Legal Considerations in Furloughs

A mandatory, unpaid furlough is a reduction in pay for employees. Legally, there are no obligations to furlough the entire workforce. “You may have profitable units you need up and running during a furlough,” notes Robert Duston, a partner at Saul Ewing LLP in Washington, D.C. “But, I had one client who decided that the morale issue of sharing the pain was more important than the potential loss of business from shutting down the profitable unit.”

As long as HR runs a discrimination analysis, the organization can target different levels of employees for furlough. “It is legally defensible to furlough a certain level of employee if you have too much capacity there or they are higher-paid,” says Duston. “Targeting higher-paid employees for furlough will get you greater cost savings, but you may damage morale and retention.”

A number of potential federal and state wage and hour issues also come into play, according to Duston.

--**Reduced pay.** Contract issues and state wage payment laws may impede the employer’s ability to unilaterally change terms and conditions of employment and reduce salary. This includes all unionized employees, unless there is a specific management rights clause regarding reductions in force that includes furloughs.

For most at-will employees, the employer is offering a unilateral change in compensation for the consideration of continued employment, and the employee is deemed to accept by staying on the job, according to Duston. But in some states even less dramatic changes in benefits spelled out in an employee handbook may require some form of consideration.

“If you start to reduce the paid leave under other policies, such as vacation or maternity or military leave, unless it is written in the policy ahead of time for furloughs, you are better off leaving it paid,” says Duston.

--**Exempt employees.** There is no provision in the Fair Labor Standards Act (FLSA) for deductions from salary due to lack of work. The FLSA regulations expressly state that deductions from salary are inconsistent with payment on a “salaried basis” and so the employee loses the exemption for that period.

“For a one-time, one-week furlough, this may not mean anything,” says Duston. “The employee will not be working more than 40 hours that week, so losing the exemption means nothing.”

But, a one-day furlough is different, Duston notes. “Even if the period affected is only that week, what if the salaried exempt employee normally works five 11-hour days? The employer docks 1/5 salary for that week on furlough, but the employee comes back and says they still worked 44 hours and are entitled to half their rate for the four overtime hours.”

For exempt employees, HR is better off mandating weekly periods of furloughs, Duston recommends.

--**Working off the clock.**The definition of what it means to “suffer or permit to work” is extremely broad, says Duston. If supervisors request or expect employees to check or respond to e-mails, voice mails, etc., or if the supervisor is aware that employees are doing so and does not act to stop it, one can argue that the supervisor is suffering or permitting the work.

“For the hourly employee, they get paid for that time,” says Duston. “For the exempt employee, at a minimum, they get an hourly rate for that time (assuming the exemption is otherwise lost) and employers should record that time.”