



Board Talking Points: Furloughs: A Tool for Managing Personnel Expenses

Furloughs are being used as a way to reduce salary costs without having to lay off employees or institute salary reductions. For example, to save money some organizations are closing their offices and furloughing their employees during the week between Christmas and New Years. When planning a furlough there are legal issues to consider, particularly with respect to exempt employees.¹

Questions:

1. What is a furlough?
2. Must all employees be furloughed or can only a segment of the workforce be subject to a furlough?
3. Are there special concerns when furloughing exempt employees?
4. Does advance notice of a furlough need to be given?
5. Will a furlough effect employee benefits?

Answers:

1. What is a furlough?

A furlough is an unpaid leave of absence during a defined, temporary period of time and can be voluntary or mandatory. Furloughs may be taken in full weeks, or on one or more days per week. An alternative to furloughs would be salary reductions but furloughs may be preferred because employees are given time off and base salaries are preserved so when economic conditions improve compensation levels are maintained.

2. Must all employees be furloughed or can only a segment of the workforce be subject to a furlough?

It is possible to furlough only a portion of employees. As with selecting employees for a layoff, make sure that there is a sound business reason for choosing the departments and individual employees subject to the furlough. For example, if funding for one program is reduced, the decision might be made to furlough all the employees working in that program while the rest of the staff remains unaffected. Employees who believe they were chosen to participate in a selective furlough for discriminatory reasons may have a cause of action. Therefore, it is important to effectively communicate with staff about the reasons for the furlough and its implementation.

¹ For purposes of this discussion, it is assumed that all employees are employees at will and not covered by a collective bargaining agreement or employment contract. If employees are covered by a collective bargaining agreement or employment contract that agreement must be reviewed when planning a furlough.

3. Are there special concerns when furloughing exempt employees?

Federal and state laws impose mandatory minimum wage requirements and overtime requirements for most employees. Certain categories of employees are considered exempt from overtime requirements including executive staff and professionals. As long as non-exempt hourly employees are continued to be paid their hourly wage (which must meet or exceed the minimum hourly wage) for the hours worked an employer can reduce an employee's hours at its discretion. Consider applying for the New York State Shared Work Program, which provides for partial unemployment insurance for full-time employees whose weekly hours have been reduced.¹

Reducing the hours and wages of salaried exempt employees, however, creates a more complicated situation. This is because under the Fair Labor Standards Act ("FLSA"), an exempt salaried employee must receive the same amount of compensation *regardless* of the amount of hours they work. This requirement is commonly known as the salary-basis test. To put it another way, an exempt employee's salary is not subject to reduction because of variation in the number of hours worked or in the quantity or quality of work performed during the pay period. This means that if an exempt employee performs *any* work - no matter how little - during the workweek, the full salary must be paid.

Exempt employees can be furloughed without pay in week-long increments (for instance, one week per month for the next four months) without running afoul of the salary-basis test.² As long as the employee performs no work for an entire week, there is no legal obligation to pay the employee for that week. During the furlough period, however, the performance of even a minimum amount of work, such as checking emails or receiving phone calls, could require payment of the employee's full weekly salary. For this reason it is critical to ensure that furloughed employees are not performing any work during the furlough period. At a minimum, employees should sign a statement that they will perform no work while on furlough. You should also consider disallowing email access or taking possession of company laptops or cell phones.

Organizations may also be able to reduce an exempt employee's salary on a weekly basis if the salary reduction reflects a reduction in the normal scheduled work week. An example would be to reduce the employee's normally scheduled work week from 40-hours per week to 35-hours per week, and correspondingly reducing their salary by 12.5%. In order to maintain the employee's exempt status, the weekly salary cannot be reduced below \$536.10. US Department of Labor regulations provide that making deductions from an exempt employee's salary due absences caused by the employer or by the employer's fluctuating business needs flunks the salary basis test. For this reason, the reduction in hours and wages should be made prospectively only, and should be made on a long-term basis. Frequently changing an employee's work schedule may result in a denial of exempt status.

¹ For more information, see <http://www.labor.state.ny.us/ui/dande/sharedwork1.shtm>.

² This is the least risky way of furloughing exempt employees, but will preclude exempt employees from participating in a Shared Work program, which requires that hours be reduced on a weekly basis by no more than 60%. Affected employees may still qualify for regular unemployment benefits for the week in which they are furloughed.

4. Does advance notice of a furlough need to be given?

To best manage employee relations in a difficult situation, advance notice of the furlough should be given. Organizations that employ 50 or more people should consult with Lawyers Alliance attorneys well in advance of imposing mandatory furloughs or layoffs in order to determine if the federal and New York State Worker Adjustment and Retraining Notification Acts (“WARN Acts”) apply. Failing to comply with the WARN Acts can expose your organization to liability for back wages and lost benefits, as well as civil penalties.

The federal and state WARN Acts require covered employers to give s written notice if at least 25 employees will experience certain types of “employment losses,” including a reduction in hours of more than 50% for each month of a six-month period or a layoff lasting more than six months. The state law requires 90 days’ written notice.³ Notice must also be given to the affected employees’ representatives, the Department of Labor, and the Local Workforce Investment Board.

The New York State WARN Act does not apply if the furlough or reduction in hours is carried out as part of a Shared Work plan through the NY Department of Labor, in which the employees receive unemployment benefits to partially compensate for their reduced wages. However, be aware that the WARN Act will apply if the wage reductions persist after the Shared Work program ends.

There is also a limited exception to the notice requirement for “unforeseeable business circumstances.” An unforeseeable circumstance must have been not reasonably foreseeable when the ninety-day notice would have been required—your organization’s major funding source collapses suddenly and without warning, for instance. Even in these cases, however, employers are still required to provide as much notice as practicable.

5. Will a furlough affect employee benefits?

Many employers’ benefits plans cover only full-time employees. For these organizations, reducing an employee’s hours to less than full-time (e.g. 4/5ths FTE) will trigger a loss of benefits. To avoid this, you may consider amending the plans to include part-time employees.

Loss of group health insurance due to a reduction in hours is considered a “qualifying event” under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), requiring affected employees to receive notice of their right to elect continuation coverage. Remember that employers participating in the New York State Shared Work Program may not reduce employee benefits.

You should also review the effect that a reduction in hours may have on an employee’s participation in other welfare plans, as well as your pension plan. Review your

³ The federal law, which covers employers with at least 100 employees, requires only 60 days’ written notice. However, employers must comply with the most stringent requirements of both statutes.

employment policies, such as vacation, to see whether a reduction in hours will affect employees on furlough.

Contact Lawyers' Alliance to speak with an attorney regarding your options and to ensure you meet all your legal obligations.

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 x 250 or visit our website www.lawyersalliance.org for further information.