

*The*  
ANTHONY  
LAW FIRM  
• PLLC •

www.theanthonylawfirm.com  
janthony@theanthonylawfirm.com

FURLOUGHS

**A CHURCH'S GUIDE TO FURLOUGHS  
DURING THE COVID-19 CRISIS**

P.O. Box 1553 Roanoke, TX 76262  
817-917-8466

**CHURCH  
RESOURCE**

**The information contained herein is for educational purposes only and does not constitute legal advice from The Anthony Law Firm, PLLC or any other entity or person distributing this information.**

For more information please see the attached Sample Furlough Policy, Sample Furlough Notice Letter and Fact Sheet #70 from the Department of Labor and contact your legal counsel.





Covid-19 has taken a financial toll on most American business, including nonprofits. And while the media has focused on for-profit employers, churches are also facing tough choices. Over the last two weeks churches have been faced with the increasing possibility of a budget shortfall due to their inability to hold live, in-person worship services and the limited ability to receive tithes and offerings. Now, furloughing staff is being considered as a necessary procedure during this Covid-19 disaster.

In an effort to assist churches and their staff during this crisis, The Anthony Law Firm, PLLC would like to provide this Frequently Asked Questions and sample Furlough Policy and Notice for a church furlough program. If you have questions, please seek guidance from your church's professional legal and accounting/financial counsel as regulations and laws regarding employment are changing rapidly during this crisis.

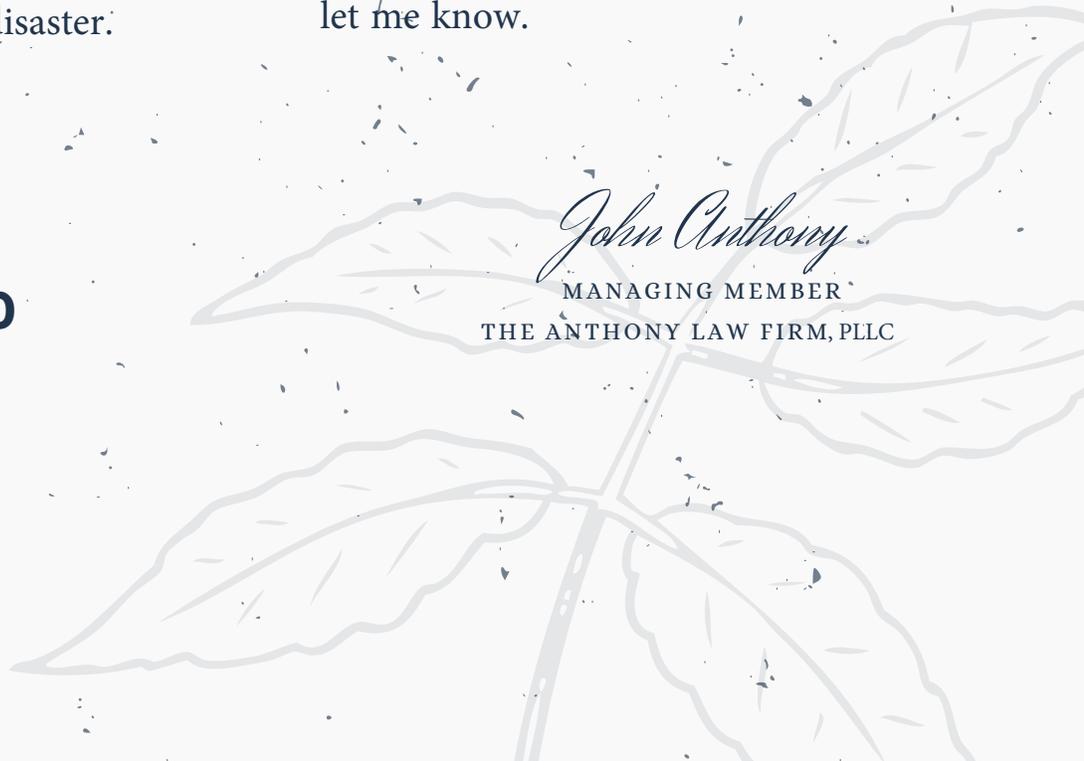
If you have more questions or if I can be of further assistance, please let me know.

**SPRING 2020**

*John Anthony*

MANAGING MEMBER

THE ANTHONY LAW FIRM, PLLC



# FREQUENTLY ASKED QUESTIONS

1. **What is a furlough?** A furlough is a temporary time off work. It is unpaid and is not typically voluntary. Employees expect to return to their jobs after the furlough is completed.
2. **When do churches furlough employees?** Often, furloughs are commenced when a church realizes their current employment budget will not be met with the necessary revenue. The more time ahead of the budget shortfall a furlough can be planned, the better.
3. **How long can a furlough last?** A furlough can be indefinite, but it may be wise to set expectations for suspected time frames and update your staff as the furlough progresses. Staff will feel the need the support their families and without regular updates, they may decide to pursue other opportunities.
4. **How is a furlough different from a temporary layoff?** A furlough can preserve the employment status of the employee, thereby preventing a disruption in benefits. A temporary layoff may trigger a loss of benefits, and the need to pay unused paid-time-off (PTO), depending on your policy.
5. **What do I need to do to implement a furlough program?** Your organization should approve a furlough policy or plan. This policy or plan should state how long the furlough intervals will last, and which benefits will be continued during the furlough (i.e. health insurance, accrued PTO, etc.) Your furlough policy or plan should identify which positions are necessary for continuation and which are eligible for furlough. Finally, you should clearly communicate the furlough, and its parameters, to your employees in writing.
6. **Can employees work during a furlough?** No. Any work for nonexempt employees will result in hourly wages, and potential eligibility for over-time. Unless arrangements are made, any work for an exempt employee can result in a full week's wages. However, if exempt employees are required to work only one day per week, they may be required to use their PTO for the remaining four (4) days. Employee's for churches may volunteer during a furlough, but they should not volunteer in the same area of their employment,
7. **Can a furlough have an impact on contract staff?** Contract staff are subject to the terms of the contract they have with the church. A church may or may not be able to cut work to a contractor based on the agreement signed by the church and the contractor. If you feel that a contract should be terminated due to the Covid-19 disaster, contact your legal counsel.

# FREQUENTLY ASKED QUESTIONS

8. **Can we reduce salary levels?** In general, yes. However, state and federal minimum wage standards cannot be violated. Furthermore, for exempt employees, they must meet the requirement of \$684 per week to remain exempt.

9. **Can we reduce the hours of nonexempt employees?** In general, yes. However, please be aware that depending on your benefits policy, dropping below a certain hourly threshold could put an employee's benefits at risk.

10. **What kind of notice do we need to give employees?** No amount of notice is typically required. However, written notice is highly advisable to avoid unapproved work. All time worked must be paid, regardless of when notice is received. Typically, employers try to give at least fourteen (14) days' notice; however, in general, there is no legal requirement as to how much notice must be given.

11. **Can exempt employees volunteer to be furloughed?** Yes, both exempt and non-exempt employees can volunteer to be furloughed. In the case of exempt employees, salary deductions may be made for one or more full days of missed work. The employee's decision must be completely voluntary and it is recommended that the decision be in writing.

12. **What do other organizations do to implement a furlough?** Some organizations have a blanket furlough, which does not allow any work until the furlough is finished, and other will use a rotating furlough, which rotates staff every other week. Rotating furloughs minimize disruption to activities, while allowing for mitigated financial impact to the employees. Rotating furloughs occur when fractions of the employee workforce are furloughed a week or two at a time, and take turns (like shifts).

13. **What about our ministerial employees?** Ministerial employees are exempt from many of the rules that lay staff may be subject to, including major portions of the FLSA and Title VII discrimination laws. When considering a furlough that will affect your ministerial employees, it may be likely that some of the rules, which would affect lay staff, will not apply to your ministerial staff. However, it is important to contact legal counsel to determine your responsibilities and employment liability to ministerial staff.

14. **What other challenges or benefits should the church be aware of?** Church employees who are furloughed are not likely eligible for unemployment.

## SAMPLE FURLOUGH POLICY

### POLICY

The Church understands that circumstances may, at times, necessitate a furlough for its staff. The Church also recognizes that the decision to furlough employees, which employees are furloughed, and the duration of any furlough will be made by the Church subject state and federal law, the Church's then current financial capabilities, and the availability of the Essential Staff, as defined below.

Furloughs, whether they are emergency or nonemergency furloughs, will be implemented in accordance with applicable statutes, regulations, and agreements.

Furloughs will be implemented only if their necessity cannot be reasonably abated through other means, such as hiring freezes, reduction in travel that is not critical to the mission of the Church, reduction of contracts with consultants and contractors, etc. The Church's Board of Directors shall be the final arbiter in determining the timing and methods used in any furlough but may delegate such decisions to the Church's Executive Staff.

"Essential Staff" shall mean employees or contractors that are required to maintain the Church's premises and ensure the continuity of the Church's legal and financial obligations. The Board of Directors may designate ministerial and non-ministerial staff as "Essential Staff" to continue providing worship services and pastoral assistance to the Church's congregation and the community in methods as determined by the Board of Directors and that are essential and necessary to the Church's mission.

### PERSONNEL CONSIDERATIONS

1. In furlough situations when not all employees are being furloughed, the Church will ask employees to volunteer to be placed on leave without pay (LWOP) status.
2. The Church reserves the right not to accept a voluntary request for LWOP from an employee for essential business-related reasons.
3. An employee will not receive credit for paid-time-off or sick leave accruals during any pay period in which he/she accumulates furlough time.
4. Employees who have had paid-time-off canceled due to a furlough will be given every opportunity to reschedule that leave.
5. Upon expiration of the furlough, employees who were on approved sick leave that did not extend beyond the end of the furlough will report to duty unless their medical status precludes them from doing so.

6. If an employee's medical status precludes him/her from reporting to work upon the expiration of the furlough, the employee must request sick leave in accordance with applicable procedures.
7. Employees may not use any type of paid-time-off on scheduled furlough days.
8. Furlough days do not count against Family Medical Leave absences and entitlements.
9. Health insurance benefits will continue for up to 90 days in non-pay status.
10. The Church shall continue to pay the Employer share of the health insurance premium.
11. The employee is responsible for his/her share of the health insurance premium. Payment of the employee's share of the premium during a furlough will be made in accordance with Church's policies and procedures.
12. Life insurance in place prior to the furlough shall continue for up to 90 days in non-pay status at no cost to the employee.
13. Employees who are required to report for duty during a furlough will be compensated in accordance with applicable law and the Church's current payroll practices.
14. Furloughs shall not be executed in violation of any state or federal law.

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## SAMPLE FURLOUGH NOTICE LETTER

[Name] [Address]

Dear [Mr./Ms. Last Name]:

As you know, our nation, and specifically our county, is greatly impacted by the Covid-19 disaster. As a result, our church is forced to make adjustments to preserve its staff positions and its essential operations. In an effort to preserve the applicable employment benefits and the current workforce here at [CHURCH NAME], it is necessary to implement a reduction-in-force in the form of a furlough. This means that your position will be subject to a temporary furlough from [BEGIN DATE], 2020 until [EXPECTED END DATE], 2020. If the Covid-19 disaster continues, and the prohibition of live worship services is continued, the furlough could be extended. We will do our best to provide current information as our church moves to have its employees come back to work.

If you are not aware, furloughs are a church-initiated, short-term, temporary, unpaid leave of absence. The furlough period and provisions may be changed or terminated at the sole discretion of the Church, and does not create any employment contract, express or implied.

[CHOOSE ONE – A. OR B.]

A.

While your position as [JOB TITLE] is not terminated, you will not be working during this time. Once the church is able achieve its normal operations, the furlough will end and you will be asked to return to work. Your health insurance benefits and obligations will continue during this furlough.

B.

Your work schedule will now be [SHIFT TIMES AND DAYS PER WEEK]. As a result, your accrual of sick leave will be reduced from [HOURS] per month to [HOURS] per month, your accrual of annual leave will be reduced from [HOURS] per month to [HOURS] per month, and your annual salary of \$[SALARY] will be reduced to \$[SALARY]. Your accrual of service tenure will also be adjusted accordingly. Your health insurance benefits and obligations will continue.

I know this is a difficult season for many people, and we plan on doing everything we can do to limit the furlough. If you have any questions about this letter, please feel free to reach out to your human resources representative [INSERT NAME] at [INSERT TELEPHONE NUMBER OR EMAIL] to set up a time to discuss.

Regards,

## **Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues**

The [Department of Labor's](#) (DOL) [Wage and Hour Division \(WHD\)](#) is responsible for administering and enforcing some of our nation's most comprehensive labor laws, including the minimum wage, overtime, recordkeeping, and youth employment provisions of the [Fair Labor Standards Act \(FLSA\)](#).

The following information is intended to answer some of the most frequently asked questions that have arisen when private and public employers require employees to take furloughs and to take other reductions in pay and / or hours worked as businesses and State and local governments adjust to economic challenges.

### **1. If an employer is having trouble meeting payroll, do they need to pay non-exempt employees on the regular payday?**

In general, an employer must pay covered non-exempt employees the full minimum wage and any statutory overtime due on the regularly scheduled pay day for the workweek in question. Failure to do so constitutes a violation of the FLSA. When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

### **2. Is it legal for an employer to reduce the wages or number of hours of an hourly employee?**

The FLSA requires that all covered non-exempt employees receive at least the applicable Federal minimum wage for all hours worked. In a week in which employees work overtime, they must receive their regular rate of pay and overtime pay at a rate not less than one and one-half times the regular rate of pay for all overtime hours. The Act does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.

### **3. Does an employer need to pay an hourly employee for a full day of work if he or she was scheduled for a full day but only worked a partial day due to lack of work?**

The FLSA does not require employers to pay non-exempt employees for hours they did not work.

### **4. In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business?**

Reductions in the predetermined salary of an employee who is exempt under Part 541 of the Department of Labor's regulations will ordinarily cause a loss of the exemption. Such an employee

must then be paid at least the federal minimum wage and overtime pay required by the FLSA, as discussed in **FAQ #2** above. In some circumstances, however, a prospective reduction in salary may not cause a loss of the exemption. See **FAQ #7** below.

Section 13(a)(1) of the FLSA exempts from minimum wage and overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity" as defined in [29 C.F.R. 541](#). An employee qualifies for exemption if the duties and salary tests are met. See [Fact Sheet #17A](#).

FLSA section 13(a)(1) requires payment of at least \$684\* per week on a "salary" basis for those employed as exempt executive, administrative, or professional employees. See [Fact Sheet #17G](#). A salary is a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed. Beginning January 1, 2020, employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level.

An employer must pay an exempt employee the full predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not permissible if the employee works less than a full day. Except for certain limited exceptions found in [29 C.F.R. 541.602\(b\)\(1\)-\(7\)](#), salary deductions result in loss of the section 13(a)(1) exemption.

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](#). See **FAQ #9** below.

Physicians, lawyers, outside salespersons, or teachers in bona fide educational institutions are not subject to any salary requirements. Deductions from the salary or pay of such employees will not result in loss of the exemption.

## **5. Can an employer reduce the leave of a salaried exempt employee?**

An employer can substitute or reduce an exempt employee's accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis payment, provided that the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed even if the employee has no leave remaining.

## **6. Can a salaried exempt employee volunteer to take time off of work due to lack of work?**

If the employer seeks volunteers to take time off due to insufficient work, and the exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee's decision must be completely voluntary.

## **7. Can an employer make prospective reduction in pay for a salaried exempt employee due to the economic downturn?**

An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to a Part 541 exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least \$684\* per week. On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

#### **8. Can an employee still be on-call or performing work at home during a furlough day?**

Whether on-call time is hours worked under the FLSA depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time).

For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait." An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is allowed to leave a message where he/she can be reached is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties.

#### **9. Are the rules for paying furloughed employees different for State and local governments?**

For non-exempt public employees, **see FAQ #2**.

For salaried exempt employees, in the case of public sector employees, a specific rule applies to furloughs as described in the following regulatory text, [29 C.F.R. 541.710](#):

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.

#### **10. Does it matter if the State or local government employee is considered an essential or critical employee for the purposes of a required furlough?**

The application of the FLSA is not affected by the classification of an employee as essential or critical for the purposes of a required furlough.

#### **11. What remedies are available to correct violations of the FLSA when employees are not paid on a timely basis?**

- a. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages or for interest on the back wages, or the Secretary of Labor may bring suit for an injunction against the failure to pay wages when due.
- b. Employees who have filed complaints or provided information during an investigation are protected under the law. They may not be discriminated against or discharged for having done so. If they are, they may file a suit or the Secretary of Labor may file a suit on their behalf for relief, including reinstatement to their jobs and payment of wages lost plus monetary damages.
- c. An employee may file suit to recover back wages, and an equal amount in liquidated damages, plus attorney's fees and court costs. Please note that the U.S. Supreme Court has ruled that the Eleventh Amendment prohibits employees of State governments from filing such suits against their State employers for monetary relief in federal courts (under Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)), and in State courts unless the State waives its sovereign immunity (under Alden v. Maine, 527 U.S. 706 (1999)).
- d. Civil money penalties may be assessed for repeat and / or willful violations of the FLSA's minimum wage or overtime requirements.
- e. Employers willfully violating the law also may face criminal penalties, including fines and imprisonment.

## **ADDITIONAL INFORMATION**

**The Wage and Hour Division is available to assist. For more information regarding the FLSA, visit the WHD Web site at [www.wagehour.dol.gov](http://www.wagehour.dol.gov) or call our toll-free help line, available 8 a.m. to 5 p.m. in your time zone, at 1-866-4US-WAGE (1-866-487-9243).**

When state law differs from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at [www.dol.gov/contacts/state\\_of.htm](http://www.dol.gov/contacts/state_of.htm).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

**\*Note:** The Department of Labor revised the regulations located at 29 C.F.R. part 541 with an effective date of January 1, 2020. The 2004 part 541 regulations will remain in effect through December 31, 2019, including the \$455 per week standard salary level and \$100,000 annual compensation level for Highly Compensated Employees. The final rule is available at: <https://www.federalregister.gov/documents/2019/09/27/2019-20353/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>.