

COVID-19 AND REEMPLOYMENT ASSISTANCE (UNEMPLOYMENT INSURANCE): GUIDANCE FOR BUSINESSES

The information provided does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available are for general informational purposes only.

EMPLOYER STEPS WHEN LAYING OFF EMPLOYEES

What steps should I take if I plan to lay off employees as a direct result of the COVID-19 pandemic?

First, the South Dakota Department of Labor and Regulation (DLR) encourages employers to sign up for an electronic system called the State Information Data Exchange System, or SIDES for short. This is a secure, electronic, standardized format that will supply claim information by email rather than by mail and will help things move forward more efficiently.

Sign up at dlr.sd.gov/sides. When it asks for your account number, that refers to the same account number you report on your quarterly tax wages to DLR.

Letter to Employees

Issue a letter to your employees notifying them they will be temporarily laid off from employment at your business in conjunction with COVID-19. DLR will ask for a copy of the letter as documentation to show that the employer clearly expressed to individuals the duration of the temporary layoff. (Until DLR asks for documentation, just maintain the letter in your personnel files.)

DLR doesn't have a template letter to be used by employers who are planning to lay off employees, as the Department does not want to be in the position of appearing to offer legal advice to employers.

As employers are drafting a letter, DLR suggests some of the things to include are:

- Today's date
- Whether this is a temporary layoff
- The date the temporary layoff will begin
- That the temporary layoff is directly related to COVID-19
- If you are doing a temporary layoff, include a tentative call-back date – the recommendation is to specify a tentative call-back date ten weeks from the date the layoff begins
- Include a notation indicating if the business is able to reopen and resume work hours prior to the callback date, refusal to return may result in a loss of benefits
- Note: Do not guarantee employees the business will resume normal operations on a specific date, do not guarantee a certain number of work hours, and do not guarantee employment, as this could then be considered a contract

Let employees know how to apply for unemployment benefits.

If workers want to file an unemployment claim, they should do so online if possible, as this is a significantly faster option than filing by phone. Tell employees to visit raclaims.sd.gov. They can file a claim on that site. A tutorial video is available to show them how to file. Individuals must know username and password to check on claim status. DLR does not have the capacity to reset forgotten usernames and passwords created in the past two weeks. We can help individuals who need a reset for usernames and passwords created more than two weeks ago. Claim status can be checked online. We also do not have capacity to check claim status for everyone who has filed.

- Individuals need: SS #, Driver's License or State ID, and 18 months work history.
- If filing online, claimants will be given a confirmation number at the end of the process.

- Next, claimants will receive a packet in the mail with monetary determination and instructions. They should receive this within 5 days. This packet outlines individual responsibilities for continuation of claim.

Individuals are required to complete a Weekly Request for Payment each week. Work search is currently suspended.

Provide employee earnings summary if possible.

If a laid-off employee applies for unemployment benefits, they will need to furnish information regarding their employment history and weekly earnings for the last 18 months. It will help if you provide them with a summary showing their weekly earnings during the time they worked for you; don't go back beyond the last 18 months. If they have worked for other employers in the past 18 months, they will need that information as well.

Consider requiring use of vacation leave or sick leave.

Many employers ask if they should require individuals to use their vacation leave or sick leave before they apply for unemployment benefits.

There is no law that requires that action; it's a matter for each employer to decide in conjunction with your policy. One thing to keep in mind: if an employee is receiving paid vacation leave or paid sick leave, they are probably receiving their full-time for that leave, whereas unemployment benefits are paid at a lower amount. So, while it isn't a requirement, it may be beneficial to the employee if you require them to use their accrued vacation leave or paid sick leave before applying for unemployment benefits.

REDUCED WORKING HOURS

Q: If I reduce working hours for my employees as a direct result of the COVID-19 pandemic, would they be eligible for unemployment benefits and should I issue a similar letter as the one provided to employees who are laid off?

A: Depending on the number of hours that have been reduced and the amount of earnings for the week, a person may be eligible for reduced unemployment/RA benefits.

If you decide to reduce employee work hours, DLR advises giving the employee a letter stating their employment hours at your business will be reduced in conjunction with COVID-19. If the employee applies for unemployment benefits as a result of the reduction in hours, DLR will ask for a copy of the letter as documentation to show that the employer clearly expressed to individuals that the change was a result of COVID-19.

DLR doesn't have a template letter to be used by employers who are planning to reduce employee work hours, as the Department does not want to be in the position of appearing to offer legal advice to employers.

As employers are drafting a letter, the Department suggests some of the things to include are:

- Today's date
- The date the reduction in hours will begin
- That the reduction in hours is directly related to COVID-19
- Include a notation indicating if the business is able to resume normal work hours, refusal to return may result in a loss of benefits
- Note: Do not guarantee employees the business will resume normal operations on a specific date, do not guarantee a certain number of work hours, and do not guarantee employment, as this could then be considered a contract. However, you can give a tentative callback date 10 weeks from the date of the letter.

Provide employee earnings summary if possible.

If a laid-off employee applies for unemployment benefits, they will need to furnish information regarding their employment history and weekly earnings for the last 18 months. It will help if you provide them with a summary showing their weekly earnings during the time they worked for you; don't go back beyond the last 18 months. If they have worked for other employers in the past 18 months they will need that information as well.

TERMINATION VS LAYOFF

Q: Should I terminate an employee rather than laying them off?

A: Termination should be considered if there is cause, such as an employee who is consistently late for work, or doesn't show up for work and doesn't notify the employer, who disregards the employer's directions, or is insubordinate. Reasons for termination should be documented.

Employees may be laid off if you are closing the business. This would be a permanent lay off with no call back date.

BENEFIT AMOUNT

Q: If I lay off employees, how much can they expect to receive in unemployment benefits?

A: As a rule of thumb, South Dakota unemployment benefits generally equal approximately 50% of an employee's average weekly earnings. State law provides that the maximum amount a person may receive is \$414 per week in benefits; the minimum is \$28 weekly, but it would be rare for a person to receive that minimum amount.

Individuals receiving unemployment benefits in conjunction with COVID-19 may be eligible for an additional \$600 per week in their benefits under the federal CARES Act signed by the President on March 27. Information about this will be available from DLR at the appropriate time as individuals work with the Reemployment Assistance/Unemployment Insurance system.

PART-TIME EMPLOYEES

Q: If I lay off part-time employees, would they be eligible for unemployment benefits?

A: Possibly. To be eligible, the first criteria is sufficient qualifying earnings. Recommend individuals apply.

Q: Will the \$600 federal weekly unemployment benefit apply to part-time employees?

A: The \$600 per week payment will be provided to each recipient of unemployment insurance for up to four months (this expires on July 31, 2020.) The \$600 is covered fully by the federal government.

SEASONAL EMPLOYEES/BUSINESSES

Q: Are seasonal employees eligible for COVID-19-related unemployment benefits if an employer planned to hire them for the spring and summer months but didn't do so because the business won't be opening, or will be opening on a reduced scale?

A: Unemployment benefits are not paid out to individuals for future employment that no longer will occur. Keep in mind, that individual may have or have had other employment, and if they lost that other job due to COVID-19, they may be eligible for unemployment benefits. Also, under the federal CARES Act, those scheduled to commence employment and due to COVID-19 no longer have a job or cannot reach the job might be eligible to apply for PUA.

Q: Are employees of businesses that are classified as seasonal businesses entitled to unemployment benefits in the off-season?

A: Special provisions in South Dakota's Reemployment Assistance/Unemployment Insurance laws and regulations pertain to seasonal employers that close for revenue purposes for five months or more each year. Administrative Rule in South Dakota identifies which industries are considered seasonal. Employers in those industries can request to have a seasonal designation applied to their business. If they do so, their employees cannot receive benefits in the off-season. For example, if you operate a business that is classified as seasonal and you are open from November through March and your employees worked during those months, when you close at the end of March your employees aren't eligible to receive unemployment benefits for that regular seasonal closure. If you closed early or laid employees off before the end of your season due to COVID-19, the employees may be eligible for COVID-19-related unemployment benefits.

WORKERS WITH MORE THAN ONE JOB

Q: If a person has more than one job and is laid off from one job but not the other, are they eligible for unemployment benefits?

A: The person's benefits would be based on all wages combined, but if they are still earning an income from one of their jobs, that will offset the amount of benefit they receive. If someone is working full time at one job and part time at another, being laid off from the part-time job will not qualify him/her for benefits.

TIPPED EMPLOYEES

Q: I operate a restaurant and need to lay off employees due to COVID-19. Would tips be considered part of wages for purposes of calculating the amount of benefits they will receive?

A: Declared tips are considered part of their wages and are used in determining the amount of the benefit. If a tipped employee does not declare tips as income, their benefits would be based on the state minimum wage, which is \$9.30 an hour.

EMPLOYEES ON COMMISSION

Q: I have workers who are paid on commission. If I lay them off, are they eligible for unemployment benefits?

A: Yes. Commissions are considered wages.

EMPLOYEES ON SOCIAL SECURITY

Q: If a laid-off employee receives social security benefits, will they be eligible for unemployment benefits?

A: Yes, they are eligible. Social Security benefits do not have to be reported and will not reduce UI benefits.

INDEPENDENT CONTRACTORS AND SELF-EMPLOYED INDIVIDUALS

Q: Are independent contractors and self-employed individuals eligible for unemployment benefits?

A: Ordinarily the answer is no. However, individuals who normally would not be eligible for unemployment benefits – including self-employed individuals and independent contractors – but who are unable to work as a direct result of COVID-19 may receive benefits under the CARES Act signed by the President on March 27, 2020.

The Act temporarily extends unemployment benefit coverage to workers who traditionally were not eligible to receive unemployment benefits.

DLR will be communicating information about this change.

EMPLOYEES NOT WORKING DUE TO SCHOOL CLOSURE

Q: I have employees who have been staying at home with their children due to school closures and daycare closures that resulted from COVID-19. Will they be eligible for Pandemic Unemployment Insurance?

A: Yes, they may be eligible to apply and should apply.

OUT-OF-STATE EMPLOYEES WORKING IN SOUTH DAKOTA

Q: Our business is located in South Dakota, but we have employees that commute here from another state. Due to COVID-19, we are going to have to lay them off. Which state should they file unemployment in?

A: They should file in South Dakota, and then typically it will result in an interstate claim.

LAYOFF OF NEW EMPLOYEE

Q: We are going to lay off employees, including an individual who just started working for us. Will that new worker be eligible for benefits?

A: The new employee is eligible to apply for unemployment benefits. Keep in mind, they may have had another job prior to coming to work for you, and their wages from their previous employment would be considered when determining the level of their benefits.

PARTIAL VS ENTIRE STAFF LAYOFF

Q: When laying off employees, would I have to lay off my entire staff for them to be eligible for benefits, or can I lay off just part of my staff?

A: Each laid-off employee files a separate claim and is treated as an individual. So whether you lay off your entire staff, part of your staff, or just one individual, the laid off employee is eligible for unemployment. If the layoff is due to COVID-19 impacts on your business, the employee may be eligible for additional benefits under the federally-enacted legislation.

EMPLOYEE CHOOSES NOT TO WORK

Q1: We have taken active precautions to prevent the spread of COVID-19 within our business. Regardless, some employees have chosen not to come to work. They have not been laid off and we are not planning to lay them off. Are they eligible for unemployment benefits?

A: No.

Q2: An employee told us they were going to self-quarantine. They haven't come to work since then and have not contacted us since then. We are going to begin laying off employees but would like to terminate that individual rather than laying them off. Is that allowable?

A: If an employee has not come to work and has not regularly communicated with you regarding the reason they aren't working, then you could certainly terminate their employment for cause rather than laying them off.

Based on current guidance from the U.S. Department of Labor, DLR has modified existing unemployment compensation rules to allow workers to file a claim for unemployment compensation benefits who are quarantined by a medical professional or a government agency, or who have tested positive for COVID-19. However, if they simply say they are going to self-quarantine and do not provide any medical documentation, they would not qualify under that provision. Be sure to maintain documentation of any contact you have had (or not had) with them.

ACTIVELY SEARCHING FOR WORK

Q: If employees are laid off and apply for benefits, do they have to be out looking for work?

A: Usually the answer would be yes, they must be able and available to work, and be actively seeking work.

However, in conjunction with the Governor's declared state of emergency regarding COVID-19, DLR Cabinet Secretary Marcia Hultman has exercised authority to waive that requirement for workers filing for unemployment during the period starting March 21. The waiver remains in effect until the declared state of emergency ends.

It's important to note many employers are still seeking workers. In some cases, businesses that provide vital services need employees, so individuals who have lost their jobs are encouraged to continue searching for work through sdjobs.org.

LAYOFFS PRIOR TO COVID-19

Q: I laid off some workers prior to COVID-19 becoming a pandemic. Would they be eligible for COVID-19 unemployment benefits?

A: Workers may have been eligible for unemployment benefits at the time they were laid off, but they might not be eligible for the COVID-19 related unemployment benefits provided for under the CARES Act.

UI TAX RATES

Q: If I lay off employees due to COVID-19, will my UI/RA rates go up?

A: Legislation enacted at the federal level provides that employer UI tax rates cannot be negatively impacted by the UI benefits paid in conjunction with COVID-19. Governor Noem signed [Senate Bill 187](#) on March 31 to comply with that. SB 187 says in part, "However, no benefits paid on the basis of a period of employment may be charged to the experience-rating account of any employer, except as provided in § 61-5-41, if the claimant:

- (10) Is unemployed as a direct result of an employer temporarily ceasing operations or instituting a reduction in force in response to Coronavirus Disease 2019 or because the claimant has been requested to isolate or quarantine as a result of Coronavirus Disease 2019 regardless of whether the claimant has tested positive for

Coronavirus Disease 2019. Relief of charges under this subdivision may be granted for no more than the duration of any emergency relating to Coronavirus Disease 2019 as declared by the Governor.”

PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA)

Q: Am I as a business owner going to be eligible for UI/RA benefits if I temporarily close my business?

A: Federal lawmakers have passed a COVID-19 stimulus bill that will expand unemployment insurance benefits. Once DLR is provided with instructions from the federal government, the agency will make an announcement through a news release and on our website about benefit eligibility for independent contractors, the self-employed, and business owners who will soon be able to apply for Pandemic Unemployment Assistance (PUA).