



## Pros And Cons Of Furloughs, Shutdowns

Law360, New York (March 06, 2009) -- Terminations, layoffs, hiring freezes and reductions in hours and pay are all increasingly well-known devices to reduce an employer's workforce costs. Each employment action has its benefits and downsides.

Two other tools for an employer facing unusual economic pressures that are growing in use, if not popularity, are the furlough and the mandatory shutdown.

### **What Are These Tools?**

The description and effect of the furlough and the mandatory shutdown are similar, and overlap in part.

With a mandatory shutdown, an employer decides that for a designated period of time, usually a workweek, the enterprise or a portion of it, will cease all — or all but essential — operations.

A shutdown week is most often designated during an industry slack period, or in connection with holidays, when at least one day off is already occurring. In some instances, the employer may require that employees use vacation, compensatory time or another employment benefit during the period of inactivity.

In other instances, an employer may wish to take the opposite tack and prohibit employees from using those benefits in order to reduce payroll expenses temporarily. State and local laws will determine whether an employee has a right to use vacation during a mandatory shutdown, or whether its use may be compelled or prohibited.

A furlough is akin to a layoff, and the terms are sometimes used interchangeably. The term "furlough" is often associated with a public sector employer imposing enforced, unpaid time off on (frequently unionized) employees.

In private industry, it is sometimes called an "enforced vacation" (even though employees may be forbidden to use available vacation time). Where the employer is unionized, special attention must be paid to the collective bargaining agreement and whether or not the furlough is a mandatory subject of bargaining.

The use of furloughs and temporary shutdowns is increasing as the economy deteriorates. Within the last nine months, various employers across the United States have ordered furloughs — including automobile manufacturers, computer hardware manufacturers and state institutions of higher education.

The state of California, faced with its most serious budget crisis in decades, has resorted to every-other-Friday furloughs of thousands of state employees.

### **What Are the Advantages of These Tools?**

The primary benefit of furloughs and shutdowns is that their implementation can save the employer payroll expenses in times of reduced demand for goods and services and reduced revenue.

These savings may amount to thousands, and even millions, of dollars depending upon the length of the shutdown and the number of employees affected.

In addition, furloughs and mandatory shutdowns preserve jobs that might otherwise have been lost to layoffs, and thereby help the employer to retain its trained and skilled workforce for the day when the economy improves.

Finally, depending upon state law, a properly planned temporary shutdown may entitle employees to job-sharing unemployment benefits from the state, a concept pioneered by California in 1978.

In states with job-sharing unemployment plans, a significant advantage to using furloughs or shutdowns is that the fiscal impact on employees may be less severe.

Job-sharing benefits mitigate the employee's lost income from the shutdown or furlough, because they enable employees to qualify for benefits even though they are not "totally unemployed."

Thus, job sharing unemployment insurance benefits allow employers to enjoy payroll savings, while reducing the amount of employees' lost compensation. Employers also may be able to retain employees who might otherwise have left to avoid the wage reduction.

### **What Are the Risks of Using These Tools?**

Numerous state and federal laws must be considered in assessing both the value of these tools and the risks they pose in any situation.

A primary concern is the impact of shutdowns or furloughs on the status of overtime-exempt employees under applicable federal and state laws.

For example, in California, an employee properly classified as overtime-exempt generally must receive a minimum annual salary of twice the minimum wage for full-time employment (now, \$33,280 per year).

In addition, if the employee performs any work in a workweek, the employee must be paid her/his salary for the entire week. An employer must carefully craft its furlough or layoff program so as not to run afoul of these requirements if it wants to maintain an employee's exempt status.

Although the restrictions of federal law as set forth in the Worker Adjustment and Retraining Notification (WARN) Act (29 U.S.C. § 2101 et seq.) have been known since the act's passage more than 30 years ago, the particulars of the act's application to various scenarios are still being interpreted by the courts.

Further limiting an employer's options are the growing number of state laws patterned on the federal WARN Act; most recently, New York joined the 20 plus states that have their own counterparts to the WARN Act.

The federal WARN Act specifies that an employee whose hours are reduced by 50 percent or more for each month of any six-month period has suffered an "employment loss."

Thus, reductions of hours may trigger WARN's notification requirements, retroactive to 60 days prior to the date the hours were first reduced.

This means that employers must be vigilant in tracking any reductions in hours, as well as layoffs, when considering the requirements of WARN.

Key federal WARN Act requirements that should be considered by employers in deciding whether or not to implement a furlough or mandatory shutdown are:

- The act applies to any business enterprise employing: 100 or more full-time employees; or 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week exclusive of overtime.
- A "plant closing" is the permanent or temporary shutdown of a single site of employment, or one or more operating units within the site, during a 30-day period that results in an employment loss for 50 or more full-time employees.
- A "mass layoff" is a reduction in an employer's workforce that is not the result of a plant closing, but which produces an "employment loss" at a single site of employment during any 30-day period involving: 50 or more full-time employees, provided those affected constitute at least 33 percent of the full-time workforce at the site; or at least 500 full-time employees, regardless of what percentage of the workforce the affected employees constitute.

In contrast to a plant closing, a mass layoff may occur regardless of whether a facility or operating unit is shut down at a site. Further, as stated earlier, a reduction of hours also may constitute an “employment loss.”

In addition to any applicable WARN acts, an employer also must check any legal requirements concerning ancillary payroll events, such as deductions (e.g., employee contribution to benefit plans, tuition reimbursement, garnishment, repayment of employer loans), which could be affected by the suspension of pay for part or all of a pay period.

In summary, although furloughs can be used as a cost-cutting technique, employers must check with their employment law counsel for an assessment of any applicable legal restrictions.

Failure to implement a furlough or mandatory shutdown properly can aggravate the economic circumstances that led the employer to use the furlough or shutdown in the first place by causing expensive and time-consuming employment litigation.

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