

## COVID-19'S EFFECT ON ARKANSAS CITIES AND TOWNS: FURLOUGHES AND LAYOFFS

Due to closures and restrictions initiated by the COVID-19 pandemic, many cities and towns are facing difficult choices regarding workforce retention. Few cities have escaped the impact of COVID-19. Many are turning to furloughs/temporary layoffs and layoffs to manage costs.

### **DEFINITIONS**

In order to avoid confusion, we begin with a clarification of several key terms. Although commonly used, these terms are often misunderstood.

A furlough does not have a precise legal definition. However, APERS defines furlough as meaning that the employer/employee relationship has not ended and that the employee will return to work in some capacity in the future. In other words, when an employer furloughs an employee there is an expectation that the employee will return to work. The term temporary layoff is often used interchangeably.

A layoff as defined by APERS means that the employer/employee relationship has ended and no longer exists in any form, whether now or in the future. In other words, a layoff is a termination of an employee's employment without any right to be recalled. In most instances an employee is laid off when there is not enough work for him or her to perform. Because benefits are terminated during a layoff, the employer saves the costs of benefits during any layoff period.

An additional concern to consider is the impact of furloughs and layoffs in relation to the FLSA (Fair Labor Standards Act).

A non-exempt employee is paid hourly, guaranteed the minimum wage, as well as guaranteed overtime or time-and-one-half for hours worked over 40 per week.

An exempt employee is compensated in the form of a salary rather than upon actual hours worked and is exempt from both the minimum wage and overtime. An exempt employee may work less than, or greater than, 40 hours per week. Not all salaried employees are exempt. In addition, job titles do not determine exempt status. To qualify for exempt status, employees generally must meet certain criteria regarding their job duties and be paid on a salary basis at not less than \$684 per week.

Overtime: The federal overtime provisions are contained in the FLSA. Unless exempt, employees covered by the Act must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time-and-one-half their regular rates of pay. Police and fire employees have different hourly requirements.

Compensatory Time: Paid time off given to eligible employees rather than overtime pay. Must be time-and-one-half.

## Wage and Hour Considerations

Should an exempt employee lose their exemption, the effect is that the employer will be obligated to pay the employee hourly, in addition to any overtime and/or compensatory time earned.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough disqualify the employee from being paid on a salary basis *only* in the workweek when the furlough occurs and for which the pay is accordingly reduced under 29 C.F.R. 541.710. For additional information please see: <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs70.pdf>.

An employer should consider collecting any mobile devices it has furnished to workers to lessen the chance that an employee will work during a furlough/temporary layoff. Otherwise, an employee could attempt to claim entitlement to compensation despite his/her furloughed status.

## UNEMPLOYMENT BENEFITS

Employees who are furloughed or laid off may be eligible for unemployment benefits. It is important to note that **effective April 27, 2020, Emergency Rule 30 of the Arkansas Department of Workforce Services requires employers to notify employees of the availability of unemployment compensation benefits to an employee upon separation from employment (Appendix A to Rule 30)**. This rule expires on December 31, 2020.

Of particular interest in the area of unemployment are the DWS shared work program and the DOL guidance regarding the various types of unemployment:

The Department of Workforce Services offers a shared work program that allows an employer to divide available work or hours of work among a specific set of employees in lieu of a layoff and allows the employees to receive a portion of their unemployment benefits while working reduced hours. For additional information please see: <https://www.dws.arkansas.gov/employers/shared-work-programs/> or call 501-682-2121.

The Department of Labor has released a publication which includes FAQs that address multiple topics such as eligibility for regular unemployment compensation, the Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation program (PEUC), and the Pandemic Unemployment Compensation program (FPUC). For additional information please see: <https://www.dol.gov/coronavirus/unemployment-insurance>.

## APERS

Whether the change in employment status is a furlough or a layoff, employers must take certain actions in the employer self-service (ESS) portal. For furloughed employees, employers must use the Add Leave Information tool and add a Leave without Pay Record. The member status will remain active, but the member will be suspended from work reports until a stop date is entered for the leave record. For laid off employees, employers must use the Terminate Member tool and add a stop date. The member status will change to inactive, and the member will no longer appear on work reports. For additional information please see the attached: [https://apers.org/images/PDFs/employer/Notice\\_on\\_Furloughs\\_and\\_Layoffs.pdf](https://apers.org/images/PDFs/employer/Notice_on_Furloughs_and_Layoffs.pdf).

## **OTHER OPTIONS**

The Treasury released the Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments in late April 2020, supplemented by Coronavirus Relief Fund FAQs in early May. The Treasury's guidance sets out that a cost accounted for in an entity's most recently approved budget (prior to March 27) would not be considered a COVID-19 related cost. However, the Guidance also sets out that a cost is not considered accounted for in the most recently approved budget if the cost is for a substantially different use from any expected use of funds in such a line item, allotment or allocation. The FAQs explain that costs incurred for a "substantially different use" include, but are not limited to, costs of personnel and services that were budgeted for in the most recently approved budget, but which due to the COVID-19 health emergency, have been diverted to substantially different functions. As an example, this might include the costs of redeploying police to support management and enforcing social distancing measures. If employees are reassigned in such a manner as to be substantially dedicated to mitigating or responding to COVID-19, the costs could be reimbursable through the CARES Act although there is not an absolute guarantee. Municipalities should keep clear and detailed records to support all such costs.

- An employer may consider changing an employee's duties and responsibilities during an emergency to avoid a layoff or furlough. For example, public schools have been closed for the remainder of the academic year eliminating the need for School Resource Officers (SRO). If a city has other duties and responsibilities that an SRO can fill, the SRO's duties and responsibilities can be temporarily changed. However, if a collective bargaining agreement exists, you must consult with the bargaining representative.

If you have any questions regarding layoffs and furloughs, please e-mail the Arkansas Municipal League at [lawinquiry@arml.org](mailto:lawinquiry@arml.org). We will also provide the most up-to-date information possible on our website [www.arml.org](http://www.arml.org) on the COVID-19 page <https://www.arml.org/resources/covid-19/>.