Furloughs, Mandatory Time Off, and Other Cost-Cutting Measures Due To COVID-19

by Grant T. Collins - Monday, March 16, 2020

The circumstances surrounding COVID-19 seem to change on a daily basis so our emphasis must as well. Therefore, while our last piece promised a look at privacy and work-at-home issues, the developments in recent days regarding school and workplace closures leads us to talk about the legal issues regarding reduced work schedules, furloughs and other cost-saving measures.

Below are some frequently asked questions from employers considering these options.

We have decided to close for the next two weeks in response to COVID-19. Do I still have to pay my employees?

Generally speaking, you need to distinguish between (a) exempt employees (i.e., paid a fixed salary and performing exempt duties) and (b) non-exempt (i.e., paid hourly) employees.

- **Non-exempt (or “hourly”) Employees**—Non-exempt employees need to be paid only for the hours that they work. If your business is closed, then you don’t need to pay them if they’re not working. Obviously, if a non-exempt employee is working (even if from home), then you’ll need to pay them for any work. You also can allow them to use PTO or vacation during this time (to make up the pay).
Exempt Employees—Exempt employees must be paid their full salary for any week in which they perform any work (or you risk losing the FLSA exemption). If your business is closed for an entire week and the exempt employee performs no work (onsite or remotely), then you don’t need to pay the salary for that week. For any partial weeks, you can reduce any sick leave or vacation balance for the days that there was no work. If an employee does not have paid time off available, you could allow the employee to “go into the negative” for any partial week, so that the employee receives his or her full pay for the week.

Can we force an employee to use PTO during a period of mandatory closure or furlough?

Generally, yes, but the answer is going to depend on the terms of your PTO policy or collective bargaining agreement (“CBA”). Most policies and CBAs do not address the issue, but, if the issue is addressed, you will need to follow your policy or CBA. If your PTO policy or CBA is silent on the issue and an employee objects, you should seek legal advice regarding the specific situation and your policy.

Some employers have asked whether it is possible to prevent an employee from using accrued and unused leave during a mandatory furlough or closure. This is a more difficult question. Generally speaking, employees do not have a right to use sick leave or PTO for absences if they don’t have a scheduled shift. However, depending on the terms of your policy, employees could argue that they have a contractual right to use their paid time off. Certainly, a union would make a similar argument under the terms of a CBA and likely file a grievance. Finally, from an employee relations standpoint, it creates additional stresses to your already stressed workforce. Thus, we generally recommend against it.

Can I do a furlough or a mandatory closure if my employees are subject to a CBA?

The process and procedure for any furlough or closure will depend on your individual CBA. Questions of whether you can shut down individual departments or whether you need to do furloughs via seniority are too individualized for general guidance. For example, many CBAs provide that the union and employees are entitled to a certain amount of advanced notice prior to a layoff or pay in lieu thereof. Further, while the decision to implement these cost-cutting measures is typically reserved only to management, you will likely need to notify the union of your decision and give them the opportunity to bargain over the effects.

Are furloughed employees eligible for unemployment?

Generally speaking, an employee who is furloughed without pay will be eligible for unemployment benefits. As the law currently stands, those eligible for benefits must wait one week (“waiting week”) before they can receive benefits.

Employees are not eligible for unemployment benefits if they are receiving pay (via PTO or
other payment) or if they choose not to work while work is available. Obviously, that would change if the employer closed (i.e., work is not available) or if the employee no longer receives pay (e.g., exhausting available paid leave).

Given the current situation, Minnesota’s Unemployment Insurance Office is seeking to amend the unemployment statute in order to eliminate the “waiting week” and make other changes maximizing payments to employees and minimizing costs to employers. For more information on this, check out their COVID-19 web page. At present, we are not aware of any proposed legislation on this issue, but we will keep you updated as we know more.

**Bottom Line**

We will continue to monitor this situation as it develops.