



# Layoffs, Furloughs, & Concessions - Negotiating in Challenging Times

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# Layoffs – Why Are They Sometimes Necessary?



# Introduction

- Tough times sometimes call for tough measures.
- **Layoff** is an involuntary separation of employment. (a/k/a reduction in force)
- Distinguished from **furlough**: Negotiated reduction of hours of work with a corresponding reduction of pay.



# When Is a Layoff Triggered?

- The agency has determined that it will reduce the current workforce by separation from service
- Lack of work
- Lack of funds



# Lack of Work

A reduction in the need to perform a service, which previously was provided by the agency.

- Agency is closing its Senior Center indefinitely. Senior Center staff have no work.
- Agency implemented a hiring freeze and is restructuring HR services. The HR analyst who reviewed resumes has no work and no role in the reorganized department.



# Lack of Funds

The agency's revenues have decreased, so it has fewer funds to continue paying agency expenses. Therefore, it has to reduce expenditures.

- The agency cannot offer classes or facilities rentals because of COVID-19 related public health orders. It has less revenue than budgeted. Positions that are funded by those revenue streams are impacted.
- The new budget projects double-digit drops in sales, transit occupancy, and property tax revenues. The agency cannot or is not willing to dip into its reserves to cover the loss.



# Rules Governing Layoffs for MMBA Agencies



# Sources of Rules

- Memorandum of understanding with affected labor group
  - Did the agency agree to a no-layoff provision in the current MOU?
- Prior layoff policy or plan
- Personnel rules / ordinances / handbooks
- General law cities: Govt. Code sec. 45100





# Common Issues

- Ensure the agency complies with any layoff procedures
- Notice
  - How much advance notice is required?
  - How is the agency required to notify the union and employees?
- Seniority list
  - Agency staff have to prepare the list
- Bumping rights and tie-breakers
- Due process



# Layoffs - Notices

- Reason for layoff: Lack of work? Lack of funds?
- Explain basis for the layoff (As a result of COVID-19 pandemic, agency has experienced a significant reduction in work/revenue)
- Identify how many positions
- Identify which positions
- Set effective date that comports with local rules
- Invite labor group to meet and confer to discuss potential impacts within the scope of bargaining
- Establish deadline for labor group to schedule the meet and confer



# Layoffs - Duty to Meet and Confer



# Layoffs - Duty to Meet and Confer

- Deciding whether to implement a layoff is a management right
  - *IAFF, Local 188 v. PERB* (2011) 51 Cal.4<sup>th</sup> 259, 277
- UNLESS the agency agreed to a no-layoff provision in the current MOU
- Also, the decision to contract out bargaining unit work is negotiable



# Layoffs - Duty to Meet and Confer

- Agency must meet and confer over impacts that are within the scope of bargaining
  - *IAFF, Local 188 v. PERB (2011) 51 Cal.4<sup>th</sup> 259, 277*
  - *Salinas Valley Memorial Healthcare System (2012) PERB Dec. No. 2298-M*



# Layoffs - Common Impacts

- Timing of the layoff
- Identifying which employees are laid off
  - Order of layoff is negotiable, but general law cities must follow seniority
- “Bumping” rights
- Transfer to vacant positions
- **Severance payments to laid-off employees**



# True or False?

The city has 15 Park & Recreation Coordinators. It decided to stop providing services at one of its community centers where the same 4 coordinators have worked for the last twenty years. The 4 coordinators who work at the closing community center are the individuals who will be laid off.

**FALSE**



# Layoffs - Common Impacts

- Reemployment or Recall rights
  - Order of reemployment
  - Seniority if reinstated
  - Duration of list
- Status of benefits at separation
- Due process to challenge layoff
  - *Levine v. City of Alameda* (9<sup>th</sup> Cir. 2008) 525 F.3d 903





# Case Study – Due Process

An employee receives a layoff notice, pursuant to the negotiated notice process for his bargaining unit. He contacts agency management and asks for a hearing regarding his layoff, because he believes his layoff is pretextual because he complained about his supervisor. What, if any, process should the agency provide?



# Layoffs - Additional Impacts

- Labor groups will often consider concessions or other changes to the MOU to prevent or limit layoffs
  - Furloughs may be considered – these must be negotiated, unlike layoffs
- Additional impacts for laid off employees:
  - Overtime for remaining employees
  - Early retirement incentive
  - Accrual payouts
- Additional impacts for remaining employees:
  - Change in reporting structures for remaining employees
  - Consolidated job duties for remaining employees
  - Change in work expectations for remaining employees



# Layoffs - Practical Challenges



# Steps to Prepare for Layoffs

1. As soon as the need for layoff is evident, assemble the right team
  - Executive management
  - Finance
  - Human Resources
  - Affected department(s)
  - Labor relations / legal



# Steps to Prepare for Layoffs

2. Establish the data that demonstrates the need for layoffs

- No more services or loss of revenue

3. Demonstrate that the agency looked at alternatives to layoffs

- Non-personnel cost-saving measures
- Hiring freezes
- Concessions (including furloughs)



# Steps to Prepare for Layoffs

4. Establish a seniority list and identify which employees will be laid off according to the applicable rules – EERR, MOU, etc.
5. Timely notify the labor group
6. Invite the labor group to meet and confer over impacts that it identifies



# Steps to Prepare for Layoffs

7. Keep your governing body aware and ensure they follow the Brown Act, and best practices for communications with represented employee groups

8. Ensure consistent communication protocols throughout the process



# A Word About the Brown Act

The decision to lay off is not covered by an exception to the open meeting rules of the Ralph M. Brown Act. (See Govt. Code sec. 54957.6)

Discussion of the agency's position on the reasonably foreseeable impacts or effects that the union may wish to negotiate, may be allowed in closed session.





# Furloughs – Issues to Consider



# Furloughs

- FLSA – exemption lost during furloughed work week
- Unemployment insurance
- Reduced work year
  - Holidays as unpaid – sworn and non-sworn or holiday closure
- Reduced work week
  - Alternating schedules or limited hours
- Workload issues
- Impact to public services
- Potential impact to service credit, final compensation and employer contributions



# Alternatives to Furloughs and Layoffs

- Reduction of staff via attrition/hiring & promotion freeze
- Early retirement incentives
  - Gov. Code §§ 20903 & 20909
  - Continue health insurance benefits
  - Severance (consider whether gift of public funds?)
  - Compliant with ADEA, OWBPA and FEHA



# Concession Bargaining



# Concession Bargaining - Preparing to Bargain

- Formulate strategy & start early
- Legal and bargaining considerations
  - Bargaining statute (MMBA, EERA)
  - Terms of effective bargaining agreements
    - In contract vs. out of contract?
    - Zipper clause?
  - Internal rules and procedures



# Sample Zipper Clauses

Ex.: It is agreed and understood between the parties that during the term of this Agreement, all existing working benefits and conditions shall remain in full force and effect. It is further agreed and understood that each party hereto voluntarily and unequivocally waives its rights to negotiate, and agrees that the other party shall not be required to negotiate, with respect to any matter covered herein during the term of this MOU, except as provided by this Agreement or through mutual agreement.



# Sample Zipper Clauses

Ex.: Certain past practices may be identified during the term of this MOU which should have been included but, due to inadvertent omission, are not set forth herein. Mutual agreement shall be necessary to implement changes to such past practices. All other practices and policies affecting wages, hours and working conditions may be changed only after the parties meet and confer. However, neither party may compel the other party to negotiate regarding proposed changes to any matter within the scope of bargaining during the term of this MOU.



# Preparing to Bargain

## Gather Documents Demonstrating Fiscal Challenges

- Lack of work/closure of services
- Budget revisions
- Revenue/expenditure data
  - Actuals vs. Projections
- Short-term (i.e., cash flow) vs. Long-term (i.e., CalPERS)
- Reserve policy/GFOA guidelines





# Preparing to Bargain

## Labor Costing Information

- Costing info. by position and by cost-type (by bargaining unit) & specific to proposal
  - Freeze leave cash out programs
  - Suspend tuition reimbursement program
  - Freeze merit/step increases



# Preparing to Bargain

## Information Requests

- Anticipate types of information labor may request pertinent to proposals
- Understand labor's right to receive "relevant and necessary" information
- Operate under reasonable timeframes and deadlines
- Organize and coordinate responses



# Preparing to Bargain

## Establish Timeline for Bargaining

- Work backwards from implementation date
- Assume fact-finding
- Explicit about effective date for savings in proposals
- Zoom vs. in-person negotiations



# Concession Bargaining: Guidelines

- Accentuate the positive
- Initially offer voluntary options
- Highlight opportunities for transfer, training, bumping, etc.
- Identify services available from employee assistance program



# Concession Bargaining

- Anticipate potential union counters
  - Cost-cutting/reduction of services in other areas
  - Eliminating contracts with outside vendors
  - Parity with other bargaining groups
  - No layoff agreement
  - Quality of life improvements (e.g., telework)



# Case Study: What Would You Do?

A union comes to the second negotiation session on concessions. It brings a detailed list of cost-saving ideas that can be used as alternatives and wants to go through each item with you. The union asks to understand why these ideas can't be implemented instead of reductions to their pay and benefits. Here are some examples from the list:

- Eliminate city provided doggie bags in all city parks - \$52,000/year
- Eliminate meals provided to council members before council meetings - \$2,800/year
- Eliminate the 4<sup>th</sup> of July city event and fireworks show - \$225,000/year



# Thank You!

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