

## About our February Program:

Beyond Disabilities – The  
ADA Amendments & Red Hot  
Employment Law Topics

Expand your knowledge on the ADA Amendments, along with compliance challenges and how they effect your organization. In the spirit of Valentine's Day, we will also spend some time talking about other "Red Hot" Employment Law Topics. This is a program you are sure to love!

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## About the Presenter:

**MICHAEL T. MORTENSEN** is an Associate in the Omaha, Nebraska office of Jackson Lewis LLP. Mr. Mortensen represents and counsels employers on a wide spectrum of labor and employment matters, including traditional labor relations, employment litigation and arbitration, discrimination defense, wage and hour compliance, and preventive strategies. He

routinely represents employers in administrative proceedings before the Equal Employment Opportunity Commission, the National Labor Relations Board, and other federal and state agencies.

In traditional labor relations, Mr. Mortensen has extensive experience counseling clients on union avoidance strategies and effective responses to union organizing drives. He also has experience negotiating collective bargaining agreements, administering contracts, and representing management in grievance arbitrations.

Mr. Mortensen regularly provides management training on legal compliance and liability avoidance. He is also a featured speaker to a number of civic, trade, and human resources organizations, including the Nebraska State SHRM Conference. He is a PHR/SPHR Instructor of the Human Resources Association of the Midlands.

In 2006, Mr. Mortensen authored, "Third Circuit Reaffirms Punitive Nature of WARN Damages," published by *The Nebraska Lawyer*.

Mr. Mortensen is a member of the American Bar Association, serving as a member of the Labor and Employment Law Section; the Nebraska State Bar Association; and the Omaha Bar Association. He is admitted to practice in Nebraska, and before the Nebraska District Court and the Ninth Circuit Court of Appeals.

Mr. Mortensen earned his J.D. from the Southern Methodist University - Dedman School of Law, and his B.A. from Creighton University.

## February 2010 Program

### PROGRAM TOPIC: EMPLOYMENT LAW

**Presenters:** *Michael T. Mortensen*, Associate, Omaha Office,  
Jackson Lewis LLP

**When:** Tuesday, February 9, 2010

**Where:** Lincoln Firefighter's Reception Hall  
241 Victory Lane

**Registration:** 11:00 a.m. – 11:30 a.m.

**Meal & Program:** 11:30 a.m. – 1:00 p.m.

**Cost:** \$15.00 Luncheon Meeting

**Meal:** Buffet provided by Cooeen's Catering  
Smothered Bacon Wrapped Chicken  
Chive & Cream Cheese Mashed Potato  
Green Beans  
Green Tossed Salad  
Iced Tea  
Assorted Cookies

# President's Message

Mark Pankoke, President



It's the Economy, stupid. This was often the answer to many questions raised from late 2008 until today. As an example, I just was on the SHRM website and took their quick opinion poll. The recession (economy) was selected by 60% of people completing the survey answering the question about which story was the biggest HR story of 2009.

The economy caused lots of changes and challenges for us in HR including: layoffs, changes in benefits, compensation implications, reevaluation of 401K contributions, changes in hiring approaches and leaner budgets. In Nebraska, thankfully, we were shielded from some of the most drastic affects of the slower economy. Despite that shielding many of us had to learn to do more with less. We were able to remain successful.

On the more positive side, the economic situation helped us in some obvious and some not so obvious ways. Hiring for many positions was easier as more candidates applied for our openings. Additionally, turnover may have decreased as people hung onto their jobs. (They may have even appreciated their jobs a little more than they did a year or two ago.)

A not so obvious benefit was the economy forced us to prioritize the most important things on our

plate. This might have made us better managers and administrators as we have looked at projects and expenditures more critically.

It is now well into 2010 and I want to challenge all of us to use our new found skills, knowledge and abilities to make us even more successful as we move forward. Maybe when asked, the CEO will tell people who he/she relies on when needing input or wise counsel, "It's HR, stupid!"

- Mark Pankoke

## ATTENDANCE DRAWING WINNERS

Who Says There's No Such Thing as a Free Lunch? Congratulations to Lauri Earhardt with Lester Electric. She will receive free lunch registration at the January 2010 meeting!

## YOU CAN DO IT!

Plan now for the Spring PHR/SPHR/GPHR Study Group - February 1<sup>st</sup> thru April 26<sup>th</sup>. Certification testing eligibility requirements change in 2011 so this is the perfect time to start studying! Visit the LHRMA website ([www.lincolnhhr.org](http://www.lincolnhhr.org)) for more information and to fill out the registration form. If you have any questions please contact Melissa Price at [mprice@nebook.com](mailto:mprice@nebook.com) or 402.421.0402.

## JOBS, JOBS & MORE JOBS!

Do you have one to advertise or are you looking for one?

CHECK OUT OUR WEBSITE:

[www.lincolnhhr.org](http://www.lincolnhhr.org)

If you are an employer who has a LHRMA member employee, then you can post your Human Resource job opening on our website by contacting

Kathy Harper at [lhrma0048@yahoo.com](mailto:lhrma0048@yahoo.com) or at 402.483.4581 x

339. If you are looking for a Human Resource job, then you can check out our website at:

[www.lincolnhhr.org](http://www.lincolnhhr.org)

## FUTURE MEETINGS

- March 9 - ASTD Duad - Employee Engagement & Internal Equity Workshop (Hay Group)
- April 13 - Diversity - Challenges facing the returning Veteran & Employer (Dept Of Defense)
- May 11 - TBD
- June 8 - Workforce Readiness - Topic TBD

## BOARD MEETING RECAP

- Approved NE Digital to update the Web site for LHRMA.
- Board will have a Strategic Planning session in January.

# LEGAL UPDATE

## Furloughing Exempt Employees

by Jack L. Shultz • Harding & Shultz, P.C., L.L.O. • Lincoln, NE



During difficult economic times, many employers consider implementing furloughs as a fair and ultimately profitable way to manage employees. Furloughing generally refers to the practice of reducing an employee's hours in lieu of a layoff. Furloughing allows employers to keep valuable, trained employees by preventing reductions in force. Employees generally prefer the reduced hours and compensation of a furlough over losing their jobs. Because the Fair Labor Standards Act (FLSA) and the Department of Labor (DOL) make it more difficult to furlough exempt salaried employees, employers must be aware of the issues which arise when furloughing exempt employees.

### EXEMPT EMPLOYEES

Under the FLSA, executive, administrative, professional, outside sales and certain computer employees may be "exempt" from receiving overtime pay depending upon their duties and compensation (which must be a minimum salary of \$455/week). Most employers understand that they can eliminate overtime hours and furlough nonexempt hourly employees, but what can employers do to furlough employees deemed to be exempt under the FLSA.

### EMPLOYER OPTIONS FOR EXEMPT EMPLOYEES

Pursuant to the FLSA, an exempt employee's compensation may not

be reduced based upon the number of hours worked or job performance. According to the DOL, however, in certain circumstances employers may furlough or alter the regular employment of exempt employees.

First, and one of the easiest cost saving mechanisms to implement is to reduce commissions, bonuses and other merit-based compensation paid to exempt employees. Because commissions and bonuses do not change either the duties or guaranteed base salary of exempt employees, there is no risk of defeating the employee's exempt status. Note, however, that employment contracts may prohibit employers from altering specific terms, such as those providing for bonuses or commissions.

Second, employers may require exempt employees to use accrued leave time given by the employer instead of working. According to the DOL, "Since employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken off on specific day(s)." (Wage and Hour Opinion, Oct. 24, 2005). Thus, employers may furlough exempt employees by requiring them to use accrued leave time, so long as they receive their minimum salary by supplementing actual time worked with paid time off.

There will be occasions when an exempt employee either does not have accrued leave time or does not have enough accrued time to cover the furlough period *and* still pay the base salary. In these circumstances, the DOL and several courts have interpreted the FLSA to allow employers to prospectively furlough exempt employees. Furloughing in this manner may not be used for short-term business needs, and it must be a long-term "reduction" and not a short-term "deduction" (like personal absences) from pay. Further, the DOL indicates that these practices should not be used to circumvent the FLSA by treating exempt employees like hourly employees. For example, employers may require exempt employees to work one four-day workweek every odd month with an equivalent reduction in salary. Thus, the DOL allows furloughing for exempt employees such that it will not defeat the FLSA overtime exemption, provided that the furlough and reduction in salary:

- are prospective and long-term;
- do not bring the salary below the minimum threshold (\$455/wk.);
- do not change the duties of the exempt employee so as to defeat exemption;
- are bona fide and do not attempt to circumvent the FLSA; and
- are not done in a way which treats exempt employees as hourly wage earners.

... continued on pg. 4

In addition to shortened workweeks, the FLSA does not require an employer to pay an exempt employee during a week in which the employee does not work at all. Consequently, the FLSA also allows employers to furlough exempt employees for periods of a full week, provided the employee does not do any work which would constitute compensable time during the furlough. Employers must make it clear that, during furloughs, exempt employees cannot do any work which would entitle them to compensation, including simple routine tasks such as calling in or checking email. If an exempt employee does *any* work during a furloughed workweek, the employer must pay the full compensation for that week.

## **EXAMPLES**

### Acceptable Practice

One employer implemented a furlough where, for a specific five weeks of every year, the exempt employees worked only four days per week. For those five weeks the employees were paid only 80% of their regular salaries, which still left the employees above the minimum standard of \$455/wk. The DOL opined that the FLSA exemption requirements were not circumvented, because “all of the exempt employees were to be paid according to a bona fide reduction . . . for a fixed schedule of five annually recurring four-day workweeks.” (Wage and Hour Opinion, Jan. 16, 2009 (citing Wage and Hour Opinion, Nov. 13, 1970)). The DOL has also interpreted the FLSA to allow week-long furloughs, as indicated above. (Wage and Hour Opinion, Jan. 15, 2009).

### Unacceptable Practice

Another employer who sent its exempt employees home when business was slow, reducing their salaries accordingly, violated the FLSA exemption. The furlough was a short-term business need and a deduction in salary, which treated exempt employees like hourly employees. (Wage and Hour Opinion, Jan. 16, 2009).

## **BEFORE YOU FURLOUGH EXEMPT EMPLOYEES**

### Duties

The goals of furloughing exempt employees might be defeated if the employee loses his or her exempt status. To ensure that this does not happen, employers must be mindful of the FLSA exemption requirements for minimum salary and employment duties. Employers should consider the possibility that, during a furlough, the duties of their employees may change. Even those employees not furloughed may assume different or additional duties which may defeat exempt status.

### No Voluntary Furlough

There is no such thing as a voluntary furlough. A loyal employee cannot offer to take time off to with the sole purpose of assisting the company during an economic downtime. However, this does not affect the employee’s ability to take a completely voluntary personal leave for reduced compensation.

### Duration

Under the FLSA, when should an employer end a furlough plan? The DOL has not specifically addressed this issue. However, in order to justify a continuing furlough, it must be “bona fide” and in compliance with the FLSA requirements discussed in this article. There is no DOL opinion distinguishing “long-term” from “short-term,” but the DOL has said that furloughing exempt employees cannot be used to meet “short-term business needs,” and cannot be based upon “day-to-day or week-to-week determinations . . .” (Wage and Hour Opinion, Jan. 16, 2009). The DOL has agreed that these furloughs may be implemented on an annually recurring basis.

### Notice

The DOL indicates that the more notice the employer gives, the more likely the furlough will be considered long-term. There is no technical notice requirement under the FLSA. However, the employer should be able to articulate the need for the furlough and demonstrate the long-term considerations.



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## Hourly Pay

As a safe haven, employers may choose to pay otherwise exempt employees on an hourly basis if a reduction in pay or a change in duties would defeat their exemption. Being cognizant of this option as an alternative to a furlough will help to prevent wage and hour liability under the FLSA.

## Permitted Deductions

Finally, furloughs do not affect the deductions in pay for absences of one or more full days for personal absences, sickness or disability, suspensions due to violating safety or workplace conduct rules, initial or terminal weeks of employment, or FMLA leave.

## CONCLUSION

Employers are faced with a number of considerations when contemplating the furlough of exempt employees. Advance planning can eliminate potential FLSA violations.

*Editor's Note: This article is not intended to provide legal advice to our readers. Rather, this article is intended to alert our readers to new and developing issues and to provide some common sense answers to complex legal questions. Readers are urged to consult their own legal counsel or the author of this article if the reader wishes to obtain a specific legal opinion regarding how these legal standards may apply to their particular circumstances. The author of this article, Jack L. Shultz, can be contacted at 402/434-3000, or at Harding & Shultz, P.C., L.L.O., P.O. Box 82028, Lincoln, NE 68501-2028, or [jshultz@hslegalfirm.com](mailto:jshultz@hslegalfirm.com)*

## SHRM Student Chapter Happenings

### February is Student Chapter Recognition Month!!



And we have fantastic students as members of our local student chapters who are eager to gain experience in the world of HR. If you have any internship or entry-level HR positions available, please utilize the LHRMA website as an advertising source. Our student members have been instructed to look there for possible positions. In addition, you can also request to view electronic resumes of our student members; electronic resumes are maintained by the College Relations Chair. There are many ways to reach out to our student members and assist them in their preparation for workforce entry. Please contact Jennifer Monroe, College Relations Chair, with questions or inquiries on how you can help.



## WELCOME NEW MEMBERS!



*Pictured Jenny Schmutte; Renae Siepold, Angela Caldwell, Dao Nguyen*

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## Coach's Corner

### Don't Forget the Q4 Performer!

by Jane Weddle, M.A. • Weddle Performance Group

The 4 quadrants of performers:

Q1	Q4
Q2	Q3

- Q1: High Motivation/Low Performer**
- Q2: Low Motivation/Low Performer**
- Q3: Low Motivation/High Performer**
- Q4: High Motivation/High Performer**

For the sake of this article I want to utilize the above diagram in relation to focus on the Q4 Employee. They are self-motivated, strong work ethic, like their workplace, always thinking of what is best for the organization and the customer and take on the projects or tasks often not being done others to name a few traits!

The Q4 Employee is the one we would prefer to have in greater numbers in our organization. Although in being realistic we have a balance of all the quadrants.

I have been witness to observing Q4 employees being taken advantage of at times within their workplaces and have interviewed and coached some of them. What can happen to Q4 employees after awhile if this type of behavior towards them continues?—They leave your organizations or they move to being a Q2 or Q3 employee.

First of all managers often assume that a Q4 employee is so self motivated, driven, positive and so on that they really don't want any of that stuff--like positive feedback or recognition. They assume that they will ask for what they need and some will but we are all different and some don't! Q4's are human and from speaking to them they do want and need feedback and to be recognized. After awhile they report feeling like they are dumped on because the Q1, Q2 and Q3 quadrant employees don't perform

so it tends to go to Who? The Q4!

#### Call to Action:

Go to your Q4 employees and **thank them** for a specific project/task they are working on ---be sincere, specific and selective. Try to at least do this once a week!

One Q4 employee stated all they wanted was when their manager passed by their office, which the manager had to pass by every day to get to their own office—was to just drop by and say hello—how is it going? Anything you need? Typical behavior of their manager was to pass by day after day and not even say Good morning or hello and demonstrated similar behavior when leaving for the day. If you are one of these managers---you know what you need to do! **JUST DO IT!**

Managers often assume that the Q4 employees are already challenged and really have all the skills/knowledge needed for the job. However, Q4 employees often report they want new challenges and to gain new skills and knowledge. **Make sure they are getting these things!**

Another Q4 employee reported to me how year after year they asked for a resource they needed to improve the accuracy and efficiency of a particular task (it was not a high cost item). They sat back and saw money being given for other things—not necessarily important things—that were much more costly to purchase. They adapted every year

and held out hope for the next year but after 3 years stopped asking. **Get them the resources they need!**

Lastly, I know of a Q4 employee that over the year saved their organization millions of dollars and this organization was not for profit. No one noticed. **What would be the value to that Q4 employee if someone noticed?** A simple feedback statement could be: *Joe, we really appreciated the work you did on the XY and Z projects this month—the funding you were able to get us and the way you managed the project saved us \$ dollars. Thanks!*

*Jane Weddle is the Sr. Performance Consultant and Certified B-Coach for Weddle Performance Group. To inquire about the services and products ranging from hiring to development that WPG offers or for more information on other organizational needs, go to [www.partnerinperformance.com](http://www.partnerinperformance.com) or call 402-429-5224.*

## LHRMA MEMBER CHANGES

Check and verify your name and address on this month's LHRResource for accuracy. Please contact Kathy Harper our LHRMA Administrative Assistant, for any of your personal job and address changes. Please either email your changes to Kathy at [lhrma0048@yahoo.com](mailto:lhrma0048@yahoo.com) or by telephone at 402.483-4581 x 339.



## To Be Patient or Not To Be Patient? That is the Question!

By Julie Gibson, LMHP, LCSW • Directions EAP, LLC • Lincoln, NE

Much has been written in business management books about motivating employees. Self-help books and management gurus have all tried to address the varied aspects of motivation. We live in an “instant gratification” culture. It’s February and some of us have already found out it’s especially challenging, if not impossible, to keep motivated when progress toward change seems so slow as to not be happening at all. We want the new improved versions of ourselves but we want to see progress –NOW.

I was reminded of a story told by many about the Chinese Bamboo Tree. Maybe you recall hearing about the extreme exercise in patience required to grow Bamboo. Once planted, completely underground, in the carefully chosen, “right” spot it requires daily tending to make sure its’ ground is kept fertile, it’s properly watered and able to receive plenty of sunshine. In its first year tenders of the garden see **no** visible signs of activity. In the second year again, **no** growth above the soil. The third and fourth, still **nothing**, but still requiring regular tending. It must be hard to keep taking special care of a tree you can’t even see. But finally in the fifth year – it’s like a miracle! The Bamboo Tree will grow 80 feet (not a typo) in just six weeks!

Think about that. Does the bamboo really grow over 80 feet in six weeks, or

does it actually take five years for this sudden burst of activity? I think there’s an analogy here to how we grow and make changes in our lives. Sometimes we have big plans for changes for ourselves maybe even for employees. We try to do everything to support that change but how often do we not see any results? The question that remains is – can we stay focused and continue to believe in what we are doing even when we don’t see immediate results? Shows like “The Biggest Loser” train us to think that weight loss happens drastically in a matter of weeks. Folks lose 100-200lbs. in a matter of months. We get frustrated with our own attempts if the scale shows 1 lb. in 7 days time. It’s so hard to think of long term, permanent, sustainable weight loss as opposed to the thrill and encouragement of stepping on the scale recording 20 lbs. lost in a week. We’ve been acculturated to want the results-now.

It’s not so different at work is it? Sometimes we invest in a new employee we think is the perfect fit for a job. We train him/her to perform and encourage and give feedback, and nurture them along. But actually, how long

does he or she get to show us their real potential? How much patience do we have if the person is facing a real learning curve, adjusting to entirely new expectations that stretch anything they’ve done before?

There is a fine line perhaps between knowing when to write an employee off as not the right person for the job, or simply not capable or motivated to get with the program and when to hang in there with someone and work to improve the situation. Maybe the answer lies in our process of really connecting with an employee – do we give regular, timely, constructive feedback? Have we really been careful to fully explain our vision and expectation of their performance? Did we take the time necessary to find the ‘right person’ for the job or were we forced to take the first qualified, breathing body?

The way a company becomes intentional about properly and effectively “onboarding” a new employee has everything to do with future success of the arrangement – at least the things within the company’s control. So part of the secret of success is figuring out when being patient is no longer prudent and something or someone is not going to fit and further changes need to be made.

*continued on pg. 8 ....*



**When the choice is to be patient with an employee** there are some critical things we need to evaluate: has the company's vision been clearly presented and understood, does the employee have all the tools and resources needed to meet the challenges we've outlined, have we provided the support and mentoring they need to be successful, have we established a real relationship with that person? It's very easy these days for employees to fall between the cracks and sometimes feel unimportant – almost invisible. Not only do we need to review an employee's fit for a position by assessing their efforts and contributions to the team we must also research the answers to the above issues.

We all will wrestle with when patience is appropriate and when is it time to go to Plan B? Maybe when those critical evaluations of our own part of the process are answered we will better be able to know the answer to the patience or Plan B question. I keep several bamboo stalks growing in my office to remind me when I'm working with clients that change is often not noticeable immediately. There is often much work to be done, even before we see any concrete evidence of success.

Whether we're working on personal goals for the New Year or trying to onboard an employee or make changes with a long standing employee—Calvin Coolidge said “All growth depends on activity. There is no development physically or intellectually without effort, and effort means work.” He might have added – a good dose of patience can't hurt! I remember a familiar prayer I learned as a young mother – Please God – grant me patience – I need it NOW!

Consider your EAP a resource in helping you find the support and encouragement you need to make the changes you want to make in your personal life or consider letting us help you research the dilemmas you might face with an employee who raises the question for you , **is it time for me – to be or not to be... patient?**

## NEW MEMBERS

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# CAREER Expo

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All area high school students, grades 9 through 12, and their parents are invited.  
For more details visit [www.lincolnhnr.org](http://www.lincolnhnr.org)



## CAREER EXPO 2010

The Workforce Readiness Committee will be hosting the 2nd Annual Career Expo on February 28, 2010, from 1-4pm at Southeast Community College's Lincoln location. A variety of careers will be represented once again, including occupational therapy, physical therapy, nursing, esthetician, lawyer, broadcasting, personal training, human resources, automotive, electronics, and many more. In addition, we have invited multiple colleges and universities to have a booth. This will allow students the opportunity to explore a variety of careers and discuss with career advisers the college or university that would best suit their career interest. If you are interested in volunteering at the expo, please contact Tara Jennings at [tjennings@hotmail.com](mailto:tjennings@hotmail.com) or by calling 402.525.7226.



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## LHRMA RESOURCE

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**SHRM LOCAL CHAPTER 0048**

PLEASE CALL KATHY HARPER AT 402-483-4581 X 339, WITH ANY CHANGE IN POSITION, COMPANY OR ADDRESS OR SEND HER AN E-MAIL AT: LHRM0048@YAHOO.COM