

# Thinking About a Furlough?

## Some Considerations for Public Employers

by Meghan N. Knight

In the current economic climate, many public and private employers are seeking ways to reduce costs and balance budgets. Furloughs provide an attractive option for employers who desire to avoid layoffs.<sup>1</sup>

A furlough is generally defined as the placement of an employee in a temporary status without duties and pay. Due to lack of work, lack of funds, or other non-disciplinary reasons, a furlough can be voluntary or mandatory. For example, an employer may decide to have a mandatory furlough for all of its employees for one week a month. Alternatively, an employer might have a voluntary furlough and allow its employees to take an unpaid day off once per week if he or she so chooses.

On April 28, 2009, in an effort to balance the state budget, Governor Beverly Perdue ordered a “flexible furlough plan” for “all persons employed in the Executive, Judicial, and Legislative Branches of State Government and all employees of the public schools, community colleges, and universities whose salaries are paid in whole or in part from moneys appropriated by the 2008 Appropriations Act.”<sup>2</sup> The annualized base salaries for each of these employees was reduced by ½% over the remainder of the fiscal year, and in exchange, each full-time employee is to receive 10 hours of flexible furlough leave and each part-time employee is to receive flexible furlough leave for a pro-rated number of hours.

The purpose of this article is to highlight some of the legal considerations and risks state and local government employers should be aware of when considering implementing furloughs.

### FLSA Considerations

The Fair Labor Standards Act (FLSA) sets the minimum wage and governs when overtime compensation must be paid.

Furloughs are easiest to implement for non-exempt employees, because under the FLSA non-exempt employees must only be paid at least the applicable minimum wage for the actual hours they work. This means that an employer may lower a non-exempt employee’s hourly rate, provided it is at least the minimum wage, and may reduce the number of hours a non-exempt employee is scheduled to work in any given work week, so long as they are paid for each hour worked.

Ordinarily exempt employees must be paid on a salary basis, which means they must be paid their full salary for any workweek in which they perform any work at all – regardless of the number of hours worked. Fortunately, the federal regulations provide an exception for public employers in the case of budgetary required furloughs. The regulations state:

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<sup>3</sup> in which the furlough occurs and for which the employee’s pay is accordingly reduced.

29 C.F.R. § 541.710(b)  
(*emphasis added*)

This means that exempt employees of public employers who are furloughed are treated as non-exempt during furlough weeks, and should be paid for each hour worked. Note that this also means that if the employee works more than 40 hours during that week, the employee is entitled to overtime (or compensatory time) at time and one-half the employee’s regular rate of pay for all hours actually worked over 40. During non-furlough weeks the exempt employee is compensated as usual – i.e. on a salary basis.

Perhaps the biggest challenge for employers is controlling the amount of “work” performed by the employee during furloughs. In the current economic climate, many employees may be concerned that they need to stay on top of things even during a furlough in an attempt to ensure job security. Thus, both non-exempt and exempt employees may be tempted to do work when they are supposed to be furloughed. This risk is increased where employees have Blackberries or other remote access to work e-mail or voice mail. Employers need to be aware that if an employee responds to a phone call or reads e-mails, that employee is working and must be paid for that time. Thus, it may be advisable to require employees to turn in work-issued Blackberries or similar devices during furloughs, and, if possible, to block remote access to e-mail and voicemail.

To the extent employees will be doing some amount of work during a furlough week, both exempt and non-exempt employees should complete time sheets. Since the goal of furloughs is cost reduction, employees should be cautioned to avoid overtime. In particular exempt employees should be told not to work overtime during furlough weeks, and made aware of any overtime policy that prohibits employees from working overtime without

## Go West Young Man!

Congratulations to Mark Payne, immediate past chair of our section on his recent selection as Guilford County Attorney. Mark is a 1983 graduate of the School of Law of the University of North Carolina. He previously worked in the North Carolina Department of Justice and most recently as the Johnston County Attorney.

advance written approval.

## Unemployment Benefits

North Carolina's Employment Security Commission ("ESC") refers to claims by furloughed workers as "attached claims." The ESC requires employers to file attached claims for unemployment benefits for any employee who works or is paid "less than three customary scheduled full-time days" or less than 60% of the customary scheduled full-time hours. To determine whether this threshold has been met, any other wages or pay (including bonus, vacation, and holiday pay) must be applied. Thus, if an employee is furloughed for an entire week with no vacation or holiday pay, that employee would be eligible for unemployment benefits for that workweek. Note that an employer may declare up to two weeks (of at least three days each) during a calendar year as *unpaid* vacation weeks, during which time employees are not eligible for unemployment insurance benefits.

Information on filing attached claims with the ESC and notice required to employees for vacation weeks is available at <http://www.ncesc1.com/individual/UI/UiClaims4.asp>.

## Benefits

If public employers decide to furlough employees, they must also decide whether employees will be forced to use accrued vacation during furloughs or simply be given the option to do so. Requiring employees to use accrued vacation may help employers reduce the number of employees taking vacation outside of the furlough period, which may increase efficiency from an operational standpoint. That said, it may help employees' morale and budgets to have control over the decision about whether and when to use paid vacation, especially where some employees may already have vacations planned outside a particular furlough period.

Employers should also examine their policies providing any other type of leave or absence (e.g. FMLA, bereavement, inclement weather) and consider how the use of that leave might be impacted by a furlough. For example, employers will need to determine what will happen if employees use FMLA leave at the same time as a scheduled furlough. Under the FMLA, if an "employer's business activity has temporarily ceased and employees generally are not expected to report to work for one or more weeks . . . the days the employer's activities have ceased do not count

against the employee's FMLA leave entitlement." 29 C.F.R. § 825.200(h).

Employee benefit plans may also be impacted by furloughs, particularly where the furlough is in place for a lengthy period of time. This might mean that in determining how to furlough employees, the employer should consider making sure employees still work the minimum number of hours needed to qualify for benefits. Another option might be amending the benefits plan to reduce minimum hours requirements.

## Discrimination

As with any employment decision, public employers should be aware that furlough decisions that are not applied "across the board" could raise the potential for discrimination claims. Employers should be mindful that furlough decisions are not made on the basis of race, color, religion, gender, national origin, age, disability, or other protected characteristic.

## Quirky Positions and Contracts

There are a few quirky positions that require special consideration with respect to furloughs. For example, by statute, a board of county commissioners may not reduce the salary, allowances, or other compensation paid to an elected officer during his or her term unless the officer agrees to the reduction or unless the Local Government Commission orders a reduction. See N.C. Gen. Stat. § 153A-92. This would appear to largely prohibit a furlough from being involuntarily applied to any elected official.

The State Personnel Act (N.C. Gen. Stat. § 126) applies to employees of four types of local government agencies/departments that receive federal funds conditioned upon use of competitive recruitment and selection procedures. These departments include health, social services, mental health, and emergency management. Pursuant to 5 U.S.C. § 7511 and § 7513, there may be special notice and other requirements for competitive service employees who are furloughed. These statutes should be examined carefully if any of these positions may be impacted by a furlough.

Finally, in the event a public employer has a contract with any employee, that contract should be thoroughly reviewed to determine whether a furlough applied to that employee would constitute a breach of contract.

## Conclusion

There are many considerations when evaluating whether to furlough employees and

how to implement a furlough. In addition to thinking through the potential legal implications, it is important for local governments to consider the ways in which municipal and county services may be impacted by reducing employee hours. It is also important to consider the impact a furlough may have on employees. Remember that the local government is probably opting for a furlough to avoid losing these employees, and taking steps to keep up morale is advisable. Give employees as much notice as possible so that they can plan and budget accordingly for any reduction in pay. Furthermore, where possible, consider giving employees flexibility in choosing furlough days. This may help employees with things like child care arrangements.

Certainly no employer wishes to be in a position of needing to furlough employees due to budgetary constraints. Taking steps to ensure compliance with any applicable laws when implementing furloughs should also reduce expenses in the long run. ■

## End Notes

1. Avoiding layoffs is an important consideration given that employers may want to retain their present employees. Further, significant costs may be associated with training new hires when the economy improves.

2. <http://www.governor.state.nc.us/NewsItems/UploadedFiles/fa6e5cal-c739-4a82-9945-c5476029b9de.pdf>

3. Note that pursuant to 29 CFR § 516.3, employers must designate a FLSA workweek for all employees. The employee's normal workweek is the workweek that should be used in determining in what week an exempt public employee becomes non-exempt due to a budget-required furlough.

4. Note that an employer may also reduce the workweek of certain exempt employees with a commensurate reduction in pay without defeating the salary basis test, where the employee's salary remains above the applicable minimum salary, and where the reduction is a bona fide reduction not designed to circumvent the salary basis requirement. (See, e.g., Wage and Hour Opinion Letter, Feb. 23, 1998).

*Meghan Knight is an associate with Cranfill Sumner & Hartzog LLP. Her primary practice areas are general civil defense litigation and employment law. She can be reached at (919)863-8757 or by e-mail at MKnight@CSHLaw.com.*