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May 12, 2009

Ms. Maria Monteagudo
Director
Department of Employee Relations
Room 706 – City Hall

Dear Ms. Monteagudo:

On October 28, 2008, we first opined that a proposed budget amendment requiring that City employees take unpaid leave was allowed by law, with some qualifications. (See attached.) You now advise that Mayor Barrett is considering asking the Common Council to pass an ordinance implementing mandatory furloughs for general City employees in 2009 and beyond as a way to address the fiscal challenges we currently face. You now ask several follow-up questions.

For purposes of this analysis, you ask us to assume that the City will implement two mandatory furlough days before the end of the 2009 fiscal year for all general City employees, including management, represented, and non-management/non-represented employees. You also ask us to assume that you are interested in minimizing the impact of implementing mandatory unpaid time off on benefits that accrue based on payroll status and earnings.

We address each of your questions in the order presented.

QUESTION 1: Implication on FLSA status of exempt employees given furlough initiative.

ANSWER:

Fair Labor Standards Act ("FLSA") regulations applicable to exempt employees will not constitute a significant obstacle to a furlough program applicable to FLSA-exempt employees as long as such furloughs are ordered because of budget-related reasons.

As a general rule, under federal Wage and Hour Division regulations all FLSA-exempt employees must be paid on a "salary basis" or they will be deemed to lose their exempt

status. 29 C.F.R. § 541.600-541-606. Payment on a "salary basis" requires, among other things, that the exempt employee receive his or her *entire* salary for any work week in which he or she performs any work, subject to certain exceptions involving matters such as exhaustion of sick leave and certain disciplinary suspensions. Unpaid furloughs involving less than a full work week are not included among the circumstances for which a reduction is permissible (note: exempt status is not affected if an employee is not paid anything for an entire week in which no work is performed; therefore, if an exempt employee is furloughed without pay for an entire work week, and if the employee performs no work during that week, this would have no impact upon the employee's status). If employees are not paid in complete compliance with the salary-basis requirements, they can be deemed non-exempt (i.e., they will be considered to be entitled to overtime pay) for a period of time stretching as far back as the statute of limitations for an FLSA claim (three years for "willful," i.e., "knowing" violations of the Act; two years for non-willful violations—most violations are found to be "willful"). There is one noteworthy and (for present purposes) highly relevant exception to this principle: under 29 C.F.R. § 541.710(b), if a "public agency" orders a "budget-related furlough" of an FLSA-exempt employee, the employee is not deemed to lose his or her exempt status "except in the work week in which the furlough occurs and for which the employee's pay is accordingly reduced."

The City qualifies as a "public agency" under this regulation and, therefore, if it were clear (e.g., through language to this effect in a resolution providing for furloughs) that mandatory furlough days are required because of *budgetary requirements*, the only week(s) in which FLSA-exempt employees subject to furloughs would be deemed non-exempt (i.e., in which they would be entitled to overtime pay) would be the week(s) in which mandatory furloughs are taken. For any such weeks, the otherwise FLSA-exempt employee would be entitled to overtime *only* if he or she worked more than 40 hours.

Some FLSA-exempt employees presently working for the City, because of the nature of their duties, may regularly or sporadically work well in excess of 40 hours in a given work week, and it is conceivable that some such employees might work more than 40 hours even in a week in which a furlough is taken. Because such employees would not be deemed exempt in any work week in which their pay is reduced because of a furlough (subject to the rule, noted in the first paragraph above, that exempt status is not affected if an employee receives *no pay* in a week during which *no work* whatsoever is performed), this potential overtime liability could possibly exceed, for such employees, the savings the City hoped to achieve with their furloughs. If, for example, an employee furloughed on a Friday worked 8 hours a day Monday through Thursday, was furloughed on Friday, then worked 10 hours each day of the weekend, for a total of 52 hours in the week, he or she would be entitled to 12 hours of overtime. This overtime would need to be paid at one and one-half times his or her "regular rate" of pay, which for most FLSA-exempt City employees would be their weekly salary divided by 40. Under a scenario such as this, the

effect of a mandatory furlough would be greater costs to the City (as regards such employees) than if furloughs had not been granted.

Accordingly, because exempt employees would be entitled to overtime pay in any week in which an unpaid furlough day is taken, in order for mandatory furloughs to achieve maximum savings, care must be taken to ensure that in any week in which a furlough is taken by an FLSA-exempt employee, actual hours worked by the employee are kept below the 40-hour overtime threshold. Managers would need to be instructed to communicate and enforce this requirement—it is worth pointing out that under the federal law any time worked by an employee counts as time worked for overtime purposes as long as the employer knew or should have known about it and allowed it to occur).

The likelihood that exempt employees with jobs that demand long hours would exceed the overtime threshold of 40 hours in a week could be significantly reduced if such employees were required to take furlough in weeks that contain a paid holiday. Paid holiday time off does not count as "hours worked" under the FLSA. Therefore, if an employee had Monday off as a paid holiday, then had Tuesday off as an unpaid furlough day, he or she would need to work more than 40 hours in the period from Wednesday through Sunday before any overtime liability would accrue. Alternatively, the furloughs of FLSA-exempt employees in positions that occasionally require extremely long hours (e.g., DPW supervisors/managers during snow emergencies, budget personnel during the weeks before a budget is submitted, City Attorney personnel preparing for a significant trial, etc.) could be scheduled at times when work demands are not pressing. Again, managers would be in the best position to ensure such conditions are met.

Because the FLSA requires employers to keep track of all hours worked by non-exempt employees, the City would need to ensure that the *actual hours worked* by an otherwise FLSA-exempt employees in any week in which a budget-related furlough is taken are accurately tracked (e.g., by requiring the employees to submit their daily hours to their manager for any week in which a furlough occurs). The City would need to keep these records for a period of at least three years from the date any furlough is taken. 29 C.F.R. § 516.3 (the federal regulations require employers to track and maintain many different types of records, for both exempt and non-exempt employees, but these are so obvious and necessary—e.g., employee names, addresses, and positions—that there seems little doubt that they are already maintained by department and payroll personnel records of actual hours worked by FLSA-exempt employees, by contrast, probably are not presently maintained).

QUESTION 2: How to avoid unemployment insurance liability for furloughed employees. Would limiting the time without pay to increments of 4 hours per week negate employee's eligibility for unemployment compensation?

ANSWER:

Under § 108.05(3) of the Wisconsin Statutes (the Unemployment Compensation Act), partial unemployment benefits are sometimes payable to employees during periods of time when their hours are reduced. Partial benefits are calculated by subtracting $30 from the wages earned by an employee in a particular week, multiplying the resulting figure by .67, and comparing the product of this calculation with the unemployment compensation benefits for which the employee would be eligible had he or she been unemployed for the entire week. The following chart shows a (very close) approximation of the partial unemployment benefits to which employees with "base period wages" at different annualized rates would be entitled under scenarios involving 8 hours and 4 hours of unpaid furlough time in a given week (base period wages is a term of art in the Unemployment Compensation Act; such wages are based upon total earnings in the first four of the last five full calendar quarters preceding the first date an employee seeks full or partial benefits):

Annualized wages in base period	U.C. benefit if furloughed 8 hours in a week	U.C. benefit if furloughed four hours in a week
$20,000/yr.	$14.95	$0.00
$25,000/yr.	$12.40	$0.00
$30,000/yr.	$10.87	$0.00
$32,500/yr.	$10.10	$0.00
$35,000/yr.	$9.33	$0.00
$40,000/yr.	$0.00	$0.00

The formula for calculating partial unemployment compensation benefits functions, in effect, to make employees who experience only four (or even five, for that matter) hours of unpaid time off in a week ineligible for benefits, and to make employees who experience only eight hours of unpaid time off in a week eligible only for a minimal benefit. Because all employees with "base period wages" at an annual rate equivalent to $36,300 or more per year receive the same maximum weekly unemployment compensation benefit of $363. The partial unemployment compensation benefit associated with an eight-hour unpaid furlough drops to zero for employees whose annualized base period wages fall somewhere between $35,000 and $40,000, and remains zero for all employees making more than that amount.

If the City planned to furlough large numbers of employees under circumstances where partial unemployment benefits might be available, it would seem prudent to contact local Unemployment Compensation Division offices in advance so that both their staff and ours will be prepared for the potential influx of claims. Given the small amount of benefits available in weeks involving only an eight-hour furlough, it seems conceivable some employees (maybe lots) might forego filing claims for such short periods off.

QUESTION 3: Impact of unpaid time off on creditable service for purposes of retirement?

ANSWER:

"Creditable service" is defined as "membership service for which credit is allowable under section 4 of this act [s. 36-04]." § 36-02-11. "Membership service" means "service as an employee since last becoming a member of the retirement system and on account of which contributions are made by the city or city agency." § 36-02-22. (Emphasis supplied.)

Section 36-04, entitled "Creditable Service", provides in subsection 1-a, that "[t]he board shall fix and determine by appropriate rules and regulations how much service in any years is equivalent to one year of service." This grant of authority is limited as specified in that section.[1] A determination of any service credit by the Board constitutes a contractual and vested right of the member. § 36-04-1-a.

Board Rule XV-A-2 provides that the Board shall allow service credit for any period of up to one-month (20 calendar days) of unpaid leave of absence, suspension, strike or layoff, provided the member agency has given the ERS appropriate documentation defining the specific dates of unpaid leave of absence, suspension, strike, or layoff.

The Board rule, however, is subject to the following limitations:

1. Service credit for unpaid time may be granted to members who were full-time employees during each pay period of the year during which the unpaid time was accrued.

2. No service credit may be granted for unpaid time accrued during the year of enrollment, or the year of retirement or separation.

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[1] The limitations are as follows: no more than one year of service credit may be awarded for all service in one year, and no service credit for a period longer than one month during which the member is absent without pay, except that members employed by the school board for a 10-month school year shall receive credit for one year. § 36-04-1-a. In addition, service credit is allowed for persons on authorized military leave and for military service prior to membership. § 36-04-1-b and c.

The circumstances for which the Board shall grant service credit under Rule XV-A-2 do not include furloughs. Accordingly, to ensure service credit is granted for time spent on furloughs, the Board would have to amend Rule XV-A-2. Moreover, part-time employees and employees in their enrollment year or retirement or separation year would not be eligible for service credit for unpaid time. The Board would need to amend the rule also to grant service credit to members in those circumstances.

QUESTION 4: Impact on benefits calculated as a percentage of earnings (i.e., life insurance, long term disability, etc.). Is there anything that can be done to minimize the impact?

ANSWER:

The impact on benefits calculated as a percentage of income will be determined by the specific language used in the legislation or contracts implementing the mandatory furloughs.

For life insurance, because the benefit amount is determined by salary rates, furloughs would not change the amount of the benefit unless the furlough provisions explicitly so provide. Section 350-25-4 of the Ordinances states that the amount of base coverage for employees other than firemen or policemen or those in a certified collective bargaining unit "shall be equal to an employee's annual basic salary to the next higher thousand dollars of earnings." Section 350-25-12 provides that the amount of the benefit for specified unrepresented fire and police management employees is "an amount equivalent to 1.5 times their annual base salary rate rounded to the next higher thousand dollars." The ordinance also states that coverage will be adjusted semiannually on January 1 and July 1 to reflect changes in the base salary rate, which is defined as "an amount equivalent to the employe's biweekly base salary on those 2 dates, as the employe's biweekly base salary is established by the salary ordinance, divided by 14 and then multiplied by 365." Current collective bargaining agreements uniformly provide that the amount of life insurance is "the employee's annual base salary rounded to the next higher thousand dollars of earnings."

Under this language, the benefit is determined by the base salary amount, and not actual wages paid. For example, the benefit for an employee on unpaid, non-FMLA medical leave who returned to work and later died in the same calendar year would be based on the contractual salary base, not the actual time work. Similarly, the benefit is not reduced to the actual amount of salary an employee earned in the year of death, nor does it increase in years in which an employee receives a retroactive pay increase. Without such a provision, the amount of the life insurance benefit would continue to be calculated on the base salary amount for a position and would not be reduced by mandatory furlough time.

A similar result prevails with respect to long-term disability benefits. The amount of a long- term disability insurance benefit is governed by the terms of the City's policy with Standard Insurance Company. The policy provides that the benefit is based on "indexed predisability earnings," which are defined as "Presdisability Earnings adjusted by the rate of increase in the CPI-W." "Predisability Earnings" are based on the earnings in effect on an employee's last full day of work and are defined as "your average monthly rate of earnings from you Employer during the preceding 12 calendar months, or during your period of employment if less than 12 calendar months." Absent a specific provision that furloughs reduce salary rates, they will have no effect on the amount of a long-term disability benefit.

QUESTION 5: What if any requirements exist to amend section 350-209 of the Milwaukee Code of Ordinances and Salary Ordinance in relation to the implementation of furloughs? (Please note that managers and other employee groups accrue vacation based on time on payroll and the intent is not to reduce the vacation accrual by the unpaid time off.)

ANSWER:

Furloughs should be accomplished via an ordinance passed by the Common Council, including language to obviate any potential effect of any existing ordinances such as section 350-209 (specifying an eight-hour workday and five-day work week) through a clause such as the following, which spells out any intended effects: "Notwithstanding any ordinances to the contrary, time spent by a City employee on furlough shall count as working time for purposes of calculating vacation eligibility and accrual subject, however, to any duty to bargain over such matters with labor organizations representing City employees." If there is an intent to allow vacation time to accrue during furlough time, and if there are any other ramifications of an unpaid day off that merit clarification and certainty (e.g., effects upon sick leave eligibility, pension benefits, life insurance, and long-term disability benefits), such effects could similarly be addressed in such a clause. We would be happy to review any such proposed legislation prior to its submission to Council.

Although it seems likely that the City's collective bargaining agreements would allow the City to unilaterally implement short furloughs, those collective bargaining agreements also address the accrual of vacation time and any unilateral modification of the rules set forth in those agreements, even if beneficial to employees, could constitute a violation of some bargaining agreements (it could also constitute an impermissible unilateral change in conditions of employment—a prohibited practice under the Municipal Employment Relations Act). If, for example, a bargaining agreement provided that vacation accrual is linked to each hour or day worked, allowing vacation to accrue on a furlough day would violate the contractual vacation accrual language and would constitute a breach of the

contract (and, as noted, a prohibited practice). Accordingly, language authorizing furloughs and any of the intended effects of furloughs upon wages, hours, and conditions of employment such as that offered in the preceding paragraph needs to contain a general reference to the duty to bargain.

One additional reason exists for including a reference to the duty to bargain in any language authorizing furloughs. Under the Municipal Employment Relations Act ("MERA"), even in situations where management has an unequivocal right to take an action unilaterally, a duty still exists to bargain over the *effects* of the action upon wages, hours, and conditions of employment. "Effect bargaining," also called "impact bargaining," generally does not include a requirement that parties reach agreement, and employers are generally free after bargaining to impasse in effects bargaining to unilaterally implement their final offers with respect to any effects of the underlying action.[2]

QUESTION 6: What if any considerations must be given to employees on paid sick leave, FMLA, injury pay, or worker's compensation during the "mandatory furlough days."

ANSWER:

Sick Leave

Section 350-37 of the Milwaukee Code of Ordinances provides for a sick and disability leave to "cover necessary absence from duty of an employee. . . ." Some of the collective bargaining agreements incorporate the language of § 350-37 in the sick leave provisions of the labor agreements. A mandatory furlough day does not require an absence from duty. Therefore, sick leave that is not being used for absences related to a Worker's Compensation injury where the employee is still in a healing period would not have to be provided by the City as paid leave for furlough days.

FMLA

FMLA is both a federally mandated and state mandated leave for a serious health condition of an employee and for serious health conditions of certain members of the employee's family, or the birth or adoption of a child. 29 U.S.C. § 2601 et. seq.; Wis. Stat. § 103.10. The purpose of the federal and state FMLA is to assist employees with

[2] An exception to the rule that an employer can implement its final offer after reaching impasse in effects bargaining exists in situations where an aspect of the employer's final offer is already addressed in the parties' collective bargaining agreement: thus, although whether or not vacation time should accrue while an employee is on furlough would constitute a proper subject for effects bargaining, an employer could not unilaterally implement a final offer on this issue that violated a collective bargaining provision covering accrual. There are certain other situations where unilateral action cannot occur after impact bargaining but these apply only under very specific circumstances and have no relevance to the issues associated with unpaid furloughs.

balancing the demands of the workplace with the needs of their family. 29 U.S.C. § 2601 (b) (1); *Kelley Company v. Marquardt*, 172 Wis.2d 234, 249, 493 N.W.2d 68 (1992). FMLA is designed to protect employees' jobs and benefits while they are on leave. *Kelley*, 172 Wis.2d at 249

Mandatory furlough days do not require an employee to take leave under the FMLA because there is no work-duty from which leave is needed. Also, as proposed by the City, the mandatory furlough days would not impact an employee's benefits or job assignment. Therefore, the City could require employees on FMLA to take mandatory furlough days during their FMLA leave. However, an employee may be able to extend his or her FMLA leave by the number of furlough days he or she is required to take during their FMLA leave. Whether an employee's FMLA leave would be extended is dependent on the individual employee's specific circumstances. Therefore, we recommend that should this situation occur, please contact our office for advice.

Worker's Compensation/Injury Pay

Under Wisconsin's Worker's Compensation law, an employer must pay temporary disability benefits for the period of time during which the employee is within the healing period for a work-related injury and sustains an actual wage loss. Wis. Stat. § 102.43; *Employers Mut. Liability Ins. Co. v. Industrial Commission*, 230 Wis. 670, 284 N.W. 548 (1939). By ordinance, the City of Milwaukee pays injury pay "in lieu of" temporary disability benefits payable under Worker's Compensation. § 350-37-8, Milwaukee Code of Ordinances. Section 350-37-8 is codified in the collective bargaining agreements between the City and the various unions. Therefore, if the City is obligated to pay temporary disability payments for specified mandated furlough days, it will be obligated to pay injury pay for those days (assuming the employee has not exhausted his or her injury pay benefit).

The Labor and Industry Review Commission (LIRC), the administrative agency that oversees and interprets Ch. 102 of the Wisconsin Statutes, has ruled that an employee who is still in a healing period is entitled to temporary disability during an employer-mandated lay-off and a compulsory vacation period, or "off-week." *Kluge v. United States Fidelity & Guaranty Co*, 2002 WL 31927542 (LIRC 2002); *Slow v. Warner Amex Cable Comm.*, 1991 WL 476890 (LIRC 1991). The rationale of these two administrative decisions would apply to mandated furlough days and require the City to pay temporary disability benefits or injury pay benefits for specified mandatory furlough days if the employee were entitled to the temporary disability benefits under Worker's Compensation. Also, if the labor contract allows the employee to use sick leave rather than being paid temporary disability benefits under worker's compensation (this is in situations where the employee has exhausted injury pay), the City would have to allow

the employee to use paid sick leave for specific mandatory furlough days that occur during the employee's healing period. However, the City can require employees who are eligible for temporary disability benefits under Worker's Compensation to take mandatory furlough days when they return to service.

QUESTION 7: What if any role does the City Service Commission play in relation to this mandate:

ANSWER:

While we recommend that the City Service Commission be advised of mandated furloughs, the Commission does not have a direct role in its implementation.

QUESTION 8: How can elected officials participate?

ANSWER:

We find no limitations in the Wisconsin Statutes, Charter or the Code of Ordinances upon the broad powers of the Common Council to deal with the City's finances and personnel that are set out in Wis. Stat. § 62.11(5) and MCC 4-10. Therefore, a furlough of elected officials in terms of voluntarily foregone salary would be within the purview of the Council's powers under MCC 18-06-13 to suspend expenditures for salaries. The decision as to whether an individual's duties should be performed on a day when his or her salary is foregone is an individual decision for that elected official.

QUESTION 9: Is there any provision (outside of collective bargaining) that guarantees employees a right to compensation if directed not to report to work?

ANSWER:

As a general rule, employers are free to determine the number of hours of work assigned to their employees unless they have committed themselves, via collective bargaining agreements covering represented employees or via employment contracts with individual employees to employment guarantees. For municipal employers, ordinances, to the extent they grant rights to employees, could also potentially give rise to enforceable employee rights.

We have also already addressed potential effects of section 350-209 of the Milwaukee Code of Ordinances in our response to item 5, above. To the extent that provision could be construed to provide any guarantees of employment for eight-hour days and five-day weeks—and such a construction seems strained (that section is concerned with ensuring employees are not subjected to excessively long workdays and weeks, not to establishing

minimum guarantees)—any such effects would be obviated by language such as that recommended by us in the first paragraph of our response to item 5 ("Notwithstanding any ordinances to the contrary, ...").

We have addressed certain ramifications of the Fair Labor Standards Act upon FLSA-exempt employees who are given furloughs in our response to item 1, above, and how the FMLA, Worker's Compensation Act, and City policies regarding injury pay are affected by furloughs in our response to item 5, above. A review of additional labor and employment laws applicable to the City has not disclosed any that would prohibit furloughs or that seem to raise issues meriting comment.

Please do not hesitate to contact us if you have any additional questions or concerns.

Very truly yours,

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