



## **Furloughs: What if you took next week off...for no pay?**

In the current economic climate all nonprofits are scrambling to find new sources of funding and cut costs. Some organizations may find themselves in tough situations, deciding between reduction in staff, decreased services or temporarily lessening hours of operation. Another idea that has gained popularity in recent months has been employee furloughs.

In the employment context, a furlough is an unpaid leave of absence where the employee does not do any work for the organization. A number of financially strapped state and local governments have utilized furloughs in order to reduce costs. The Gannett Company, the nation's largest newspaper publisher, most notably of *USA Today*, required its employees to take a week off without pay in order to avoid substantial layoffs. It seems no business is safe in this economic climate.

Though furloughs may seem like a viable option for your nonprofit organization, there are some legal issues you must consider before putting a plan into action. Furlough plans become much more complicated depending upon the types of employees who are asked to comply with the plan.

### **Fair Labor Standards Act**

Under the Fair Labor Standards Act ("FLSA"), an employer is required to pay its employees an amount at least equal to the federal minimum wage for all hours worked up to 40 hours per week, and time and one-half the regular rate for all time worked over 40 hours in a work week.

However, certain employees are exempted from this requirement. An exempt employee includes any employee who is classified as a bona fide executive, administrative, professional, or outside sales employee. Some employees who perform computer services are also exempt.

In order to qualify for this exemption, the employee must:

- earn \$455 per week or more, and
- meet the criteria for being included in one of the exempt employee classifications.

It must be noted that an employee's job title does not determine an employee's exempt status. Both the employee's specific duties and salary must meet the

requirements for an exemption stipulated under the FLSA.

Non-exempt employees are paid only for hours they actually work. They are paid their regular rate of pay for up to 40 hours worked, and time and one-half for any hours worked above 40. Thus, if a non-exempt employee works 35 hours per week, he or she will be paid the normal hourly wage multiplied by 35.

As a result, an employer can require its non-exempt employees to accept an unpaid furlough. If an employer asks a non-exempt janitor to remain home for three days because the work flow has slowed, the employer would not be required to pay the janitor for those three days because no work was performed. The employer would not violate the wage and hour law if it gave the non-exempt employee a furlough for those days.

A different rule applies, however, for exempt employees. Under federal law, an exempt employee must be paid the same salary for each pay period in which the employee performs any work. Exempt employees are entitled to be paid without consideration of how many hours or days in a given week they have worked.

Therefore, if an exempt employee's rate of pay is \$600 per work week, and the employee only works 35 hours in that work week, he or she is still entitled to \$600. On the other hand, if the employee works 45 hours during a week, he or she will still receive only \$600. The exempt employee is not entitled to overtime pay or "compensatory" time off for any hours worked over 40.

If the employer does not follow these rules, and the employee does not receive full pay because he did not work 40 hours during the work week, the exempt employer risks forfeiting the employee's exempt status. For example, if an employer furloughs its employees, requiring that they do not work one day a week, an exempt employee subject to this directive will forfeit his or her exempt status. In such case, in the future the employee will be eligible for overtime pay for any hours worked during the week over 40.

### **Exceptions to General Rule**

However, there are exceptions to these general rules. For example, these rules do not apply if the employee is absent by choice. Thus, if an employee is out sick or on vacation, the employer can deduct from the employee's wages an amount equal to the sick days or vacation days, or charge his or her absence to the employee's accrued sick leave or vacation leave, if applicable.<sup>1</sup>

In addition, even under the FLSA, the employer is entitled to set minimum performance standards for the employee. For example, if, as part of his or her duties, the employee is required to be in the office a certain number of hours per week in order to meet with colleagues, staff an information hotline or provide on-site services, the employer is entitled to discipline the employee for failing to meet the minimum standards. However,

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<sup>1</sup> As a general rule, the employer cannot reduce an exempt employee's pay if the employee is ready, willing and able to work. Thus, if the employer is closed because of inclement weather, the employer cannot deduct from the exempt employee's wages the equivalent of one day's pay.

the employer should not dock the employee's pay for the time missed.

Moreover, the employer may furlough the employee for an entire work week. This will not result in the employee forfeiting his or her exempt status because an exempt employee is not entitled to any salary in a week where no work is done.

### **Prospective Changes in Terms of Employment**

While an employer cannot place an exempt employee on an unpaid, one-day furlough, the employer still has some flexibility in changing the terms of the exempt employee's employment. The Department of Labor has held that an employer can make a *prospective* reduction in an exempt employee's compensation and hours. The Department has reasoned that, although federal regulations preclude *deductions* from pay for current or past work periods, they do not preclude *prospective* reductions implemented for future work periods.

For example, suppose an employer wants to reduce an exempt employee's pay by 20% in order to cover a funding shortfall. Instead of putting the employee on a one-day-a-week furlough, which would result in a loss of the employee's exempt status, the employer can reduce the employee's future pay by 20%. Provided the employee continues to make at least \$455 per work week, the employee is still considered an exempt employee.

Moreover, if the employer wants to prospectively reduce the employee's responsibilities, so the employee is only

expected to work four days a week in return for the reduced salary, it also will not result in a loss of the employee's exempt status. The difference between this and a furlough is that this is a permanent, fixed change in the employee's pay and work schedule that is being made on a prospective basis.

### **Useful Reminders:**

- a. **NO work permitted:** If the employer elects to furlough an exempt employee for an entire work week, the exempt employee may be tempted to check his or her Blackberry and exchange emails regarding work tasks for the following week. The employer should give notice in writing that no work is allowed during the furlough period. Even the practice of checking voicemail may put the employer at risk of paying the employee's entire week's salary.
- b. **Vacation Time:** Employers may be tempted to request mandatory use of vacation time or paid time off during furlough periods. Though this may save employers some money, it may be illegal under various labor laws. The best choice would be to extend the option of using vacation time or paid time off during a furlough.
- c. **Advance Notice:** For employers choosing furloughs or reducing hours as a cost-cutting measure, advance notice in writing is critical to make employees aware of the change in circumstances. Many states require advance notice for any reduction in compensation.

- d. **Unions:** Employers seeking mandatory furloughs should consider the impact the changed circumstances will have on employees who are members of a union or whose contracts fall under a collective bargaining agreement. Certain provisions of employment contracts may restrict an employer's ability to furlough employees.

### **Alternatives to Furloughs**

Where furloughs may be difficult to implement, employers may choose to take other steps, such as:

1. Temporary salary reductions;
2. Across the board wage freezes;
3. Hiring freezes; or
4. Reducing business hours

Employers interested in utilizing furloughs or other shifts in their workforce should consult with an attorney in order to make an informed decision.

### **Additional Resources**

If you have further questions about furloughs, you may find the following resources to be helpful:

#### **Department of Labor's FairPay Overtime Initiative**

<http://www.dol.gov/esa/whd/regs/compliance/fairpay/>

#### **Opinion Letters - Fair Labor Standards Act**

[http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009\\_01\\_15\\_14\\_FLSA.htm](http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_14_FLSA.htm)

#### **An Update on Furloughs and Reduced Hours: New Guidance on Cost-Cutting Strategies Other than Layoffs**

<http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?ID=144>

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