TOPIC:

FURLOUCHS: THE NEW "NORMAL"?

INTRODUCTION:

The worst economic crisis in decades has dealt a series of blows to college and university budgets, resulting in double-digit endowment losses; dramatic decreases in state funding; votes of no confidence in institutional leadership; and protests by students, faculty, and staff against cuts in programs, activities, and personnel. As the gravity of the recession bore down on campuses throughout 2009, administrative leaders tried a wide variety of budget-cutting mechanisms to cut costs, such as hiring freezes, travel restrictions, layoffs, and mandatory or voluntary furloughs. Unfortunately, for many institutions and educational systems, 2010 does not appear to offer much relief. State budget deficits nationwide, totaling approximately sixteen billion dollars [1], may require institutions to use layoffs and furloughs for the foreseeable future [2].

In February 2009, NACUA colleagues Lawrence White and Martin Michaelson provided excellent guidance on how to effectively plan for layoffs, while managing any associated legal risks [3]. Though this NACUANOTE focuses on furloughs, the due diligence process provided by White and Michaelson to assess the viability and legal foundations for layoffs is just as useful when deciding whether furloughs can or should be implemented. The essential components of this due diligence include:

- **Establishment of Legal Foundations**: Carefully review existing, applicable campus policies, state and federal laws.
- **Management of the Process**: Identify those administrators and/or departments responsible for effective implementation. Ensure that the implementation plan is clear and consistently applied.
- **Political and Strategic Considerations**: Develop a sound rationale for using furloughs and document the fact that you are employing them only after other viable alternatives were considered and/or rejected.
- **Campus Communications**: Develop an effective communications plan that provides accurate and consistent information, as well as necessary updates to all employees and related constituencies.

DISCUSSION:

I. TO FURLOUGH OR NOT TO FURLOUGH?

While a number of non-personnel options can be used to cut costs on campus, such as travel restrictions, linking tuition rates to particular programs or majors, restrictions on equipment or supply purchases, etc., the costliest daily operations component is personnel. Over the last 18-24 months, many institutions have taken the following actions, individually or in combination, to reduce personnel costs:

- Salary freezes and/or pay cuts (5% - 20%)
- Shorter work weeks; fewer work hours
- Renegotiation of faculty workloads
- Phased and/or early retirements
Mandatory and/or voluntary furloughs

Furloughs, the placement of employees on temporary leaves without pay or associated work duties for a designated period of time, have been used to manage urgent or immediate cost reduction needs. Unlike layoffs or reductions in force (RIFs), employees who are furloughed typically return to the workforce.

Legal Foundations for the Use of Furloughs

The legal basis for furloughs must be communicated openly, clearly, and consistently with all employees and campus constituencies. Accordingly, prior to the implementing a furlough program, it is essential to know:

- Whether you can furlough non-exempt and exempt employees?
- What state sources of authority for furloughing exist?
- What constraints, if any, exist under current individual contracts or collectively bargained agreements (CBAs)?
- Whether you can furlough research assistants, or grant-funded employees or foreign nationals employed by the institution?

The Fair Labor Standards Act (FLSA)

Traditionally, employers use furloughs most often with non-exempt employees, since they are paid only for the hours they actually work. Increasingly, however, they are beginning to furlough exempt employees, such as administrative staff and faculty. Therefore employers should carefully read and analyze the wage and hour laws applicable to both FLSA exempt and non-exempt employees to avoid violations of the FLSA [4] or comparable state regulations. The FLSA, and most state law counterparts, establish the basis for distinguishing exempt and non-exempt employees. Employees must meet both the salary basis test and the duties and discretion test (e.g., are an employee’s primary duties best described as executive, administrative, or professional?) to be exempt from overtime pay requirements. Under the salary basis test, an employee must be compensated at a rate of not less than $455 per week [5]. An employee meets this test if he/she "regularly receives each pay period on a weekly, or less frequent basis, a pre-determined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed … [A]n exempt employee must receive full salary for any week in which the employee performs any work without regard to the number of days or hours worked" [6].

This general rule applies to exempt employees subject to the “salary basis” test as part of the exemption. Teachers, lawyers and doctors fall into a slightly different class because these occupations do not have a “salary basis” requirement. To qualify as a teacher who is exempt from receiving overtime pay, the U.S. Department of Labor (DOL) simply requires that an employee have “teaching” as a primary job duty and be employed by an educational establishment [7].

If an institution decides to furlough both exempt and non-exempt employees, it should consider the following "cautionary notes":

- Furloughs should be use prospectively. An exempt employee is entitled to the entire salary for the week in which work is performed. Employers imposing an immediate furlough are responsible for paying exempt employees for the work they performed in the current pay period. However, employers do not need to pay exempt employees for any week in which they did not perform any work [8]. As a result, exempt employees prospectively furloughed for an entire week are unlikely to lose their exemption, since no salary is owed for the full week. You should consult your applicable state laws to determine whether the reduction of an exempt employee’s work schedule, in combination with any salary reduction, is permissible.
Exempt employees must not perform any work during the furlough period without advance, written authorization. Work performed during the furlough period (e.g., responding to e-mails, voice mails, working in the library, etc.) creates an employer obligation to pay the exempt employee his/her full salary for that period [9].

Consult your state's law. Although federal law permits employers to mandate the use of accrued vacation during furlough periods, state law may determine the type of notice that your institution must provide, and whether it can impose an unilateral “use it or lose it” policy.

Reducing an exempt employee’s time or wages over an extended period below the $455 per week threshold will threaten the employees’ exempt status.

Give employees advance, written notice, clearly identifying compliance with FLSA regulations, prior to furloughing them.

Sources of State Legal Authority

As a general rule, institutional leaders at public institutions seeking to implement furloughs will usually find or craft the necessary legal authority in executive orders issued by their state’s governors; state personnel system authorizations; or through the governing board’s express and inherent authority (e.g., fiduciary and legal) to operate a college, university, or university system. Governing boards cite these sources of authority to support implementing furloughs [10]. In fact, it is both wise and necessary to document all actions taken to manage financial challenges. In the case of furloughs, such documentation will be helpful in ensuring that furloughs do not stray from their original purpose (i.e. addressing current budgetary needs, as opposed to longer-term restructuring). Governing board resolutions should include language that not only describes the prior, non-personnel actions taken, but also identifies the limited scope of the furloughs.

Private institutions that are not constrained by collective bargaining agreements or state government structures must still act consistently with any applicable policies, procedures, or contractual documents that authorize the use of furloughs as part of a general layoff policy. They must also comply with any state laws that govern furloughing exempt employees.

Furloughs, Collective Bargaining Agreements, and Employment Contracts

Unionized Employees:

An institution implementing a mandatory furlough program, must understand the terms and conditions of all its current collective bargaining agreements. An employer’s promise to pay employees an identified salary for a defined period of time cannot be broken unilaterally, absent mutual agreement to amend the CBA via mutually agreed upon language. Amendment language may include: (a) when and how furloughs may be implemented; (b) the institution’s ability to reduce FTEs; or (c) the institution’s ability to withhold a guarantee of a certain number of work-hours each week. Imposing mandatory furloughs without this type of contract language will probably produce grievances and/or litigation [11].

Administrative Staff and Non-unionized Faculty:

Mandatory furloughs of administrative staff and non-unionized faculty can be very problematic [12]. This is because institutions often issue these two groups employment contracts or appointments that specify a particular salary for a defined academic or fiscal year. Since a mandatory furlough effectively unilaterally reduces an employee’s salary for the year, it constitutes a breach of that contract, unless the parties mutually agree to amend it and adjust the salary to reflect the projected furlough time.
Communication:

No matter what types of agreements an employer has in place with its employees, it must develop and communicate a sound rationale for using furloughs, mandatory or voluntary. Employers gain a strategic advantage and manage legal risk better if they convey a clear and consistent message that the economic challenges the institution is facing are real; that they have made efforts to control costs prior to the use of furloughs; and that, the institution’s programs, activities and/or viability will be seriously impacted, unless furloughs are imposed.

Furloughs, employment of foreign nationals, grant-funded employees, part-time workers, and other special cases.

A comprehensive discussion about furloughing foreign nationals employed on campus is beyond the scope of this NACUANOTE. But, your institution should assess how foreign nationals in H-1B or another immigration status may be affected. For example, an individual on a H-1B visa cannot be paid less than the prevailing wage for the position occupied by another comparable worker, as established by the state workforce agency for that area [13]. Imposing a furlough for an extended period of time, along with the contemporaneous reduction in salary, may take that H-1B employee out of status. Further, employers are required to pay an H-1B employee’s wages for “non-productive” time, if it is related to the employment, thus defeating the underlying purpose of a furlough. As a result, most colleges and universities exempt those with H-1B visas from participating in their furlough plan.

Others exempt from furloughs typically include:

- Employees whose employment during the furlough plan’s calendar year is funded at 90% or greater by externally sponsored and/or funded grants or projects.
- Employees whose salary is $30,000 or less per year.
- Graduate assistants, pre- and post-doctoral fellows.
- Undergraduate student workers.
- Employees working less than half-time.
- Those excluded for programmatic health or safety reasons (e.g., campus safety or health clinic workers).

Management of the Process

Typically, an institution’s Human Resources Department (HR) manages furloughs. This is because HR is often in the best position to oversee the day-to-day implementation of furlough programs; define program requirements; answer a wide range of questions from employees; provide updates and forms; and ensure employee cooperation and program compliance. Therefore, HR should establish a webpage dedicated to describing all aspects of the furlough program. Employees should be able to use this site as a comprehensive resource for finding the rationale for furloughs and the implementation process. Many of the most effective furlough websites on campuses include Frequently Asked Questions (FAQ) pages that are regularly updated. The following is a sampling of furlough-related FAQs that address affected employees greatest concerns to affected employees. Information for developing answers that may be appropriate for your institution is provided

- What is a furlough?

  A furlough is a temporary leave of absence, without pay, for a designated period of time, imposed to meet an urgent or immediate cost cutting budgetary need.

- How many furlough hours/days is an employee required to take?
Some institutions base the number of furlough days on one’s annualized salary. Other institutions create a flat number of days applicable to every employee on campus. Employees are typically furloughed for four- or eight-hour increments, and are expected to complete the required number of furlough days during each pay period through the end of the applicable fiscal year.

- **Can employees work during furlough leave?**

  Under most programs, employees are not permitted to work during a furlough period. This is particularly important for those employees who are exempt under the FLSA. If work is performed while on furlough, the exempt employee is entitled to pay for the entire week at issue, thereby defeating the furlough cost savings.

- **Will an employee be required to participate in the furlough program while on a leave of absence?**

  Institutions with furlough programs generally require employees on intermittent FMLA, administrative or extended leaves, and sabbaticals to take the required number of furlough days. However, employees on unpaid leave (e.g., leave without pay or FMLA) are required to take furlough hours on a pro-rated basis during the next fiscal year when they are on paid status or when the furlough plan is in effect.

- **Can an employee use accrued sick or vacation time while on furlough?**

  Institutions differ on this issue. Many maintain that the purpose of the furlough is to reduce expenses; as a result, accrued leave may not be substituted for furlough time. A number of campus plans also state that employees do not accrue sick days or vacation days during the furlough.

- **How will furloughs affect employee benefits?**

  Many institutions state that furlough programs will not affect fringe benefits, including retirement programs. In some cases, employees remain responsible for making required contributions. In other cases, institutions are responsible for making both employer and employee contributions if coverage is otherwise interrupted during the furlough. And, on a few other campuses, where benefits or retirement plans calculate contributions on a percentage of one’s salary or pay period basis, unpaid furlough days have had some impact: contributions stop when an employee goes off pay status, and benefits, such as voluntary life insurance and voluntary short-term disability, are calculated as a percentage of earnings. Further, furlough programs typically are not viewed as qualifying events under tax regulations governing health and life insurance plans. As a result, employees have not been permitted to change or stop their contributions to these plans. However, employees on some campuses have been permitted to stop or change certain voluntary benefits, such as long- and short-term care coverage to reduce their payroll deductions.

- **Does an employee have grievance rights regarding the imposition of furloughs?**

  Institutions uniformly respond that furloughs do not constitute grounds for a grievance under institutional policies or applicable state employee grievance acts. Employees who believe that their furlough is the result of unlawful discrimination are directed to file a complaint in accordance with established procedures.

- **If an employee is injured while on furlough, is he/she covered by insurance?**

  Most institutions respond in the following manner: worker’s compensation insurance covers work-related injuries. If an employee is on furlough, he/she is not allowed to work and, as a result, not
being on furlough does not impact an employee’s coverage under his/her individual health insurance plan. NOTE: If an exempt employee, such as a professor or administrator, is on campus to retrieve a book from the library or office in order to complete work that is beneficial to the institution, and is injured, he/she may be not only covered under worker’s compensation insurance, but he/she is also entitled to compensation for the entire week, including the day initially scheduled as a furlough day. It is important to emphasize that “no work means, no work.”

- Can an employee take more than the required number of furlough days, or have one’s pay reduced in lieu of taking required furlough days?

A number of institutions implement voluntary furlough programs that supplement the mandatory furlough program, and/or other cost-cutting measures. Many of these programs are open to full- and part-time employees in full-time equivalent (FTE) positions. Campuses that do this establish a certain number of days that can be taken in full- or partial-day increments, pre-approved by an employee’s supervisor. Typically, employees who participate in the voluntary program also must participate in the mandatory program. As a general rule, voluntary reduction-in-time programs have been used to provide exempt and non-exempt employees an opportunity to voluntarily, permanently reduce their time and corresponding pay. A number of institutions also combine furloughs with early or phased retirement programs.

It is highly recommended that counsel for your institution work closely with HR in developing the answers to these and other similar questions.

II. THE BEST LAID PLANS... [14]

Employees at all levels of responsibility on campus have varying capacities for understanding and/or accepting the nature of the economic crisis; how it impacts your institution; why you may need to implement furloughs (as one of numerous options); and the impact these cost-cutting options will have on their daily lives during an academic year. You cannot count on all employees to react in a rational or patient manner when action, such as a furlough, affects them directly. Consider carefully the political impact a furlough program will have on your institution. And ensure that the program is not only legally compliant and strategically organized, but that its rationale is clearly and consistently communicated to all employees and other affected constituencies. Any “detours” from, or ad hoc modifications to, the plan and its underlying rationale will serve as a recipe for confusion, lowered campus morale, media disasters, potential grievances, and/or litigation. Clear, effective, and consistent communications is essential.

On numerous campuses across the country, the HR, the General Counsel’s Office, and the Office of the President coordinate their communications and use their web pages to effectively explain the current economic crisis and the underlying rationale for cost-savings programs, including furloughs, as well as provide links to each other’s web pages for additional information. This type of thoughtful collaboration and planning ensures good decision making and effective risk management.

III. SUGGESTED BEST PRACTICES

The following best practices are recommended with respect to implementing campus furloughs:

- Carefully prepare for any furlough plan by developing a team approach to decision making and communications.
- Establish a clear communications plan that will be effective with internal and external constituencies.
Evaluate and document the basis (legal and strategic) for the furlough, and document the consideration (or use) of viable alternatives.

Develop a furlough plan that: (a) provides adequate notice to affected employees; (b) is workable, neutral, and fair; and (c) complies with any applicable collective bargaining agreements, contracts, or handbook requirements, as well as applicable statutes and regulations.

Take the time necessary to train those who will implement the plan, especially those responsible for communicating with employees affected during an emotionally charged time.

Establish dedicated web pages that will provide ongoing information regarding, among other things, the rationale for the furlough, the means of implementation, the period of time the furlough will be in effect, and the impact of the furlough on the pay and benefits of classified and unclassified employees. Many institutions have found the President's webpage, in particular, to be an extremely helpful means of establishing an ongoing dialog with campus constituencies, alumni, and others.

Stay focused on what the furlough is designed to do: address urgent budgetary concerns in the current fiscal year.

CONCLUSION:

In response to the recent fiscal crisis, many institutions are using furloughs to reduce personnel costs. Furloughs work best when used to manage immediate cost reduction needs. In taking this approach, campus counsel and administrators must be mindful of legal restrictions imposed by federal and state laws, as well as the contractual constraints in your institution’s employment contracts and collective bargaining agreements, while also paying special attention to the rules that apply to foreign nationals, grant-funded employees, part-time workers and other special cases. Remember, furlough plans are most successful when they incorporate best practices and are clearly communicated to your institution's employees.

FOOTNOTES:


FN2. See, "Furlough FAQ" (addressing the state budget crisis in Illinois, the impact on the University of Illinois, and implementation of cost-cutting measures).


FN4. Helpful in this regard is the Department of Labor’s Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues (July 2009).

FN5. See, 29 C.F.R. § 541.600. NOTE: It is critical to consult state laws to determine if any other requirements exist under the salary basis test. For example, in Wisconsin, the salary basis test requires earnings of $700 per month or more.

FN6. See, 29 C.F.R. § 541.602. NOTE: In the case of FLSA violations, the following may occur:

- The Secretary of Labor may bring suit for back wages and seek an equal amount as liquidated
damages or for interest on the back wages. In addition, the Secretary of Labor may seek an injunction against the failure to page wages when due.

- An employee may file suit to recover back wages and seek an equal amount in liquidated damages, plus attorneys’ fees and costs. Employees who file complaints may not be discharged or discriminated against for having done so.
- Civil money penalties may be assessed for repeated and/or willful violations of the FLSA’s minimum wage or overtime requirements.
- Employers who willfully violate the law also may be subject to criminal penalties, including fines and imprisonment.

FN7. See, 29 C.F.R. § 541.303. It is not always a given that an individual with an instructor title will qualify. See, e.g., Astor v. U.S., 79 Fed. Cl. 303 (2007) (firearms instructors not entitled to exemption both because not employed by educational establishment and because “teaching” not considered primary duty).

FN8. Id. See also, 29 C.F.R. § 541.710(b) (“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”).

FN9. NOTE: Be aware of any “on call” policies that may exist. Whether on-call time constitutes hours worked under the FLSA depends on the particular circumstances. For example, facts may show that an employee engaged to wait (e.g., a secretary who reads a book while waiting for dictation) is working, as opposed to an employee waiting to be engaged (e.g., allowed to leave a message regarding when he/she can be reached). In this case, the employee is not considered to be working. See, “Employment Lawyers Predict that Furloughs May Lead to Lawsuits,” The National Law Journal (May 18, 2009) (discusses employer methods to ensure that no work is conducted while an exempt employee is furloughed).

FN10. See, Section 6-H03 – Commission on Higher Education, 6.31 (CHE Mandatory Furlough), (S.C. General Assembly 2008 Budget Recession Act, which mandated the establishment of a furlough program to respond to the financial crisis. As a result, the University of South Carolina implemented a mandatory 10-day furlough during the 2008-2009 fiscal year). See, 2008-2009 Mandatory Furlough Program Guidelines and Frequently Asked Questions (University of South Carolina); See also, January 16, 2009 Budget Message (Clemson University).

- See, Special Board Meeting, Arizona Board of Regents Office, January 27, 2009 and Board of Regents Meeting Agenda, March 11, 2010 (discusses the legal bases for the establishment of a furlough program for the Arizona System).
- See, Resolution of the Board of Regents of the University System of Maryland Authorizing Furloughs of Employees.
- See, "UC President Mark G. Yudof Statement on Employee Furloughs" and "Policy Governing Employee Furloughs and Compensation Reductions During Fiscal Emergencies and Amendment of Standing Order 100.4" (discusses the bases for use of furloughs in the University of California System).
- NOTE: Numerous institutions have affirmatively chosen not to use furlough programs, either due to concerns about potential FLSA non-compliance regarding exempt employees, gaps in effective implementation, and the like. However, a number of institutions have engaged in a comprehensive analysis of furloughs as one of numerous cost-saving options. See, http://hr.rpi.edu/update.do?artcenterkey=462 (Renssalaer Polytechnic Institute);

"UMS Chancellor Says 'Difficult Choices' Necessary to Protect Quality and Achieve Financial Sustainability" (University of Maine System); University of Idaho to Implement Furloughs (University of Idaho).


FN14. With apologies to Scottish poet, Robert Burns, who in 1785 penned “To a Mouse, on Turning Her Up in Her Nest, With the Plough.” A memorable stanza in the poem reads:

But little Mouse, you are not alone,
In proving foresight may be vain:
The best laid schemes of mice and men
Go often askew,
And leave us nothing but grief and pain,
For promised joy!

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RESOURCES:

NACUA Resources:

- Employment: RIFS and Retrenchments Resource Page
- Employment Separation Resources and Links Resource Page
- NACUANOTE: Staff Layoffs and Reductions in Force: Organizing the Process and Managing the Legal Risks
- “Financial Distress and Faculty Issues” Steven G. Olswang and Ellen M. Babbitt Annual Conference (June, 2009)
- “Campus Collective Bargaining in a Bad Economy” Nicholas Di Giovanni, Jr. NACUA Annual Conference (June 2007)
Other Association Resources:

- NACUBO: "Facing the Financial Downturn: Toolkit and Resources for Colleges and Universities"
- Association of American Universities: "Universities Address the Economic Recession" (provides links to presidential campus communications regarding the financial crisis)

Other College and University Sites Discussing the Use and Implementation of Furloughs on Campus:

- University of Illinois 2010 Furlough Information
- University of Wisconsin System Furlough Guidelines
- University of California, President's Page
- University of Maryland-Baltimore, President's Page (2009)
- Clemson University, President's Page (2009)
- Arizona State University, Office of the President, Furlough Program Announcement; see also, ASU Furlough Guidelines for 2009 (describes the 2009 program)