



CIDS

County Information and Data Service

Published weekly by: County Commissioners Association of Ohio

209 East State Street • Columbus, Ohio 43215-4309
Phone: 614-221-5627 • Fax: 614-221-6986 • www.ccao.org

VOLUME XXXXVIII

NO. 32

AUGUST 14, 2009

DATES TO REMEMBER

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| AUGUST 19, 2009 | CCAO BOARD OF TRUSTEES, GALAXY RESTAURENT & BANQUET CENER, MEDINA COUNTY (WADSWORTH) <i>(held in conjunction with CCAO/CEAO/OSU Extension Meeting)</i> |
| AUGUST 19-21, 2009 | CCAO/CEAO/OSU EXTENSION SUMMER MEETING, GALAXY RESTAURANT & BANQUET CENTER, MEDINA COUNTY (WADSWORTH) |
| AUGUST 27, 2009 | CCAO COUNTY & LOCAL GOVERNMENT REFORM & COLLABORATION TASK FORCE, CCAO OFFICES, COLUMBUS |
| AUGUST 28, 2009 | CORSA ANNUAL MEETING, DOUBLETREE HOTEL, FRANKLIN COUNTY (COLUMBUS) |
| AUGUST 28, 2009 | UNDERSTANDING THE NEW FURLOUGH AUTHORITY REGIONAL SEMINAR, RIVERBEND PARK – BRUGEMAN LODGE, HANCOCK COUNTY (FINDLAY) |
| AUGUST 31, 2009 | UNDERSTANDING THE NEW FURLOUGH AUTHORITY REGIONAL SEMINAR, SUMMIT COUNTY JOB CENTER, SUMMIT COUNTY, (AKRON) |
| SEPTEMBER 9, 2009 | UNDERSTANDING THE NEW FURLOUGH AUTHORITY REGIONAL SEMINAR, GREENE COUNTY SOCIAL SERVICES CENTER – MEDIA ROOM, GREENE COUNTY (XENIA) |
| SEPTEMBER 14, 2009 | UNDERSTANDING THE NEW FURLOUGH AUTHORITY REGIONAL SEMINAR, LOGAN HIGH SCHOOL - AUDITORIUM, HOCKING COUNTY (LOGAN) |
| SEPTEMBER 14, 2009 | NW DISTRICT COMMISSIONERS & ENGINEERS QUARTERLY MEETING, GREEN HILLS GOLF COURSE, SANDUSKY COUNTY (CLYDE) |

ASSOCIATION NEWS

UNDERSTANDING THE NEW FURLOUGH AUTHORITY REGIONAL SEMINARS SCHEDULED

The Ohio Council of County Officials (OCCO) is sponsoring four additional regional seminars on "Understanding the New Furlough Authority Granted in the State Budget Bill (HB 1) Seminars." Registration begins at 8:30 a.m. with the seminar starting at 9:30 a.m. and ending at 12:30 p.m.

This week, nearly 170 people attended the first of five regional seminars sponsored by OCCO. Registration for this seminar is limited to county elected officials, staff, and related county agencies that fall under the umbrella of the office of the county commissioners.

County appointing authorities received the much sought furlough authority for non-collective bargaining employees. HB 1 permits each county appointed authority to establish a mandatory program that each non-collective bargaining employee must participate in for up to 80 hours in each of state fiscal years 2010 and 2011.

Dates – Locations - Times

- **August 28** – Riverbend Park – Brugeman Lodge, 16618 Township Road 208, Hancock County (Findlay). Registration begins at 12:30 p.m. with the seminar starting at 1:00 p.m. and ending at 4:00 p.m.
- **August 31** - Summit County Job Center, 1040 East Tallmadge Avenue, Summit County, (Akron). Registration begins at 8:30 a.m. with the seminar starting at 9:30 a.m. and ending at 12:30 p.m.
- **September 9** – Greene County Social Services Center – Media Room, 541 Ledbetter Road, Greene County (Xenia). Registration begins at 8:30 a.m. with the seminar starting at 9:30 a.m. and ending at 12:30 p.m.
- **September 14** – Logan High School – Auditorium, 14578 State Route 328, Hocking County (Logan). Registration begins at 8:30 a.m. with the seminar starting at 9:30 a.m. and ending at 12:30 p.m.

There is no charge to attend, but space is limited. There will be a \$10 charge for no-shows, but last minute substitutions are welcome. Registration forms are being distributed to county commissioners this week. To download a copy go to www.ccao.org. Click on the story on the front page. For more information, please contact Amanda Jones, CCAO Administrative Assistant, at (614) 220-7985, (888) 757-1904, or ajones@ccao.org.

CIDS PUBLICATION SCHEDULE

The County Information and Data Service (CIDS) will not be published on August 21, 2009 to permit the staff to prepare and attend the CCAO/CEAO/OSU Extension Meeting to be held in Medina County (Wadsworth). We will return to our regular publication schedule on August 28, 2009.

CCAO/CEAO/OSU EXTENSION SUMMER MEETING – EFFECTIVE GOVERNMENT THROUGH COLLABORATION

In a collaborative effort, OSU Extension – Medina County and the North East Regional Office have invited CCAO/CEAO to meet together on August 19-21, 2009 in Medina County (Wadsworth). This is the first time that our three organizations will meet together. The theme of the meeting will be “Effective Government Through Collaboration.” CCAO has planned the following sessions:

Wednesday, August 19

- **CCAO Board of Trustees Meeting** – This meeting is open to all county commissioners and staff members

Thursday, August 20

- **HR Cost Saving Measures** – Areas of human resource cost saving issues available under state and federal law will be highlighted.

- **Workers' Comp – New Programs & Options for Counties** – Hear the latest information to assist your county choose a workers' comp program to meet your needs.
- **Legislative Panel** – Panel members include Senate President Bill Harris, Senate Minority Leader Capri Cafaro, House Majority Floor Leader Jennifer Garrison, and State Representative Ron Amstutz.
- **OPERS Benefits: What Changes Are Being Explored?** – Update on current fiscal conditions and possible future benefit changes.
- **OSU Extension** – Restructuring Update

Friday, August 21

- **Management Improvement Recommendations** – Discussion about the committee, recommendations, and future plans.
- **When Bad Things Happen to Good Counties** - Lessons learned from claims & lawsuits
- **Election Reforms: Proposals from Recent Elections Summit** – Various recommendations from the recent elections summit and legislative proposals.
- **NE Ohio Regional Prosperity Initiative** – Proposed plans that involve the 16 county NE Ohio region will be discussed.

For more information about **CEAO and OSU Extension sessions and tours go to www.ccao.org** and click on the article on the front page. If you have any questions about the conference please contact Mary Jane Neiman, CCAO Public Relations Associate, at (614) 220-7979, (888) 757-1904, or mjneiman@ccao.org.

SANDUSKY COUNTY TO HOST NW DISTRICT MEETING

Sandusky County Commissioners Terry Thatcher, Dan Potter, and John Rettig and County Engineer James Moyer will host the NW Ohio Commissioners and Engineers Association Quarterly Meeting on Monday, September 14, 2009 at Green Hills Golf Course, 1959 South Main Street, in Sandusky County (Clyde).

Events begin with an optional golf scramble starting at 10:30 a.m. Greens fees: \$30 per person (includes 18-holes and shared cart.) Please pay the day of the outing.

A tour of Rutherford B. Hayes Presidential Home, Museum and Spiegel Grove begins at 11:00 a.m. The Home is a 31-room mansion and centerpiece of the Presidential Center located in Fremont. Hayes' family started the Museum, which was the first Presidential library/museum in the country, after the turn of the 20th century. Spiegel Grove is named after the natural reflecting pools that form after a storm. A box lunch will be provided for this tour.

The business meeting begins at 3:30 p.m. followed by a social hour and dinner. Registration deadline: August 28, 2009. For more information, contact Mary Ann Reser, Clerk, Sandusky County Commissioners, (419) 334-6100 or Tim Grabenstetter, Human Resources Director, at (419) 334-6108.

COUNTY ACTIVITIES

CUYAHOGA COUNTY'S HELP PROGRAM MARKS 10TH YEAR

Last week, Cuyahoga County Treasurer Jim Rokakis marked the 10th year of a loan program credited with leveraging at least \$100 million in property improvements in the Cleveland area. The Housing Enhancement Loan Program (HELP) (<http://treasurer.cuyahogacounty.us/homeimprove/Helpandout.pdf>) offers home improvement loans at interest rates three percentage points below normal lending rates. Residents can borrow from \$3,000 to \$200,000, and pay it back over five or ten years, depending on the amount borrowed.

Bank fees are capped at \$175. Funds can be used for single and multiple unit homes as well as investment properties.

"At a time of unprecedented challenges for our housing market, HELP has provided a stabilizing force and a vital tool to protect and restore area neighborhoods impacted by the economic crisis," said Rokakis.

At least 7,500 property owners have participated in the program over the last decade, investing at least \$103 million in their property. Similar initiatives have since been started in Hamilton, Medina, Summit, and Montgomery counties. Participating banks are Fifth Third, Huntington, Key Bank, National City, and U.S. Bank. For more information, contact Bruce Nimrick, Director of Community Programs and Outreach, Cuyahoga County Treasurer's Office, at (216) 443-2149, or trbin@cuyahogacounty.us.

STATE ACTIVITIES

SEPTEMBER IS NATIONAL PREPAREDNESS MONTH

This year, the Department of Homeland Security's Ready campaign is focusing on changing the perceptions about emergency preparedness and helping Americans understand what it truly means to be Ready. National Preparedness Month (NPM) 2009 will illustrate how preparedness goes beyond fire alarms, smoke detectors, dead-bolt locks and extra food in the pantry, and help people communicate important preparedness messages to families, businesses and communities.

The four key points of the Ready campaign: Get a Kit. Make a Plan. Be Informed. Get Involved. For additional information and to view the NPM 2009 Calendar, visit www.ready.ohio.gov or www.ready.gov.

FEDERAL ACTIVITIES

CABINET SECRETARIES TO VISIT MUSKINGUM COUNTY ON AUGUST 31

Agriculture Secretary Tom Vilsack and Interior Secretary Ken Salazar will travel to Muskingum County (Zanesville) on Monday, August 31 to discuss green jobs and a new energy economy with a focus on renewable energies. Top Obama administration officials are visiting rural communities to hold a series of discussions on how communities, state and the federal government can work together to help strengthen rural America.

The administration's goal is to have multiple Cabinet secretaries conduct "listening sessions" and focus on issues such as a broad-based rural health care, economic development, infrastructure, education, energy, natural resources, and agriculture. For more information go to www.ruraltour.gov.

NACo ACTIVITIES

JAIL POPULATION MANAGEMENT: ELECTED COUNTY OFFICIALS' GUIDE TO PRETRIAL SERVICES

The National Association of Counties (NACo), in partnership with the Pretrial Justice Institute (PJI), is proud to announce the upcoming September release of a new publication. The result of a three-year collaboration and a 2008 grant award from the Bureau of Justice Assistance, "Jail Population Management: Elected County Officials' Guide to Pretrial Services" provides detailed information on how a high-functioning pretrial justice system can dramatically impact jail populations and reduce corrections expenditures. In September, this document will be mailed to 6000 elected county officials across the country. The overarching goal of NACo's work with PJI has been to assist counties with strategies to ensure local correctional resources are most

effectively and efficiently used by focusing on the front-end of the jail system. For more information, please contact Mary-Kathleen Guerra, NACo Senior Associate, at (202) 942-4279 or kguerra@naco.org.

SHARE BEST COUNTY ENERGY PRACTICES FOR INTERNATIONAL RECOGNITION

NACo is supporting a project to collect U.S. local-level best practices in energy efficiency and renewable energy to share with developing nations. With funding and support from the U.S. Department of State, the most innovative and successful programs will be highlighted in a *Compendium of Best Practices*. The compendium will be used to provide a resource of replicable models for China, India, and other developing countries. This is an opportunity for your county to be recognized as a leader in energy efficiency and clean energy efforts.

If your program is selected, you will receive international visibility — the compendium is expected to be used as a U.S. government resource to assist developing countries by showcasing proven programs, policies, or initiatives that are working in the U.S.

If you would like to submit your program for consideration, please fill out a short online survey <http://www.surveygizmo.com/s/159012/compendium> by the **end of August or early September**. The program must promote the use of energy efficiency and/or renewable energy, have measurable outcomes, and currently be in practice in the United States. For questions and more information, please contact Kelly Zonderwyk, NACo Project Manager, at (202) 942-4224 kzonderwyk@naco.org.

CONFERENCE

OHIO PUBLIC SECTOR FACT FINDING CONFERENCE

The State Employment Relations Board (SERB) will host a conference on Ohio Public Sector Fact Finding on Friday, August 28, 2009 at the Ohio Department of Transportation/Ohio Department of Public Safety Auditorium, 1980 West Broad Street – Lower Level, in Columbus. Registration opens at 8:30 a.m. and sessions end at 4:00 p.m.

SERB's biennial fact-finding conference convenes this year at a time when it is arguably more needed than ever before. No public jurisdiction in Ohio is immune from the effects of the economic downturn, and negotiations are being conducted everywhere in an atmosphere of deep budget cuts.

CLASSIFIEDS

COUNTY HOME ADMINISTRATOR

Muskingum County seeks a county home administrator to plan, coordinate and direct the operation and activities of the county home. Must be a licensed administrator, knowledge of rules/regulations for nursing home operations, Medicaid reimbursement systems, budgets and practices/techniques of patient care.

If interested, please send resume and salary requirements **by August 19, 2009** to: Muskingum County Human Resources, Attn: Michelle Campbell, Director, 401 Main Street, Zanesville, OH 43701, (740) 588-4371. EOE

OHIO COUNCIL OF COUNTY OFFICIALS

Representing Ohio's County Officials

**Auditors – Coroners – Clerks of Court – Commissioners – Engineers
Judicial Conference – Prosecuting Attorneys – Recorders – Sheriffs – Treasurers**

August 14, 2009

UNDERSTANDING THE NEW FURLOUGH AUTHORITY GRANTED IN THE STATE BUDGET BILL (HB 1) REGIONAL SEMINARS

- **August 28** – Riverbend Park – Brugeman Lodge, 16618 Township Road 208, Hancock County (Findlay). Registration begins at 12:30 p.m. with the seminar starting at 1:00 p.m. and ending at 4:00 p.m.
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- **September 9** – Greene County Social Services Center – Media Room, 541 Ledbetter Road, Greene County (Xenia). Registration begins at 8:30 a.m. with the seminar starting at 9:30 a.m. and ending at 12:30 p.m.
- **September 14** – Logan High School – Auditorium, 14578 State Route 328, Hocking County (Logan). Registration begins at 8:30 a.m. with the seminar starting at 9:30 a.m. and ending at 12:30 p.m.

Four regional seminars, sponsored by the Ohio Council of County Officials (OCCO), have been scheduled to help county appointing authorities understand the new furlough authority granted in the state budget bill, House Bill 1. This seminar is limited to county elected officials, staff and related county agencies that fall under the umbrella of the office of the county commissioners.

County appointing authorities received the much sought furlough authority for non-collective bargaining employees. HB 1 permits each county appointing authority (commissioners, auditor, treasurer, etc) to establish a mandatory program that each non-collective bargaining employee must participate in for up to 80 hours in each of state fiscal years 2010 and 2011.

Appointing authorities requested this short-term budget solution in an effort to keep employees in their positions as opposed to layoffs. Utilizing this authority; however, is not something officials eagerly seek and is reflective of the challenging fiscal times counties are facing. Under this provision, a county appointing authority must issue guidelines concerning how the appointing authority will implement the furlough language. Implementing this new authority is complicated and includes many different considerations, and because of this the Ohio Council of County Officials, along with the Downes, Fishel, Hass, and Kim law firm (formerly known as Downes, Hurst, and Fishel) is developing sample guidelines for counties to use.

The regional seminars are designed to help counties understand the do's and don'ts of implementing furloughs. County employees are the backbone of county government and essential in providing the day-to-day services that our residents come to expect. While furloughs are better than lay-offs, such personnel action must be conducted professionally and decisively so as to not cause uncertainty in the workplace, generate greater morale problems, and foster disruptions to the county's customers.

A registration form is attached. For more information, contact Amanda Jones, CCAO Administrative Assistant, at (614) 220-7985 or ajones@ccao.org.

OHIO COUNCIL OF COUNTY OFFICIALS

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COUNTY _____

NAME	TITLE

COST OF SEMINAR: There is **NO Charge** for these seminars; however, space is limited and there will be a \$10 charge for no-shows (last minute substitutions are welcome).

Authorizing Signature _____ Title _____

Address _____ City/State/Zip _____
() _____
Contact Phone Number _____

Please return registration form one week before the seminar to:

CCAO, ATTN: Amanda Jones, 209 East State Street, Columbus, Ohio 43215-4309

Fax: 614/221/6986. No registrations will be taken over the phone. For additional information contact Amanda Jones at (614) 220/7985.

**Downes - Fishel
Hass - Kim LLP**

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www.downesfishel.com

**Guidelines for Implementing
Mandatory Cost Savings Program
House Bill 1**

**For
Ohio Council of County Officials**

August 12, 2009

**Prepared by
Marc A. Fishel
mfishel@downesfishel.com**

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MANDATORY COST SAVINGS PROGRAM

I. STATUTORY PROVISIONS

The State budget bill (HB 1) includes a new provision authorizing counties to implement a mandatory cost savings program beginning July 1, 2009. O.R.C. § 124.393. The mandatory cost savings program permits counties to implement furloughs of all employees not subject to a collective bargaining agreement for up to eighty hours (80) between July 1, 2009 and June 30, 2010 and an additional eighty (80) hours between July 1, 2010 and June 30, 2011. After June 30, 2011, a county may implement mandatory cost savings days consistent with O.R.C. § 124.393(B) in the event of a fiscal emergency. A fiscal emergency is defined as one or more of the following:

- A. A fiscal emergency declared by the governor under O.R.C. § 126.05;
- B. A lack of funds as defined by O.R.C. § 124.321;
- C. For reasons of economy as defined by O.R.C. § 124.321.

Ohio Revised Code § 124.321(B)(2) defines a lack of funds as a current or projected deficiency of funding to maintain current or sustain projected levels of staffing. This section does not require an appointing authority to transfer money between funds in order to offset the deficiency. A lack of funds is presumed if employees are working under a grant or a similar funding mechanism and the grant is withdrawn or reduced.

Pursuant to O.R.C. § 124.321(D)(2)(a), reasons of economy is based on the appointing authority's estimated amount of savings with respect to salary and benefits. The need for such savings must be due to a reduced appropriation by executive or legislative action or to address a current or projected deficiency.

A fiscal emergency is defined: If the governor determines that the available revenue receipts and balances in any fund or across funds will likely be less than the appropriations for the year, the governor may declare a fiscal emergency and may issue such orders as necessary to the director of budget and management to reduce expenditures, or to the director of administrative services to implement personnel actions consistent therewith, including, but not limited to, mandatory cost savings days under § 124.392 of the Revised Code. This definition is not related to a fiscal emergency under Chapter 118 of the Ohio Revised Code.

Ohio Revised Code § 124.393 specifically refers to county appointing authority. As a result, each appointing authority has the right to make its own determination if and how it will implement a mandatory cost savings program. The board of county commissioners may implement a plan for all exempt employees (those employees not subject to collective bargaining) for whom it serves as the appointing authority. Other county appointing authorities may adopt a commissioner plan or may implement their own plan. With respect to county departments of job and family services, the commissioners and DJFS director serve as the co-appointing authorities. As a result, the board of county commissioners must approve the plan.

The statute maintains flexibility for appointing authorities within the plan. Appointing authorities are not required to treat all exempt employees the same under the mandatory cost savings plan. Ohio Revised Code § 124.393(B)(1) specifically states that the plan may be implemented differently among employees based on their classifications, appointment categories or other relevant criteria. Based on this flexibility, the commissioners may approve different plans for different employees. For example, the county department of job and family services may have a different plan than other employees under the board of county commissioners.

A county appointing authority implementing a cost savings plan must have written guidelines to explain the plan. These guidelines do not need to be extensive. An appointing authority's implementation of the mandatory cost savings plan is not subject to appeal to the State Personnel Board of Review. In addition, the statute does not require any specific notice requirements to the employees.

The Ohio Department of Administrative Services (DAS) has implemented rules concerning mandatory cost savings days for State employees. The rules do not apply to counties but can be used as guidance for county appointing Authorities.

<http://das.ohio.gov/hrd/emppol.html#exparity09>

II. IMPLEMENTING THE PROGRAM

As stated above, an appointing authority has significant flexibility in how it implements the mandatory cost savings days (CSDs). The decision is solely within the discretion of the appointing authority based on legitimate operational considerations. This program may be implemented in conjunction with layoffs. There is no requirement for the appointing authority to report its implementation to DAS.

Since there is flexibility in how this program is implemented, each appointing authority should review its own particular needs as it determines how to proceed. The following are some variations concerning the ways in which the program may be implemented.

- A. Appointing authorities can implement the cost savings days (up to 80 hours) by reducing the employees' bi-weekly wages for each pay period throughout the year an amount equivalent to the 80 hours of unpaid leave. This method would spread out the reduction in pay for the full period of the cost savings plan and avoid a greater loss of pay for the weeks an employee is furloughed for one or more days. This is one of the approaches being taken by the State of Ohio.

This approach would work by determining the period during which the cost savings plan will be implemented. For a full 12 month period at forty hours per week, the employee would normally work 2080 hours. An 80 hour reduction on 2080 hours represents a 3.84% work hour reduction. As a result, each employee's bi-weekly pay would be reduced by 3.84% for the 12 month period that the cost savings program is in effect. The employees would then take off ten furlough days during the 12 month period. Of course, these figures would need to be adjusted if the ten furlough days are taken over less than a

12 month period, the number of hours worked in a 12 month period is less than 2080 or an employee is furloughed less than 80 hours.

This approach will require consideration for addressing employees who are hired or who quit during the year. Those employees who are separated can have their final wages adjusted based on a prorated amount of time they worked during the year and the number of furlough days they have taken at the time of separation.

Under this plan, the appointing authority will still have to decide how the days off are determined.

- B. An appointing authority can assign the days off for each employee or allow the employees to choose the days and reduce the employees' pay only for the bi-weekly pay periods when the employee is in an unpaid status. For example, if the employee is on a furlough day for 8 hours during an 80 hour bi-weekly pay period, his wages for that two week period will be reduced by 10%. This approach may create problems for those employees who are exempt from the Fair Labor Standards Act because it will reduce their pay in a workweek due to the quantity of work. This action could destroy the FLSA exemption. See section III(B).
- C. Employees may be permitted to choose the furlough days similar to vacation days or other time off. The appointing authority can black out certain dates that are unavailable to be taken as furlough days. The appointing authority may decide how employees can bid on dates. Under this approach, the appointing authority can decide between A and B above in terms of the pay reduction.
- D. The appointing authority can determine the ten days (eighty hours) that the entire agency will be closed. This approach may result in additional savings due to the closure of the agency. The pay reduction would be based on A or B above. While this approach may be useful, appointing authorities are cautioned to avoid closing the entire office on consecutive days. There are other statutes that will be implicated if a public office fails to perform its functions for multiple days. Ex: Clerk of Courts.
- E. Employees can continue to have the statutory ten holidays off work but not receive holiday pay. Again, the pay reduction can be as set forth in A or B above.
- F. Employees can be required to use five CSDs days for a full workweek or ten days in a bi-weekly pay period. This approach will avoid FLSA issues for employees who are not subject to overtime requirements. It will have implications for unemployment benefits. See Section III(E).
- G. In lieu of taking paid vacation leave, an employee may be required to take one or more furlough days. For example, employees who request vacation leave would have the first day of the vacation leave treated as a furlough day. The employee would receive no pay for this day and not be charged for vacation leave.

H. An appointing authority may use a combination of the above examples.

A plan implemented by and for employees of a board of county commissioners should be approved by a resolution of the board. Similarly, other boards such as MRDDs, health departments and children's services boards should approve their plans by a resolution. All other appointing authorities must have a written guidance for its employees but there is no requirement to notify the board of county commissioners.

As stated above, the statute grants significant flexibility to the appointing authority in implementing the plan. Unlike layoffs, there are no requirements to impose the CSDs on all employees in a particular classification or to base any decisions on seniority. The appointing authority may take all legitimate operational factors into consideration when it implements the plan. Of course, care should be taken to avoid a claim of unlawful discrimination.

The statute does not address the issue of service credit or other benefits while the employee is on a cost savings day. Generally, an employee is not entitled to accrue sick or vacation leave during an unpaid leave. Depending how an appointing authority implements the program, employees could be in an unpaid status for one or more days during a pay period. An appointing authority has the power to allow employees to accrue vacation leave and sick leave while in this unpaid status without extending such right to other non-furlough unpaid status situations. This is the approach being taken by the State of Ohio. The appointing authority should also make sure that the furlough days do not impact eligibility for health insurance.

Ohio Revised Code § 124.393 does not specifically address the issue of partial days. It is unclear whether appointing authorities may implement the mandatory cost savings program by requiring employees to be off work in an unpaid status for less than a full work day. Ohio Revised Code § 124.393(B)(1) refers to a cap of not more than eighty hours per year. On the other hand, O.R.C. § 124.393(B)(2) states after June 30, 2011, a county appointing authority may implement mandatory cost savings **days** as described in division (B)(1) of § 124.393(B)(2). (emphasis added)

Under a traditional application of civil service law, it would be unlawful for an appointing authority to reduce an employee's pay through a reduction of work hours except in limited situations such as discipline. It is clear that O.R.C. § 124.393 is an exception to the normal rule. The question is whether this exception only applies to full days. Based on the statutory structure and the intent of the statute, it appears that a reduction for partial days may be implemented under O.R.C. § 124.393. This conclusion is based on several factors. First, there is nothing in the statute that specifically mandates full days off for employees. Second, O.R.C. § 124.393(B)(1) refers to eighty hours. As a result, it seems that an appointing authority may implement its plan based on a reduction of hours as long as it does not exceed eighty hours in the State fiscal year. Third, the statute grants significant flexibility to appointing authorities to implement its program.

Employees who are on paid injury leave, wage continuation or some other extended leave are subject to the CSDs on the same basis as other employees. The written guidance promulgated by the appointing authority should clearly address these categories.

Ohio Revised Code § 124.34 addresses appeals to the State Personnel Board of Review (SPBR). This statute was amended to provide:

This section does not apply to any modifications or reductions in pay authorized by division (O) of § 124.181 or § 124.392 or 124.393 of the Revised Code.

The intent of this change is to prohibit appeals by employees whose pay is reduced as a result of a mandatory cost savings program. Appointing authorities should be prepared to file a motion to dismiss with the SPBR if an appeal is filed. It is possible that employees could bring other types of legal challenges in response to this program based on how it is implemented.

III. RELATION TO OTHER LAWS

A. Fair Labor Standards Act

There are two issues relating to the Fair Labor Standards Act and overtime pay. First, the appointing authority's guidelines should clearly state that time spent on CSDs are not considered hours worked for purposes of overtime.

Second, appointing authorities are cautioned not to implement this program in a manner that could improperly impact those employees who are exempt from the FLSA. Generally, certain employees are exempt from the FLSA based on job duties. Employees who work in a managerial, executive or professional capacity are exempt from the FLSA and are not entitled to overtime. These employees must be paid on a salary basis. A summary of the FLSA standards for these exemptions is attached. Exempt employees cannot have their regular pay reduced due to the quality or quantity of work in a work week except for certain disciplinary reasons. As a result, an approach such as the one suggested in II B above could violate the FLSA and entitle these exempt employees to overtime pay.

It is likely that the approach set forth in II A (wage reduction) above will not violate the FLSA. This is because the employees' wages will be the same every bi-weekly pay period, even when they take CSDs. The fact that their wages will be reduced every work week by a certain amount does not violate the FLSA.

Another possible approach is to not pay FLSA exempt employees for holidays. Since the FLSA does not require holiday pay, exempt employees can be denied holiday pay and have their bi-weekly wages reduced for the pay periods in which the holiday occurs.

B. Family Medical Leave Act

The guidelines and the FMLA policy should state that the CSDs will run concurrent with family medical leave. Employees on FMLA may be treated the same as other employees with respect to the mandatory cost savings program as long as the implementation of the

program does not interfere with their rights under the FMLA. Employees on FMLA leave have no right to be treated better than other employees.

C. Unclassified Employees

The limitations set forth in O.R.C. § 124.393 only apply to classified employees. An appointing authority may apply the same rules to unclassified employees. On the other hand, an appointing authority may impose wage reductions on unclassified employees with or without furlough days. Such reductions are not limited by O.R.C. § 124.393. In addition, the 80 hour limitation in the statute does not apply to unclassified employees.

D. Collective Bargaining

By its specific terms, O.R.C. § 124.393 is not automatically applicable to bargaining unit employees. An appointing authority may negotiate a similar provision with the union. It may also enter into a memorandum of understanding concerning furlough days. A union is not compelled to agree to a cost savings day program simply because one may be implemented for non-bargaining unit employees. Similarly, an appointing authority is not obligated to offer such a program to bargaining unit employees. An appointing authority may simply proceed with layoffs pursuant to a collective bargaining agreement even if it is using a cost savings day program for its non-bargaining unit employees.

E. Unemployment Compensation

Depending on the type of mandatory cost savings program implemented by an appointing authority, an employee may be entitled to unemployment benefits. It is likely that the use of the salary reduction approach would avoid the possibility of unemployment benefits.

Employees are entitled to unemployment if they are totally or partially unemployed. Unemployment benefits begin subsequent to a waiting period of one week. The waiting period occurs only one time for each employee in a benefit year. O.R.C. § 4141.29(B). Benefits are not retroactive to the first day of unemployment. The waiting period commences on the first day of the first week with respect to which an individual files a claim for benefits, provided that the claim is allowed. O.R.C. § 4141.29(C). The benefit year is different for every individual who applies. The benefit year is the fifty-two week period beginning with the first day of that week with respect to which the individual first files a valid application for benefits. O.R.C. § 4141.01(R)(1).

House Bill 1 contains some changes to Chapter 4141 that are designed to lessen the potential impact of unemployment for employees on a mandatory cost savings program under O.R.C. § 124.393. It should be noted that the statute addressing cost savings days for State employees specifically indicates that such days shall be considered remuneration for purposes of O.R.C. § 4141.31. O.R.C. § 124.392(E). There is no comparable provision in O.R.C. § 124.393. Ohio Revised Code § 4141.31 provides the types of remuneration that will reduce the amount of unemployment benefits an employee receives. This statute was amended to include the determinable value of cost

savings days. Ohio Revised Code § 4141.07(DD) defines a cost savings day as any unpaid day off from work in which employees continue to accrue employee benefits which have a determinable value including, but not limited to, vacation, pension contribution, sick time and life and health insurance. It appears that this provision applies to cost savings days under O.R.C. § 124.393.

As a result of these statutory changes, an appointing authority will need to determine the value of the accrued benefits that an employee will continue to receive during the cost savings days in the event an employee becomes entitled to unemployment benefits. The value of these benefits will be deducted from the unemployment benefits.

Generally, employees are entitled to 26 weeks of unemployment benefits under Ohio law. As part of the stimulus package, the federal government extended these benefits for an additional 33 weeks. This extension is federally funded. In addition, the State of Ohio has approved an additional extension of up to 20 weeks although this extension is likely to expire after December 31, 2009 absent additional federal funding. The extended benefit amount is the same as the initial weekly benefits.

Employees cannot waive their right to apply for unemployment benefits.

F. Workers' Compensation

Employees on workers' compensation should not be affected by a cost savings program. While on workers' compensation, these employees are not being paid by the appointing authority. An employee on wage continuation or light duty may be subject to the cost savings program.

G. PERS

Any reduction in pay will impact the highest three years of pay for those employees nearing retirement.

IV. OTHER CONSIDERATIONS

A. Payout of leave

Employees who separate from service under certain situations are entitled to be paid for some or all of their accrued but unused leave depending on county policy. For example, all employees with at least one year of service are entitled to payout of vacation leave. The FLSA requires employers to payout earned but unused compensatory time. At a minimum, sick leave is paid out upon retirement to employees with at least ten years of service.

Ohio Revised Code § 325.19(C) provides that vacation leave is paid out **at the employee's current rate of pay** upon separation. (emphasis added) As a result, employees earning less due to the implementation of a mandatory cost savings program

would receive pay for vacation leave at the rate in effect at the time of separation. A similar provision in O.R.C. § 124.13 applies to employees of a county department of job and family services.

Ohio Revised Code § 124.39(B) contains a provision concerning sick leave. At retirement, employees are entitled to pay for a portion of earned but unused sick leave at the rate of pay in effect at the time of retirement. Appointing authorities should make sure that their payout policies for vacation and sick leave do not inadvertently deviate from these statutory provisions.

The payout of compensatory time is governed by the Fair Labor Standards Act. Upon separation, employees subject to the FLSA are entitled to be paid for earned but unused comp time at the higher of either their rate of pay at the time of separation or the average rate of pay for the three years prior to termination. 29 C.F.R. § 533.27(c). If an appointing authority is using the CSD plan that results in a reduction of employees' hourly rates, the payout rate for comp time will differ from the rate for vacation and sick leave.

B. Step Increase/Promotion

Time spent on CSDs should not affect the entitlement to step increases under a pay plan. The issue that may arise is the proper rate for employees upon attaining a step increase or a promotion for employers using the rate reduction method. In general, these employees should be paid the same percentage less than the new wage rate as was in effect for the prior wage rate.

Counties may freeze steps for exempt employees by amending their pay plan as a cost-saving measure.

C. Consistency with Collective Bargaining Agreement

Ohio Revised Code § 325.19(F) authorizes an appointing authority to establish an alternative vacation schedule that deviates from the statute. If some of the appointing authority's employees are subject to a collective bargaining agreement, the alternative schedule cannot be inconsistent with the provisions of the agreement. It is possible that a union may try to apply this section in response to changes that an appointing authority may implement pursuant to the mandatory cost savings day program. For example, the appointing authority may deviate from statute by permitting employees who are on unpaid CSDs to earn vacation leave while in an unpaid status. Such a provision would likely be inconsistent with a collective bargaining agreement. It is likely that this argument, if made by a union, would fail because O.R.C. § 325.19 was intended to apply to schedules of earned leave that deviates from the statute and not this type of change.

D. Military Leave

One issue that may arise is whether allowing employees on unpaid CSDs to accrue benefits results in employees who are on unpaid military leave to accrue such benefits. Generally, employees on an unpaid military leave do not accrue benefits that are accrued based on paid status because other employees do not have such a benefit. Many mandatory cost savings policies likely will permit employees to accrue vacation and sick leave while they are in an unpaid status. According to the Department of Labor web-site, if an employer allows accrual of vacation leave for employees who are on a comparable furlough or leave of absence, then an employee on an unpaid military leave would be permitted to accrue vacation and sick leave. The issue will be whether the unpaid CSDs constitute a comparable furlough to unpaid military leave. Because the CSDs are a finite and limited leave directed by the employ they probably will not be considered comparable to an unpaid military leave.

V. VOLUNTARY FURLOUGHS

Nothing in O.R.C. § 124.393 impacts the right of an appointing authority to implement a voluntary furlough program for its employees. Such a program can be implemented for non-bargaining unit and/or bargaining unit employees. Since a voluntary furlough program affects wages, hours and terms and conditions of employment, the appointing authority has bargaining obligations with respect to bargaining unit employees. It cannot unilaterally implement such a program for bargaining unit employees even if it is voluntary.

In implementing a voluntary program, an appointing authority may go beyond the eighty hours set forth in O.R.C. § 124.393. An appointing authority has significant discretion in how it will implement the voluntary program. A voluntary program may include a voluntary reduction of work hours in a work day or workweek in lieu of or in combination with the voluntary furlough program.

Since it is likely that a voluntary furlough program will go beyond the statutory limitations, an employee should sign a waiver of appeal or other legal challenge. In addition, the employee should acknowledge that the program may be discontinued at the discretion of the appointing authority with the employee returning to the prior work hours. An example of a waiver is attached.

VI. OTHER CIVIL SERVICE CHANGES

- A. HB 1 also modified O.R.C. § 124.34 to provide that employees who are exempt from the Fair Labor Standards Act may only appeal suspensions of **more than** 40 hours. Employees subject to the Fair Labor Standards Act may only appeal suspensions of **more than** 24 hours. The statute previously permitted appeals of 40 hours or more and 24 hours or more respectively. Under the new provisions, FLSA exempt employees generally will only be permitted to appeal suspensions of more than five days and other employees can only appeal suspensions of more than three days. This change applies to

appeals to the State Personnel Board of Review and civil service commissions. These changes take effect immediately.

- B. O.R.C. § 124.321 was changed to eliminate the requirement of county appointing authorities to submit a statement of rationale to the Department of Administrative Services in the event of layoffs. This requirement was previously eliminated in cases of job abolishment. Also, DAS will no longer have the authority to review a county appointing authority's calculation of retention points. These changes go into effect 90 days after the Governor signed HB 1 or October 17, 2009.

With respect to counties, the changes in O.R.C. §124.321 do not require the adoption of any new rules. There are several current provisions in the Ohio Administrative Code that will still apply to counties. For example, OAC 124:1-41-09 still governs the computation of retention points. Counties must also comply with OAC 124:1-41-10 which addresses the timing and contents of layoff notices.

FLSA EXEMPT EMPLOYEES

- A. In order to qualify as an exempt employee, the employee must still be paid on a “salary basis.”
1. Employees who are paid on a salary basis are paid the same amount per week for any week in which they perform some work. They need not be paid every week, but the salary cannot be reduced due to variations in the quality or quantity of the work performed.
 - a. Exceptions
 - i. Absence for part of a work week due to personal reasons, other than sickness or disability (unless it is unpaid FMLA leave).
 - ii. Absence due to sickness or disability if the employer has a bona fide plan to provide substitute wage replacement benefits.
 - iii. Offset for amounts received as witness, jury duty or military pay (Ohio Law).
 - iv. Penalties or suspensions imposed in good faith for violations of safety rules or other workplace conduct rules.
 - v. Proportionate part of the employees’ full salary if they start or end employment during a work week.
 - vi. For public sector employers, the deduction is made pursuant to 29 C.F.R. 541.5d; permission for leave with pay was not sought or not granted, the employee chose to use leave without pay, or available leave time was exhausted.
 - b. Effect of improper deductions.
 - i. Destroys the employee’s exempt status for the period in which the improper deduction was made.
 - ii. Destroys the exempt status for all other employees in the same classification.
 - iii. Destroys the exempt status for all employees working under the manager who authorized the improper deduction.
 - c. Curing the improper deduction.
 - i. Have a policy that prohibits improper deductions and that has been clearly communicated to employees.

- ii. Make immediate (i.e., the next paycheck) re-imburement.
 - iii. Make a good faith effort to comply with law and your policy.
2. Remaining Issues Under the Salary-Basis Test.
- a. Window of Correction: when an employer inadvertently or incorrectly makes a deduction prohibited by the salary-basis test, the employer may be able to avoid liability if it reimburses the employee for the improper deductions and promises to comply in the future. 29 C.F.R. §541.118(a)(6).
 - b. Hourly vs. salaried pay: if pay appears to be calculated on an annual basis, or is adjusted for extra work, this may be viewed as inconsistent with the salary-basis test.
 - c. Overtime pay for exempt employees: It is clear under Ohio law that a local government can choose to grant overtime compensation, in comp time or cash, for extra hours worked. But a number of courts have ruled that such extra compensation is inconsistent with the salary-basis test, and may expose the employer to full liability under the FLSA (e.g., time-and-a-half instead of hour-for-hour pay, etc.)
 - d. Requiring exempt employees to keep detailed records of hours actually worked, or to turn in time sheets, or to work a fixed schedule.

B. White collar exemptions; minimum salary is \$455 per week,

- 1. Can be paid weekly, bi-weekly, semi-monthly or monthly.
- 2. No more 80%/20% rule, new exemptions are based on “primary duties.”
 - a. The principle, main, major or most important duty that the employee performs.
 - b. Factors to consider:
 - i. Relative importance of the exempt duties;
 - ii. Amount of time spent performing exempt work (employees who spend more than 50% of their time performing exempt work will generally be considered exempt, but the regulations specifically DO NOT require that the employee spend any specific percentage of time performing exempt duties);
 - iii. Relative freedom from direct supervision;
 - iv. Relationship between the employee’s salary and those paid to other employees performing the same kind of work.

C. Executive positions:

1. Primary duty is management of the enterprise, or managing a customarily recognized department or subdivision of the enterprise; AND
2. Customarily and regularly direct the work of at least two or more other full-time employees or the equivalent; AND
3. Have the authority to hire or fire other employees, or have “particular weight” given to his/her suggestions to hire, fire, advance, promote or any other change of status of other employees.
 - a. Management of the enterprise includes ANY of the following:
 - i. Interviewing, selecting, training and evaluating employee performance,
 - ii. Setting and adjusting employees’ rates of pay and hours of work,
 - iii. Directing and planning the work of employees, including determining the techniques used to accomplish the work,
 - iv. Handling employee complaints and grievances,
 - v. Disciplining employees,
 - vi. Apportioning work among employees,
 - vii. Determining the type of materials, supplies, machinery to be used or merchandise to be bought, stocked or sold,
 - viii. Controlling the flow and distribution of materials or merchandise and supplies,
 - ix. Providing for the safety of the employees or the employer’s property.
 - b. Department or subdivision means;
 - i. A discrete work group, not just a collection of subordinates;
 - ii. A work unit with continuing status and a defined function.
 - iii. E.g., an Auditor’s office may have several qualifying subdivisions, accounts payable, accounts receivable, collections, property tax, etc.
 - c. Customarily and regularly means;
 - i. Work that must be more than occasional, but may be less than consistent, e.g. occurs either on a regular basis, weekly, monthly, etc, or with some frequency.
 - ii. It cannot be an isolated or one-time event.
4. Who will qualify in local government?
 - a. Generally, all department heads (if two or more employees).
 - b. In larger offices/departments, there may be other managerial/supervisor positions which will qualify.

D. Administrative Positions

1. Performance of office or non-manual work related to the management or general business operation of the employer or the employer's customers; AND
2. Hold a position of responsibility with the employer.
 - a. Related to the management or general business operation means:
 - i. Areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, etc.
 - b. Position of responsibility means;
 - i. Customarily and regularly perform work of substantial importance or requiring a high level of skill or training.
 - ii. Examples include; Formulating, interpreting or implementing management policies; Providing consultation or expert advice to management; Making or recommending changes to operating policies that have a significant impact on general business operations or finance; Handling employee complaints, arbitrating disputes or resolving grievances; Planning long or short term business objectives.
 - iii. Carry out major assignments in conducting the operation of the business.
3. Typical examples include:
 - i. Executive, administrative and confidential assistants, generally in larger agencies.
 - ii. Advisory specialists for management (e.g. tax, risk management, personnel analysts).
 - iii. Heads of one-employee departments (e.g. personnel director, economic development director, finance director).

E. Professional Positions:

1. Performs office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience ("learned professional") OR
2. Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

- i. Equivalent combination of intellectual instruction and work experience is not really defined, best possibility is someone who has some college engineering courses, for example and experience in the engineering field, whose duties are primarily in the engineering field, but who is not a Registered Engineer.
3. The following are always exempt irrespective of tests:
- i. Employee holding valid license to practice law or medicine, actually engaged in such practice; or
 - ii. Employee holding M.D. or D.O. degree for general practice of medicine in residency or internship; or
 - iii. Teacher in a school or educational institution.

F. Computer Employee Exemption

1. Paid on either a salary or a fee basis of not less than \$455.00 per week, OR not less than \$27.63 per hour; AND
2. Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the following duties:
 - a. Application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
 - b. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - d. A combination of the above duties, the performance of which requires the same level of skills.
3. Does NOT include trainees or employees in entry level positions learning to become proficient in these areas or employees in computer occupations who have not attained a level of skill or expertise that allows them to work generally without close supervision.
4. Does NOT include employees engaged in the operation of computers or in the manufacture and repair of computers.
5. Does NOT include employees whose work is highly dependent on, or facilitated by the use of computers, but who are not engaged in systems analysis, programming, etc.

VOLUNTARY FURLOUGH AGREEMENT

By signing this document I indicate my agreement to voluntarily accept a furlough as set forth in this document. I agree not to work on the days that I am scheduled to be furloughed.

I understand that this will result in a proportional reduction in pay; as well as a reduction in the accumulation of those benefits, e.g., sick leave and vacation leave, that are based on my hours of work. **Change reference to leave accumulation if it will not be altered by unpaid furlough.**

I agree that my hours may be increased as needed. I further understand that even I am not entitled to time and one-half compensation unless and until I work more than forty (40) hours in a workweek in accordance with the County's current policy for overtime compensation.

I recognize that the County may eliminate the voluntary furlough with at least fourteen days notice.

Signature

Date

Print name

VOLUNTARY WORK HOUR REDUCTION

By signing this document I indicate my agreement to voluntarily reduce my hours of work from ____ hours per week to ____ hours per week. I agree not to work more than ____ hours per week without prior authorization of my supervisor, except in an emergency situation.

I understand that this will result in a proportional reduction in pay; as well as a reduction in the accumulation of those benefits, e.g., sick leave and vacation leave, that are based on my hours of work.

I agree that my hours may be increased as needed, but that I will regularly be assigned to work ____ hours per week. I further understand that even if I am authorized or assigned to work more than ____ hours per week, I am not entitled to time and one-half compensation unless and until I work more than forty (40) hours in a workweek in accordance with the County's current policy for overtime compensation.

I recognize that the County may increase my work hours to ____ hours per week with at least fourteen days notice.

Signature

Date

Print name

FURLOUGH POLICY CHECKLIST

1. Explanation of policy

Ex.: This policy is issued pursuant to O.R.C. § 124.393 which authorizes a county appointing authority to establish a mandatory cost savings program not to exceed eighty (80) hours of unpaid furlough between July 1, 2009 and June 30, 2010 and an additional eighty (80) hours between July 1, 2010 and June 30, 2011. This mandatory cost savings program is being implemented due to a lack of funds [or reasons of economy] in accordance with O.R.C. § 124.321.

2. Scope of the policy

Ex.: All full-time employees shall serve an unpaid furlough of ten work days between the effective date of this policy and June 30, 2010. These days shall be designated as cost savings days (CSDs). A cost savings day is one full work day or one full holiday.

[Note- CSDs may also apply to regular part-time employees.]

Depending on the level of funds available to the appointing authority, this program may be eliminated or modified. In addition, the program may be extended for the period July 1, 2010 through June 30, 2011.

3. Implementation

Ex.: In order to ease the burden on employees, the mandatory cost savings program shall be implemented by reducing employees' bi-weekly wages for each pay period beginning September 1, 2009 through the final pay period that includes June 30, 2010 by 5.5%. [This amount presumes use of wage reduction approach and 1,440 hours remaining in the State fiscal year]. Employees who are hired after September 1, 2009 or who separate prior to taking all cost savings days shall have their final pay pro-rated to reflect the actual amount of time off on CSDs.

[Note- This language should be used only if the wage reduction method is used. If another version of CSDs is used, the language should be in this section.]

4. Determining CSDs

Ex.: The following holidays are designated as agency-wide cost savings days and shall be without pay.

Ex: The following days shall be designated as cost-savings days for employees. The agency will be closed on these days.

Ex.: Employees may request cost savings days which shall be granted based on the operational needs of the agency.

[Note- Different methods can apply to different employees. This section should also list days that are unavailable for employees to take as CSDs if applicable.]

Ex: Employees must use CSDs prior to taking paid leave. [Optional to make sure employees take the CSDs.]

Ex.: The appointing authority reserves the right to schedule employees off on their CSDs.

[It is difficult to include all examples of language for a policy because there are numerous variables for an appointing authority]

5. Miscellaneous

Ex.: Employees shall continue to accrue vacation leave and sick leave while on cost savings days.

Ex.: Cost savings days shall not be considered a break in service or effect retention points.

Ex.: Cost savings days shall not be considered hours of work for purposes of computing overtime pay.

Ex.: Cost savings days shall be taken concurrent with FMLA leave. [Note- FMLA policy can require employees to take CSDs concurrent with FMLA leave prior to taking paid leave.]

(F) The cost savings fund is hereby created in the state treasury. Savings accrued through employee participation in the mandatory cost savings program and in mandatory cost savings days shall be allocated to the fund. The fund may be used to pay employees who participated in the mandatory cost savings program or in mandatory cost savings days. Any investment earnings of the fund shall be credited to the fund.

Sec. 124.393. (A) As used in this section:

(1) "County exempt employee" means a permanent full-time or permanent part-time county employee who is not subject to a collective bargaining agreement between a public employer and an exclusive representative.

(2) "Fiscal emergency" means any of the following:

(a) A fiscal emergency declared by the governor under section 126.05 of the Revised Code.

(b) Lack of funds as defined in section 124.321 of the Revised Code.

(c) Reasons of economy as described in section 124.321 of the Revised Code.

(B)(1) A county appointing authority may establish a mandatory cost savings program applicable to its county exempt employees. Each county exempt employee shall participate in the program of mandatory cost savings for not more than eighty hours, as determined by the appointing authority, in each of state fiscal years 2010 and 2011. The program may include, but is not limited to, a loss of pay or loss of holiday pay. The program may be administered differently among employees based on their classifications, appointment categories, or other relevant distinctions.

(2) After June 30, 2011, a county appointing authority may implement mandatory cost savings days as described in division (B)(1) of this section that apply to its county exempt employees in the event of a fiscal emergency.

(C) A county appointing authority shall issue guidelines concerning how the appointing authority will implement the cost savings program.

Sec. 124.81. (A) Except as provided in division ~~(E)~~(F) of this section, the department of administrative services in consultation with the superintendent of insurance shall negotiate with and, in accordance with the competitive selection procedures of Chapter 125. of the Revised Code, contract with one or more insurance companies authorized to do business in this state, for the issuance of one of the following:

(1) A policy of group life insurance covering all state employees who are paid directly by warrant of the state auditor, including elected state officials;

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**House Bill 1 - Implementing
Mandatory Cost Savings Program**

Commonly Asked Questions

**For
Ohio Council of County Officials**

August 12, 2009

**Prepared by
Marc A. Fishel
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1. What are the effective dates of O.R.C. § 124.393?

Answer: The statute is effective from July 1, 2009 through June 30, 2011. It specifically permits a furlough of up to 80 hours in State fiscal year (“SFY”) 2010 and an additional 80 hours in SFY 2011.

2. Does the statute have an expiration date?

Answer: No. The statute provides that after June 30, 2011 an appointing authority may implement a plan similar to the one authorized by the statute in the event of a fiscal emergency.

3. What is a fiscal emergency?

Answer: A fiscal emergency is defined by the statute as:

- A. A fiscal emergency declared by the governor under O.R.C. § 126.05;
- B. A lack of funds as defined by O.R.C. § 124.321; or
- C. For reasons of economy as defined by O.R.C. § 124.321.

4. What is the definition of “lack of funds” and “reasons of economy”?

Answer: Ohio Revised Code § 124.321(B)(2) defines a “lack of funds” as a current or projected deficiency of funding to maintain current or sustain projected levels of staffing.

Pursuant to O.R.C. § 124.321(D)(2)(a), “reasons of economy” is based on the appointing authority’s estimated amount of savings with respect to salary and benefits. The need for such savings must be due to a reduced appropriation by executive or legislative action or to address a current or projected deficiency.

5. Does O.R.C. § 126.05 apply to counties (i.e. State Fiscal Emergency)?

Answer: No. It only applies to the State. Under the statute, the governor can declare a fiscal emergency if the governor determines that the available revenue receipts and balances in any fund or across funds will likely be less than the appropriations for the year. The governor may declare a fiscal emergency and may issue such orders as necessary to the director of budget and management to reduce expenditures or to the director of administrative services to implement personnel actions consistent therewith, including, but not limited to, mandatory cost savings days under § 124.392 of the Revised Code.

6. Who is authorized to implement a mandatory cost savings plan?

Answer: The statute authorizes a county appointing authority to implement a plan. This means that a board of county commissioners may implement a plan only for those employees for whom it is the appointing authority. Other appointing authorities may adopt a county-wide plan but also have the option to have no plan or a different plan. There is no requirement for a county appointing authority to obtain approval from or notify the board of county commissioners.

7. How does the statute treat co-appointing authorities?

Answer: Co-appointing authorities essentially are treated the same under O.R.C. § 124.393 as other statutes. For example, a board of county commissioners and department of job and family services director both must approve the mandatory cost savings plan.

8. Which employees are subject to the mandatory cost savings plan?

Answer: An appointing authority may apply a plan to all employees who are not subject to a collective bargaining agreement. The statute refers to these as exempt employees. See O.R.C. § 124.393(a)(1) This definition should not be confused with employees who are exempt from the Fair Labor Standards Act or unclassified employees.

9. Does O.R.C. § 124.393 apply to unclassified employees?

Answer: Technically, the statute only applies to classified employees. Because an appointing authority has more latitude in dealing with its unclassified employees, it can apply the same type of cost savings program to them. In addition, appointing authorities can go beyond the limitations in O.R.C. § 124.393 in addressing its unclassified employees.

10. Can a similar cost savings plan be applied to bargaining unit employees?

Answer: Yes, but only by agreement with the union. A furlough program is a mandatory subject of bargaining under Ohio Collective Bargaining Law. Unless the collective bargaining agreement authorizes the employer to implement this type of program, it must bargain with the union concerning such a program. An employer cannot reach an agreement with unionized employees on a furlough absent an agreement with the union.

11. Do all exempt employees have to be treated the same?

Answer: No. The statute maintains flexibility for appointing authorities within the plan. Ohio Revised Code § 124.393(B)(1) specifically states that the plan may be implemented differently among employees based on their classifications, appointment categories, or other relevant criteria. As a result, cost savings days can apply only to certain employees or classifications at the reasonable discretion of the appointing authority.

12. Can employees challenge a mandatory cost savings plan at the State Personnel Board of Review?

Answer: No. Ohio Revised Code § 124.34 was amended to prohibit appeals of the implementation of this program. Employees are not prohibited from pursuing other legal challenges. Appointing authorities must make sure that the plan does not discriminate based on unlawful factors such as age, race, gender, etc.

13. Do employees accrue benefits while they are on cost savings days?

Answer: Depends. The statute does not address this issue. An appointing authority may permit employees on CSDs to accumulate vacation leave and sick leave.

14. Is an appointing authority required to have a written policy?

Answer: Yes. The statute requires the appointing authority to have written guidelines. Any plan implemented by a board of county commissioners, MRDD, health department, or children's services board should be approved by a resolution.

15. What type of notice to the employees is required?

Answer: The statute does not address this issue. Unlike layoffs, there is no specific advance notice requirement. The written guidelines should be treated like other policies and employees should be given reasonable advance notice.

16. Does the Department of Administrative Services ("DAS") have a role?

Answer: No. The counties have no reporting requirements to DAS concerning this issue. In addition, DAS has no authority to promulgate rules for counties concerning a mandatory cost savings program. DAS has implemented rules for the State which can be used for guidance by a county.

17. What should a mandatory cost savings plan include?

Since there is significant flexibility, it is difficult to focus on a model plan. The following are some examples.

- A. Appointing authorities can implement the cost savings days (up to 80 hours) by reducing the employees' bi-weekly wages for each pay period throughout the year an amount equivalent to the 80 hours of unpaid leave. This method would spread out the reduction in pay for the full period of the cost savings plan and avoid a greater loss of pay for the weeks an employee is furloughed for one or more days. This is one of the approaches being taken by the State of Ohio.

This approach would work by determining the period during which the cost savings plan will be implemented. For a full 12 month period at forty hours per week, the employee would normally work 2080 hours. An 80 hour reduction on 2080 hours represents a 3.84% work hour reduction. As a result, each employee's bi-weekly pay would be reduced by 3.84% for the 12 month period that the cost savings program is in effect. The employees would then take off ten furlough days during the 12 month period. Of course, these figures would need to be adjusted if the ten furlough days are taken over less than a 12 month period or the number of hours worked in a 12 month period is less than 2080.

This approach will require consideration for addressing employees who are hired or who quit during the year. Those employees who are separated can have their final wages adjusted based on a prorated amount of time they worked during the year and the number of furlough days they have taken at the time of separation.

Under this plan, the appointing authority will still have to decide how the days off are determined.

- B. An appointing authority can assign the days off for each employee or allow the employees to choose and reduce the employees' pay only for the bi-weekly pay periods when the employee is in an unpaid status. For example, if the employee is on a furlough day for 8 hours during an 80 hour bi-weekly pay period, his wages for that two week period will be reduced by 10%. This approach may create problems for those employees who are exempt from the Fair Labor Standards Act.
- C. Employees may be permitted to choose the furlough days similar to vacation days or other time off. The appointing authority can black out certain dates that are unavailable to be taken as furlough days. The appointing authority may decide how employees can bid on dates. Under this approach, the appointing authority can decide between A and B above in terms of the pay reduction.
- D. The appointing authority can determine the ten days (eighty hours) that the entire agency will be closed. This approach may result in additional savings due to the closure of the agency. The pay reduction would be based on A or B above.
- E. Employees can continue to have the statutory ten holidays off work but not receive holiday pay. Again, the pay reduction can be as set forth in A or B above.
- F. Employees can be required to use five CSDs days for a full workweek or ten days in a bi-weekly pay period. This approach will avoid FLSA issues for employees who are not subject to overtime requirements. It will have implications for unemployment benefits.
- G. In lieu of taking paid vacation leave, an employee may be required to take one or more furlough days. For example, employees who request vacation leave would have the first day of the vacation leave treated as a furlough day. The employee would receive no pay for this day and not be charged for vacation leave.

H. An appointing authority may use a combination of the above examples.

18. Does the mandatory cost savings program have to be implemented based on seniority?

Answer: No. The cost savings days may be implemented based on any legitimate operational criteria. An appointing authority may use seniority as a basis for its plan but it is not required to do so.

19. Does a mandatory cost savings program have to treat employees in the same classifications identical for furlough purposes?

Answer: No. Unlike layoffs, appointing authorities may take other criteria into consideration. Some employees in a classification may be subject to different guidelines than others in the same classification.

20. Can an appointing authority implement a mandatory cost savings plan in addition to layoffs?

Answer: Yes. An appointing authority's decision concerning layoffs is unaffected by its decision to implement or refrain from a mandatory cost savings plan.

21. Can a county require employees to be furloughed for more than eighty hours in calendar year 2010?

Answer: Yes. The only restriction is that an employee may not be furloughed more than 80 hours in SFY 2010 and 80 hours in SFY 2011. As a result, a county appointing authority may require employees to use 80 hours of CSDs between January 1, 2010 and June 30, 2010 and another 80 hours between July 1, 2010 and December 31, 2011. As a result, an appointing may require employees to be furloughed for 160 hours in calendar year 2010 as long as no more than 80 hours are in the first half of the year and 80 hours in the second half of the year.

22. Can the plan include partial days?

Answer: Yes. The statute seems to contemplate eighty (80) hours in SFY 2010 and SFY 2011. Because the statute grants significant flexibility to the appointing authority, partial days can be used as all or part of the eighty hours. Essentially, an appointing authority can reduce an employee's work schedule by 80 hours in SFY 2010 and 80 hours in SFY 2011.

23. Does a work schedule of less than forty hours affect the 80 hours referred to in the statute?

Answer: No. The maximum number of hours for CSDs is forty regardless of an employee's regular work schedule. For example, an employee who works a 35 hour work week may be furloughed up to 80 hours. An appointing authority may also require regular part-time employees to use CSDs for up to 80 hours.

24. Are there any implications for military leave?

Answer: Probably not. The CSDs should not impact an employee's entitlement for fully paid military leave of 176 hours per year in accordance with the Ohio Revised Code.

One issue that may arise is whether allowing employees on unpaid CSDs to accrue benefits results in employees who are on unpaid military leave to accrue such benefits. Generally, employees on an unpaid military leave do not accrue benefits that are accrued based on paid status because other employees do not have such a benefit. Many mandatory cost savings policies likely will permit employees to accrue vacation and sick leave while they are in an unpaid status. According to the Department of Labor web-site, if an employer allows accrual of vacation leave for employees who are on a comparable furlough or leave of absence, then an employee on an unpaid military leave would be permitted to accrue vacation and sick leave. The issue will be whether the unpaid CSDs constitute a comparable furlough to unpaid military leave. Because the CSDs are a finite and limited leave directed by the employer they probably will not be considered comparable to an unpaid military leave.

25. Are employees on CSDs entitled to unemployment benefits?

Answer: Depends. Employees are entitled to unemployment if they are totally or partially unemployed. Unemployment benefits would begin subsequent to a waiting period of one week. The waiting period occurs only one time for each employee in a benefit year. O.R.C. § 4141.29(B). Benefits are not retroactive to the first day of unemployment. The waiting period commences on the first day of the first week with respect to which an individual files a claim for benefits, provided that the claim is allowed. O.R.C. § 4141.29(C). The benefit year is different for every individual who applies. The benefit year is the fifty-two week period beginning with the first day of that week with respect to which the individual first files a valid application for benefits. O.R.C. § 4141.01(R)(1).

House Bill 1 contains some changes to Chapter 4141 that are designed to lessen the potential impact of unemployment for employees on a mandatory cost savings program under O.R.C. § 124.393. Ohio Revised Code § 4141.31 provides the types of remuneration that will reduce the amount of unemployment benefits an employee receives. This statute was amended to include the determinable value of cost savings days. Ohio Revised Code § 4141.07(DD) defines a cost savings day as any unpaid day off from work in which employees continue to accrue employee benefits which have a determinable value including, but not limited to, vacation, pension contribution, sick time and life and health insurance. It appears that this provision applies to cost savings days under O.R.C. § 124.393.

26. Are there any FLSA considerations?

Answer: Yes. First, appointing authorities should make it clear that CSDs are not considered hours worked for purposes of overtime.

Second, counties must be careful not to implement its mandatory cost savings program in a way that improperly impacts employees who are exempt from the FLSA. Those exempt employees cannot have their wages for a work week reduced based on their quality or quantity of work except in certain disciplinary situations. The plan under which the employees' bi-weekly salary is reduced for the entire period of the plan does not violate these restrictions.

27. Are employees on FMLA subject to the CSDs?

Answer: Yes. Employees on FMLA may be subject to the CSDs on the same basis as other employees. In addition, the FMLA policy should state that CSDs will run concurrent with FMLA.

28. How do CSDs impact employees on workers compensation?

Answer: Depends. Employees who are off work and receiving workers compensation payments would not be affected by CSDs because they are not being paid by the county. Employees on wage continuation or light duty can be treated the same as other employees.

29. Does the mandatory cost savings program affect the payout of leave?

Answer: Depends. Under the wage reduction method, employees' wages are reduced. If an employee separates while the wage reduction is in effect and is entitled to payout of vacation and/or sick leave, the payout is at the rate of pay at the time of separation. For purposes of compensatory time, the employee is paid the higher of his rate at the time of separation or the average of the three years prior to separation. As a result, employees could be paid a different rate for vacation and sick leave than for compensatory time.

30. Does the mandatory cost savings program affect an employee's step increase or promotion?

Answer: Depends. The cost savings program should not impact an employee's entitlement to a step increase or promotion based increase. On the other hand, if the salary reduction approach is used, the new wage rate should be reduced by the appropriate percentage.

31. Can counties have a voluntary furlough plan?

Answer: Yes. Ohio Revised Code § 124.393 does not impact an appointing authority's right to implement a voluntary furlough plan instead of or in addition to a mandatory cost savings plan. Such a plan should be in writing. Moreover, a voluntary plan may go beyond eighty (80) hours. Appointing authorities must bargain such a plan with a union if it desires to apply it to bargaining unit employees.

32. Are there any other changes to civil service law?

Answer: Yes. HB 1 also modified O.R.C. § 124.34 to provide that employees who are exempt from the Fair Labor Standards Act may only appeal suspensions of **more than** 40 hours. Employees subject to the Fair Labor Standards Act may only appeal suspensions of **more than** 24 hours. The statute previously permitted appeals of 40 hours or more and 24 hours or more respectively. Under the new provisions, FLSA exempt employees generally will only be permitted to appeal suspensions of more than five days and other employees can only appeal suspensions of more than three days. This change applies to appeals to the State Personnel Board of Review and civil service commissions. These changes take effect immediately.

O.R.C. § 124.321 was changed to eliminate the requirement of county appointing authorities to submit a statement of rationale to the Department of Administrative Services in the event of layoffs. This requirement was previously eliminated in cases of job abolishment. Also, DAS will no longer have the authority to review a county appointing authority's calculation of retention points. These changes go into effect 90 days after the Governor signed HB 1.

With respect to counties, the changes in O.R.C. § 124.321 do not require the adoption of any new rules. There are several current provisions in the Ohio Administrative Code that will still apply to counties. For example, OAC 124:1-41-09 still governs the computation of retention points. Counties must also comply with OAC 124:1-41-10 which addresses the timing and contents of layoff notices.

(F) The cost savings fund is hereby created in the state treasury. Savings accrued through employee participation in the mandatory cost savings program and in mandatory cost savings days shall be allocated to the fund. The fund may be used to pay employees who participated in the mandatory cost savings program or in mandatory cost savings days. Any investment earnings of the fund shall be credited to the fund.

Sec. 124.393. (A) As used in this section:

(1) "County exempt employee" means a permanent full-time or permanent part-time county employee who is not subject to a collective bargaining agreement between a public employer and an exclusive representative.

(2) "Fiscal emergency" means any of the following:

(a) A fiscal emergency declared by the governor under section 126.05 of the Revised Code.

(b) Lack of funds as defined in section 124.321 of the Revised Code.

(c) Reasons of economy as described in section 124.321 of the Revised Code.

(B)(1) A county appointing authority may establish a mandatory cost savings program applicable to its county exempt employees. Each county exempt employee shall participate in the program of mandatory cost savings for not more than eighty hours, as determined by the appointing authority, in each of state fiscal years 2010 and 2011. The program may include, but is not limited to, a loss of pay or loss of holiday pay. The program may be administered differently among employees based on their classifications, appointment categories, or other relevant distinctions.

(2) After June 30, 2011, a county appointing authority may implement mandatory cost savings days as described in division (B)(1) of this section that apply to its county exempt employees in the event of a fiscal emergency.

(C) A county appointing authority shall issue guidelines concerning how the appointing authority will implement the cost savings program.

Sec. 124.81. (A) Except as provided in division ~~(E)~~(F) of this section, the department of administrative services in consultation with the superintendent of insurance shall negotiate with and, in accordance with the competitive selection procedures of Chapter 125. of the Revised Code, contract with one or more insurance companies authorized to do business in this state, for the issuance of one of the following:

(1) A policy of group life insurance covering all state employees who are paid directly by warrant of the state auditor, including elected state officials;

