

# CASCADE OF OPTIONS FOR HANDLING DOWNTURNS

We are in unprecedented times and employers in California are facing some of the toughest challenges of the last century. We believe that the vast majority of businesses are trying to make the right decisions for their employees and the survival of their organizations. Many of these businesses have been faced or will be faced with very difficult choices as we pass through this pandemic. These choices involve a complex overlay of financial considerations, operational challenges, legal and tax implications, and cultural, moral, and ethical concerns.

As we have counseled our clients through the beginning stages of the COVID-19 crisis, we have developed a menu of tools that can be used by businesses to get through an economic downturn. Not all of these tools are “legal” tools so to speak, but each of them has legal implications, and it is from this perspective that these tools are presented. You should of course consult your financial, tax, and business advisors as well as your own judgment and common sense on many of these options, as needed.<sup>1</sup>

These tools are not mutually exclusive, and most can be used in combination, but in general we have tried to organize them as a cascade of options that move from the mildest to the most momentous. We hope that most employers try to use a combination of less severe measures to preserve jobs, morale, and the common good, before jumping immediately to layoffs. While we understand that some businesses will have no choice but to do layoffs, we’ve seen companies that initially thought they needed to perform layoffs be able to work around layoffs using some of these options and relying on relief from the recent stimulus legislation, which incentivizes employee retention.

As with anything else, there are layers of complexity with any business/legal decision. Below is an overview of the options at a glance with links to additional resources, where applicable.

<sup>1</sup>All materials have been prepared for general information purposes to permit you to learn more about issues related to the impact of the COVID-19 pandemic. The information presented is not legal advice, is not to be acted on as such, may not be current and is subject to change without notice. We are providing this information to help keep you informed, and before you take action you should consult your financial, tax, legal, and businesses advisors, as well as your own judgment and common sense, on many of these options.

## THERE ARE THREE PRINCIPLES TO KEEP IN MIND WHEN EVALUATING THESE OPTIONS:

**1**

STAY CALM AND DON'T OVERREACT. WE WILL GET THROUGH THIS AND BE STRONGER ON THE OTHER SIDE.

**2**

STAY TRUE TO YOUR CORE VALUES AND PUT OTHERS FIRST. AS LEADERS AND AS ORGANIZATIONS, WE WILL BE MOST REMEMBERED FOR HOW WE REACTED IN THE MOST TRYING TIME OF OUR GENERATION.

**3**

MAKE A PLAN, DOCUMENT THE PLAN, AND COMMUNICATE THE PLAN WITH AS MUCH TRANSPARENCY AND CARE AS POSSIBLE TO YOUR ORGANIZATION. YOUR EMPLOYEES WANT TO KNOW THAT YOU HAVE A PLAN AND THAT YOU ARE TRYING TO DO THE RIGHT THING WITH THEIR BEST INTERESTS IN MIND.

## RECENT STIMULUS RELIEF AND CREDIT OPTIONS

### A. BASICS

The CARES Act, passed on March 27, 2020, contains some valuable and promising relief options for businesses, including low interest loans with some amount of loan forgiveness.

### B. DETAILS

The Paycheck Protection Program contained in the CARES Act provides for low interest loans for small businesses to cover broadly defined payroll expenses (including payroll, medical, some taxes, rent, etc.). The loans are designed to encourage employee retention and discourage layoffs as they reward higher payroll expenses with larger relief. These loans, which have very relaxed and minimal prequalification requirements, may be a much-needed lifeline to many businesses. The Economic Injury Disaster Loans and Emergency Economic Injury Grants of the CARES Act also provides for emergency advances and grants for qualifying small businesses. Many organizations are holding off on layoffs currently until they have a better understanding of how these loans and grants can help them in the coming weeks (hopefully). In the meantime, businesses are requesting credit limit increases, working with lenders for other types of financing, or asking for deferment or payment relief to get through the time period before these loans are available.

### C. CAUTION

The CARES Act has different programs for businesses that are under 500 employees and over 500 employees. Thus, it is important to consult with a tax or financial planner to better understand the options for your company. The CARES Act is new and it may take weeks for these loans and grants to start being processed, let alone for funds to start flowing. Thus, it is important to plan for the weeks and months ahead with that in mind and exhaust other credit options if necessary.

### D. RESOURCES

- I. [HTTPS://WWW.CONGRESS.GOV/BILL/116TH-CONGRESS/SENATE-BILL/3548/TEXT](https://www.congress.gov/bill/116th-congress/senate-bill/3548/text)
- II. [HTTPS://ADVOCACY.CALCHAMBER.COM/2020/03/28/THE-CARES-ACT-EXPLAINED/](https://advocacy.calchamber.com/2020/03/28/the-care-act-explained/)

## CUT HOURS AND OVERTIME

### A. BASICS

The most simple, quick, and easy way to respond to a downturn is reducing employee hours or time worked.

### B. DETAILS

For non-union and non-contract employees, an employer can unilaterally cut hours of work and cut or reduce overtime worked. While all hours actually worked must be paid, there is generally no legal limitation on cutting hours or overtime, unless you have contracted for set hours (which is rare). Generally, employers can control the number of shifts and hours employees work in advance to reduce costs. Currently, California is offering unemployment benefits to workers who have their hours reduced but are not completely laid off. The CARES Act also adds federal unemployment benefits to employees (as well as potentially independent contractors and self-employed individuals) whose hours are reduced in conjunction with state unemployment benefits. Thus, this option may have certain advantages for both employee and employer.

### C. CAUTION

Things to be careful of are union contracts or employment agreements that have contractual commitments related to hours or overtime. In addition, the manner in which hours can be cut is different for hourly and salaried employees. For exempt employees, an employer must pay the full predetermined salary amount “free and clear” for any week in which the employee performs any work without regard to the number of days or hours worked. But there is no requirement that the predetermined salary be paid if the employee performs no work for an entire work week.

### D. RESOURCES

- I. [HTTPS://WWW.CONGRESS.GOV/BILL/116TH-CONGRESS/SENATE-BILL/3548/TEXT](https://www.congress.gov/bill/116th-congress/senate-bill/3548/text)
- II. [HTTPS://ADVOCACY.CALCHAMBER.COM/2020/03/28/THE-CARES-ACT-EXPLAINED/](https://advocacy.calchamber.com/2020/03/28/the-cares-act-explained/)
- III. [HTTPS://WWW.EDD.CA.GOV/ABOUT\\_EDD/CORONAVIRUS-2019.HTM](https://www.edd.ca.gov/about_edd/coronavirus-2019.htm)



## CUT PAY

### A. BASICS

Another simple and effective way to respond to a downturn that is less severe than a layoff is pay reduction.

### B. DETAILS

For at-will employees who are not represented by a union and are not covered by employment contracts, an employer may unilaterally reduce the wages and/or salaries of its employees. Any such wage and salary reductions need to be prospective (not retroactive) and announced to the affected employees in advance. The amount of advance notice needed is uncertain and debatable, but is likely minimal in the midst of a pandemic.

### C. CAUTION

Wage reductions cannot go below the applicable minimum wage, prevailing wage (where applicable), or below the minimum exemption salary thresholds for exempt employees. A best practice is to announce any salary or wage reduction at least one week in advance. For exempt employees, salary cuts and hours reductions can be trickier and it is advisable to seek employment law counsel. While an employer can prospectively reduce salary of an exempt employee due to a downturn, short term day-to-day or week-to-week reductions in salary due to an employee working less time certain days or certain weeks, may put the exempt status of the employee at risk and should be avoided.

### D. RESOURCES

Federal:

- I. [HTTPS://WWW.DOL.GOV/AGENCIES/WHD/FACT-SHEETS/70-FLSA-FURLOUGHES](https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs)

California:

- I. [HTTPS://WWW.DIR.CA.GOV/DLSE/OPINIONS/2009-08-19.PDF](https://www.dir.ca.gov/dlse/opinions/2009-08-19.pdf)
- II. [HTTPS://WWW.EDD.CA.GOV/ABOUT\\_EDD/CORONAVIRUS-2019.HTM](https://www.edd.ca.gov/about_edd/coronavirus-2019.htm)

## IV

**REDUCE BONUSES AND INCENTIVE COMP****A. BASICS**

If your company has bonuses, commissions, or incentive compensation, you may be able to renegotiate or revise comp/bonus plans depending on the terms of these plans.

**B. DETAILS**

Modifying, reducing, or eliminating a non-discretionary bonus or incentive compensation plan is largely a matter of contract. You should look carefully at your company's compensation agreements with affected employees to determine whether provisions exist allowing modification, reduction, and/or elimination of incentive compensation in certain circumstances.

**C. CAUTION**

If your comp, bonus, commission, or incentive plan is not in writing, you will need to consult with an attorney about the implications associated with revising your plan. The business is likely obligated to pay any compensation or commissions already earned under the terms of the applicable plan, but again consulting with an attorney is a good idea as this is a complicated area of the law.

**D. RESOURCES**

Bonuses are usually a matter of contract and therefore subject to state employment and contract laws.

## V

**SICK PAY, VACATION, PTO, AND/OR LEAVE USAGE****A. BASICS**

You may be able to utilize some combination of paid leave (vacation, sick, or PTO) for workers at home due to shutdowns or ill employees as a result of COVID-19.

**B. DETAILS**

Generally, employers can regulate when and how employees can use their vacation or PTO under the terms of its vacation policy (sick time is different). Many employers are revisiting and redrafting their policies or carefully using their policies in the midst of the pandemic to provide more flexibility with handling the crisis. There are also ways to manage and use sick time, although there are more restrictions with sick time.

**C. CAUTION**

The administration of sick time, vacation, and/or PTO in combination with various leave laws (like FMLA and CFRA) has always been a complicated area of the law. The complexity has grown with the passage of the federal Families First Coronavirus Response Act (FFCRA), which was signed into law on March 18, 2020). FFCRA expands FMLA requirements related to COVID-19 and provides mandatory sick pay obligations for employers with under 500 employees. This is a new law and the best resources for information regarding sick leave, PTO, and leave usage are currently available from state and federal labor agency websites.

**D. RESOURCES**

Federal:

- I. [HTTPS://WWW.DOL.GOV/AGENCIES/WHD/PANDEMIC/FFCRA-QUESTIONS](https://www.dol.gov/agencies/wHD/PANDEMIC/FFCRA-QUESTIONS)

California:

- I. [HTTPS://WWW.DIR.CA.GOV/DLSE/PAID\\_SICK\\_LEAVE.HTM/](https://www.dir.ca.gov/dlse/paid_sick_leave.htm/)
- II. [HTTPS://WWW.DIR.CA.GOV/DLSE/FAQ\\_VACATION.HTM](https://www.dir.ca.gov/dlse/faq_vacation.htm)

## FURLOUGH

### A. BASICS

A furlough is generally recognized as a temporary layoff for a specific period of time (in contrast to a permanent layoff).

### B. DETAILS

The concept of a “furlough” is not well defined under California law, but is similar to an unpaid temporary leave of absence that is initiated by the employer. Generally, the employee remains on payroll (but not paid) and is eligible for benefits, including health insurance coverage, and has an expectation of reinstatement at some later point. While a furlough doesn’t typically qualify an employee for unemployment insurance, in the wake of COVID-19, California has been relaxing its unemployment insurance requirements and has announced that if an employee is subject to reduced work hours, shutdowns, or is temporarily unemployed because of COVID-19, then they can apply for unemployment insurance.

### C. CAUTION

Although not well defined, to be a true furlough and not a layoff or reduction in force, it would have to be for a short period of time, with the expectation of reemployment at some point in the future. Notice is recommended although it may be minimal notice. Because a furlough is considered temporary, it doesn’t typically implicate notice laws like the federal WARN Act, but it may trigger California’s more liberal WARN Act. Governor Newsom, however, issued Executive Order N-31-20 on March 4, 2020, which temporarily suspends the 60-day notice requirement in the California WARN Act for those employers that give written notice to employees and satisfy other conditions. You should consult with an experienced employment attorney if your business has employed more than 75 employees in the last 12 months and you are considering a furlough of more than 50 employees.

### D. RESOURCES

Federal:

- I. [HTTPS://WWW.CONGRESS.GOV/BILL/116TH-CONGRESS/HOUSE-BILL/748/TEXT](https://www.congress.gov/bills/116/congress/house-bills/748/text)

California:

*Executive Order N-31-20:*

- I. [HTTPS://WWW.GOV.CA.GOV/WP-CONTENT/UPLOADS/2020/03/3.17.20-EO-MOTOR.PDF](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-MOTOR.PDF)

*EDD COVID-19:*

- II. [HTTPS://EDD.CA.GOV/ABOUT\\_EDD/CORONAVIRUS-2019.HTM](https://edd.ca.gov/about_edd/coronavirus-2019.htm)

*WARN FAQs:*

- III. [HTTPS://EDD.CA.GOV/ABOUT\\_EDD/CORONAVIRUS-2019/FAQS/WARN.HTM](https://edd.ca.gov/about_edd/coronavirus-2019/faqs/warn.htm)

## VII

### WORKSHARE

#### A. BASICS

California has a Work Sharing Program that allows employers to ask or mandate that employees reduce their hours worked and share duties with other similarly situated employees in conjunction with a state program that allow employees to potentially receive unemployment compensation while also working part-time.

#### B. DETAILS

A workshare is a potential alternative to layoffs for businesses experiencing reduced production, services, etc. that allows for businesses to keep trained employees and avoid the cost of recruiting hiring and training new employees when business conditions improve. Employees receive the same health and retirements while participating in the Work Sharing Program.

#### C. CAUTION

Currently, it is unclear to what extent the Work Sharing Program is operating or equipped to handle the COVID-19 crisis. Employers must satisfy specific requirements to participate in the program. Leased, intermittent, seasonal, or temporary service employees cannot participate. Employers interested in this program should contact the Employment Development Department.

#### D. RESOURCES

- I. [HTTPS://EDD.CA.GOV/PDF\\_PUB\\_CTR/DE8714BB.PDF](https://edd.ca.gov/pdf_pub_ctr/de8714bb.pdf)
- II. [HTTPS://EDD.CA.GOV/UNEMPLOYMENT/WORK\\_SHARING\\_PROGRAM.HTM](https://edd.ca.gov/unemployment/work_sharing_program.htm)

## VIII

### VOLUNTARY LAYOFF AND SEVERANCE

#### A. BASICS

A voluntary layoff is where a worker decides to take a voluntary severance package on their own instead of being selected or subjected to an involuntary layoff.

#### B. DETAILS

Unlike a traditional layoff where the employer selects a group of employees for layoff (based on objective, nondiscriminatory criteria), a voluntary layoff is when the employer offers employees the option of stepping forward for layoffs in lieu of or in advance of a larger involuntary layoff. Typically, the employer incentivizes this with a severance package of some type that provides the employee with additional pay that they normally would not receive in an involuntary layoff. Some employees may be ready to retire or move on and may voluntarily step forward for such a package, which can help both them and the business.

#### C. CAUTION

Although somewhat less risky than involuntary layoffs, voluntary layoffs still need to be handled with care to make sure the employer is not targeting people by age, gender, nationality, or any other protected characteristic that can be seen as discriminatory. There of course is an added cost associated with voluntary layoffs usually in the form of the severance, which the business will have to carefully calculate in advance. It is also important to have a good severance agreement that provides for a full release of all claims against the company in exchange for the payment of the severance amount.

#### D. RESOURCES

Work Sharing and Alternatives to Layoffs:

- I. [HTTPS://WWW.EDD.CA.GOV/UNEMPLOYMENT/WORK\\_SHARING\\_PROGRAM.HTM](https://www.edd.ca.gov/unemployment/work_sharing_program.htm)
- II. [HTTPS://WWW.EDD.CA.GOV/PDF\\_PUB\\_CTR/DE8714RRB.PDF](https://www.edd.ca.gov/pdf_pub_ctr/de8714rrb.pdf)

Severance Pay Criteria / Total and Partial Unemployment:

- III. [HTTPS://WWW.EDD.CA.GOV/UIBDG/TOTAL\\_AND\\_PARTIAL\\_UNEMPLOYMENT\\_TPU\\_46035.HTM](https://www.edd.ca.gov/uibdg/total_and_partial_unemployment_tpu_46035.htm)

## IX

### REDUCTION IN FORCE OR INVOLUNTARY LAYOFF

#### A. BASICS

An involuntary layoff or reduction in force is where the employer lets a group of employees go at the same time on a permanent basis.

#### B. DETAILS

In contrast to a furlough, a true layoff is permanent. That is, an employer terminates an employee's employment without any right to be recalled or reinstated if business conditions improve (although individuals can optionally reapply). Unlike a furlough, benefits typically are terminated and the employee is taken off of payroll. The employee is then eligible for unemployment insurance as a result.

#### C. CAUTION

Layoffs must be handled carefully to ensure that the employer is not targeting people by age, gender, nationality, or any other protected characteristic that can be seen as discriminatory. Objective criteria should be used, demographic information should be evaluated, and an employment lawyer should be consulted. The California WARN act, which requires certain notices for layoffs, applies to any "mass layoff" of 50 or more employees in a 30-day period. While the California WARN notice requirements have been relaxed due to COVID-19, there are still notice requirements. Regardless of California WARN's application, a best practice is for employers to provide some type of written documentation/notice for all layoffs to clearly connect the layoff with the consequences of COVID-19 for a variety of legal, financial, and insurance purposes. The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of the federal WARN Act applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

IF YOU HAVE QUESTIONS PLEASE REACH OUT  
TO BRANDON MCKELVEY AT [BRANDON@MEDINAMCKELVEY.COM](mailto:BRANDON@MEDINAMCKELVEY.COM)  
OR CALL US AT 916.960.2211