COUNCIL ON GOVERNMENTAL RELATIONS

1200 New York Avenue, N.W., Suite 460, Washington, D.C. 20005
(202) 289-6655 / www.cogr.edu

Furlough Programs and Implications for Financial Research Compliance

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In this unprecedented period of the COVID-19 pandemic and the consequent economic upheaval, several State, as well as Private institutions, are contemplating reducing costs for a specified period of time by implementing furlough programs. The Council on Governmental Relations (COGR) has prepared this analysis in light of the difficult budgetary decisions institutions are being forced to make.

This analysis is designed to help institutions understand the important issues and considerations associated with furlough programs as they relate to Federal cost principles (2 CFR 200, Subpart E). It should not be construed as a definitive guide of acceptable policies and practices. While Federal officials may comment informally on some of the discussions that follow, there currently is no official Federal policy or guidance specific to furlough programs. In the conclusion to this analysis, final thoughts are presented on how an institution might analyze implementation of a furlough program and the associated financial compliance risk, absent formal Federal approval of a plan.

While the discussions that follow have been reviewed by individuals from institutions confronting these difficult decisions, ***this document does not provide legal advice.*** Accordingly, the advice of a lawyer or other professional should be obtained. COGR cannot and does not warrant that the approaches and information discussed are legally sufficient, and is not suggesting that other approaches are not equally sufficient from a legal or any other perspective.

INTRODUCTION

The definition of furlough used for this analysis is "*the placement of an employee in a temporary non-duty, non-pay status for budget-related reasons.*" In effect, employees are required to take a defined, or indeterminant, number of "off-days" with no compensation. The *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (2 CFR 200 – Uniform Guidance; and specifically, 2 CFR 200.430) do not require higher education institutions to account for time using hours and/or days (level of effort is the standard metric), nor does 2 CFR 200 define a professional employee's workload in terms of a 5-day, 40-hour workweek (workload can be viewed in the context of the full 365-day year). However, "days" worked can be a useful metric when framing the initial discussion on furloughs. For example, assuming 260 available working days, a 10-day furlough effectively results in a reduction of days worked and a pay decrease of almost 4%.

There are important financial and compliance considerations in the development of a furlough program, many of which are described in this analysis. ***Equally important includes the public perception of equitable treatment of employees, mitigation of the impact on instruction, public safety, and research operations, and minimization of potential impacts on individual employees.*** While these other topics are not addressed in this paper, they should be part of the institutional assessment when considering the implementation of a furlough program.

Alternatives to furloughs include mandatory, temporary salary reductions for a specified or indeterminate period of time and "lay-offs"—reductions in total workforce. While not discussed at length, salary reductions are addressed briefly in this analysis. And while individuals in lay-off status may still have access to some institutional benefits (e.g., health, retirement, etc.); individuals in lay-off status are not discussed in this paper. Implications to financial research compliance and other related topics are addressed in the remainder of this analysis, with the primary focus on furlough programs.

DEFINITIONS FOR DISCUSSION ITEMS IN THIS DOCUMENT

Furlough Scenario A:

The furlough program is applicable only to employees paid from State (or internal institutional) funding sources – employees funded from other funding sources are not affected.

Furlough Scenario B:

The furlough program is applicable to employees paid from all funding sources (e.g.., State/Institution, Federal, Industry, Foundation, Endowment, Gifts, etc.).

Assumptions for Examples Used Throughout Analysis:

- Dr. Sam – University Employee Paid 100% from State or Institution Funds
- Dr. Fred – University Employee Paid 100% from Federal Funds
- Dr. Carla – University Employee Paid 50% from State/Institution and 50% from Federal Funds
- Furlough program consists of 10 days

THE ISSUES

1. Rate of Pay

Furlough Scenario A – Furlough Applies Only to Employees on State/Institution Funds

Focusing on Dr. Sam (100% State/Institution) and Dr. Fred (100% Federal) only, there could be an inclination to believe there is an inequity to the Federal government since the employee paid from Federal funds would not be required to take the furlough. However, there is no inequity because there is no resulting differential in "rate of pay."

2 CFR 200.430(h)(2) states: "*Salary basis. Charges for work performed on Federal awards by faculty members during the academic year are allowable at the IBS [Institutional Base Salary] rate. Except as noted in paragraph (h)(1)(ii) [Incidental activities] of this section, in no event will charges to Federal awards, irrespective of the basis of computation, exceed the proportionate share of the IBS for that period. This principle applies to all members of faculty* (*) *at an institution.*" By reducing the number of days worked and the proportionate salary amount, there is no change in the rate of pay for Dr. Sam. At the same time, since Dr. Fred is not required to take the furlough days, the rate of pay for Dr. Fred is not affected. Therefore, the rate of pay for Dr. Sam and Dr. Fred remains the same. It is true, however, that State/Institution funded employees who do not wish to be put on furlough may well regard the differential treatment as an inequity.

> * NOTE: While stated as applicable to "faculty," institutions normally consider this principle applicable to most professional employees at the institution.

Furlough Scenario B – Furlough Applies to Employees on All Funds

The rate of pay remains equal for all employees, regardless of funding.

2. Split-funded Employees

Furlough Scenario A – Furlough Applies Only to Employees on State/Institution Funds

The analysis is relatively straightforward when comparing Dr. Sam to Dr. Fred. Dr. Sam (100% State/Institution) would be required to take 10 furlough days, Dr. Fred (100% Federal) would not. However, for Dr. Carla (50% State/Institution, 50% Federal), there are administrative considerations.

For a 10-day furlough program, Dr. Carla may be required to take only 5 days since she is paid from State/Institution funds for 50% of her appointment. One approach is that the 5 days should be applicable to State/Institution funded activities only (e.g., teaching, proposal writing, etc.). Assuming the 5-day furlough is equal to a prorated salary amount of $500 per day, the State/Institution would realize $2,500 of budget savings. Under this model, payroll distribution would have to be updated to reflect the increase in Federal funded salary in relation to State/Institution funded salary. In addition, care should be taken that charges to a Federal award reflect effort committed to that award. In this example (i.e., furlough time is applied to State/Institution activities only), it is critical for employees to recognize that the percent of total effort contributed to Federal activity must be increased in order to be consistent with the shift in payroll distribution. Under this approach, the institution will need to determine how practical it is to account precisely for the increase in Federal effort in relation to the effort contributed on State/Institution funded activities.

A second approach, in order to avoid having to adjust payroll distribution and effort percentages and to ease administrative and accounting burden, would be to apply the 5-day furlough equally to State/Institution and Federal activity. This would result in the budget savings being split equally between State/Institution and Federal funding sources; $1,250 each. Under this model, effort would remain 50% State/Institution and 50% Federal and the precision to account for the effort contributed would not be as demanding as the first approach.

A third approach is to require split-funded employees to take the maximum number of furlough days. In the case of Dr. Carla, even though she is funded 50% from Federal funds, she would be required to take the full 10-day furlough. Under this model, again effort would remain 50% State/Institution and 50% Federal.

<u>Furlough Scenario B – Furlough Applies to Employees on All Funds</u>

Where the furlough program is applicable to all employees, regardless of funding source, the issue of managing split-funded employees is not applicable.

3. Effort Commitments

<u>Furlough Scenario A – Furlough Applies Only to Employees on State/Institution Funds</u>

Once again, the analysis is relatively straightforward when comparing Dr. Sam to Dr. Fred. Dr. Sam (100% State/Institution), by definition, has no Federal funding and effort commitments would be not applicable. Dr. Fred (100% Federal) would not be required to take furlough days and his effort commitments would not be affected.

Dr. Carla (50% State/Institution, 50% Federal) requires closer analysis. If the institution decided to utilize a model where she would be required to take only 5 furlough days and these days would be applicable to State/Institution activity only, the payroll distribution would have to be updated to reflect the increase in Federal funded salary in relation to State/Institution funded salary. Furthermore, the percent of total effort contributed to Federal activity must be increased in order to be consistent with the shift in payroll distribution (also see the example from the previous section). Again, it would be necessary to demonstrate that the percentage of total effort contributed to the Federal activity has increased in order to be consistent with the shift in the payroll distribution.

However, if the model is to apply the 5-day furlough equally to State/Institution and Federal activity, or if Dr. Carla is required to take the full 10-day furlough, furlough time will be applicable to Federal activity. The analysis on the impact on effort commitments is discussed below under Furlough Scenario B.

Furlough Scenario B – Furlough Applies to Employees on All Funds

This scenario is applicable to Dr. Fred (100% Federal) and also would be applicable to Carla (50% State/Institution, 50% Federal) if the institution determines that Dr. Carla's 5-day furlough will be applied equally to State/Institution and Federal activity, as well as if Dr. Carla is required to take the full 10-day furlough.

In each of these cases, there is no impact on payroll distribution or effort; Dr. Fred remains 100% Federal and Dr. Carla remains 50% State/Institution - 50% Federal. In addition, it is reasonable to maintain that the full-time workload responsibilities for both Dr. Fred and Dr. Carla are not affected. As 2 CFR 200.430(i)(1)(ix) states: "*Because practices vary as to the activity constituting a full workload (for IHEs, IBS), records may reflect categories of activities expressed as a percentage distribution of total activities*." An institution implementing furloughs for all employees for a defined period of time could be considered to be redefining, for a period of time, its definition of "full workload." Consequently, percentage of effort commitments are not affected.

It could be argued that even if a researcher's time and effort (funded 100% by a Federal award) is viewed in terms of days worked, a 10-day furlough (assuming 260 available working days), results in a percentage decrease in days worked of less than 4%. The decrease in days worked due to the furlough program is well below the benchmark established in 2 CFR 200.308(c)(1)(iii) where prior agency approval is required for decreases (disengagement) in effort of 25% or more (in fact, assuming a researcher is funded 100% by a Federal award and there are 260 available working days, 65 furlough days would have to be applicable in order for the 25% threshold to be reached).

4. Changes in Sources of Funding and Rebudgeting

Furlough Scenario A – Furlough Applies Only to Employees on State/Institution Funds

When changes in funding source take place and the institution has established differential treatment for State/Institution versus non-State/Institution funded employees, it could be argued that the number of furlough days should be continually adjusted. For example, Dr. Sam (100% State/Institution) is subject to 10 furlough days. Three months into the furlough program he receives a Federal award and his payroll distribution is now 75% State/Institution and 25% Federal. In examples such as this one, institutions will need to determine if: a) furlough days should be adjusted, or b) the number of furlough days will be established based on the funding mix on a particular date, and that number of days can not be modified.

Another consideration when the furlough program is applicable only to State/Institution funding sources is where split-funded employees might be motivated to shift their effort and budget more towards non-State/Institution funds and away from State/Institution funds. If justified, this would be allowable. Institutions may wish to review their policies and controls regarding the reasonableness of effort budgeted and reported on grants and contracts as compared to State/Institution funded activities such as teaching and other departmental duties. Also, the institution may want to issue clear criteria with respect to the allowability for rebudgeting, including the extent to which rebudgeting is permitted under expanded authorities granted by certain Federal agencies.

Furlough Scenario B – Furlough Applies to Employees on All Funds

Where the furlough program is applicable to all employees, regardless of funding source, the issues of adjusting furlough days or having employees shift their effort and budget are not applicable.

5. Unique Employee Groups and Situations

There are a number of cases where certain groups of employees or situations unique to a group of employees require closer consideration or analysis. When treating a certain group of employees in a special manner compared to all other employees, this would be permissible – as long as that entire group is treated in the same manner regardless of funding source, and that the group is not selected with a bias negatively affecting Federal funded sources.

Graduate students, in like circumstances, should be treated in the same manner by institutions that charge graduate student support to Federal funded projects. If the furlough program were to be applicable to State/Institution funded employees only, there would be a risk of differential treatment between State/Institution funded Graduate Teaching Assistants (GTAs) and Graduate Research Assistants (GRAs) supported from Federal funds (though some might suggest that GTAs and GRAs represent unique employee groups with unique appointment terms/responsibilities and differential treatment is allowable). In order to avoid the risk of differential treatment, an institution might exempt all graduate students and/or post docs from taking furlough days. In addition, when determining the treatment of graduate students and/or post docs, the impact of the potential shortfall of tuition cost recovery also must be assessed.

Nine-month faculty, while subject to the furlough program, might be subject to a prorated share of furlough days. Consequently, if a 10-day furlough is the benchmark for full-time employees, a 7.5-day furlough would be applicable to nine-month faculty. The prorated application of furlough days would result in a consistent application of furlough days and compensation reduction, while leaving “rate of pay” unaffected.

Split-funded employees were discussed in detail previously. Because of the challenges of prorating furlough days applicable to Dr. Carla (50% State/Institution, 50% Federal), one solution is that split-funded employees be subject to the maximum number of furlough days. However, if an employee has significant non-State/Institution funding (e.g., 10% State/Institution - 90% Federal), an institution might consider an exception and require that no furlough days are required.

"Critical Operations" employees could include employees such as animal care workers, employees responsible for specialized facilities or equipment, and situations that require "24/7" attention. If there are few staff available with this specialized knowledge needed to carry out responsibilities, institutions may consider whether there should be flexibility to adjust furlough requirements as applied in these particular cases.

Employees on H1B Visas, and other similar Visas or situations, may need to be exempted as required by law. For example, when an H1B Visa is granted, the institution certifies to the "prevailing wage" that the H1B Visa holder will receive, and no changes can be made to that amount.

Hourly and/or Union employees, or situations where State laws, Federal laws (e.g., Fair Labor Standards Act), collective bargaining agreements, etc. are applicable may require special consideration. Before any furlough or salary reduction program is implemented, institutions need to review applicable wage and hour laws (State/Institution and Federal) and any collective bargaining agreements. The reduction in hours may impact employee benefits (full time to part time). Some institutions may consider exempting all employees where the annual compensation is below a certain threshold so as to help protect lower paid employees from the impact of a furlough or salary reduction program.

Fair Labor Standards Act (FLSA) Exempt employees require careful consideration in an implementation plan. Under FLSA, or similar state statutes, exempt employees are expected to receive their full salaries for a workweek in which any work is performed. This requirement is different from non-exempt employees who are paid only for the hours worked. Institutions need to carefully structure leaves so that the furloughs do not result in the loss of FLSA exempt status, while at the same time, reduce salaries. Institutional human resources and employment legal officials should be consulted on how the usage of leave and reduced pay levels may impact the designation of FLSA exempt employee.

6. Fringe Benefits

Institutions planning furloughs should consider the cost of the institution's obligations to pay the employee's share of benefits. Such contributions are often based on a percentage of salary based on the recovery of sufficient funds to pay for the programs. In planning furloughs, institutions should determine whether or not they will or must base their contributions to employee retirement systems or optional programs on the employees' normal rates of pay. Institutions will have to determine the source of funds to make up the shortfall in fringe benefit recovery, or if utilizing a "fixed with carry-forward rate," recognize the likelihood of higher rates in the next negotiated period.

The rate of fringe benefits charged to Federal projects and other sources of funds for split-funded employees must be the same. For institutions that negotiate fringe benefit rates for costing purposes, fringe benefit rates generally cannot be changed without approval from the cognizant agency.

7. Cost Shared Effort

Institutions should be aware of State/Institution funded effort that is pledged as committed cost sharing for Federal funded programs, and where the State/Institution funded cost sharing commitment would be subject to the furlough program. This would result in a reduced level of cost sharing and may result in cost sharing commitments not being met. This would be the case if the cost sharing commitment is in the form of a percentage of effort commitment or as a specific dollar amount.

8. Facilities and Administrative (F&A) Reimbursement

If the furlough program is applicable to all funding sources, institutions should be aware of the impact of a reduction in the recovery of F&A reimbursement associated with the reduced salaries charged to sponsored programs. To the extent that F&A recoveries flow into an institution's general operating fund, there may be a shortfall in funds for ongoing operations. Also, the F&A on State/Institution funded salary that is pledged as cost share on Federal funded projects will be reduced proportionately with the reduction in State/Institution funded salary. Consequently, the cost share commitment may not be met. As State/Institution funded costs are reduced across all activities, there will be a corresponding decrease in costs that may be included in the general, departmental and sponsored projects administrative cost pools, potentially suppressing future F&A rates.

9. Closed for Furlough Day(s)

This discussion may not be as relevant in the context of "telework;" however, if the furlough plan includes closing the university for a day or more – and if the institution's policy is that no employee will have access to its facilities, thus making it impossible to work on those days – all State/Institution and non-State/Institution funded employees should be subject to that day without pay. To not do so essentially provides those paid from Federal funded projects an extra holiday, which creates potential "rate of pay" and/or fringe benefit inconsistencies.

10. Conversion of Paid Holiday to Unpaid Holiday

If the furlough plan includes eliminating pay for one or more paid holidays, all State/Institution and non-State/Institution funded employees should be subject to that same reduction in pay so that some employees are not provided an "extra" paid holiday. Once again, any differential treatment creates potential "rate of pay" and/or fringe benefit inconsistencies.

11. Across-the-board Salary Reductions

If an across-the-board salary reduction program is implemented, the program would need to be applied equally to employees paid from all funding sources; if not, the "rate of pay" issue would be problematic. In effect, because any differential treatment between employees funded from State/Institution versus non-State/Institution funding sources would be unallowable, some of the complex issues discussed earlier in this analysis would be not applicable. Under a salary reduction program, there could be differential treatment between groups of employees (e.g., a larger percentage salary reduction for faculty compared to clerical staff), as this approach would not create "rate of pay" or inconsistency issues applicable to Federal funding sources.

CONCLUSION

If an institution implements a furlough program where there is differential treatment between employees funded from State/Institution funds compared to employees funded from Federal funds, the institution should consider closely the issues raised in this analysis.

The focus of this paper has been the important financial and compliance considerations in the development of a furlough program. However, as we stated earlier, other considerations, not addressed in this paper, should be part of the calculus as institutions assess the implementation of a furlough program. ***These equally important considerations include public perception of equitable treatment of employees, mitigation of the impact on instruction, public safety, and research operations, and minimization of potential impacts on individual employees.***

There are no specific Federal guidelines for how to gain formal approval of a furlough plan, especially when contemplating the many nuanced issues embedded in this discussion. However, if the Federal government is not being financially disadvantaged, and equally important, funding agency expectations are being met because the Federally funded research is being completed in a manner consistent with institutional commitments, financial and other compliance risks are minimized.

Finally, a last look at the "consistency" principle should be noted as institutions contemplate furlough policies. As written in 2 CFR 200.430(a)(1):

> *(a) General. Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the Federal award, including but not necessarily limited to wages and salaries. Compensation for personal services may also include fringe benefits which are addressed in §200.431 Compensation—fringe benefits. Costs of compensation are allowable to the extent that they satisfy the specific requirements of this part, and that the total compensation for individual employees:*
>
> *(1) Is reasonable for the services rendered and conforms to the established written policy of the non-Federal entity consistently applied to both Federal and non-Federal activities;*

The "*consistently applied*" standard is a broadly applicable and important Federal costing principle used throughout 2 CFR 200. Using a narrow context, one argument against applying a furlough program to State/Institution funded employees only is that total compensation policies are not being consistently applied. ***However, and as discussed at the beginning of this paper (The Issues, 1. Rate of Pay), it may be more appropriate to use a context that focuses on the cost principle defined in 2 CFR 200.430(h)(2), which requires equitable treatment through the consistent application of rates of pay between State/Institution funded and Federal funded employees.*** Using this criterion, the "*consistently applied*" standard is not violated, and applying a furlough program to State/Institution funded employees only should be permissible.

In conclusion, there is no Federal requirement to have furlough plans approved—just the requirement to be in compliance with 2 CFR 200. While representatives from OMB, funding agencies (e.g., NIH, NSF, etc.), or the cognizant agencies (DHHS-CAS, ONR) could all provide feedback, it is unlikely that a single Federal official would be in a position to issue broad pronouncements. ***Therefore, institutions have to accept some risk for implementing a plan without formal approval.*** However, risk is minimized by showing compliance with the Federal costing principles, maintaining documentation that supports payroll charges and corresponding effort are in alignment, and demonstrating that the plan is being closely monitored by internal staff and audit personnel.