that occurs. So a furlough that encompasses a full work week is one way to accomplish, accomplish this without any wage hour concerns. Because the Fair Labor Standards Act states that exempt employees do not have to be paid for any week in which they perform no work. An employer can also require all employees to go on furlough, or it can exclude some employees who provide essential services to the operation. The theory really is to have the majority of employees share some hardship when there's financial pressures or funding issues as opposed to just a few employees losing their jobs completely. Um, so that that's really the concept of a furlough.

Emily ([04:48](#)):

In contrast, a layoff is a temporary separation from payroll and an employee's laid off because there's not enough work for the employee to perform, and the employer believes this condition is going to change and hopes, intends expects to recall the person when work becomes available. Again, employees are typically able to collect unemployment benefits while on an unpaid layoff.

Emily ([05:21](#)):

And then finally, the term of art "reduction in force" is important to understand. A reduction in force or a RIF occurs when a position is eliminated without the intention of replacing it. And this is considered a permanent reduction in headcount. A layoff can turn into a RIF or an employer can choose to immediately reduce the workforce depending on, you know, all the various business considerations. A RIF can be accomplished, um, either by terminating employees, um, which is typically involuntary, or sometimes with a voluntary incentive, um, or by means of attrition. And if an employee is terminated pursuant to a reduction in force, um, which is sometimes referred to as being RIF-ed, employers use "layoff" as a synonym for actually what is considered to be a permanent separation of employment. And, and so that can be confusing to the affected employee because it implies that recalls a possibility which could prevent them from seeking another job. And, you know, in this respect, it's really important to take care and be intentional about the terminology that's used in this context.

Sireesha ([06:44](#)):

Thanks, Emily. I wanted to share a little more information about unemployment in Georgia. When a temporary layoff occurs where the employer removes employees from the payroll but expects to call the employees back within a short time, the employer may need to file what are called "partial unemployment claims" on behalf of the affected employees with the Georgia Department of Labor. Partial unemployment claims can provide unemployment benefits for up to 6 weeks to employees affected by a temporary layoff. A link to the Georgia Department of Labor's explanation of partial unemployment claims is attached to this podcast.

If you are contemplating a “temporary” layoff, please consider carefully whether you really think that the employees will be called back within 6 weeks or not. If you do think so, it may make sense to file these partial unemployment claims for your employees for up to 6 weeks. After 6 weeks, if the layoff continues, each employee would then have to file their own individual claims with the Georgia Department of Labor to apply for continued benefits.

If you don’t know how long a layoff will last or you think it may last beyond 6 weeks, it may make more sense to separate the employees permanently and allow them to file their own unemployment claims rather than conducting a temporary layoff.

And Emily, are there any forms that the employer has to provide to employees who are laid off or who are terminated in a reduction-in-force?

Emily ([08:39](#)):

A layoff or termination requires a Georgia employer to complete a notice of separation form, and that's Georgia DOL form 800 for an individual. There's also in Georgia a provision that requires employers to, to complete a different form. If 25 or more employees are affected with a separation at the same time for the same reason, it's, if you will, a mini - WARN Act for Georgia. It's simply a different form. It's called the Georgia DOL 402 Notice of separation form, where instead of completing the notice for each individual affected employee, you fill out a grid as the employer identifying all the persons affected at the same time for the same reason. Under Georgia statute, an employer has an affirmative obligation to complete these separation notices within three business days of the separation. But again, in a furlough situation, there may be different obligations.

Sireesha ([9:56](#)):

Nonprofits have two options for unemployment available to them. The contributory method, which is how for-profit employers operate, and then they have the reimbursable method, which is an option for nonprofits to opt out of the traditional contributory method. If a nonprofit has not been paying into unemployment, if they have opted for the reimbursable method, this means that the employer would have to pay the full amount of unemployment benefits to any employees who are eligible for unemployment benefits. So while the nonprofit organization may no longer have the payroll expenses of those employees, keep in mind that there could be future unemployment benefits expenses to factor in. The whole amount of those unemployment benefits since the nonprofit has not been historically paying into that insurance. And now, Emily, let's talk about other benefits, um, such as vacation, health insurance, retirement benefits. How are they impacted in a furlough versus a layoff?

Emily ([11:15](#)):

So Georgia being a relatively employer friendly state on the spectrum of varying state employment laws, California being perhaps on the other end of the spectrum leaves that typically to employers, which is to say that plan provisions, so for example group health insurance benefits plan provisions for group health insurance benefit eligibility are going to control, and that can vary depending on your provider and your employer. Other benefits such as paid time off and whether someone is eligible for payout of accrued, unused paid time off, that is also a function of employer policy and practice. So it's important to think about those considerations when you may have impacted workforce, um, and just make sure that, that

you are taking into account what the plan provisions set out you have to do in such circumstance. If you have someone who's not actively working, who is on a furlough, um, do they remain eligible for those benefits for an extended period of time when they are not working? It's important also to take into account the potential that cobra may come into play if there is an extended furlough or layoff situation. Certainly any separation of employment will trigger COBRA provisions, which obligates employers to extend eligibility to continue participating in a group health plan for up to 18 months. Though the employee will have to make the contributions to continue coverage within that group health plan.

Sireesha ([13:12](#)):

So, as you mentioned, it is important for nonprofits to keep in mind that, particularly where they are doing a furlough or temporary layoff, while some benefit plans may allow laid off employees to continue benefit coverage during a layoff, many plans do not allow employees who are not actively at work to continue to be covered – you should carefully check with your benefit plan provider to ensure you understand the potential implications for your employees of a temporary layoff v. a more permanent separation. If employees cannot continue to have benefits, such as health insurance coverage during a layoff, that may be a factor in how you decide to structure the employment action you are contemplating. In addition, the size of your organization may determine whether COBRA or other benefit continuation rights are available to employees whose employment is terminated.

And what about payroll tax implications? Um, is there any difference in a furlough versus a layoff situation?

Emily ([14:33](#)):

There certainly can be because in a furlough situation as previously defined, there may still be some active work occurring just not on the same basis. So you may reduce a 40 hour work week to a 32 hour work week and then you're going to continue to pay the person accordingly. You certainly want to keep clear documentation on whether the furlough is an extended period of unpaid time away or is a partial pay period modifying the usual work schedule. And as previously mentioned, that can have an impact on how an employee is classified for wage hour purposes as an exempt or non-exempt employee. So it's important to do that in a very deliberate fashion and clarify on the front end how the furlough is going to be administered. Certainly for layoff purposes or separation purposes, um, you know, whether there's any continuation of, of pay would depend entirely on, on any employer practices. Uh, sometimes employers will offer a separation and release agreement in exchange for pay continuation that they're not otherwise obligated to extend. And you know, how you, you process that will just depend on whether there's an agreement, whether you have a policy or practice to that effect if somebody parts ways.

Sireesha ([16:08](#)):

So now, if we have an employer who has heard this podcast and understands the difference between furloughs and layoffs, and they've decided that they need to proceed with one or the other, can you talk us through the notice requirements that a nonprofit employer needs to be aware of as they are communicating these decisions to employees?

Emily ([16:31](#)):

Certainly. So there's not a comprehensive law or guidance on what communications need to go out to employees who are going to be furloughed, but obviously you want to have clear, transparent communications with affected employees and frankly, with the entire workforce because it can have a big impact on morale. In terms of why this action is happening at this point in time. You know, what is prompting it? Usually it's financial pressures, sometimes it's a global pandemic, whatever the case may be. And then what the expectations are with respect to a period of furlough, whether it's partial work, whether it's a full unpaid leave and how to communicate that, how people are being selected, what the criteria are for determining who's going to be impacted in a furlough or a layoff situation. Um, is it a function of an objective criteria like tenure? Um, you know, those who are most recently hired are going to be impacted first, or is it a more subjective criteria like operational needs? Those who have what we've defined as essential functions are not going to be impacted by this action. Those with non-essential functions are. So that's, that's important as a starting point, certainly for any separation, whether a furlough evolves into a layoff or it's a layoff, a separation, or a RIF, at first blush. Again, in Georgia, there is, um, a statutory requirement to provide the Georgia Notice of separation form the DOL 800 for individuals or the DOL 402 form, if there's 25 or more people impacted at the same time for the same reason,

Emily ([18:37](#)):

I think it's important to, again, reference WARN, which probably won't apply to most of the listeners, but WARN, the "Worker Adjustment Retraining Notification Act" can come into play. If an employer has at least a hundred employees and is experiencing a mass layoff or a plant closing, it may trigger WARN act notice obligations both to the employee workforce and to the government entities, um, the Georgia Dislocated Worker unit. And if there is a unionized workforce to union representatives, probably unlikely that most listeners will fall into that category. But if that happens, it's important to plan ahead enough to get out those written notices to the affected workforce and government agencies, including the head local government official, the mayor, or if you will, usually is the appropriate person with 60 days-advance notice. And there can be financial penalties assessed if less notice is provided absent exigent circumstances.

Sireesha ([19:55](#)):

Emily, I imagine a lot of nonprofit employers who are listening to this episode now are ones that are in a situation where they have funding concerns right now, and there's a lot of uncertainty around that. So they don't know whether their funding will come through later on or not. And in this in between situation where it's tricky to plan, they might be considering having a layoff for some employees, but a furlough for other employees. If an employer is considering a situation like that, what are some things that they should keep in mind in how they select which employees would be laid off versus furloughed?

Emily ([20:40](#)):

So these are certainly difficult business decisions to make. And they are subject to challenge if, uh, an employer is not thoughtful about the selection criteria used to determine who will be impacted. So what we recommend, uh, to put employers in the most defensible position in these very challenging situations is that there's clear documentation from the decision makers about the reason for this action. Because, for example, of economic challenges, as you mentioned, and clarity about why these conditions have impacted the ability to continue operating and what, if anything has been done, other cost saving measures other than staff reductions before taking this relatively drastic step. In my

experience, uh, litigating employment concerns for three decades now, the employment action that is most likely to be challenged is a termination. And so in that respect, we do recommend that employers carefully document why they're taking this action, who the decision makers are, and above all what the selection criteria are when involuntary layoffs, terminations, or even furloughs are contemplated. And so, you know, that means clarifying that despite our best efforts and alternative steps we've explored, we can only continue operating at this point through implementation of a furlough or of a layoff. And if a furlough evolves into a layoff, why that's changed when we first considered it. What circumstances have come into play in the interim that were unanticipated.

Emily ([22:41](#)):

And then above all, how are we selecting the impacted employees? What criteria? Is it length of service? Is it job category? Is it preexisting performance or appraisal data? Is it skillsets? Is it qualifications to perform essential job functions? And that's very important to I identify and document because that is the legitimate non-discriminatory, nont, retaliatory reason for selecting certain employees as opposed to others if there is a challenge to these actions.

Sireesha ([23:22](#)):

So basically be consistent, be intentional, be thoughtful, and document, document, document.

Emily ([23:31](#)):

Document, document, document is my mantra, unfortunately. And Sireesha, something I'm happy to do is provide the pro bono partnership of Atlanta with a template we've developed over the years to help employers memorialize this, this decision making process. Um, I call it a "RIF Rationale Memo" or "Workforce Reduction Memo". But I will share that with you to keep available for your employers if they are struggling with this very challenging circumstance.

Sireesha ([24:07](#)):

Definitely thank you for that, Emily. And we are always advising our clients about the importance of documentation, so having kind of a guideline definitely would help take on that task. My next question is related to what should an employer do if they get to the point where they have decided that they can bring back employees? Um, are there any restrictions on bringing back the employees or how to do that?

Emily ([24:38](#)):

Usually there are not, I doubt that many of these listeners have a unionized workforce. But if that is the case, the collective bargaining agreement in place should always be consulted as an initial matter because it will have a priority spelled out in most instances as to recall rights and who has priority, often based on seniority. Um, absent a unionized workforce and a collective bargaining agreement, it's important for an employer to consider if there's any written policy on this subject to take into account or even past practice in similar circumstances. Absent that, again, being thoughtful and deliberate about the selection criteria for determining the order of rehiring employees who've been laid off, you know,

and being able to articulate legitimate non-discriminatory non-retaliatory reasons for those decisions is important. Again, document, document, document.

Sireesha ([25:48](#)):

And as we're talking about documentation, I will mention that one additional consideration that employers should keep in mind is how a workforce reduction dovetails with grants and funding. Whether it's a furlough or a layoff, a nonprofit should probably double check the terms of their grants or awards. For example, if you have a grant for a specific program, but you are planning to furlough or might need to lay off employees that help to execute that program, your organization could risk losing those funds. But it might also be an opportunity or time for the nonprofit to reach out to that funder, let them know about your situation and what your plans are. And that might be an opportunity to have those funds unrestricted or redirected to another program. And now, Emily, do you have any final thoughts that you would like to share with nonprofits who are listening maybe best practices or ideas that they should keep in mind as they're kind of considering layoff versus furlough?

Emily ([26:56](#)):

Certainly these are, these are certainly difficult circumstances. And it affects morale and the ability to continue operating. And so from a best practice standpoint, I can't underscore enough the importance of clear and transparent communication with your entire team, particularly in a mission-driven organization. Anytime there's a need to implement a furlough or a layoff or a reduction in force, it has a big detrimental effect on everyone's morale, those who are directly impacted, and those who are continuing to keep the lights on. And so the best practice is to be as transparent and clear as you can about what's happening, why it's happening, what the intention is, and certainly considering any alternatives such as reduced work hours, job sharing, pay cuts before taking these relatively drastic steps that affect the employment of the team. Also, just for an employer's consideration, eyes wide open, certainly the risk of losing your team, first and foremost, furloughed employees, but even other workers during these circumstances is a concern. Retention is challenging when people fear that there may not be a job for them there going forward. So we find the best practice is to have frequent and clear communications with the workforce, um, to avoid panic and try to maintain, you know, some upbeat morale in terms of what is happening in that organization.

Sireesha ([28:55](#)):

This was so much great information that you covered here today, Emily. Thanks for helping us better understand employers options when they're going through a reduction in force and the considerations to keep in mind in a layoff versus a furlough. We appreciate you sharing your time and expertise with us.

Emily ([29:16](#)):

My pleasure.

Sireesha ([29:19](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your

organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.