

NW Employer Solutions, LLC



INNOVATIVE LEGAL SOLUTIONS FOR EMPLOYERS

About Us

NW Employer Solutions, LLC, is a woman-owned, employment law practice located in Beaverton, Oregon. It is dedicated to helping employers of all sizes, locations and industries comply with the myriad of employment laws and requirements. The goal of NW Employer Solutions, LLC is to minimize legal risks and avoid lawsuits.

Heyke Kirkendall-Baker proactively counsel's employers on the best practices in employee relation issues, wage and hour compliance, leave of absences, proper classification of workers, independent contractors, and compliance with federal and state laws. She routinely handles difficult performance problems and high-risk terminations. She has also conducted dozens of workplace investigations and favorably resolved a multitude of disputes with employees before lawsuits were filed.

Heyke is licensed in Oregon, she earned her J.D. from Lewis & Clark Law School, and her B.S., Magna cum laude, from the University of South Carolina-Aiken. She has represented management in all aspects of labor and employment law for more than 20 years. She primarily focuses on providing consultation and representation to employers and management in employment matters. She has four grown children, and she resides in Beaverton, Oregon with her husband, Steve.

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COVID-19 Options

Agenda

- Definitions
 - Furlough
 - Layoff
 - Reduction in force
- Unemployment options for employers and employees
 - Workshare
 - Worked examples
- Next Steps:
 - Taking action
 - Communication
- New Legislation:
 - Emergency Paid Sick Leave (E-PSL)
 - Emergency Family and Medical Leave

Important Note

**RULES AND CRITERIA ARE CHANGING ON A REGULAR BASIS – PLEASE
CHECK THE WEBSITE FOR YOUR LOCAL GOVERNING BODY FOR MOST
CURRENT INFORMATION!**

Current as of: March 30, 2020

Definitions: Furlough

- Alternative to layoff – temporary interruption of work
- Employees required to work fewer hours or rotate periods of time off without pay
- Benefits: health insurance continues during this type of reduction; and new leave legislation (FFCRA) applies during this type of reduction
- Unemployment Benefits: may be eligible (dependent upon hours and wages)
- Additional Considerations
 - Non-exempt (hourly): provide clear expectations for no overtime
 - Exempt (salary): should rotate on a full work-week basis (if employee works one day during the week, employee owed entire week of salary); and provide clear expectations that employee should not work at all during week off (e.g., phone, email, voicemail, remote work, etc.)

Definitions: Layoff

- A temporary separation from payroll (i.e., employee inactive) - not enough work for employees, but situation will change in the future
- Laid off employees will be recalled when reason for layoff resolves
- Benefits: laid off employees not eligible for benefits – COBRA notices should be sent; and new legislation (FFCRA) does not apply
- Unemployment benefits: laid off employees generally eligible for Unemployment Benefits
- Additional Considerations
 - Recommend analysis of workforce to reduce risk
 - WARN Act may apply if more than 50 employees laid off at one site and more than 6 months' separation

Definitions: Reduction in Force

- A permanent separation from payroll
- Not enough work for employees, and situation will not change in the future
- Laid off employees will not be recalled
- Benefits: employees not eligible for benefits – COBRA notices should be sent; and new legislation (FFCRA) does not apply
- Unemployment benefits: employees generally eligible for Unemployment Benefits
- Additional Considerations
 - Recommend analysis of workforce to reduce risk
 - WARN Act may apply if more than 50 employees permanently separated from workforce at one site

Summary of Definitions

Action	Definition	Continuation of Health Insurance	FFRCA Applies	Unemployment Benefits
Furlough	Temporary interruption or reduction	Yes	Yes	Depends upon the amount of reduction*
Layoff	No work until recall	No, follows typical separation process	No	Yes, if meeting qualification criteria*
Reduction in Force	No work, no recall	No, follows typical separation process	No	Yes, if meeting qualification criteria*

*Qualification criteria may change or waived due to COVID-19. Please review information provided by state specific governing body.

Unemployment Basics

- Waiting Period: 1 week
 - It is possible that waiting period will be waived due to COVID-19
- Benefit amount is based upon earnings in the first four of the last five calendar quarters
- Unemployment benefits up to 26 weeks, over a 52 week period (base year begins on filing date)
 - May be extended due to COVID-19
- Taxable, earnings are gross
- Available for COVID-19 related reasons

Weekly Benefit Calculation: Oregon

- Weekly benefit amount = 1.25% of total base year wage
 - Minimum unemployment: \$151 per week
 - Maximum unemployment: \$648 per week
- Worked hours will reduce weekly benefit
- Can not exceed maximum benefit – benefit reduced by:
 - Gross earnings
 - Cash
 - Non-cash payments such as room and board
 - Stand-by Pay
 - Sick Pay, Vacation, and Holiday Pay

Scenario Unemployment Estimate: Furlough

- Employee remains “active” employee (does not need to be terminated)
- Expectation to return to full-time employment or employment above maximum benefit amount
 - Employee must be able to work, stay in contact with their employer, and be available to work when called back
 - The employee is not required to seek other employment
- Employer maintains health benefits
- Joe earns \$60,000/year, hours reduced to 20 hours per week (\$576.92/week)
 - Weekly calculated benefit = \$648.00
 - Subtract earned wages = **\$576.92**
 - Weekly benefit = \$ 71.08

Scenario Estimate: Layoff & Reduction in Force

- Employee no longer “active”
- Required to seek other employment to remain eligible
 - May be waived due to COVID-19
- Employee not eligible for health benefits (COBRA)
- Joe earns \$35,000 in base year (\$673/week)
 - 1.25% = \$438 weekly benefit
- Joes earns \$60,000 in base year (\$1,153/week)
 - 1.25% = \$750 weekly, exceeds maximum
 - Weekly benefit = \$648

Work Share Oregon Program



Work Share provides an alternative for employers and workers who may be facing the prospect of a lay off situation. With Work Share, instead of reducing staff, an employer reduces the hours of work for a group of workers. Partial Unemployment Insurance benefits are then paid to supplement workers' reduced wages.

- Application by employer, with identification of employees (union signoff)
- Must impact at least 3 employees
- Must maintain health and retirement benefits
- Hours and wages must be cut between 20-40%
- Employees are not required to seek work
- Available to employees who have worked full-time for 6 months or part-time for 12 months
- Valid for up to one year

Work Share Scenarios I

- John works 5 days a week and earns \$39k (\$750 weekly)
 - Laid off → \$487.50 weekly benefit*
- John's hours reduced by 20% under Workshare
 - Earnings from employer = \$600.00 per week**
 - Unemployment benefit = \$97.50 per week***
 - Total earnings = \$697.50 per week
(plus benefits)

* \$39K (Annual Salary) x 1.25% = \$487.5 maximum weekly benefit

** \$750 (Weekly salary) x 80% for days worked (20% is WorkShare)

*** \$487.5 Maximum weekly benefit x 20% = \$97.50

Work Share Scenarios II

- Jane works 5 days a week and earns \$52k (\$1,000/week)
 - Laid off = \$648 weekly benefit (max)*
- Jane's hours reduced by 20% under Workshare
 - Earnings from employer = \$800.00 per week**
 - Unemployment benefit = \$130.00 per week***
 - Total earnings = \$930.00 per week
plus benefits

*\$52K (Annual Salary) x 1.25% = \$650 → Maximum \$648

** \$1000 (Weekly salary) x 80% for days worked (20% is WorkShare)

*** \$648 Maximum weekly benefit x 20% = \$130

Work Share Scenarios III

- Bob works 5 days a week and earns \$104k (\$2,000/week)
 - Laid off → \$648 weekly benefit (max)*
- Bob's hours reduced by 20% under Workshare
 - Earnings from employer = \$1,600.00 per week**
 - Unemployment benefit = \$129.60 per week***
 - Total earnings = \$1,729.60 per week
plus benefits

*\$104 K (Annual Salary) x 1.25% = \$1300 → Maximum \$648

** \$2000 (Weekly salary) x 80% for days worked (20% is WorkShare)

*** \$648 Maximum weekly benefit x 20% = \$129.60

Next Steps: Taking Action

- Select potential employees that may be impacted
- Create spreadsheet with objective criteria to analyze workforce
- Examples of objective criteria for analysis
 - Seniority
 - Performance
 - Preferred education/training
 - Experience
 - Skills
- 2-3 leaders objectively evaluate employees
- Retain supporting documentation used in analysis

Analysis Example

Criteria	Bob	Sally	Mary	Bill
Performance Evaluation • Level 1-5	3	5	2	5
Years of Seniority: • 1-3 years = 1 • 4-7 years = 2 • 8+ years = 3	1	2	2	1
Years of Experience: • 1-3 years = 1 • 4-7 years = 2 • 8+ years = 3	1	3	2	2
Punctuality & Attendance • Poor = 1 • Unsatisfactory = 2 • Satisfactory = 3 • Very Satisfactory = 4 • Outstanding = 5	5	4	2	5
Total	10	14	8	13



Performance Evaluation

Scale	Level	Description
5	Outstanding	Performance represents an extraordinary level of achievement and commitment in terms of quality and time, technical skills and knowledge, ingenuity, and creativity and initiative. Employees at this performance level should have demonstrated exceptional job mastery in all major areas of responsibility. Employee achievement and contributions to the organization are of marked excellence.
4	Very Satisfactory	Performance exceeded expectation. All goals objective, and targets were achieved above established standards.
3	Satisfactory	Performance met expectations in terms of quality of work, efficiency and timeliness. The most critical annual goals were met.
2	Unsatisfactory	Performance failed to meet expectations, and/or one or more of the most critical goals were not met.
1	Poor	Performance was consistently below expectations, and/or reasonable progress toward critical goals was not made. Significant improvement is needed in one or more important areas.

Next Steps: Taking Action

- Reduce risk: review protected status of each selected employee
 - Demographic information
 - Workers' comp claim, if applicable
 - FMLA/OFLA leave (pregnancy, illness, etc.), if applicable
- Consider severance package
 - Release of potential claims
 - Additional requirements if employee 40 years or older
- Consider additional services
 - Resume and employment support
 - Payment of COBRA

Next Steps: Communication

- With affected employees verbally
 - Virtual meetings
 - Phone calls
 - Document verbal conversation, with specifics
- With employees who will remain
 - Virtual meetings
 - Phone call

Families First Coronavirus Response Act (FFCRA)

FFCRA Provides Additional Benefits

The Act has several added benefits. We will focus on the benefits that employers will need to provide to qualifying employees.

Two additional provisions:

1. Implementation of Emergency Paid Sick Leave (E-PSL)
2. Implementation of Emergency Family and Medical Leave (E-FMLA)

Emergency – Paid Sick Leave (E-PSL)

In *addition* to the leaves already in place through local specific requirements and company generosity, *up to 80 additional* hours of paid sick time shall be made available in the following 6 qualifying instances:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. (no similar conditions are currently specified).

PAY IS NOT THE SAME FOR ALL OF THESE QUALIFYING EVENTS

Pay During An E-PSL and E-FMLA

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying E-PSL reasons **#1-3 above**, up to
 - \$511 daily &
 - \$5,110 total
- 66.6% for qualifying E-PSL reasons **#4 and 6 above**, up to
 - \$200 daily &
 - \$2,000 total
- 66.6% for qualifying E-PSL reason **#5 above**, up to
 - 12 weeks of paid sick leave and expanded family and medical leave paid
 - \$200 daily &
 - \$12,000 total

Emergency Family and Medical Leave (E-FMLA)

Expanded coverage in comparison to FMLA

- Covers employers with fewer than 500 employees (FMLA covers 50 or more employees)
- Employee eligibility occurs at 30 calendar days of employment, prior to the designated leave (FMLA eligibility is 1,250 hours during the 12 months prior to the leave)
- Protected leave remain up to 12 weeks, however, a portion of the leave is partially paid
- Available on intermittent basis, if employee and employer agree
- Additional qualifying event: “Allows an employee who is **unable to work or telework to care for the employee’s child** (under 18 years of age) if the **child’s school or place of care is closed** or the **childcare provider is unavailable** due to a public health emergency.” (#5 on E-PSL)

Note: Small businesses with *fewer than 50 employees* may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth. Criteria for exemption is expected in April.

Pay During an E-PSL and E-FMLA

- A part-time employee is eligible for leave for the number of hours that the employee is *normally scheduled* to work.
- If a regular schedule is not worked, you must determine the schedule by averaging the hours and employee was scheduled to work, per day, over the 6 months preceding the need for leave.
- If the employee has not worked for 6 months, you will use the number of daily hours that were anticipated to be worked at the time of hire.
- Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the first two weeks of partial paid leave.
- **IN ALL CASES** –the pay provided cannot be less than the greater of your locations or federal minimum wage.

NW Employer Solutions, LLC

LEGAL CONSULTATION

NW Employer Solutions is dedicated to providing effective, client-focused legal solutions for employers. We want to become your trusted employment partner.

PAY EQUITY SOLUTION

Pay Equity Solution: Parity Software®

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Partner with NW Employer Solutions for effective manager and legal compliance training.

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