LIEBERT CASSIDY WHITMORE

SPECIAL BULLETIN

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EMPLOYEE FURLOUGHS: Questions and Answers

On January 29, 2009, the Sacramento Superior Court denied the writ petitions filed by several unions challenging Governor Schwarzenegger's Executive Order imposing unpaid furloughs on State employees. The Court refused to stay the ruling pending appeal, so the furloughs will begin on February 6, 2009 and will require closing many State offices.

The Governor's Executive Order requires represented employees to take two unpaid days off per month. The furlough days will be the first and third Fridays of every month. If a particular State office cannot close, then the dates for an employee to take his/her two furlough days per month will be selected by the employee, subject to approval of the supervisor.

The estimated savings to the State from these imposed furloughs is alleged to be ten percent (10%) of employee salary. Of course, there will be a corresponding reduction in the level of service provided by State government.

Although it is only a trial court ruling that has been appealed, the decision upholding the Governor's unilaterally imposed furlough plan has prompted numerous inquiries from local agencies about such plans. The following is an attempt to identify those questions and provide summary answers for general application. Since facts, labor contracts, past practices and fiscal condition vary greatly from agency to agency, these answers should not be deemed to be legal advice to address any specific situation.

QUESTION: Can our local agency rely on the Court's decision upholding the Governor's furlough plan to impose a similar plan?

ANSWER: Not directly. The Sacramento Superior Court based its decision on several grounds that are unique to State government. First, the Court cited the extraordinary authority given to the Governor by State law. Second, the Court relied on particular language in the Memoranda of Understandings (MOUs) negotiated between the unions and the State, giving the Governor the right to establish work weeks and work days and to relieve employees from duty in an emergency. Finally, the Court based its decision on the strong evidentiary showing made by the Governor to demonstrate the existence of a serious fiscal crisis facing the State. These bases for the Court's decision are not necessarily available to local agencies seeking to implement their own furlough plans.

QUESTION: The Governor did not meet and confer with represented employees before imposing his furloughs. Does our agency have to meet and confer prior to implementing its furlough plan?

ANSWER: Most likely the agency would have to meet and confer, assuming there is no specific management rights language in an MOU constituting a clear and unmistakable waiver by the union, as existed in

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the State case. There are several reasons why local agencies would likely be required to meet and confer over furloughs. First, such agencies lack the extraordinary power that State law grants the Governor. Second, furloughs affect both "wages" and "hours" which are mandatory subjects of bargaining. If it were possible for the agency to demonstrate an "emergency," then State law would allow the agency to implement furloughs subject to meeting and conferring "at the earliest practicable time" after implementation.

QUESTION: Could we avoid meeting and conferring if we established voluntary - rather than mandatory - furloughs?

ANSWER: Probably not. Any type of pay reduction or time off arrangement impacts wages and hours and would almost certainly trigger a duty to bargain.

QUESTION: If we are not successful in meeting and conferring with the union over furloughs, can we enter into individual agreements with employees who are willing to take furlough days?

ANSWER: Individual agreements with represented employees may constitute an unfair labor practice, since they interfere with the union's ability to represent its members, so LCW advises against individual agreements. Of course, individual agreements with unrepresented employees do not pose the same risk.

QUESTION: Can we include employees who are exempt from overtime under the Fair Labor Standards Act (FLSA) in our furlough plan?

ANSWER: Subject to satisfying any meet and confer requirements, it is possible to include exempt employees in a furlough plan. However, exempt employees lose their exempt status during a workweek in which they take a furlough day if their pay is reduced in that week as a result of the furlough. If they lose their exempt status during such a week, then they are entitled to overtime pay for overtime worked in that work week. If they lose pay in a workweek but there are no furlough days taken in that workweek, they still lose their exempt status in that workweek. If they do not lose any pay in that workweek, they do not lose their exempt status. The specific Department of Labor Regulation that addresses exempt employees and a “budget-required furlough” is 29 CFR 541.710(b) (formerly 541.5d)

QUESTION: Can we require exempt employees to take furloughs but spread the resulting salary reduction over future pay periods without losing their exemption from overtime?

ANSWER: Not unless the salary reduction is intended to be permanent. The FLSA salary test generally prohibits an employer from reducing the salary of an exempt employee because of variations in the quality or quantity of work performed unless the reduction is intended to be permanent. An unpaid furlough is not a permanent reduction in salary and would trigger application of the FLSA furlough regulation at 29 CFR 514.710(b) (formerly 541.5d). If the salary reduction is not intended to be permanent, the exempt employees would lose their exempt status and be entitled to overtime in any work week in which they receive a salary reduction. A "permanent" salary reduction would likely need to extend, at a minimum, through the end of the fiscal or calendar year to a time when salaries would normally be adjusted.

QUESTION: Can our agency accomplish the salary savings we need by implementing a salary reduction (instead of a furlough) and simultaneously providing exempt employees with additional leave time?

ANSWER: Yes, but only if the salary reduction is intended to be permanent. See discussion above regarding the furlough regulation. Of course, excluding exempt employees from budget-required furloughs would avoid the problem of loss of exempt status.

QUESTION: Can we allow employees to use vacation during a furlough?

ANSWER: Subject to any necessary meeting and conferring, allowing vacation would be permissible. However, such use does little to deal with short term fiscal problems, since the agency would be paying the employee's salary during the furlough. Perhaps the resulting reduction in outstanding leave balances might be sufficiently advantageous to the agency to warrant such an approach.

QUESTION: Must we close down operations during furloughs, as contemplated by the Governor's plan?

ANSWER: No. After appropriate meeting and conferring, it would be possible to have "floating" unpaid furlough days. These should be taken only when approved by supervisors or managers. Such an approach would allow departments to continue operating, albeit short-staffed.

QUESTION: If meeting and conferring occurs but does not produce an agreement, can we unilaterally impose a furlough plan?

ANSWER: Yes, subject to certain conditions. First, the agency must complete the meet and confer process, including any impasse procedure. Second, the plan being adopted unilaterally much be the last, best and final proposal made in negotiations. Third, the unilateral adoption is not considered an MOU. Finally, the unilaterally imposed plan cannot deprive the union from its right to meet and confer prior to the adoption of the next annual budget.

QUESTION: Can the union rely on a zipper and/or waiver clause in the current MOU to refuse to meet and confer over furloughs?

ANSWER: The union's ability to refuse to meet and confer would depend on the particular language in the clause. If the language clearly waives the agency's rights to meet and confer and/or to change matters within the scope of representation during the term of the MOU, then the union may be successful in its refusal.

QUESTION: If the Union refuses to agree to furloughs, can we proceed with layoffs?

ANSWER: Yes, unless there is a provision in the MOU promising that there will be no layoffs. Also, the agency must meet and confer over the impact of layoffs.

QUESTION: What is the extent of the duty to meet and confer over layoffs?

ANSWER: The general rule is that the decision to lay off is a managerial policy decision that is not subject to meeting and conferring. However, the impact of the layoff decision is negotiable and that would include the timing, number and identity of those being laid off.

QUESTION: Why would a union ever willingly agree to furloughs?

ANSWER: The most common quid pro quo for agreeing to furloughs is the promise of no layoffs for a period of time (e.g. the term of the side letter or MOU). Often such a promise is attractive enough in tough economic times to persuade a union to accept furloughs.

QUESTION: Do we have to meet and confer over furloughs if our negotiated Management Rights clause allows us to "take all reasonable steps in an emergency."

ANSWER: It would be difficult to rely on such a management rights provision to avoid meeting and conferring over furloughs, although not impossible. If the subject of furloughs was actually discussed at the time the management rights language was negotiated and both parties expressed an intent to apply the language to furloughs, then the language could be interpreted as a waiver by the union to challenge furloughs. Absent a specific discussion about the subject, it would very hard for the agency to show that the union knowingly and intentionally waived its right to bargain and/or otherwise challenge furloughs. Of course, this "emergency" could reasonably be interpreted as mirroring Government Code Section 3504.5, giving the agency the right to implement furloughs and then meet and confer as soon as "practicable" thereafter.

THE FOREGOING IS INTENDED AS GENERAL INFORMATION REGARDING THE SUBJECT OF FURLOUGHS AND NOT AS LEGAL ADVICE FOR ANY PARTICULAR SITUATION. FOR MORE SPECIFIC SUGGESTIONS ON HOW TO DEAL WITH INDIVIDUAL QUESTIONS AND FOR THE SPECIFIC AUTHORITIES THAT SUPPORT THE FOREGOING INFORMATION, PLEASE CONTACT LIEBERT CASSIDY WHITMORE.

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If you have questions about this issue, please contact our Los Angeles, Fresno or San Francisco office.