

## Furloughs – Pay Considerations

# **WAGE AND HOUR**

*Revised: March 2020*

### **Summary:**

Before implementing furloughs and shortened work weeks for exempt employees, employers must consider whether the plan can lead to violations of the Fair Labor Standards Act (FLSA) and comparable state laws. To be “exempt” from the overtime requirements of the FLSA, employees must normally receive their full weekly salary for any week in which they work any hours. Docking an exempt employee’s pay due to lack of work or for economic downturns, in increments of less than a full week, could result in an employer losing the exemption for that employee and all others in the employee’s classification. For nonexempt employees, furloughs will not pose an FLSA issue because nonexempt employees can simply be scheduled for fewer hours of work and be paid for actual hours worked.

**For additional resources, please see page 4.**

### **Important Notice:**

*The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.*

---

**Copyright, 2018 Employers Council.** All rights reserved. Quotation from or reproduction of any part of this report, in any form, without prior permission in writing from the Employers Council, is prohibited.

# I. INTRODUCTION

---

For employers who do not want to terminate or lay off employees, mandatory unpaid furloughs are becoming increasingly viewed as a viable option for controlling payroll costs. The other option is to reduce the salaries of employees who do not have contracts to be paid at a certain rate for a particular period of time. For information on cost reduction efforts used by Employers Council members, review the annual Planning Packet published in September of each year and available at [www.EmployersCouncil.org](http://www.EmployersCouncil.org).

The following information is intended to answer questions about compliance with the Fair Labor Standards Act (FLSA) that may arise when private and public employers require employees to take furloughs and to take other reductions in pay or hours. Employers should also check state law, employment agreements, and union collective bargaining agreements for conflicts or requirements that are more stringent.

## A. MANDATORY USE OF ACCRUED LEAVE IN THE PRIVATE OR PUBLIC SECTOR

### **1. Can an employer require exempt employees to use accrued vacation/PTO?**

Increasingly, employers want to require employees to use vacation or other paid leave in connection with a furlough or simply to reduce the accrued liability. Such a practice does not violate the FLSA.

An employer can charge or dock an exempt employee's accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis requirement, provided the employee still receives the predetermined salary in any week in which any work is performed.

As noted in a Wage and Hour Opinion Letter, “[T]he employer may require exempt employees to use accrued vacation time for any absence, including one resulting from a plant shutdown, without affecting their exempt status, provided that employees receive a payment in an amount equal to their guaranteed salary. An exempt employee who has no accrued vacation benefits ... or has a negative balance ... still must receive the employee's guaranteed salary for any absences occasioned by the employer or the operating requirements of the business.”<sup>i</sup>

### **2. Can an employer require nonexempt employees to use accrued vacation/PTO?**

There is no FLSA restriction on employers requiring employees to use vacation or other paid leave in connection with a furlough, to reduce the accrued liability or for any other reason.

## B. FURLOUGHS OR REDUCING THE RATE OF PAY FOR NONEXEMPT EMPLOYEES IN THE PRIVATE OR PUBLIC SECTOR

### **1. If employers need to cut payroll expenses can they reduce the hourly rate or number of hours of nonexempt employees?**

The FLSA does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the statutory minimum wage. There is no required notification period to reduce an employee's rate of pay. However, the change should be made prospectively.

The FLSA does not preclude an employer from reducing the number of hours the nonexempt employee is scheduled to work. Hence, an employer may impose a furlough plan requiring nonexempt employees to take one or any other number of days off without pay on any schedule the employer chooses. Even if the employee is scheduled for a full day but only works a partial day due to lack of work, the FLSA does not require employers to pay nonexempt employees for hours they did not work. This is one area in which state law or a union contract may be more stringent.

### **2. Can an employee still be on call or performing work at home during a furlough day?**

Assuming the on-call time is non-restrictive, the employer may exclude it from hours worked. But employees who perform any part of their job duties during a furlough day must be paid for the time while performing such duties. Employers should be concerned with employees who access and respond to their e-mails offsite with a Blackberry or by logging onto the employer's network while on unpaid furlough status. Employees cannot volunteer to work while on unpaid furlough status.

On-call employees who are allowed to leave a message where they can be reached or carry a beeper or cell phone are not working (in most cases) while on call. However, once the employee is called into service, hours of work must be paid regardless of furlough status.

## C. FURLOUGHS AND REDUCING PAY OF EXEMPT EMPLOYEES IN THE PRIVATE SECTOR

### **1. Can an employer mandate an unpaid day of furlough, or in other words reduce an otherwise exempt employee's salary due to economic conditions and the need to cut the payroll budget?**

FLSA requires the payment of at least \$684 per week on a "salary" basis for those employed in an exempt executive, administrative, or professional capacity as defined by Part 541.<sup>ii</sup> A "salary" is a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed.<sup>iii</sup>

An employer must pay an exempt employee the full predetermined salary amount for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Therefore, an

employer may mandate a week of unpaid furlough as long it coincides with the workweek in which the employee performs no work.

Deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. Hence, an employer may not mandate unpaid furlough days for exempt employees in the private sector who work any part of the week. This means that an employer in the private sector may not furlough employees one day of the workweek with a corresponding reduction in salary.

**2. If the employee chooses to take days off on a voluntary basis, is that acceptable?**

Yes, an employee may choose to take a personal day off without pay without loss of the exemption.<sup>iv</sup> The employee's decision must be completely voluntary. A day off without pay during any week when the employee works may not be mandated by the employer.

**3. Can the employer mandate the employee take vacation, PTO, or holidays in combination with unpaid furlough days to account for the five-day workweek if the employee does not work at any time during the workweek?**

As long as the employee does no work during the week, the employer can mandate the use of paid leave in combination with unpaid furlough days. The only caution is to ensure employees are not working offsite by using PDAs to respond to e-mails or logging into a network to work from home. An employee cannot volunteer to work.

**4. Can an employer make prospective reduction in pay for a salaried exempt employee due to economic downturns and to reduce the payroll budget?**

An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to exempt employees provided the change is bona fide and not used as a device to evade the salary basis requirement and the employee still receives on a salary basis at least \$684 per week. For instance, the employer can announce it finds it necessary due to budget constraints to reduce the salary of exempt employees by 20 percent going forward.

On the other hand, deductions from the predetermined salary occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitutes impermissible deductions from the predetermined salary and would result in a loss of the exemption. For instance, it is not permissible for the employer to reduce the employees' salary by 20 percent for particular work weeks (e.g., equivalent to one day of pay) and communicate the employee can take off Fridays or some other days during the week of salary reduction. The difference is the first instance involves a prospective reduction in the salary which reflects long-term business needs. The second instance is a short-term deduction from the employee's salary for absences from scheduled work occasioned by the employer or its business operations.<sup>v</sup>

## D. FURLOUGHS AND REDUCING PAY OF EXEMPT EMPLOYEES IN THE PUBLIC SECTOR

### **1. Can a public sector employer mandate an unpaid day of furlough or in other words reduce an otherwise exempt employee's salary due to economic conditions and the need to cut the payroll budget?**

In the case of public sector employees, a specific rule applies to furloughs for salaried exempt employees. 29 CFR 541.710 allows:

“Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.”

Hence, public sector employers may mandate unpaid furlough days even if the employee works part of the week, unlike private sector employers. The one caution is if the exempt employee works more than 40 hours during the same week in which he or she experiences a furlough deduction from pay the employee is not considered to be paid on a salary basis and the employee must be paid overtime for actual hours worked over 40 in the workweek.

## **II. Conclusion**

---

To reduce costs and control payroll budgets, furloughs can be useful. However, employers must ensure that furloughs comply with FLSA requirements or the employer may lose the exempt status for one or more employees.

## **III. Sample Furlough Notice**

---

Due to unforeseen business circumstances, [Company name] is implementing a temporary furlough. This notice is to inform you that your position is included in this furlough, and as such, you are being placed on a temporary, unpaid leave of absence effective beginning [date]. [Company] anticipates this leave will be effective through [date] but cannot guarantee that it will not extend to some future date.

Benefits {will/will not} continue during the furlough period. [Employers should check plan documents and with providers to see if there are any provisions for continued coverage while employees are furloughed]. {The monthly health care premiums will be paid in full by the organization during this period}, or {You'll be expected to pay your monthly portion of the healthcare premiums by (state the method of payment. Examples are: sending in a check, going into arrears and repaying upon return.)}

You may be eligible for unemployment benefits under these circumstances. Present this notice at the time you apply for unemployment benefits. Contact [name of state agency] to find out the process for applying.

So that we can contact you during this furlough, please ensure we have your current contact information, including phone number, email, and street or post office address.

Contact [name of appropriate person] if you believe the information we have on file may be incorrect.

Nothing in this policy or any other policy of [employer name] shall be interpreted to be in conflict with or to eliminate or modify in any way, the at-will employment status of [employer name] employees. Employment at-will means that either you or the employer may end the employment relationship at any time and for any reason.

## **IV. Additional Resources on this Subject**

---

### **A. SEMINARS**

Wage and Hour Workshop

### **B. REFERENCE MATERIAL**

FYI

Wage and Hour: Exemptions- Salary Basis Test

---

<sup>i</sup> Wage and Hour Opinion Letter [FLSA 2009-2 \(January 14, 2009\)](#)

<sup>ii</sup> 29 C.F.R. 541

<sup>iii</sup> 29 C.F.R. 541.602(a)

<sup>iv</sup> 29 C.F.R. 541.602(b)

<sup>v</sup> 29 C.F.R. 541.602(a)