

***Q & As on the Effect of the Furlough Policy  
on Employees Holding Nonimmigrant Statuses***

**Questions Applicable to All Nonimmigrants (Visa Holders)**

**1. Are employees who hold non-immigrant statuses part of the furlough?**

Yes, but depending on the status in question, implementation of the furlough requirement will be different. H-1B employees in the U.S. will be re-classified as part-time, working a total of 152 hours per month. Other nonimmigrants will participate in the furlough with all other employees.

**2. How will the furlough affect my nonimmigrant status?**

The furlough will not cause anyone to fall out of status or violate status. Regardless of whether you hold F, J or H status, the validity of the status is not harmed by the furlough.

**3. Can I travel?**

The furlough does not affect anyone's ability to travel. If you need to travel, ensure that your paperwork is current, that the Visa Office knows about your travel, that your passport and visa are current or that you have made plans to obtain a new visa, etc.

**4. Can I get another job during the furlough?**

Fermilab's outside employment and consulting policy is still in effect. If you take another position outside of Fermi Research Alliance, you must complete the Outside Employment and Consulting form ([http://wdrs.fnal.gov/section/out\\_employ\\_form.pdf](http://wdrs.fnal.gov/section/out_employ_form.pdf)).

- **F-1 employees** who have approved Post Completion Practical Training and hold Employment Authorization Documents may work at any job in the U.S., or multiple jobs in the U.S., that are within their field of study. The EAD is not a *general* employment authorization, in that you are not authorized to work in jobs that are outside your field of study.

- **J-1 employees** may not obtain a second job in the U.S. J-2 spouses, if they have an Employment Authorization Document, may get jobs in the U.S. if they have not already done so. They must have the EAD card in hand to be work authorized – an approval notice without the EAD itself is insufficient.

- **H-1B employees** may obtain a second job if a second U.S. employer files a petition on their behalf for concurrent employment, and this petition is approved. H-1B employees may work for foreign employers that have no presence in the U.S. Be aware that although the foreign employer is not subject to U.S. immigration or related laws, the wages or other payment you receive likely will be considered U.S.-sourced income that likely must be declared on your U.S. tax filing. You should seek the advice of a qualified tax advisor before making your decision.

## Questions for H-1B Employees

### 5. What is the Policy for H-1B employees?

H-1B employees in the U.S. must work between 30 and 40 hours per week, for a total of no more than 152 hours per month. There may be no more than 2 non-work days within a work-week, excluding vacation, sick days, holidays or other paid leave days. The employee and his or her supervisor must outline the employee's work schedule before the beginning of each 2-month furlough period. The supervisor is responsible for ensuring that the employee complies with this policy, and must affirmatively attest that the employee has worked no more than 152 hours each month by signing a form submitted on a monthly basis to the Employee Records Office in the Workforce Development and Resources Section (WH 15E). The employee may arrange non-work days and paid leave to yield 4 or more days across 2 or more weeks – e.g. by taking Thursday and Friday of one week, Monday and Tuesday of the following week, and then as many days of paid leave as desired.

### 6. Were all options considered?

During the January 24 meeting, concerns were raised as to whether other options were considered, and a comment was made that “we were facing complicated and perhaps not fully analyzed issues.”

The Visa Office engaged in extensive legal research, brainstorming, and solicitation of ideas and advice from HR professionals from other departments within the Workforce Development and Resources Section as well as legal counsel outside Fermilab. We considered every option that was feasible and within the parameters of our legal constraints. All issues were fully analyzed. We regret that the extent of our efforts were not apparent, but please be assured that the Visa Office takes our responsibilities seriously.

### 7. Does this allow for flexibility in scheduling work time?

In response to concerns about flexibility, the final policy will allow limited flexibility from one week to the next. H-1B employees may work between 30 and 40 hours each week, provided:

- The total hours each month are restricted to no more than 152,
- No more than 2 days per work week are “non-work” days,
- The supervisor and the employee confirm ahead of time the outline of anticipated work hours.

The planning of work hours will resume as normal after the end of the furlough period.

### 8. How will this limit be enforced?

Concerns have been raised that the monthly limit on hours is artificial and that, in reality, H-1B employees will work regular hours for reduced “part-time” wages. The limit is NOT artificial, however. During the Furlough Period, no Lab employee (H-1B or otherwise) may work during designated “furlough or temporary non-duty, non-pay time.” During non-work time, employees

should not access emails, take work home, attend work-related conferences, or engage in other work-related activities.

To ensure this, supervisors of H-1B employees must attest to, and confirm, that H-1B employees worked no more than 152 hours during each month. A copy of the attestations must be forwarded to the Employee Records Office, in the Workforce Development and Resources Section (WH 15E), on a monthly basis; at the end of the Furlough Period, the original attestation form must be transmitted to the Employee Records Office.

#### **9. How can I get my work done in only 152 hours per month?**

Concerns were expressed that H-1B employees would be unable to complete their work within the 152 hours per month limit. Similar concerns arose that those H-1B employees who complied with the limit would be viewed as “slackers” by colleagues or supervisors.

This possibility faces all Lab employees during the Furlough Period, not merely those in H-1B status. All work effort at the Lab during the Furlough Period will be affected. As a result, colleagues and supervisors within the Lab should understand, because they will be experiencing similar circumstances. As well, by requiring supervisors of H-1B employees to participate in monitoring work-hours, they should understand and appreciate the very real limitations.

#### **10. Why can't H-1B employees furlough like everyone else?**

The Law requires employers to pay H-1B employees wages for “nonproductive” time if the reason for the nonproductive time is related to the employment. This means that if H-1B employees take leave, the Lab still must pay them full wages. This defeats the purpose of the furlough requirement.

Also, the Law requires employers to provide H-1B employees the same wage rate and working conditions as all other comparable workers. This means that if all other exempt employees at the Lab work fewer hours, then H-1B employees also must work fewer hours.

But, even while working fewer hours, H-1B employees may not have more than 2 non-workdays per work-week. This is in contrast to other workers who get an entire week of furlough. The more consecutive time spent in nonproductive status, the more likely we are to trigger the requirement to pay wages. The Directorate has determined that 2 days of non-work per week is the acceptable threshold.

#### **11. Why can't the Lab just reduce H-1B employees' wages?**

If we reduce wages without reducing hours, it means that H-1B employees are working more hours than everyone else for a lower overall hourly wage *rate*. As mentioned, the Law requires employers to provide H-1B employees the same wage rate and working conditions as all other comparable workers. If you receive a reduced wage for “normal” hours, it means your wage *rate* is different (*i.e.* lower than everyone else). This would violate the law.

#### **12. So doesn't this mean the Lab must treat H-1B employees exactly like everyone else?**

H-1B legislation and regulations restrict employers from putting H-1B employees on unpaid leave. It does not restrict employers from taking any other necessary and lawful action to accommodate changed circumstances.

Ultimately, it is the H-1B legislation and regulations that mark H-1B employees for different treatment. By implementing the H-1B Policy, Fermilab is attempting to ensure that the required different treatment yields a result that is equivalent to the treatment received by all other employees – a reduction in overall hours and proportionate reduction in wages.

**13. Why can't the Lab just exempt the H-1B employees from the furlough entirely?**

It is the policy of the Lab that all employees\* share in the efforts to reduce Lab costs by participating in equivalent reductions in hours and thereby experiencing proportionate reductions in wages.

**14. But why does this mean H-1B employees must be "part-time"?**

Fermilab is changing the classification of H-1B employees from fulltime to part-time because of the reduction in monthly hours.

As background, the Fair Labor Standards Act (FLSA), the Department of Labor (DOL), Department of Energy Acquisition Regulations (DEAR), and Federal Acquisition Regulations (FAR), all use the premise that the "standard" fulltime work week is 40 hours, and that the standard fulltime work year comprises 2080 work hours.

The Laboratory's compensation policy, as approved by the DOE, also operates on the premise of a 2080-hour fulltime work year, comprised of fifty-two 40-hour work weeks.

In contrast, H-1B employees will work 152 hours per month, which averages to 35.35 hours per week. Under the Lab's compensation structure, this constitutes part-time employment.

Changing the definition of fulltime and part-time would affect many legal documents, contracts and plans, thereby requiring DOE approval. Such changes will not be made.

**15. How much are H-1B employees sacrificing, in comparison to everyone else?**

The standard work year is 2080 hours, based on 52 standard work weeks in the year, each of 40 hours.  $2080 \div 12 \times 8 = 1,368$  hours during the Furlough Period.

All other exempt employees must furlough for 1 week (40 hours) during each of 4 furlough cycles (each comprised of 2 months), yielding a total sacrifice of 160 hours and proportionate reduction in pay. 160 hours is 11.69% of the total 1,368 hours of the furlough period.

During the Furlough Period, H-1B employees must work 152 hours/month. For purposes of payroll and benefits, there are 4.3 weeks per month.  $152 \text{ hours/month} \div 4.3 \text{ weeks/month} = 35.35$  hours per week (on average).

- 40 hours – 35.35 hours yields a sacrifice of 4.65 hours per week, which is 11.63%.
- By comparison, all other exempt employees are sacrificing 11.69% of their time, which is 4.68 hours per week.

Thus, the sacrifice is roughly equivalent.

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\* except emergency-responders.

**16. How will you change my wages?**

Your annualized salary has not changed. Your annualized salary is the wage received during the normal work-year, comprised of 2080 hours, spread over 12 months.

However, your classification has changed, from fulltime to part-time. During February, each affected employee will receive a new payroll authorization, stating their part-time proportion of 88.4% (rounded from 88.36%) of the "normal" salary.

**17. How will you change me to part-time?**

A "Labor Condition Application" was submitted to the Department of Labor (DOL) on January 30, 2008, changing your wage rate to hourly and changing your classification from fulltime to part-time. This was certified the same day, and effective February 1, 2008.

During February, the Visa Office will file "Amending" Petitions that notify the U.S. Citizenship and Immigration Service (USCIS) of the change. The USCIS will take roughly 4 to 6 months to review and approve these petitions (based on current processing times). Because these petitions merely notify the USCIS of changes already certified by the DOL, we need not wait for approval before implementing the wage rate change. The filing, pending and review by the USCIS of these petitions do not affect the validity of your current H-1B approval or H-1B visa.

**18. Is that all you will be doing when you file the petitions?**

When we file the petitions with the USCIS, we will be requesting extensions of status to the maximum extent possible for your situation under applicable H-1B regulations.

For example, Term employees will be extended to the end of their current Term, while H-1B employees in "post-6<sup>th</sup>" year H-1B status (when only 1-year extensions are possible) will be extended for an additional year. Our goal is to eliminate another filing within the near future.

**19. Will fulltime classification be restored at the end of the furlough period?**

Yes. When the Furlough Period ends, payroll authorizations indicating the return to fulltime also will be issued.

**20. What about my family?**

The status of H-4 dependents arises from their relationship with you. The filings with DOL and USCIS will not affect the validity of their H-4 status or H-4 visas.

Because we are seeking extensions of status at the same time, your family members temporarily will have different expiration dates than you. We will make every effort to prepare the necessary extensions applications for them after we have finished all the necessary paperwork for H-1B employees.

As you know, Fermilab does not pay the filing fees for H-4 applications. Before we file such applications, therefore, we will need payment from you. We understand that this is a sizeable filing fee at the same time as a sizeable reduction in your wages. If you do not want to extend your family members' H-4 status at this time, that is your choice, but the Visa Office strongly recommends that you facilitate the filing of this application in the near future. It is very easy to lose track of dependent family member's expiration dates. Ultimately, please remember that it is your responsibility to track their expiration dates. The Visa Office is not responsible for the status of dependents.

**21. Must I get another visa to “trigger” the change?**

No. The change in classification from fulltime to part-time has already occurred. We filed Labor Condition Applications requesting the change on January 30, which were certified the same day, and the change is effective February 1, 2008. You do not need to obtain a new H-1B visa, re-enter the U.S. or do anything else.

**22. Is my current H-1B visa invalid?**

Your current H-1B visa is not affected by the new LCA or amended petition. You may use your existing and unexpired H-1B visa to travel outside the U.S. as you wish. You may enter the U.S. using the visa up to and including the last day of its validity.

**23. May I travel while the paperwork is pending approval from the USCIS?**

Yes.

If you have an unexpired H-1B visa, you may travel using it for as long as it is valid.

If you do not have a current valid H-1B visa, or if your current H-1B visa will expire within the next six months and you need to travel outside the U.S. after it expires, you will need to obtain a new H-1B visa before you re-enter the U.S. To do so, you will submit to the U.S. Consulate as part of your visa application: the existing H-1B approval, the receipt from the H-1B amending petition filing, a copy of the amending petition, and an Employment Confirmation letter from the Visa Office. This will be sufficient for the issuance of the H-1B visa.

Neither the H-1B approval notice nor the H-1B visa indicate your wage rate or whether your employment is fulltime or part-time.

**24. Is Fermilab still sponsoring employees for permanent residence?**

The furlough will not affect the Visa Office's permanent residence caseload. We intend to continue to prepare and file Labor Certifications and/or Form I-140 immigrant petitions on behalf of qualified foreign nationals. If you have been contacted by the Visa Office to begin the permanent residence process or are already have paperwork being prepared or filed, the furlough will not affect you. Please note that the Lab has a backlog of such cases, and so if the Visa Office has not yet contacted you, please be patient until we do so.

**25. Does the change from fulltime to part-time affect my eligibility for permanent residence?**

No. H-1B petitions focus solely on “now.” Permanent residence petitions focus on the future – the situation that will exist at the time the greencard is issued. Your temporary change to part-time classification is irrelevant to your permanent residence process.

**26. I am nearing the end of my permanent residence process. What do I say when I go for an Adjustment Interview and they ask me about whether I have a fulltime job offer?**

The permanent residence process focuses on your employment after the greencard is issued, not your employment during the interview. Once the greencard is issued, you are no longer an

H-1B status holder, and your part-time classification would end. Accordingly, as has always been the case, Fermilab will continue to provide H-1B non-Term employees with "Confirmation of Employment" letters for adjustment interviews. These letters confirm your job title, provide a general description of your job, state your annualized salary, and confirm that your employment will be fulltime. These letters satisfy USCIS requirements.

**27. I am an H-1B status holder – can I undertake alternate means of raising additional money, such as renting my home?**

Yes, as long as it does not involve outside employment or breaking any laws. (See Question #4 above discussing outside employment.)

**28. Are my Long Term Disability benefits being eliminated?**

No.

Fermilab's LTD contract with the insurance carrier limits coverage to fulltime employees. Normally, therefore, Fermilab's part-time employees are not eligible for LTD coverage. However, in response to concerns expressed, the Benefits Department has negotiated an amendment to this contract to extend coverage to H-1B part-time employees during the Furlough. LTD coverage therefore will continue uninterrupted for part-time H-1B employees during the Furlough.

**29. Is my Leave accrual and usage being affected?**

No.

Normally, paid Leave accrues in proportion to the employee's work-time, which then would mean that part-time H-1B employees would accrue leave at a lower rate. However, the Benefits Department has gained approval for retroactive amendment of vacation and sick leave accrual rates. Vacation and sick leave accrued during the furlough will be adjusted after the furlough ends (due to payroll requirements) to represent accruals based on full-time employment. Therefore, although accruals will be delayed, H-1B employees will not lose them.

Similarly, vacation and sick leave used during the furlough that was accrued while classified as fulltime will be adjusted after the furlough ends (due to payroll requirements) to represent usage based on full-time employment. Therefore, although adjustment will be delayed, H-1B employees will not lose any paid leave (vacation or sick time).

**30. I am in J or F status now but will need to change to H-1B status. What happens?**

If you are running out of time on your J or F status, then we must change you to another work-authorizing status, which usually will be H-1B status.

For as long as you hold a status other than H-1B, you will furlough like all other employees. As soon as H-1B status is effective, then you will be subject to the H-1B Policy. The Visa Office can advise you specifically as to when your H-1B status will be effective. We will request H-1B effective dates to coincide with the beginning of a 2-month furlough cycle.