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Bill Ritter, Jr.
Governor

D 2010-001

EXECUTIVE ORDER

Declaring Insufficient Revenues Available for Expenditures and Extending Executive Orders D 015 09 and D 024 09 Ordering Mandatory Furloughs for Certain State Employees

Pursuant to the authority vested in the Office of the Governor of the State of Colorado, and in particular section 2 of Article IV of the Colorado Constitution and section 24-2-102(4) of the Colorado Revised Statutes, I, Bill Ritter, Jr., Governor of the State of Colorado, hereby issue this Executive Order declaring that there are insufficient revenues available for expenditures and extending Executive Orders D 015 09 and D 024 09 ordering mandatory furloughs for certain state employees.

I. Authority

Section 2 of article IV of the Colorado Constitution vests in the Governor the "executive power of the state." The authority and responsibility vested in the Governor under this provision includes the "executive authority to allocate staff and resources" and to closely supervise appropriations made by the General Assembly. *General Assembly v. Owens*, 136 P.3d 262, 266 (Colo. 2006); *see also Anderson v. Lamm*, 579 P.2d 620, 623-24 (Colo. 1978). Ordering mandatory furloughs to reduce personal services expenditures in order to meet a revenue shortfall is squarely within the Governor's authority under this provision of the Constitution. Indeed, the authority of the Governor to order mandatory furloughs under this provision of the Constitution was confirmed in a formal opinion issued by the Attorney General on July 16, 2009. *See* Attorney General Opinion No. 09-05.

In addition, section 24-2-102(4) of the Colorado Revised Statutes provides that "[i]f, during any fiscal period, there are not sufficient revenues available for expenditure during such period to carry on the functions of the state government and to support its agencies and institutions and such fact is made to appear to the governor, in the exercise of his discretion, by executive order, he may suspend or discontinue, in whole or in part, the functions or services of any department, board, bureau, or agency of the state government . . . ." This statutory authority to order a partial shutdown of government services provides an additional and independent basis for the Governor to order mandatory furloughs of state employees in the current budgetary environment. The duration of a partial shutdown ordered pursuant to C.R.S. § 24-2-102(4), however, is limited to three months. *See* C.R.S. § 24-2-102(4).

II. Background and Purpose

In August 2009, I issued Executive Order D 015 09, ordering two mandatory furlough days and identifying two more days that would be ordered before the end of calendar year 2009. In that Executive Order, I indicated that additional mandatory furlough days beyond the four identified in that Executive Order were a very real possibility. Based upon the September 2009 economic forecast, the State had to close an additional budget shortfall of $250 million in fiscal year 2009-10, beyond the $384 million budget gap that we closed in August 2009. In light of the September forecast, in October 2009, I declared that total of eight mandatory furlough days would be ordered in order to meet a portion of the revenue shortfall in fiscal year 2009-10, and to that end I issued Executive Order D 024 09, identifying the six remaining furlough days and ordering the furlough days for November and December 2009 and January 2010. The budget situation that necessitated the previous five furlough days persists. As set forth in Executive Order D 024 09, the three remaining mandatory furlough days will be as follows:

- Friday, February 12, 2010;
- Friday, April 2, 2010; and
- Friday, May 28, 2010.

Because section 24-2-102(4) of the Colorado Revised Statutes provides an independent basis for ordering these furloughs and that provision only authorizes this Order to be in effect for three months, this Order is limited to the February and April 2010 furlough days; the May 2010 furlough day will be the subject of subsequent Executive Order that will be issued in April 2010.

As was the case with the earlier round of mandatory furloughs, there are state employees who will be exempt from the mandatory furlough requirement. In crafting the exemptions, we endeavored to balance fairness and equity with the need to ensure that essential round-the-clock services and services in high-demand because of the economic downturn are not disrupted. A description of the positions that will be exempted from mandatory furloughs is set forth in the Directives section below. In addition, the State constitution vests management of the Judicial and Legislative branches in the heads of those branches, and State law vests management of the State's institutions of higher education in the leaders of those institutions. Therefore, employees of those branches and at higher education institutions will be exempt from the furloughs ordered by this Executive Order. Moreover, in deference to the other statewide elected officials, the departments of Law, State, and Treasury are exempted from this Executive Order. At this time, it is anticipated that those branches, institutions, and departments will meet the budget cuts required by the revenue shortfall utilizing appropriate budget-cutting measures.

In addition, some offices cannot be entirely shut down on a designated mandatory furlough day without imposing a substantial hardship on or adversely impacting the

health or safety of the citizens of the State or because doing so would substantially impair the ability of the office to meet its legal obligations. Because of these limitations, I am granting each Executive Director the flexibility to determine whether it is necessary and in the best interest of the State to permit certain employees subject to mandatory furlough to take their furlough days on days other than those designated above. Although this exemption will be sparingly invoked, such flexibility is necessary to ensure that the State continues to meet its obligations during the furloughs. Those employees occupying positions that cannot be furloughed on the designated furlough days will take their furlough days on alternative dates determined by the Executive Director of the respective employee's department.

III. Directives

A. I hereby find that during fiscal year 2009-10 there are not sufficient revenues available for expenditure to carry on the functions of the state government and to support its agencies and institutions such that mandatory furloughs of certain state employees are necessary.

B. I hereby order that state employees in departments and offices subject to this Executive Order, subject to the exemptions and conditions set forth below, shall take two mandatory furlough days without pay during the effective period of this Executive Order.

C. For full time employees, each mandatory furlough day required by this Executive Order shall be for an eight-hour work day; for part-time employees, the mandatory furlough day required by this Executive Order shall be proportionately adjusted (e.g., a half-time employee must take four hours of unpaid furlough time, a three-quarters-time employee must take six hours of unpaid furlough time).

D. To the extent practical, all employees subject to mandatory furlough under this Executive Order shall be furloughed on Friday, February 12, 2010 and Friday, April 2, 2010. Because certain offices and divisions of State government are not able to entirely shut down on a designated day without imposing a substantial hardship on the citizens of the State or because doing so would substantially impair the ability of a department, division, or office to meet its legal obligations, I hereby grant each Executive Director of an affected department the authority to determine, in the exercise of his or her discretion, that it is necessary and in the best interest of the State to permit certain employees subject to mandatory furlough under this order to take such furlough day on a day other than Friday, February 12, 2010 and/or Friday, April 2, 2010. Upon such a determination, those employees occupying positions that cannot be furloughed on one or more of the designated furlough days or who would not normally work on such day or days, shall take alternative mandatory

unpaid furlough days between the date of this Executive Order and April 30, 2010, on days determined by the Executive Director of the employee's department; however, Executive Directors may not require an employee to take more than one mandatory furlough day during any calendar month or during any single pay period.

E. Subject to the exemptions set forth below, the mandatory furlough ordered in this Executive Order shall apply to all state employees in all offices in the Governor's Office, the Lieutenant Governor's Office, and all employees in the following departments: Department of Agriculture; Department of Corrections; Department of Education; Department of Higher Education; Department of Health Care Policy and Financing; Department of Human Services; Department of Labor and Employment; Department of Local Affairs; Department of Military and Veterans Affairs; Department of Natural Resources; Department of Personnel and Administration; Department of Public Health and Environment; Department of Public Safety; Department of Regulatory Agencies; Department of Revenue; and Department of Transportation.

F. The following is a general description of the state employees who are exempt from the mandatory furloughs:

1. Department of Corrections: designated correctional officers, food service employees, and clinical services personnel who are necessary to ensure the safe and continuous operation of state correctional institutions.

2. Department of Education: designated employees working at the Colorado School for the Deaf and Blind who are necessary to ensure the safe continuous operation of the school and compliance with the Individuals with Disabilities Education Act and Americans with Disabilities Act.

3. Department of Human Services: designated employees providing patient care, nursing care, mental health services, youth correction services, food and health services, and custodial services at 24-hour and residential facilities; designated employees working in 24-hour shift positions at 24-hour facilities; and employees performing Social Security Disability determinations.

4. Department of Labor and Employment: designated employees involved in administering unemployment compensation and workforce programs.

5. Department of Military and Veterans Affairs: designated air traffic controllers necessary to ensure continuous and safe operation of the Buckley Air Force Base and the Air Sovereignty Alert Mission of the 140th Wing, Air National Guard patrol officers who are necessary to provide security for the Greeley Air National Guard Station; and designated transportation maintenance personnel necessary to provide equipment and road maintenance for the safe and continuous operation of Buckley Airfield.

6. Department of Public Health and Environment: designated laboratory employees necessary to ensure continuous operation and prompt turnaround in laboratories that test for environmental contamination, communicable disease, inherited metabolic diseases in newborns, and drug and alcohol use; designated employees who perform testing and certification of evidential blood alcohol testing equipment; home healthcare and health facility inspectors necessary to ensure that the State inspects facilities with the frequency required under federal law; and designated employees whose job duties involve H1N1 flu monitoring, prevention, and/or response.

7. Department of Public Safety: Colorado State Patrol (CSP) officers with the rank of Sergeant and below; designated security officers within the CSP Capitol and Executive Security unit; CSP Communications Officers and Communications Supervisors; designated Colorado Bureau of Investigation (CBI) Identification Unit Data Specialists and Fingerprint Examiners; designated CBI Network Operation Center staff necessary to ensure the continuous operation of the Colorado Crime Information Center network.

8. Department of Revenue: designated lottery employees and support personnel who are necessary to administer lottery drawings in compliance with state law; designated port of entry employees who are necessary to ensure the continuous and safe operations of the ports of entry; and designated Communications Center employees who are necessary to provide support to law enforcement verifying identification documents and vehicle registrations.

9. Budget Staff: designated budget staff in the Office of State Planning and Budgeting and the covered Departments who are necessary to prepare the fiscal year 2010-11 budget submission. Designations pursuant to this paragraph F(9) shall be made by the Director of the Office of State Planning and Budgeting or the Executive Director of the covered department prior to the furlough day designated for any such exempted employee.

10. Elected officials whose salaries, pursuant to the State constitution, cannot be adjusted during their terms in office. *See* Colo. Const. art. IV, § 19.

G. Paragraph III(G) of Executive Orders D 015 09 and D 024 09 set forth the process for departments to designate employees exempt from the mandatory furloughs, as well as the process for amending such designations. The most recent exemption designations provided under paragraph III(G) of Executive Order D 015 09 or paragraph III(G) of Executive Order D 024 09 shall remain in effect with respect to the furlough days required by this order. Moreover, Executive Directors of departments subject to this Executive Order, in consultation with and subject to the approval of OSPB, may modify the list of positions exempt from the furloughs from time-to-time in order to adapt to changes in the workforce, including but not limited to reassignments, separations, and new hires.

H. Employees who have responsibilities in the event of an emergency, including but not limited to employees in the Division of Emergency Management or in the Department of Public Health and Environment, may be called to duty on a mandatory furlough day in the event that an emergency arises on such day. In such an event, the employee shall arrange with the Executive Director of his or her department to take an alternative mandatory furlough day.

I. In implementing and administering the mandatory furloughs required by this Executive Order, departments and offices subject to this Executive Order shall abide by all applicable State and federal laws and regulations, including but not limited to the Fair Labor Standards Act.

J. The Colorado Constitution and Colorado statutes provide the grounds for a grievance or appeal of an adverse employment decision. This Executive Order neither expands nor diminishes those grounds for a grievance or appeal. Specifically, decisions made in connection with implementing this Executive Order, including but not limited to determinations regarding which positions are and are not exempt from mandatory furlough and whether and when to require employees to take alternative furlough days, are not subject to review or appeal, except for claims of discrimination, whistleblower, or those claims expressly provided a right of appeal or hearing in the State Constitution or under State statute. Should an employee believe that he or she has an appealable or grievable claim in connection with this Executive Order and should an employee wish to pursue it, the employee must follow the procedures set forth in the State Personnel Board Rules, including Personnel Board Rule 8-8, which

provides that "an employee must initiate the grievance process within 10 days of the action or occurrence being grieved."

K. The State Personnel Director is hereby ordered and authorized to issue technical guidance to departments with respect to implementing and administering the mandatory furloughs required by this Executive Order.

IV. Duration

Executive Order D 024 09 remains in full force and effect. This Executive Order shall take effect on February 1, 2010 and remain in force until April 30, 2010, unless modified or rescinded by future Executive Order of the Governor.

GIVEN under my hand and the Executive Seal of the State of Colorado this twenty-eighth day of January, 2010.

Bill Ritter, Jr.
Governor