

Another Wave of COVID-19 Personnel Considerations

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Since the start of the COVID-19 (coronavirus) pandemic, many municipal employers across the Commonwealth of Pennsylvania have engaged in an extraordinary juggling act between fighting the spread of coronavirus in the community and workplace, maintaining public services and continuing to pay employees full salary even as they work reduced schedules. While some municipalities may plan on continuing such efforts in the short term, the sustainability of this arrangement will be questioned as municipal tax revenue declines. Municipalities need to be proactive in identifying cost savings through a reduction of services, expenses and personnel. If municipalities decide to reduce services and/or staff, they must comply with an assortment of laws and obligations relating to pay, collective bargaining and employee benefits.

Initially, a municipality will have to decide whether to layoff or furlough employees. Although the terms are often conflated, the terms are different. Typically, a furlough is considered to be less harsh than a layoff because it often involves a reduction of pay based on working fewer hours or days in a work week or requiring an employee not report to work (and thus not be paid) for a designated temporary period of time. An employer can furlough all employees or only those deemed to be non-essential for the immediate future needs of the employer provided such furloughs do not violate anti-discrimination statutes or collective bargaining agreements.

Issues arise when furloughing (or laying off to a lesser extent) exempt employees under the Fair Labor Standards Act (FLSA). The FLSA requires that exempt employees be paid the same minimum salary for each pay period. If an exempt employee performs *any* work during a workweek, that exempt employee must receive their entire salary that week subject to the leave policies and practices of the governmental employer. The failure to compensate an exempt employee for a week where any work is performed may jeopardize that employee's exempt status. If an employer furloughs an exempt employee for an entire workweek, however, no salary is owed for that full week and the employee's exempt status is not affected. For exempt employees, it is recommended that furloughs occur in full work week increments subject to the terms of a collective bargaining agreement.

For non-exempt employees who are not covered by the terms of a collective bargaining agreement, employee work schedules can generally be altered without FLSA liability concerns. In addition, employers do not need to pay non-exempt employees (who are not subject to a collective bargaining agreement) for time not worked except as is required by the Families First Coronavirus Response Act.

While a layoff is typically considered indefinite, it can be permanent. A laid off employee is often subject to recall if work becomes available within a certain period of time after the layoff according to the terms of a policy or collective bargaining agreement.

Regardless of whether a municipality implements a furlough or layoff, it must comply with the terms of any applicable policy for non-unionized employees or a collective bargaining agreement for unionized employees. Before making a decision to layoff or furlough employees, municipalities must work with labor counsel to carefully review all terms of any applicable policy

or collective bargaining agreement to determine what, if any obligations apply. For example, collective bargaining agreements can impose notice requirements, meet and discuss and bargaining obligations, a limitation on the circumstances under which such decisions can be made, or an obligation to pay employees or continue healthcare during any portion of a furlough or layoff. Such obligations factor not only into the implementation of a layoff or furlough decision but also the cost effectiveness of such a decision.

Even if the applicable collective bargaining agreement contains no such restrictions, bargaining units should be given advanced notice, if possible, of employee furloughs and layoffs for the purpose of requesting impact bargaining over the effects of the decision. Under certain limited circumstances, the federal WARN Act may apply, requiring advanced notice of a mass layoff. Generally, local governments are not subject to the WARN Act's requirements, but they may be covered where they engage in commercial activities like running a transit system, housing authority or water authority. The WARN Act can be an intricate analysis and the failure to comply with the WARN Act can be very costly so municipalities must discuss this issue with labor counsel before a layoff decision is made.

If an employer either furloughs or lays off employees, unemployment benefits may be available to such employees, as the Pennsylvania Unemployment Compensation Act provides eligibility for full-time employees whose regular hours of work are reduced. This is another issue that should be considered before the decision is made.

A layoff or furlough will also trigger an employee's right to continue his or her healthcare under the requirements of the Consolidated Omnibus Budget Reconciliation Act (COBRA), which is a federal law that will allow a separated employee to temporarily keep health coverage after his or her employment ends or some other qualifying event occurs. If elected, COBRA requires the employee to pay up to 102% of the premiums, which includes a small administrative fee.