

EMPLOYMENT LAW ALERT

June 2009

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For further information, please contact our Employment Law Group members:

Jeffrey M. Schlossberg
Chair
(516) 663-6554
jschlossberg@rmfpc.com

Douglas J. Good
(516) 663-6630
dgood@rmfpc.com

Joseph R. Harbeson
(516) 663-6545
jharbeson@rmfpc.com

Kimberly Malerba
(516) 663-6679
kmalerba@rmfpc.com

Planning a Summer Furlough? Avoid These Pitfalls

By: **Jeffrey M. Schlossberg**



In response to on-going economic conditions, many employers naturally are exploring cost-cutting measures. One such action is a furlough, an unpaid layoff of employees for a pre-determined, fixed period of time. The savings in salaries seems attractive, but employers must also be aware of the potential pitfalls.

Before your company announces that summer furlough, here are several points that require your consideration in order to avoid significant liability.

First, in this day and age of staying connected "round the clock," many employees work even while away from the job site. Many companies provide employees with cell phones and PDAs just for that purpose. However, should employees use their cell phones or Blackberrys for any meaningful period of time during a furlough, those employees would be able to claim that they worked and thus should be paid. Of course, an isolated email or cell phone call would not be problematic. However, if employees spend significant time using these tools, it is considered work time and, thus, is compensable. Therefore, optimal choices for those employees to be furloughed are those who would not regularly use their cell phones or Blackberrys after hours. If that cannot be avoided completely, then prior to the furlough, the company should clearly direct in writing that employees should not perform any work during the layoff, including using cell phones, PDAs, laptops, etc., without express authorization from management.

Second, if you furlough exempt employees (those not entitled to overtime), they should be laid off for a full workweek. This is because federal regulations governing exempt employees provide that an exempt employee is required to be paid his or her full salary for any week in which he or she performs any work. Thus, if an exempt employee works one day and is furloughed for the balance of the week, the company would still have to pay the full

week's salary to protect the exemption (which would defeat the reason for the furlough). Failure to pay exempt employees in weeks during which they work exposes an employer to loss of the exemption and a corresponding obligation to pay those employees overtime.

Although not as much of a cost saving as a full week furlough, one alternative employers can consider is establishing a four-day workweek and reducing salaries by a comparable amount. This type of change, however, must be made on an on-going basis. If the Department of Labor views this as merely temporary to circumvent compliance with the fixed salary requirement, it could find a violation of the regulations.

If we can be of assistance on this or any employment law issue, do not hesitate to contact us.

Next month: Planning a reduction-in-force to minimize liability.

REMINDER: The federal minimum wage increases to \$7.25 per hour as of July 24, 2009.



East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfp.com

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