

Questions & Answers re CSU/CFA Furlough MOU

SALARY, BENEFITS, AND DURATION OF FURLOUGH

48. How are salaries and furlough determined for faculty members on sabbatical leave?

The required number of furlough days for sabbatical or difference in pay leaves will be commensurate with the duration of the leave (e.g. 2 days per month for 12-month employees, 18 days for a full academic year/9 days per semester/6 per quarter for academic year employees.) The furlough will result in the same percentage salary reduction (compared to the normal salary associated with the leave type) as would be applied to the employee if not on leave, based on the employee's classification and pay plan (academic year, 12-month, or 10-month paid over 12 months). For examples of calculations, see TL HR/Salary 2009-07, supplement 5.

49. How are salaries and furlough determined for faculty members on difference in pay leave?

For difference in pay leaves, both the faculty member's original salary and the benchmark salary for the class will be reduced by the furlough percentage; the salary for the DIP leave is the difference between the two. The net effect of the furlough will be to reduce the salary for the leave by the same *percentage* as that of a faculty member in the same classification who was not on leave.

Example: An academic year employee with a salary of \$8,000 per month takes a difference in pay leave for the spring 2010 semester. The monthly furlough reduction for this employee is 9.23%, and the employee is required to take 18 days of furlough during AY 2009/10. Over the spring semester while on DIP leave, the employee would be required to take 9 days of furlough. The salary reduction is calculated as follows. First, the faculty member's salary is reduced by the furlough percentage of 9.23%, giving a net salary of \$7,261.60. The benchmark salary is subtracted from this amount. In this example, the benchmark rate would be \$3137.01 (the minimum salary for the Instructor rank, reduced by 9.23%.) The salary for the difference in pay leave period would then be \$4,124.59 per month.

FAIR LABOR STANDARDS ACT ISSUES

50. Do faculty members retain their exempt status under the FLSA during a furlough week?

In general, instructional faculty (as well as some coaches) retain FLSA exempt status during furlough weeks, while most other members of the faculty bargaining unit lose exempt status during the furlough week.

51. Why do some faculty unit members retain their exempt status during weeks in which they take a furlough day while others do not?

It is important to recognize that one's exempt status is based on the criteria in the Fair Labor Standards Act (FLSA), and not based on the bargaining unit to which the employee belongs. Most members of the faculty bargaining unit are classified as exempt employees (except for some coaches who have been classified as non-exempt). In order to qualify for "exempt" status under the FLSA most employees must meet tests based both on their salaries and their duties. Certain professional groups, including "teachers" in bona fide educational institutions, lawyers, and doctors, are *not* subject to the salary test. In the faculty bargaining unit, this includes all instructional faculty as well as "exempt" coaches. However, while some librarians may fall under the teacher classification based on their individual duties, most would not. Similarly, only those counselors with an M.D. would fall under the exemption for doctors. Those librarians or counselors who do not fall under the teacher or doctor exemption must meet the salary test.

How this relates to furloughs: As a general rule, exempt employees in public agencies who are furloughed for part of a week retain their status as exempt *except during the week in which they are furloughed.* (see

29 CFR 541.710.) However, those individuals such as teachers or doctors whose exempt status does *not* depend on the salary test retain their exempt status even during a furlough week. On the other hand, since librarians and counselors do not generally qualify as teachers or doctors under the FLSA, they will not retain their exempt status during furlough weeks.

DETERMINATION OF FURLOUGH DAYS AND WORK ASSIGNMENTS

52. What if a scheduled furlough day falls on a day when a faculty unit employee is traveling on business?

In such cases, the furlough day for that individual should be rescheduled. If the employee is traveling for business during regular working hours, the day must be considered a work day, not a furlough day.

53. If a faculty member has a scheduled furlough day, but decides to work anyway and is injured in the course of performing the work, is the university liable for workmen's compensation?

Yes. If the faculty member was engaged in activities that were within the scope of employment, the university would be liable, even if the individual was not authorized to work that day. The university cannot waive its liability even if the faculty member's activities were not authorized. (This is in no way meant to encourage faculty unit members to go ahead and work on a furlough day!)

EXEMPTIONS, EXCLUSIONS, SPECIAL CONSIDERATIONS

54. Can a faculty member work on a grant on a furlough day if the faculty member's salary is partially reimbursed by the grant or a contract?

If a faculty member's salary is partially reimbursed by a grant, and thus the faculty member is partially exempt from furlough, it would be permissible for the faculty member to perform work on the grant on a day that was otherwise scheduled as a furlough day. No work should be performed on any activities *not* associated with the grant.

55. Some other universities (like the UC) have exempted individuals on H-1b visas from furlough. Why has the CSU decided to go ahead and include holders of H-1b visas in furloughs?

The potential issue does not have to do with the H-1b visa itself but with the requirements for labor certification, which include that the employer must pay at least the prevailing wage. A concern that has been widely circulated is that a furlough would reduce salaries to below this level, thus jeopardizing the employee's labor certification status. However, one of the ways that prevailing wage is established is through a collective bargaining agreement. The existence of a collective bargaining agreement distinguishes the CSU from the UC and some other institutions, like Arizona State, that exempted H-1b visa holders from furlough. In essence, the existence of a negotiated agreement means that we are paying the prevailing wage.

The reference in federal law that discusses requirements for labor certification is 20 CFR 655.731.

MISCELLANEOUS PROVISIONS

56. Does the language in the Furlough Agreement really mean that anyone who requests an extension to the probationary period gets it?

As described in the Furlough Agreement (section 5 (d)) it is the intent of the parties that the furlough program not have an adverse impact on the eligibility for or the award of tenure and/or promotion. To that end, upon the request of a probationary faculty unit member between July 1, 2009 and June 30, 2010, the probationary period for that employee will be extended by one year, provided that the request is received by the appropriate administrator before the first level of review has rendered its recommendation concerning an active application for tenure and/or promotion.

In practice, that means that any probationary faculty member who requests such a leave according to the timelines, including someone up for tenure in AY 2009/10, provided the request was made prior to the completion of the first level of review, would be granted the extension. An extension would also be granted to any faculty member who requested an extension before June 30, 2010, and whose tenure review was scheduled *after* 2009/10.

57. If an extension has been granted, what kind of review should we be doing?

Following discussions with CFA, we have clarified that for anyone who has received an extension, if the next scheduled review was to have been a performance review, the performance review should be postponed for a year. The campus can conduct a periodic evaluation instead, or may, at its discretion, skip the review for that cycle.

For example, if an individual was scheduled for a performance review for retention in 2009/10 but requested the extension, the retention review would be postponed to 2010/11. A periodic evaluation in 2009/10 could take its place.

58. If an extension is granted but later on the faculty member decides to apply for tenure on the original schedule, should this be considered an application for early tenure?

Yes. To the extent that the campus has set different standards for early tenure, it may apply those standards in reviewing an individual for tenure who has received an extension to the probationary period but applies for tenure in what would have been the sixth probationary year. In other words, the extension should be treated as irrevocable.