
Coates' Canons Blog: Furloughing Employees During the COVID-19 Crisis

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To slow the spread of COVID-19, to comply with Governor Cooper's stay-at-home order, and to deal with budget stresses, many local governments are considering furloughs. A furlough occurs when one or more employees are put into a temporary leave without pay status during which they are instructed not to perform any work. There are no federal or state laws that govern when and how local government employers may furlough employees. There are, however, common issues that every North Carolina local government must address when it furloughs employees. This blog post discusses those issues using a question and answer format.

10 Questions and Answers

1. Who May Make the Decision to Furlough?

For cities and counties in North Carolina, only the city council and board of county commissioners have the authority to institute furloughs. This power derives from their authority to make compensation determinations for city and county employees and their authority to adopt personnel policies. For cities, *see here and here*; for counties, *here and here*. See also *City of Asheville v. Bowman* and *Newber v. City of Wilmington*.

For counties, there are limitations on the commissioners' ability to furlough employees of the elected sheriff and register of deeds, however. North Carolina General Statutes (N.C.G.S.) § 153A-92(b)(3) provides that the sheriff or register of deeds must approve any reduction in the salaries of employees assigned to his or her office except where the board makes an across-the-board reduction of all county salaries. Since the offices of both the sheriff and the register of deeds provide services deemed essential to the state's response to COVID-19 (*see here and here*), employees in those offices are unlikely to be subject to a furlough.

There are no comparable restrictions on the boards of county commissioners' authority to furlough and thus change the compensation of county health and social services employees. The commissioners make the furlough decisions for those departments.

For local government entities other than cities and counties (a water and sewer authority, for example), the decision to institute a furlough program must be made by the governing board.

2. May an Employer Furlough Only Some of Its Workforce? Must a Furlough Be Complete or May It Be Only a Partial Furlough?

A local government may furlough all or only some of its employees. If the local government is instituting a furlough that applies to only some employees, it may distinguish among those who will continue to work and those who will be furloughed on any reasonable basis it chooses. It may not, of course, choose employees for furlough on the basis of race, color, sex, religion, national origin, age, disability or other protected class status.

Just as an employer may furlough only part of its workforce, it may also institute (for all or only some employees) a partial furlough. A partial furlough could, for example, reduce everyone from full-time status at 40-hours per week to half-time status at 20 hours per week. A partial furlough could also have some employees work Monday through Wednesday and others only Thursday and Friday. A partial furlough could also have employees alternating weeks. Any such reasonable arrangement is lawful.

3. How Much Advance Notice of a Furlough Must an Employer Give?

There are no federal or state laws that require employers to give any notice whatsoever before instituting a furlough. If an employer has previously adopted a furlough policy, it must follow the procedures described in the policy. Or the governing board may amend the policy before instituting the furlough. Either way, the employer must follow its adopted policy.

As a practical matter, at the time that an employer gives notice of a furlough, it should probably tell employees how it will notify them to return to work. Employers should make sure that employees understand where to look for such an announcement (e-mail, U.S. mail, recorded telephone message) and that they have up-to-date information for reaching employees.

4. May Exempt Employees Be Furloughed?

The federal Fair Labor Standards Act divides employees into two groups. The first consists of nonexempt employees. Nonexempt employees track their hours, are paid by the hour, and are paid time-and-one-half premium pay for every hour over 40 they work in a workweek. The second group consists of employees who are exempt from the overtime pay requirements. Exempt employees are paid on a salary basis. They receive the same amount each week regardless of the number of hours they work.

In a furlough, *nonexempt* employees continue to be paid as they always are: at a set rate of pay for hours actually worked in a given workweek. When nonexempt employees don't work, they don't get paid. *Exempt* employees may also be furloughed. An exempt employee who is totally furloughed in any particular week simply does not receive a salary for that week. When an exempt employee is partially furloughed and does in fact work part of a regular workweek, the employer treats the exempt employee as nonexempt during that furlough week and pays at a pro-rata rate for the hours actually worked. In that case, the employer will not lose the exemption for that position in non-furlough weeks. In those weeks, the employer must require exempt employees to track their time, if they do not already do so. The employer will want to ensure that these normally-exempt employees limit the number of hours worked, or the purpose of having a furlough week in the first place may be undone. If an exempt employee regularly works in excess of 40 hours a week in order to get his or her work done, and works a similar number of hours during the furlough week, he or she must be paid overtime at time and one half. This will likely undo the purpose of having a furlough week in the first place.

This special exception to the regular rules for exempt employees is set out at 29 CFR 541.710(b):

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

5. What Happens to Health Insurance during a Furlough?

The answer to this question will vary from employer to employer. Group plans usually require that an employee work a minimum average number of hours per defined period (usually a week or a month) to qualify for coverage. For commercially insured plans, the minimum number of hours will be set by the insurer and found in the plan documents. Employees who fall below the minimum number of hours because they have been furloughed may lose their health insurance. Employers do not have the unilateral right to continue employee enrollment in their plans if employees lose eligibility: to do so would put them in potential breach of their contract with the health insurance company, open them up to liability for that breach of contract, and risk the possible loss of coverage for their workplace going forward. Employers may contact their health insurers, however, and ask whether the company will allow them to treat furloughed employees as active employees for the purposes of a COVID-19 furlough. If the insurer agrees, an employer should get the agreement in writing before acting on it.

Employers who are self-insured will also have plan documents and eligibility requirements. Most will also have reinsurance or stop-loss coverage to insure against catastrophic claims. A decision to treat employees who lose eligibility for health insurance coverage under the terms of their self-insured plan as active employees should not be made without consulting the company that provides reinsurance or stop-loss coverage.

Whether a plan is insured or self-insured, there are two important things to remember when furloughs cause employees to lose health insurance.

COBRA Continuation Coverage

First, when a reduction in the number of hours an employee works causes the employee to lose group health insurance coverage, the employer must offer the employee COBRA continuation coverage. The federal Consolidated Omnibus Budget Reconciliation Act of 1973 (COBRA) requires all employers who have had twenty or more employees to allow employees and their covered dependents to continue participating in the employer's group health plan for eighteen months at 102% of the cost of the applicable premium **at the employee's own cost** when a qualifying event occurs. A reduction in an employee's hours that results in termination of health insurance coverage is one such qualifying event.

In offering COBRA continuation coverage, employers will have to determine how employees who are not being paid will reimburse them for the full cost of their premiums. Although employers are not required to do so, they may continue paying the employer share of the premium and may even pay the full cost of employee premiums during the furlough period. If an employer decides to pay for or subsidize the cost of COBRA premiums, it should make clear to the employee whether the subsidy is for the cost of employee-only premium or includes premiums for employees plus dependents.

COBRA's continuation coverage requirement applies not only to group health plans, but to prescription drug plans, whether they stand alone or are incorporated into the group health plan, as well as dental plans and vision plans.

The Affordable Care Act's Employer Mandate

The second issue that an employer must keep in mind is that a furlough that results in an employee's loss of coverage may affect the employer's compliance with the Affordable Care Act's requirement that employers with 50 or more full-time equivalent employees offer minimum essential coverage that is affordable to 95% of its employees or pay a penalty. Furloughs represent a challenge to ACA compliance because those who are furloughed are still employees for whom the employer is required to make an offer of coverage. Employers should not panic just yet, however. In past years, the IRS Form 1094 and 1095 series have offered a reporting indicator for COBRA coverage. And it is possible that Congress will authorize a safe harbor for furloughs due to the COVID-19 crisis later this year.

6. Do We Continue to Make LGERS Contributions during a Furlough? Does the Furlough Period Count as Creditable Service Toward Retirement?

Local Governmental Employees Retirement System retirement allowances are funded by employee deductions from employee wages and employer contributions based on an employee's wages. See N.C.G.S. § 128-130. During periods where an employee is not being paid, such as a furlough, neither employer nor employee contributions are made to LGERS. Employer and employee contributions are still made on the wages of employees subject to a partial furlough, where they are working a reduced number of hours.

A period of total furlough does not count as creditable service toward retirement. N.C.G.S. § 128-21(8) defines "*creditable service*" as "the total of '*prior service*' plus '*membership service*' plus service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 128-26." At section 128-21(14), "*Membership service*" is defined as "service as an employee rendered while a member of the Retirement System." Where employees are not performing services for their local government employers, they cannot earn membership service credit.

Furloughed employees may, however, be able to purchase service credit pursuant to N.C.G.S. § 128-126(s), which provides for the purchase of service credit at full cost for periods of employment not otherwise eligible for service credit. Correspondence from the Retirement Systems that the author has seen refers employees seeking to purchase service credit to Form 432, guide C, which may be accessed through a member's ORBIT account.

7. Are Furloughed Employees Eligible for Emergency Paid Sick Leave or Emergency FMLA Leave under the FFCRA?

Furloughed employees are **not** eligible for either the emergency paid sick leave or emergency paid FMLA leave benefit

provided by the Families First Coronavirus Response Act (FFCRA). This is true for both employees who are not working at all and for those who are partially furloughed. FFCRA leave is only available where an employee would otherwise be working but for one of the five qualifying reasons set out in the Emergency Paid Sick Leave Act or because their child's school is closed or regular child care provider is unavailable due to COVID-19 related reasons. For a more detailed discussion of emergency paid sick leave and emergency FMLA leave, see my previous blog posts [here](#) and [here](#).

8. May Furloughed Employees Use Accrued Paid Sick or Vacation Leave or Accrued Comp Time During the Furlough?

Furloughed employees may use accrued paid sick, vacation or personal leave to make part of the furloughed period paid, provided, of course, that the employer's personnel policies allow these forms of accrued leave to be used in this way. There are no federal or state laws that govern the granting and use of accrued sick, vacation and personal leave, so each employer must look to its own policies. If an employer's sick leave policy does not allow for the use of sick leave during a furlough (which is not, after all, a medical leave), but the employer wishes to allow for its use in these extraordinary times, the governing board will have to amend the policy. If the personnel policy allows, accrued paid leave may be used for employees on a period of total furlough or to supplement the income of employees on a partial furlough.

This is an also excellent way to remove accrued nonexempt employee compensatory time off ("comp time") from the books and make employees whole during what would otherwise be unpaid time off from work. Employers should grant any employee request to use accrued comp time during a furlough. Employers may also require the use of comp time. Comp time may be used by employees who are completely furloughed and to supplement the pay of employees on a partial furlough. For a discussion of FLSA comp time, see [here](#).

Accrued paid leave payments and accrued comp time payments are compensation and the same IRS withholding rules and rules governing LGERS contributions will apply to them in this situation as do in "normal" times. Note also that the use of accrued paid leave and accrued comp time may affect an employee's eligibility to continue on the employer's health insurance plan depending on the individual plan's rules.

9. Are Furloughed Employees Eligible for Unemployment Benefits?

Local government employees who have been furloughed for COVID-19 related reasons will be eligible for both "regular" state unemployment benefits and enhanced COVID-19 benefits paid for by the federal government.

State Unemployment Compensation Benefits

Under North Carolina's Employment Security Law, found in Chapter 96 of the General Statutes, employees who are temporarily laid-off or are working fewer hours than their customary schedule are eligible for unemployment compensation benefits. So even before legislation passed by Congress to enhance unemployment compensation benefits for COVID-19-related reasons and executive orders issued by Governor Cooper to facilitate the extension of benefits to employees affected by COVID-19, North Carolina local government employees who were furloughed were eligible for state unemployment compensation up to maximum benefit of \$350.00 per week for twelve weeks. And under N.C.G.S. § 96-15.01, even employees using accrued paid leave or accrued comp time during a furlough period are eligible to receive unemployment compensation. That is because accrued paid leave represents compensation for periods previously worked and is not current compensation within the meaning of the Employment Security Law.

Executive Order 134 addresses unemployment issues related to COVID-19 related furloughs. In the Order, the Governor defines furloughs broadly:

A "furlough" shall mean a temporary period of time during which an employee performs no personal services for the employer as a result of a layoff caused by the economic impacts or public health impacts of COVID-19.

This means that an employer does not have to have declared a "furlough" for employees to be eligible for unemployment compensation when they have been told to not to report to work because of COVID-19 safety concerns and cannot work remotely..

Some employers are able to provide furloughed employees with payments equal to or less than their regular wages during

the furlough period. Normally, such payments would disqualify an employee from receiving unemployment compensation. Executive Order 134 defines voluntary payments made to a furloughed employee and registered with the Division of Employment Security as part of a "COVID-19 Support Payment Plan" as payments made for services rendered by the employee in the past. This allows employees who are receiving payments from their employers during a furlough to be eligible for unemployment benefits.

Bottom line: Local government employees who have been furloughed formally or informally are eligible for unemployment compensation whether they are unpaid, using accrued paid leave or are receiving payments from their employer as part of a COVID-19 Support Payment Plan. Employers providing such payments should review Executive Order 134 and the Division of Employment Security website for details on how to register such a plan.

Federal Unemployment Benefits

In addition to regular state unemployment compensation payments, furloughed employees are also eligible to receive unemployment benefits from the Federal Pandemic Unemployment Compensation (FPUC) Program. This program, which is funded by the federal government but administered by the North Carolina Division of Employment Security, will provide furloughed employees with \$600 per week through July 31, 2020, *in addition to* the regular unemployment compensation to which they are entitled under the North Carolina Employment Security Law. The cost of the FPUC Program is 100% paid by the federal government. Nothing will be charged to an employer's account.

Furloughed employees who exhaust their twelve weeks of regular unemployment compensation are entitled to an additional thirteen weeks of basic unemployment benefits from the federal Pandemic Emergency Unemployment Compensation (PEUC) Program. Benefits from this program are available through December 31, 2020 and are fully-funded by the federal government.

For more information on the FPUC and PEUC Programs, see [here](#) and [here](#).

Note that employers may file an "attached claim" with the Division of Employment Security on behalf of employees who have been furloughed or who are working less than 60 percent of their usual full-time hours in a calendar week. This may help speed up the payment process for employees. For instructions on how to file an attached claim, see [here](#).

10. How Do We End a Furlough and Bring Employees Back to Work?

Since furloughs must be instituted by the city council or board of county commissioners or other governing board, the decision to end a furlough and bring employees back to work must also be made by or ratified by that board, unless the board has delegated that authority to the city or county manager (or chief executive of another local governmental entity). Beyond that, there are no legal requirements about how to resume regular operations, although there are practical considerations.

First, although it is not required, employers should probably try to give employees some advance notice of the return to work. Some may have chosen to spend the time away from work visiting relatives in another city or state. Others may need to arrange for child care.

Second, all indications are that the coronavirus that causes COVID-19 will still be present in our communities for some time to come, probably until there is an effective vaccine. This means that employers may need to continue

- employee health checks (questions about COVID-19 symptoms and/or the taking of temperatures) at the beginning of the workday (on employee health checks, see [here](#)),
- social distancing policies (where possible),
- encouraging or requiring the use of face masks,
- enhanced cleaning and sanitizing practices, especially in "high-touch" areas of the workplace,
- making sanitizer easily available,
- providing forms of personal protective equipment appropriate for an employee's risk of exposure to COVID-19 at work, and
- providing emergency paid sick leave and emergency FMLA leave for COVID-19 related reasons through



December 31, 2020.

Links

- files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf
- nclleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-162.html
- www.nclleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-164.html
- www.nclleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-92.html
- www.nclleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-94.html
- cite.case.law/nc-app/172/586/
- scholar.google.com/scholar_case?case=3049938535332839244&hl=en&as_sdt=6&as_vis=1&oi=scholar
- www.cisa.gov/emergency-services-sector
- www.law.cornell.edu/cfr/text/29/541.710
- www.law.cornell.edu/uscode/text/42/300bb-1
- www.nclleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_128/GS_128-30.pdf
- www.nclleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_128/GS_128-21.pdf
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- www.nclleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_96/GS_96-15.01.html
- files.nc.gov/governor/documents/files/EO134-UI-Furlough.pdf
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