

# THE DAILY RECORDER

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## The “Work Sharing” Program: An Alternative to Layoffs

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Employers facing tough economic times are sensitive to the impact layoffs have on their employees. To avoid eliminating jobs, some employers look for other cost-cutting measures that distribute the financial burden across the workforce. One option for employers serious about cutting payroll costs is to reduce work hours for non-exempt employees.

While employees doubtlessly feel the financial impact of reduced work hours, many appreciate the even-handedness of the approach and recognize that it saves jobs. And, there is a way to offset the impact on employees: the Work Sharing Unemployment Insurance Program (“Work Sharing”). Administered by the Employment Development Department (“EDD”), this program allows employees to collect partial unemployment insurance benefits when their work hours are involuntarily reduced. Because it lessens the financial impact of diminished income for employees without an immediate, significant cost to the employer, it makes reducing work hours a particularly attractive and feasible cost-saving option.

### What is Work Sharing?

The first program of its kind in the nation, the EDD originally established Work Share in 1978 to help employers and employees avoid the burdens of layoffs. The program allows employers to reduce work hours as an alternative to layoffs, and

allows employees who have work hours involuntarily reduced to receive a proportionate amount of unemployment insurance benefits.

For example, an employer with 10 non-exempt employees working for \$12 per hour, 40 hours per week, might consider eliminating two positions to save \$960 weekly. Instead, under Work Sharing, the employer can reduce work hours for all non-exempt employees by 20%, still saving \$960 per week. At the same time, each employee would receive 20% of the unemployment insurance benefits to which they would be entitled if totally unemployed. If the weekly benefit amount if totally unemployed is \$240, affected employees would receive a total of \$432: \$384 in regular salary, plus \$48 in unemployment insurance benefits.

### Who Can Participate in Work Sharing?

Any California employer who reduces production, services, or other conditions that cause the employer to seek an alternative to layoffs can participate in Work Sharing. However, the employer must reduce the wages and hours worked of at least two employees and at least 10% of the workforce or a designated work unit. Also, hours and wages must be reduced by at least 10%.

An employer wishing to participate must submit a “Work Sharing plan” to the EDD for approval, using a

special application created for that purpose. If approved, the EDD will send the employer a claim packet and 10-week supply of certification forms for each participating employee. Each week of reduced hours and wages, the employer issues the certification forms to the affected employees. As with regular unemployment insurance claimants, participants have a one-week, unpaid waiting period.

### The Benefits of Work Sharing

Work Sharing helps employees maintain income when working fewer hours, but it helps employers, too. The benefits of the program include:

- Maximizes responsiveness to changing markets. When business necessitates an increase in production, an employer participating in Work Sharing will be ready to mobilize a trained, skilled workforce.
- Reduces recruiting, hiring, and training costs. Employers will not spend the time, energy, and money to find and train new talent when business conditions improve.
- Instills loyalty. Work Sharing tells employees the employer values the team, because the alternative is to layoff individual employees. Many employees will appreciate this sense of fairness and commitment.

- Lessens the financial and administrative burden of layoffs. Employers who participate in Work Sharing may eliminate the expense and hassle of layoffs, such as providing required advanced notice of mass layoffs, deciding whether to offer separation payments, and decreased productivity and morale of remaining workers.
- Eases permanent transition. While Work Sharing is an option for employers facing a temporary slowdown, it is also an option for employers who need to permanently reduce the size of the workforce. Work Sharing can be used as a transition to layoff, allowing employees to work fewer hours with some unemployment insurance benefits while seeking other employment before an expected layoff.

### The Drawbacks of Work Sharing

While there are substantial benefits to Work Sharing, the program has some limits, too. Drawbacks include:

- Administrative burden. Employers who wish to participate in the program must first apply, then certify each week that affected employees are working reduced hours. This administrative burden may not be significant if only a few employees are participating, but can be burdensome if many employees are involved. Also, an employer must reapply to continue to participate beyond six months.
- Potential increase in unemployment insurance costs. Because the EDD charges employers' reserve accounts for Work Sharing benefits, an

employer that participates may see a rise in its unemployment insurance tax rate. Of course, employers that layoff employees may also see an increase in their rates.

- The proportionate cost of a position is not reduced dollar-for-dollar. Because employing individual involves more than just paying a salary—such as costs for benefits, taxes, and office space and equipment—reducing the work hours of five employees by 20% may not have the same financial impact of eliminating one position entirely, for example.
- Exempt employees cannot participate. For the reasons discuss below, the Department of Labor Standards Enforcement (DLSE), the California agency responsible for enforcing our wage-hour laws, has made it clear exempt employees cannot participate in Work Sharing.

### Beware: Work Sharing Not Available for Exempt Employees

Although Work Sharing is a viable and attractive option for many employees, it is not a “one size fits all” solution to reducing payroll costs without eliminating jobs. In fact, Work Sharing is not an option for employers who think they can reduce the work hours of exempt employees.

Exempt employees must be paid on a “salary basis”—a fixed salary that is paid without regard to the quality or quantity of the work the employee performs. In other words, exempt employees are paid for the work they do, and not for the hours they work. With limited exceptions under California law, if an exempt employee works any part of a workweek, the employee must be

paid for the entire workweek. Following this general rule, under the DLSE's enforcement position, an employer cannot reduce the weekly work hours of an exempt employee because the employee is not paid based on a “set” schedule or “regular” hours.

The DLSE made this clear in a 2002 Opinion Letter addressing, among other things, whether exempt employees may participate in Work Sharing. The DLSE explained that Work Sharing is premised on a reduction in work hours on a weekly basis. The DLSE reasoned that “if an employer puts the exempt employees on a work share program whereby they are paid out of government funds for a percentage of what they would have made but for the reduction in hours which the employer instituted, those employees are no longer, by definition, on a ‘salary basis.’” That is because the employees are being paid based on the hours they work, which is inconsistent with exempt status. Accordingly, the DLSE concluded that exempt employees may not participate in Work Sharing and remain exempt. (Here is a link to the Opinion Letter: <http://www.dir.ca.gov/dlse/opinions/2002-03-12.pdf>.)

Employers looking to reduce payroll costs may also want to consider some of the alternatives to Work Sharing described below.

### Alternatives to Work Sharing

There are cost-cutting alternatives to Work Sharing, short of eliminating jobs. These include:

- Reducing benefits. Employers may reduce the accrual rate for paid vacation, or require employees to pay a larger portion of health insurance or other premiums, for instance. Some

employers are eliminating such benefits and programs all together. Of course, employees may not take away any vested benefits and should provide employees with reasonable notice of any changes to benefit programs.

- Eliminating non-essential business costs. Some employers focus on reducing or eliminating non-essential travel, overtime, training and similar business expenditures.
- Shutdowns/furloughs. The State of California's furlough program has garnered headlines over the past several months. Under that program, certain exempt and non-exempt employees received a 10% pay cut and may take two days per month off. Because of various provisions in the federal Fair Labor Standards Act and the California Government Code, the state has argued that exempt employees do not lose their exempt status even though they are working only part of certain workweeks (the week in which they take a furlough day). (There have been a number of legal challenges to the program relating to exempt employees, some of which remain unresolved.) Because of the publicity surrounding the state's furlough program, many private sector employers assume that

they, too, may implement furloughs of a day or two per month. While non-exempt employees could participate in such a program, exempt employees in the private sector cannot be forced to take furloughs of less than a full workweek. In addition, the workweek is only unpaid only if exempt employees do not perform any work during the week, including checking voicemail, email, etc. The DLSE Opinion Letter referenced above provides a more detailed analysis of this issue.

- Salary/hiring freezes. Freezing salaries and hiring can help maintain the status quo, until business conditions improve.
- Salary reductions. Employers may reduce the compensation of any employee so long as employment contracts or agreements do not prohibit doing so. As discussed above, however, there cannot be a corresponding reduction in hours for exempt employees. In addition, the changes must prospective and employees should receive at least one pay period's notice of any reduction in their compensation. Finally, non-exempt employees must be paid an hourly rate of at least the state's minimum wage (current \$8.00 per hour), and exempt

employees must be paid a salary of at least two times the state's minimum wage, or \$33,280 annually.

- Voluntary programs. Some employers have asked employees to voluntarily use their vacation/PTO time, take unpaid time off, or participate in voluntary retirement programs. Again, legal issues can arise with such practices, particularly with respect to exempt employees.

Of course, no matter what cost-cutting measures an employer elects, it cannot discriminate when applying those measures. That means programs cannot target or disproportionately impact employees based on their membership in a protected class—for example, based on their gender or age—and should be based on legitimate business needs.

#### More Information on Work Sharing

Employers interested in participating in Work Sharing should contact the EDD's Special Claims Office at 916-464-3343 or visit the website at [www.edd.ca.gov](http://www.edd.ca.gov) (Type "work sharing" in the search box).

Employers also should seek legal advice regarding the implementation of any of the measures discussed in this article.

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