

Chapter 3

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This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

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Chapter 3

Discipline, Termination, Resignation and Retirement

Understand the laws, practices and policies a city should consider at the end of an employment relationship through resignation, retirement or involuntary discharge.

RELEVANT LINKS:

HR Reference Manual,
[Chapter 1.](#)

Section III-C-4, *Legal
Concerns.*

HR Reference Manual,
[Chapter 6.](#)

HR Reference Manual,
[Chapter 1.](#)

I. Applicable state and federal laws

There are a number of ways in which an employment relationship ends, but the three most common ways are resignation, retirement, and involuntary discharge. In each of these situations, there are a variety of laws, practices, and policies the city will want to consider. Situations involving involuntary discharge, however, are the most complex and the most likely to result in legal problems for the city. A city needs to be aware of the many state and federal laws affecting all aspects of the employment relationship, including end-of-employment requirements and sometimes continuing employer obligations in a post-employment relationship. Applicable state and federal laws for various points in the process of separating from employment are discussed within City Employment Basics Chapter of the HR Reference Manual, including, but not limited to, employment at-will protections and limitations, laws prohibiting discrimination and harassment, severance pay limitations, benefits continuation, required leaves, and laws governing the employment relationship.

A. Labor laws

A city should apply the same general principles when taking disciplinary action against an employee who is a member of a union as they would a nonunion employee. The primary difference between discipline and discharge of a union member versus a nonunion member is the union member has automatic access to a grievance procedure, binding arbitration, and representation by the union at no cost to the employee. Union employees, therefore, have little incentive not to use available grievance and arbitration remedies.

B. Civil service

Civil service rules may dictate the methods by which a city administers discipline to employees, including the circumstances that must be present to recommend an employee be terminated.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

HR Reference Manual,
[Chapter 6](#).

Section VI, *Separation
checklists*.

State v. Williams, 180 Minn.
157, 230 N.W. 633 (1930).

[Minn. Stat. § 268.095, subd.
2\(d\)](#).

HR Reference Manual,
[Chapter 1](#), see section IV-E-
[3-b Vacation payouts at
termination](#) & 4-b, Common
sick leave practices.

Section VI-D-3,
*Vacation/Annual Leave/PTO
Payout*.

C. Minnesota Public Employment Labor Relations Act (PELRA)

In matters of discipline and termination, the Minnesota Public Employment Labor Relations Act (PELRA) provides certain remedies for employees covered by a collective bargaining agreement.

II. Resignation

This section of the manual discusses several types of resignations and some key considerations associated with each of them. It also discusses steps the city should take in case of the death of an employee.

A. Accepting and documenting a resignation

Unless a specific statutory or charter requirement specifies otherwise, an employee's resignation takes effect as soon as it reaches the appointing authority. The employee may not later withdraw the resignation unless the city agrees to allow him or her to do so.

A supervisor of a city employee may accept the resignation of an employee he or she supervises without further action of the city council. However, it is a good practice to have the city council confirm the decision in cities where only the city council has the authority to hire and fire employees.

B. Resignation in good standing

It is common for cities to have a resignation or termination policy stating employees must provide a written resignation and a certain period of notice (e.g., two weeks, one month) in order to leave the city in good standing. A city's vacation policy, not statute, covers what, if any, unused vacation or PTO leave will be paid to the separating employee. Based on a 2021 Supreme Court case, some standard employee handbook disclaimers may not be enough to rely on to prohibit PTO balance payouts for separating employees. Specifically, in the event of an employee separation and an associated employee's failure to provide sufficient notice to the city to qualify for the payout on the employee's leave balance, it is important to consult the city attorney regarding accrued leave payouts. Some standard employee handbook introductory disclaimers can be viewed as lacking in precision so a more detailed explanation of when accrued leave payments will not be made upon separation is highly recommended. For additional information on payouts at separation, please see the section referenced on the left.

RELEVANT LINKS:

[Minn. Stat. § 13.43.](#)

[Minn. Stat. § 13.43, subd. 2.](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(6\).](#)

[Minn. Stat. § 13.43, subd. 2\(e\).](#)

[DPO 12-006.](#)

[Pribil v. Archdiocese of St. Paul and Minneapolis](#), 533 N.W.2d 410 (Minn. Ct. App. 1995).

[Continental Can Co. v. State](#), 297 N.W.2d 241 (Minn. 1980).

C. Resignation in lieu of discharge

In certain situations, a city may provide an employee who would otherwise be terminated with the opportunity to resign his or her position with the city.

A key advantage of a resignation is the Minnesota Government Data Practices Act protects most of the information surrounding a resignation as private data (not available to the public).

Conversely, much of the information related to a discharge or an involuntary termination is available to the public and, therefore, available to any potential future employer. It is important to note the MGDPA makes public the complete terms of settlement agreements. For settlements for more than \$10,000, the specific reasons must be included within the agreement as well. Additionally, a resignation of a “public official,” which includes higher-level positions in cities with a population of more than 7,500, can be tricky, so a city entering into a separation agreement or accepting the resignation of a higher-level employee should seek legal advice on the appropriate data classifications.

Some of the reasons a city might offer resignation in lieu of discharge include:

- The city and the employee don’t really have a bad relationship, but the requirements of the position and the skills and abilities of the employee are not a good match.
- The employee has been a solid employee but has done something for which the city’s policy indicates he or she must be terminated from employment.
- The city wishes to negotiate a termination agreement with the employee but does not want to expose the city to post-termination proceedings or litigation.
- Performance indicates the employee should be terminated, but the city does not wish to leave future employers with the impression the discharge was for reasons of misconduct.

D. Constructive discharge

A constructive discharge is a situation in which the employee resigns, but in doing so alleges the city permitted such intolerable conditions in the workplace that any reasonable person subject to them would resign.

Situations resulting in a charge of constructive discharge may come about in a variety of ways. One example occurs when an employee experiences harassment, whether general or sexual, in the workplace.

RELEVANT LINKS:

Hall v. Gus Const. Co., Inc.,
842 F.2d 1010 (8th Cir.
1988).

The employee may or may not have reported said harassment to anyone, but believes the city knew or should have known about these events. The employee alleges the city has done little or nothing to address this situation. The city's inaction allows the harassment to continue resulting in an intolerable work environment and the employee resigns.

Most commonly, an allegation of constructive discharge would be brought to the city in the form of a lawsuit. It is important to promote a safe and healthy work environment, free from illegal discrimination and harassment, both through policy and practice, to avoid such claims.

To avoid constructive discharge claims, it is advisable for the city to take actions to the extent possible and appropriate to resolve work-related differences. Sometimes those efforts are unsuccessful but that does not necessarily mean an employee will be able to successfully make a claim of constructive discharge.

E. Death of an employee

1. Notifying co-workers

Notifying employees of the death of a co-worker can be one of the toughest jobs an employer ever has to do. While it is important employees be notified promptly, it is also important that whoever provides the information carefully plans what to say.

It is likely employees who worked with the deceased will be unable to complete their work the day of the announcement. As much as possible, this reaction should be anticipated, and arrangements should be made to allow those who need time off to receive it. Management will need to make decisions about how any time off will be counted and compensated.

2. Appoint a contact person/spokesperson

Tragedy in the workplace creates a great deal of emotion and confusion. Appointing a contact person is a good idea. Co-workers are likely to have questions. Having all information come from one source reduces confusion, because then all co-workers will receive the same information. The grieving family is likely to have information they need to get to the city as well as many questions about benefits, etc. Having one point of contact will ease their burden at this time.

3. Assisting employees

If an employee assistance program is available, the city should be sure to highlight it to employees in the days following their co-worker's death.

RELEVANT LINKS:

LMC information memo;
[Public Purpose Expenditures](#),
see section on flowers.

If an employee assistance program is available, the city should be sure to highlight it to employees in the days following their co-worker's death. Because co-workers may have known the deceased on a personal level, their grief may affect behavior and work performance. In the event an employee assistance program is not available, some other form of counseling may be available through the city's group health insurance. If appropriate, the city may want to bring a grief counselor on-site for a few days.

In most situations, the employee will have personal belongings at work. It may be difficult for co-workers to see these items removed. Arrange for a member of the employee's family to collect those items after a respectable amount of time has passed.

It is sometimes easiest for family members if the materials are boxed and ready to go ahead of time, or if the city has arranged to have boxes and packing materials available for family members to use.

4. Services

It is important that those who desire to attend services held in honor of the deceased be allowed to do so. This may require a city hall shut down for a morning or afternoon. Again, this should be anticipated, and arrangements should be made to facilitate it. A spokesperson for the city should find out when the services will be held and what type of remembrances (e.g., flowers, charitable donations, funds for surviving dependents, etc.) are preferred by the family. Cities will want to be mindful there is no specific statutory authority for purchasing flowers in these cases, so it is important to review the memo linked to the left.

5. Process checklist

a. First steps if death occurs at work

- Call 911.
- Call the person the employee designated as an emergency contact, if the information is available, or another known family member to advise of the employee's removal to hospital.
- Have a spokesperson travel to the hospital to meet family.
- Contact OSHA at 1-800-321-OSHA, as well as the city's workers compensation carrier, if death/accident is work-related.
- Notify employees/executives with the most critical need to know first, including HR.
- Upon death, notify remaining employees indicating details will be forthcoming.

RELEVANT LINKS:

HR Reference Manual
[Chapter 4, Compensation](#), and
[Chapter 5, Benefits](#), for
further information on
continuation of benefits and
final paychecks.

- Follow existing internal procedures regarding contact with the media as needed.
- Be sensitive to family—ask them for the name of a contact person who can provide funeral details that can be shared with city staff once they are known, answer co-worker questions about the family’s wishes, and arrange for benefits paperwork to be completed and processed when appropriate.
- Designate a city staff member to answer questions for employees to avoid numerous calls from employees trying to contact the family.

b. First steps if death occurs outside of work

- Notify employees/executives with the most critical need to know first, including HR.
- Notify remaining employees indicating details will be forthcoming as available.
- Be sensitive to family—ask them for the name of a contact person who can provide funeral details that can be shared with city staff once they are known, answer co-worker questions about the family’s wishes, and arrange for benefits paperwork to be completed and processed when appropriate.
- Designate a city staff member to answer questions for employees to avoid numerous calls from employees trying to contact the family.
- Follow existing internal procedures regarding contact with the media, as needed.

c. Special arrangements and ongoing city business

- Notify customers/clients with direct relationships and reassign work, as appropriate.
- Arrange to intercept and redirect phone, voicemail, email, and mail communications.
- Plan for counseling for employees through an employee assistance program (EAP) or local hospice, appropriate to the circumstances surrounding the death.
- Provide grieving employees with time off as needed (immediately if they witnessed the death) preferably on a paid basis.
- Begin termination processing following normal procedures.
- Have a designated contact person keep track of all notes, flowers, etc., that arrive following the death, so they can be responded to and collected for the family. Photographing flower arrangements received can be helpful to the family.

RELEVANT LINKS:

[Minn. Stat. § 181.58.](#)

Section VI, *Separation checklists.*

[Minn. Stat. § 353.31.](#)

[Minn. Stat. § 176.111.](#)

[Minn. Stat. § 299A.44.](#)

LMC information memo,
[Continuation of Benefits.](#)

[Minn. Stat. § 299A.465 Subd. 2.](#)

Commissioner's Office:
[Public Safety Officer Benefit Programs.](#)

MN Dep't of Public Safety:
[Public Safety Officer's Death Benefits Application Packet.](#)

d. Wages and benefits

It is easy to forget about an employee's final paycheck at a time like this. Wages, vacation, sick leave, paid time off, etc., should be carefully calculated and included in the final paycheck. Human resources or another appropriate party should review the employee's file to determine what benefits the employee had through the city and what needs to be done to cancel, continue, or expedite a payout of benefits. In general, Minnesota statutes allow an employer to pay the surviving spouse of a deceased employee directly (if there is no personal representative of the estate appointed) up to \$10,000.

The spouse must provide an affidavit to prove their relationship and must acknowledge receipt in writing.

- Determine final wages and process benefits.
- Schedule time to meet with beneficiaries, if possible.
- Locate beneficiary designations for all benefits.
- Treat accrued but unused vacation, sick leave, paid time off, etc., in accordance with city policy.

Be sure to review the actions that should be taken by the city as well as what the survivors/beneficiaries should do for all city-provided benefits. Such benefits may include (but are not necessarily limited to):

- Life insurance (accidental death and dismemberment, if applicable).
- Long-term care and long-term disability (may have survivor or refund-of-premium benefits).
- Retirement—PERA, deferred compensation, other.
- Workers' compensation death benefits (notice may be required).
- Special death benefits for public safety officers who are killed in the line of duty.
- Terminate health insurance according to policy as of date of death.
- Handle benefits continuation paperwork for dependents.
- Determine balance of health care flexible spending account for health care expenses prior to date of death and notify family of procedure (including COBRA notice, if needed).
- Specific health insurance coverages and obligations through the city may be available to dependents of police officers or firefighters killed in the line of duty. Minnesota law includes volunteer firefighter positions for continued health insurance benefits to dependents of full-time peace officers and firefighters killed in the line of duty.

RELEVANT LINKS:

Office of Justice Programs:
[Public Safety Officers
Benefits Program](#).

Section VI, *Separation
checklists*.

- Police Officers and firefighters may be entitled to additional benefits outside of the city offered benefit plans. For example, dependents of police officers killed in the line of duty will want to connect with the following resources:
 - Minnesota Department of Public Safety
 - Federal Public Safety Officer Benefit Program

e. Other considerations

- Follow normal termination checklists to ensure all equipment, keys, credit cards, etc., are returned and security issues are addressed.
- Arrange for packing and delivery of personal belongings and ask family how they want this handled; or offer to do it for them, if preferred. A close colleague or supervisor is the best choice if the family prefers not to be involved.
- Be aware employees may have a hard time using the deceased employee's desk or office; consider other uses for the space, if possible.
- Keep in touch with family as appropriate, especially regarding benefits issues.

III. Discipline and termination

Disciplinary actions, including terminations, can be cumbersome due to the many special protections given to public employees. Some of these protections limit the discretion a city has in its decision-making. And even the most careful city can miss one or more procedural requirements.

Even when done properly, the disruptive impact of a disciplinary termination on employees and the city can be significant.

There are some basic rules to be carefully followed before making a final decision to involuntarily terminate an employee for disciplinary reasons.

This section is designed to give cities an overview of important procedural steps and other considerations associated with terminating an employee. However, a city should always seek legal advice before proceeding with a disciplinary termination.

A. Discipline and termination policies

Policies outlining a city's discipline and termination procedures can protect the city by causing management to focus on the grounds, relevant factors, and procedures leading up to a management decision. Like other policies, they contribute to uniformity in the decision-making process.

RELEVANT LINKS:

[Minn. Stat. § 181.932. *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588 \(Minn. Ct. App. 1986\). *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 \(Minn. 1987\).](#)

[Abraham v. Cnty. of Hennepin, 639 N.W.2d 342 \(Minn. 2002\). *Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452 \(Minn. 2006\). *Schmitz v. U.S. Steel Corp.*, 831 N.W.2d 656 \(Minn. Ct. App. 2013\).](#)

[Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588 \(Minn. Ct. App. 1986\). *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 \(Minn. 1987\). *Dukowitz v. Hannon Sec. Services*, 841 N.W.2d 147 \(Minn. 2014\).](#)

[HR Reference Manual, Chapter 6.](#)

[LMC information memo, *Veterans Preference in Discipline, Discharge or Job Elimination*. HR Reference Manual, Chapter 1.](#)

When distributed to employees, the policies put them on notice regarding unacceptable conduct. When employees know and understand the rules, they are less likely to bring forth employment-related claims against discipline administered by management.

Procedures established for the discipline and/or termination process should accomplish two major objectives:

- They should restrict the ability of lower-level supervisors to discharge employees.
- They should ensure there is a “paper trail” of documents in support of management’s decision.

B. Employment-at-will

In applying this concept in an actual termination, cities should proceed cautiously in applying this idea and work closely with an attorney to make sure each employee is truly an employee at-will, and the city is not violating law (i.e., unlawful discrimination, retaliation, etc.).

This concept has been narrowed significantly in past decades by both statutory and common law protections against wrongful discharge. In Minnesota, in addition to the many statutory and civil rights protections, the public policy exception to the employment-at-will concept is widely recognized.

The public policy exception to employment-at-will states that an employee is wrongfully discharged when the termination is against a well-established public policy of the state. Minnesota courts have narrowly applied the public policy exception.

Some common public employment situations which are not considered employment-at-will include:

- Employees covered by union contracts.
- Employees covered by a civil service system.
- Qualified veterans.
- Progressive discipline sections of personnel policies for nonunionized employees where no disclaimer language is included stating the policies do not create contract rights.

RELEVANT LINKS:

LMC information memo,
[Police Department
Management and Liability
Issues](#), Section IV-A-2, Off-
duty conduct.

C. Procedural considerations and preliminary questions

A city's discipline and termination procedures should provide a reliable method of ensuring the events leading up to the discipline and/or termination are properly documented, and all necessary human resources procedures were followed.

1. Practical management concerns

It is important to consider those practices to help the city achieve its goals:

- Consult the city's guiding documents. In general, the city should not put itself in the position of failing to follow its own established policies. Consider things like union contracts, civil service rules, personnel policies and employee handbooks, city ordinances, and relevant state and federal laws. Be familiar with and follow grievance procedures detailed in collective bargaining agreements for union employees and personnel policies for unrepresented employees, and possibly union employees as well.
- Determine what action makes sense. In a situation where poor performance appears to be the issue, the city might consider coaching, formal training, rearranging duties, a transfer to another position, or demotion. Supervisors need to be aware of and clarify their limits of authority in administering discipline to employees. Generally, unless an issue involves someone's health or safety, supervisors should consult with the appropriate authority before acting.
- Treat the employee with respect and dignity. Some of the keys to this include speaking with the employee in person and in private; giving the employee an opportunity to explain and listening closely to their explanation; telling the employee what should have been done; and informing the employee of what will happen if the behavior reoccurs. Remember to finalize any disciplinary document or memo after your discussion with the employee.
- Determine past practice and consistency. Consider how similar situations have been handled in the past. If the city wishes to handle this situation differently, be certain there are defensible business reasons for doing so.
- Do the homework necessary to make this a defensible decision. Be prompt, but take the time needed to arrive at the right decision. Consult all written documents. Take advantage of available appropriate sounding boards; don't operate in a vacuum. Work with the city attorney when major discipline is being considered.

RELEVANT LINKS:

Section III-C-4, *Legal concerns*.
[Minn. Stat. § 13.43](#).
[Minn. R. 1205.0400, subp. 2](#).

[U.S. Const. amend. XIV, § 1](#).

Section III-B, *Employment-at-will*.

[Phillips v. State](#), 725 N.W.2d 778 (Minn. Ct. App. 2007).

[Cleveland Bd. of Educ. v. Loudermill](#), 470 U.S. 532, 105 S. Ct. 1487 (1985).

HR Reference Manual,
[Chapter 1](#).

[Cleveland Bd. of Educ. v. Loudermill](#), 470 U.S. 532, 105 S. Ct. 1487 (1985).

- When writing up a disciplinary action, be sure to let it sit overnight before sharing it with the employee. Finally, double-check to make sure all city procedures were followed.
- Pretend to be an outside observer. Ask yourself the following questions: Does the discipline appear justified? Does the city appear objective? Have I tried alternatives to the discipline being suggested? Has the employee been given every reasonable opportunity to succeed? Can the employee point to cases where others were treated differently?
- Keep in mind data practices requirements. Only share disciplinary information with those in management whose work assignments reasonably require access. Supervisors should be trained on the necessity of confidentiality when it comes to disciplinary processes.

2. Due process

Cities are prohibited by the 14th Amendment to the United States Constitution from taking any action that deprives an individual of a protected property or liberty interest without first providing due process of law. Without some contractual or other specially created right, public employment on its own does not create constitutionally protected property interests in continued employment, and, therefore, employees have no right to due process.

However, where a contract, policy, or statute requires process limits the city employer's right to terminate employees at-will, constitutional requirements apply. Those public employees who have such a protection are entitled to due process prior to the termination of their employment, because they have a protected property right in their jobs.

Before a city can deprive an employee of a job in which the employee has a property interest (i.e., terminate, lay off, or demote), certain procedures must be followed. This process is often referred to as a "Loudermill" hearing or a "pre-termination" hearing, but it is not as formal as a hearing. The purpose of the Loudermill or a pre-termination hearing is to provide an employee an opportunity to present his or her side of the story before the city makes a final decision on the proposed demotion, layoff, or termination.

It is simply a notice of charges and an opportunity to respond before deprivation of a property right in employment (i.e., termination, layoff, demotion). The meeting usually involves at least the highest appointed official (i.e., the city administrator and/or department head) and must occur before a discipline decision is finalized. There is no obligation to call witnesses, offer exhibits, or allow cross-examination.

RELEVANT LINKS:

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985).

Sutton v. Bailey, 702 F.3d 444 (8th Cir. 2012).

Somers v. City of Minneapolis, 245 F.3d 782 (8th Cir. 2001).

Hagen v. Civil Serv. Bd., 282 Minn. 296, 164 N.W.2d 629 (1969).

The Loudermill hearing can be very helpful to the city by operating as a check against mistaken decisions. Keep in mind, however, formal hearings may be required in each of these situations by personnel policies, written agreement, or state law—e.g., grievance arbitration, veterans preference hearing. The key question is whether the employee had sufficient opportunity to present his/her side of the story before adverse action is taken.

The requirements of due process are satisfied by either verbal or written notice of the charges supporting the proposed termination or demotion, although documented notice is preferred. If the final decision-maker is someone other than the individual recommending termination, such as the full city council, make sure the employee's response to the allegations are presented prior to the termination decision. Better yet, invite the employee to present their response directly to the city council or final decision-maker.

There need not be a delay in time between the notice of charges and an employee's opportunity to respond. However, allowing a short period of time to respond (three-five days) may lessen the appearance of being unfair.

Public employees who are employed at-will or considered probationary do not have a protected property interest in employment and, therefore, are not entitled to constitutional due process. Some pre-termination process, however, should generally still be provided. A simple notice of charges and opportunity to respond to such charges will suffice.

This action will effectively prevent any potential due process claim and can also be used as an additional check that defensible employment decisions are being made.

3. Just cause

Despite the preference of many cities that all employees be covered under the employment-at-will doctrine, some cities apply the standard of "just cause" in situations of discipline and termination.

"Just cause" means the reason the city is terminating the employee is reasonable, fair, and honest, and the termination is being done in good faith. "Cause" has also been defined as "touching the qualifications of the officer or his performance of its duties, showing that he/she is not a fit or proper person to hold the office." This type of language is often found in conjunction with a progressive discipline policy.

The advantage of using this standard is, if followed carefully, it provides documentation of supportable (non-arbitrary) reasons for employment actions making it more likely for the city to prevail in a formal hearing or in court.

RELEVANT LINKS:

HR Reference Manual,
[Chapter 1.](#)

[42 U.S.C. § 12112.](#)

EEOC: [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA.](#)

MN Dep't of Labor and Industry: [Earned Sick and Safe Time.](#)

LMC information memo, [Continuation of Benefits.](#)

Minn. Stat. § 412.641, subd. 1a.

The disadvantage is it can give the employee many avenues to challenge decisions, especially if it is not followed or applied correctly (i.e., “the city did not meet the just cause standard it promised in its discipline policy”).

4. Legal concerns

It is important to consider laws that might apply to the employment relationship and ensure the city is able to defend itself if legally challenged. Laws to consider in discipline and termination situations include, but are not limited to:

- ***Americans with Disabilities Act (ADA)*** – Has reasonable accommodation, including considering an alternative job at the city, been made or attempted? The city must make a good faith effort to accommodate individuals with a qualified disability. A variety of laws may come into play when an employee is absent from work due to medical reasons. A city should work through the legal dos and don'ts when evaluating leave requests, requesting and reviewing medical documentation, and making decisions about continued employment. In some cases, when an employee is gone from work for medical reasons one or more leaves may overlap. For example, an employee gone from work and receiving workers' compensation may at the same time qualify for leave under the Family and Medical Leave Act and, as of January 1, 2024, MN Earned Sick and Safe Time (ESST). In situations where an employee can no longer satisfactorily perform his or her job responsibilities due to a condition that may be covered by the ADA, the city should work directly with the employee and partner with the city attorney to determine the best course of action.
- ***Benefits continuation/COBRA*** - Prior to an employee's separation from employment, the city should meet with the employee to review the details of that employee's benefits continuation, if any. When possible, it is helpful to be able to provide the employee with the continuation election information prior to the last day of employment. This is not, however, a requirement. The employee should also be made aware of those benefits that will discontinue at the end of employment with the city.
- ***City manager (Plan B form of government)***- If the city council moves to terminate a city manager's services, after one or more years of service, the manager may demand the charges in writing and request a public hearing on said charges before termination becomes effective.

RELEVANT LINKS:

LMC information memo,
[Family and Medical Leave Act.](#)

[8 U.S.C. ch. 12.](#)

U.S. Dep't of Labor:
[Immigration and Nationality Act.](#)

[Minn. Stat. § 13.43.](#)

LMC information memo,
[Data Practices: Analyze, Classify, Respond.](#)

See flowchart in Appendix A:
public vs. private disciplinary data.

LMC information memo,
[Meetings of City Councils.](#)

[Minn. Stat. ch. 13D.](#)

[Minn. Stat. § 626.89, subd. 6.](#)

LMC information memo,
[Police Department Management and Liability Issues.](#)

[42 U.S.C. §§ 2000e-2000e-16.](#)

[Minn. Stat. § 363A.](#)

LMC information memo,
[Veterans Preference in Discipline, Discharge or Job Elimination.](#)

[Minn. Stat. § 197.455, subd. 1\(b\).](#)

- ***Family and Medical Leave Act*** - The Family and Medical Leave Act (FMLA) provides certain employees with up to 12 weeks of unpaid, job- and benefit-protected leave per year for certain family and medical reasons. In general, the city can neither discipline nor dismiss employees because they are absent from work for a reason that qualifies for leave under the FMLA.
- ***Immigration and Nationality Act*** - A city may terminate the employment of a legal immigrant. Be aware, however, of the special issues usually involved in this situation. Much will depend on the type of visa or work permit that the employee has been issued by the federal government. It is possible that the city will have to pay the cost of sending the immigrant back to his or her country of origin.
- ***Minnesota Government Data Practices Act*** - Most of the information relating to a resignation is private unless a resignation results while complaints or charges are pending against a higher- level employee. Some of the information relating to discipline and discharge is public:
 - Existence/status of complaints or charges.
 - Final disposition of disciplinary action.
 - Specific reasons for disciplinary action and data documenting basis for action.
 - Complete terms of any separation agreement.
- ***Open Meeting Law*** - The Open Meeting Law requires all meetings of governing bodies be open to the public, with few exceptions. When a discipline or termination decision is made by a city council, meetings involved in the process may be closed only under certain, limited circumstances. The exceptions to the open meeting law are narrow.
- ***Peace Officer Discipline Procedures Act*** - The Peace Officer Discipline Procedures Act (PODPA) requires cities to follow certain procedures when, during the course of investigating allegations against a licensed peace officer, it is necessary to take a formal statement from the officer.
- ***Title VII of the Civil Rights Act and Minnesota Human Rights Act*** - If the employee is covered by a protected status, can the city defend its action on the basis of business necessity if charged with discrimination? The city must be able to prove that discipline or termination is based on business reasons.
- ***Veterans Preference Act*** - The city is required to provide a qualified veteran with proper written notice, including opportunity for a hearing, when preparing to terminate or lay off the employee. The city may need to provide multiple types of procedures. If the employee is a qualified veteran and a union member, the matters governed by sections M.S. §§ 197.46 to 197.481 must not be considered grievances under a collective bargaining agreement.

RELEVANT LINKS:

HR Reference Manual,
[Chapter 1.](#)

*In re Enter. Wire Co. and
Enter. Indep. Union*, 46 LA
359 (1966) (Daugherty, Arb.).

Section III-C-2, *Due process*.

- Thus, if a veteran elects to appeal the dispute through those sections, the veteran is precluded from making an appeal under the grievance procedure of the collective bargaining agreement.
- ***Whistleblower law*** - The whistleblower law makes it illegal for an employer to discharge, discipline, threaten, otherwise discriminate against or penalize an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee undertakes certain actions in good faith.

5. Before administering the discipline

There does not appear to be any universally accepted criteria to help a city determine what kind of disciplinary action should be taken based on the infraction that occurred.

In union environments, however, there is a strong consensus that certain questions should be asked regarding any discipline action.

While these questions originated from disciplinary situations that occurred in union environments, these same questions can be of value to a city when applied to disciplinary situations for nonunion employees as well.

In 1966, an arbitrator, Professor Carroll Daugherty, created a seven-part test for just cause terminations for use in labor arbitration proceedings. Again, even if the termination does not involve a union employee, these seven questions can still be helpful to review.

The more of these questions the city can answer "yes" to, the more likely the disciplinary action is appropriate and would be upheld if challenged. The questions can be summarized as follows:

- Was the rule, regulation, or standard allegedly violated by the employee made known to the employee or was it one that any employee should have known?
- Was the employee given advance notice that violation of the rule, regulation, or standard would result in disciplinary action?
- Was the rule, regulation, or standard allegedly violated by the employee reasonable and job-related?
- Did the evidence indicate that the employee did in fact violate the rule, regulation, or standard?
- Did any investigation conducted to show the employee violated the rule, regulation, or standard violate the employee's due process rights (see Due Process subsection above)?
- Has discipline for violation of the rule, regulation, or standard been enforced equally without discrimination?

RELEVANT LINKS:

- Did the degree of discipline imposed logically follow from the nature of the offense committed (i.e., did the “punishment fit the crime”)?

D. Progressive discipline

Progressive discipline means an employee receives increasingly more serious disciplinary measures for repeated offenses. When establishing policy or contract language regarding discipline, a city should strive for broad authority to enable the city to determine the nature of any punishment based on a number of factors including prior history and the nature of the offense.

A union will generally seek to have punishment be progressive. Many cities incorporate progressive discipline into their discipline policies even if the employees are not covered by a bargaining agreement.

The advantage of progressive discipline is it’s likely to be seen as fair if followed carefully. The disadvantage is it sometimes “ties the city’s hands” in dealing with a disciplinary situation.

For example, the city may wish to impose a harsher disciplinary action than the next step described in the policy for reasons it believes are justified. Unfortunately, different people may not agree with the city’s justification (e.g., a jury, arbitrator, or judge may not agree that skipping a step was justified). When this happens, the city can be viewed as not following its own policy—a situation difficult to defend.

It is strongly advised to include language in any progressive discipline policy reserving total city discretion for determining the level of discipline and allowing for the skipping of steps where the city (as employer) deems necessary and appropriate.

Below some of the more common forms of discipline found in both policy and contract language are discussed.

1. Verbal reprimand

Even though this is called a verbal or oral reprimand, some notation to the employee’s personnel file should be made to verify this step took place. The verbal reprimand notifies the employee of the gap between his/her existing performance and what the city expects. It also notifies the employee it is his/her responsibility to the job he/she is being paid to do. The supervisor should document the time and date of the meeting, who was present, and briefly identify the issue(s) discussed. The documentation should also note this action meets the requirements of the progressive discipline policy and improvements must be made or additional step discipline may be imposed.

RELEVANT LINKS:

An oral reprimand should always be conducted face-to-face with the employee, by the employee's direct supervisor if possible.

The original documentation should be given to the employee, and it is helpful if a copy is placed in the personnel file. The fact the employee received a copy should be documented as well. Documentation can help establish "like treatment" of other employees which is important in discrimination claims. Documentary evidence is often given greater weight than individual recollections and provides proof a warning was given and that something was said or not said. Memos to the personnel file by a supervisor without the employee's acknowledgement can be questionable and allows the employee to claim at another time the discipline never happened.

Ideally, the documentation should state that its intent is to be written documentation of a verbal reprimand. Noting this is a verbal reprimand may be especially helpful to combat a union's claim this is really a written reprimand.

2. Written reprimand

A written reprimand is a document or memorandum generally considered more severe than an oral reprimand and where more information is documented than for an oral reprimand.

The written reprimand should state the problem, explain why said behavior is a problem, document what happened, clarify what the city expects from an employee in that situation (what the employee should have done or not done), describe the consequences of the employee's behavior, and clearly indicate what the consequences will be if the employee repeats the behavior.

The supervisor should meet with the employee to discuss the written reprimand and have the employee sign to acknowledge receipt of (not in agreement with) the document. A copy of the written reprimand should be placed in the employee's personnel file. Ideally, the document should clearly state it is considered a written reprimand.

3. Paid suspension

A paid suspension may or may not be disciplinary in nature. Where removal from job duties is necessary prior to any determination on discipline, it is a good practice to use terminology such as "administrative leave" instead of "suspension" to characterize the situation. There are several circumstances under which an employee might be placed on a paid administrative leave/suspension:

RELEVANT LINKS:

Section V, *Veterans preference*.
LMC information memo, *Veterans Preference in Discipline, Discharge or Job Elimination*.

- When a rule or policy violation warrants this level of discipline. In this case, the leave is disciplinary, and the term suspension is appropriate.
- When a peace officer has discharged his or her weapon in the line of duty. (It is common practice for a city to place a peace officer on leave during the investigation that follows an incident in which the officer discharged a weapon).
- When an investigation is taking place, an employee may be placed on paid leave pending the outcome or other developments. The determination to provide a paid administrative leave in lieu of allowing an employee to use accrued time should be reviewed closely while considering past practice, written policies, cost, and length of expected leave.
- When a city is preparing to terminate a qualified veteran, the 30 days prior to the dismissal being final are paid, even though the veteran is not on the job during this time.

Prior to any required administrative leave or suspension, or as soon thereafter as possible, an employee should be notified in writing of the reason for and the duration of the suspension.

In the case of a disciplinary suspension, when the employee returns to work the city should provide a written statement outlining the potential consequences to this employee should the behavior occur again and what is expected of the employee in the future. A copy should be provided to the employee with the original placed in the employee's personnel file.

In the event the employee was placed on paid suspension pending the outcome of an investigation, the results (not the details, just the results) of the investigation should be provided to the employee in writing.

It is a good idea to wait until any investigation is complete before placing disciplinary information in an employee's personnel file. This way, if an investigation shows no discipline is warranted, no one needs to remember to remove the documentation from the employee's file.

4. Performance Improvement Plans

Performance Improvement Plans (PIPs) or performance action plans can be an effective tool to give an employee with performance deficiencies the opportunity to succeed. Effective PIPs put an employee on notice of performance issues and set forth a process to give an employee an opportunity to correct the problem.

RELEVANT LINKS:

Contact HRBenefits@lmc.org
for a sample PIP.

While not required, nor necessarily appropriate for every situation, a PIP is a formal document which can be simple or complex, depending on the performance issue(s) being addressed and the city's strategic objectives. A PIP can be used at any point in the disciplinary process and some cities find it useful to use before initiating the disciplinary process.

A PIP can be an effective tool when there is a commitment to help an employee to improve. Progress toward goals should be documented and discussed in regular meetings between an employee and his/her supervisors, seeking to identify why improvements have or have not been made. If gaps in training or required tools become apparent, provide those as soon as possible. It's important to note that supervisors cancelling meetings or showing up late for PIP check in meetings can convey a lack of importance and commitment on the city's part, so commitment is key to this process.

A best practice can include encouraging supervisors to have employees on a PIP lead these regular check-in meetings, to self-report on how they believe they are doing, and share any realizations they have made, or what else they feel they need to succeed.

Regardless of the format used, an effective PIP includes the following:

- Clear identification of the employee performance or behavior issue(s).
- The policy or performance standard at issue and an explanation why the employee is not meeting it.
- Specific, measurable, objective and achievable goals to bring the employee back into compliance.
- Clear timeframes associated with the compliance goals.
- Defined and regularly scheduled check in meetings with management.
- Clearly defined consequences if the employee fails to comply with the plan.
- Keep in mind a PIP and its related process, should always be brought to an end. Although a PIP can be extended for legitimate reasons, it should never be open ended until the end of time. In the best-case scenario if the PIP is effective, the employee's performance improves. If, on the other hand, the employee fails to adhere to the plan, the PIP should be closed out and the city will then proceed with the next step in the process (i.e., discipline).

5. Unpaid suspension

Suspension without pay is generally reserved for only the most serious rule infractions or repeat offenders.

RELEVANT LINKS:

[29 C.F.R. 541.602\(b\).](#)

[29 C.F.R. 541.602\(b\).](#)

Contact the HR & Benefits
Department
800.925.1122
651.281.1200
HRbenefits@lmc.org

LMC information memo,
*Veterans Preference in
Discipline, Discharge or Job
Elimination.*

One reason an employee might be placed on suspension without pay is for creating a risk to the health and/or safety of the employee or others (i.e., an OSHA violation, etc.). At times, it may be appropriate to place an employee on unpaid administrative leave.

Cities should proceed with caution when placing any employee who is exempt under the provisions of the Fair Labor Standards Act (FLSA) on unpaid suspension for a period of less than one week.

Cities can impose an unpaid disciplinary suspension on exempt employees of one or more full days for workplace conduct of a serious nature, such as sexual harassment, workplace violence, drug or alcohol use, or violations of state or federal laws. Such suspensions must be imposed pursuant to a written policy applicable to all employees.

Keep in mind, an exempt employee's compensation should not be docked for less serious performance or attendance issues for anything less than a full week to avoid risking the exempt status of that employee per the FLSA. Call the League for assistance with this issue.

File documentation for a situation of unpaid suspension is the same as recommended for a case of paid suspension.

6. Demotion

When performance issues exist and the option of removing certain duties and/or transferring the employee to a job more suitable to the employee's skill level is possible, the city may choose to demote the employee.

A typical example is an employee who performed at a satisfactory level at a past position, was hired for a different position within the city, but is not performing at a satisfactory level in the new position. Some cities permit an employee in this situation to transfer back to their original position. Clearly, a demotion must be a good "fit" for a situation; for example, demoting an employee who has embezzled money from the city would not be appropriate. Another example occurs when an employee's job is changed by the addition of duties.

If the employee does not perform the new duties in a satisfactory manner, the city may choose to remove those new duties and decrease the employee's compensation back to what it was in the original position. (It is not uncommon to have this right established in the personnel policy or collective bargaining agreement). Due process requirements and obligations under the Veterans Preference Act may be applicable to a demotion situation.

RELEVANT LINKS:

Section III, *Discipline and termination*.

Appendix B, Pre-termination considerations flowchart.

[Minn. Stat. ch. 412.](#)

HR Reference Manual,
[Chapter 1.](#)

HR Reference Manual,
[Chapter 1.](#)
[Minn. Stat. § 419.05.](#)
[Minn. Stat. § 420.06.](#)

[Minn. Stat. § 419.02, subd. 1.](#)
[Minn. Stat. § 420.03.](#)

[Minn. Stat. § 419.07.](#)

7. Discharge/ Termination

A city should never discharge an employee without first consulting with legal counsel. The review of a possible discharge should include a careful examination of all the facts leading up to the decision to terminate, a review of discipline policies and employee handbooks, a review of the employee's personnel file, and a review of past practices to ensure the employee is treated consistently with employees who have committed similar offenses.

Also consider whether there are extenuating circumstances that may justify a lesser discipline. Terminating an employee for disciplinary reasons can be very complicated and emotionally charged. If handled inappropriately, it can result in serious legal problems for the city. Other sections of this chapter discuss specific aspects of discharge/termination.

There may be times when a manager or city council feels pressured to make a quick decision to terminate an employee. This is never a good idea. A decision to terminate employment should only be made after careful review of all important information and involvement of all appropriate decision-makers.

Even in the most extreme cases, legitimate steps can often be taken to address the concerns or remove the employee from the workplace without immediately terminating an employee. An administrative leave of absence is the most common tool to use, and it will allow necessary review and planning by all appropriate decision-makers.

8. Authority

It is important to determine who has the legal authority to terminate employees and to obtain the proper approvals in advance of notifying the employee. Authority varies depending upon the type of city in which you operate. In a Plan A city, the city council is the authoritative body. In a Plan B city, the city manager is the decision-maker. In charter cities, the authority to terminate is defined by the city charter.

In addition, some cities have created a civil service commission under Minn. Stat. ch. 419 or 420 that has the "absolute control and supervision over the employment, promotion, discharge, and suspension of all officers and employees" of the police or fire department. A civil service commission consists of three appointed members who are residents of the city. Members serve staggered three-year terms. Cities with a police civil service commission, for example, must provide a public hearing before a police employee can be removed or discharged from employment.

RELEVANT LINKS:

[Minn. Stat. § 419.07.](#)

Section III- C-2, *Due process.*

Specifically, any police officer who has been employed for at least 12 months can be removed or discharged only for cause upon written charges and “after an opportunity to be heard in defense of the charges.” These discharge proceedings should comply with both state law and due process requirements. A city must be careful to follow all procedural requirements, and the decision of the commission is not subject to city council review or approval but can be appealed to the district court.

9. Administering discipline

a. Discipline meeting

When meeting with an employee to deliver a notice of discipline, especially if the issue has already proven to be emotionally charged, it is a good idea to have two management representatives present. The reasons behind the decision should be explained as objectively and unemotionally as possible.

Be aware the employee on the receiving end of the discipline may also have a right per city policy or union contract to have a representative present with him or her. If the employee does not have this right by policy, law, or contract, the city still may want to allow the employee to have someone present unless or until the individual disrupts or interferes with the meeting.

If the employee wishes to have an attorney present, however, the city should probably have its attorney also present.

b. Termination meeting

Notifying the employee of the decision to terminate is undoubtedly the most stressful part of the termination process. How the decision is communicated to the employee and others reflects the values and professionalism of city leadership. Therefore, leadership must always be professional and in control of their own emotions. Employees who feel they have been treated with dignity and respect are much less likely to pursue legal claims against the city.

In most cases, telling an employee they are being let go is a very emotional event. It is critical the manager prepares what to say in advance and practices. The meeting will go more smoothly if the manager is calm and confident in what he/she is saying. When preparing key messages, remember the purpose of the meeting is to communicate the message to the employee in the most professional and respectful way possible. The meeting should be short and stick to the facts. This is not the time to re-hash events, make “small talk,” assign blame, or engage in arguments. Before meeting with the employee, determine what type of reference, if any, the city will provide.

RELEVANT LINKS:

It is always wise to have another manager present to take notes and assist as needed. Have the meeting in a discreet location where you will not be interrupted or overheard by co-workers or the public. Most management experts agree that employees should be notified early in the week. Terminating someone on a Friday gives the employee two days to think about the worst before they can actually begin their job search. It also makes sense to schedule the meeting at a time when the employee can leave discreetly. In many cases, this may be the end of the day. Additionally, if possible, try to avoid terminations on birthdays or holidays.

Provide a brief summary of what has happened so far and communicate the decision. Here are three examples:

- “As you know, we have been working with you over the last few months to improve your performance. At this time, we have made the decision to end your employment with the city effective today.”
- “We will be recommending the city council terminate your employment effective _____.”
- I appreciate this is difficult news to hear. Is everything I’ve said clear to you? Do you have any questions at this time?

While this is a difficult message to deliver, it is very important to be direct about the decision. Stay with your talking points and remain calm. Do not engage in arguments with the employee.

Making indirect statements such as “I don’t think it is best for you to continue employment here” can leave the employee confused about whether the decision or recommendation is final.

Focus on the facts instead of your opinions or perceptions. Do not engage in “blame and shame.” At the same time, do not feel the need to defend your decision or argue with the employee. A simple statement such as “We’re sorry you feel that way, but we’ve made our decision” should suffice.

If the council does not need to approve the decision, review important compensation and benefit information. The employee likely will have a difficult time digesting information at this point. Therefore, it is best to have all this information in writing for the employee to take home and review later. During the meeting, highlight any of the important deadlines, as well as available resources such as the employee assistance program.

Be prepared to answer questions about references for the employee and what information will be communicated to co-workers. If the council needs to approve the decision, compensation and benefits information will need to be communicated to the employee later. As difficult as it may seem, try to end the meeting on a positive note such as “We’re sorry this didn’t work out, but we wish you well in the future.”

RELEVANT LINKS:

Let the employee know who they should contact with questions going forward. It is a good idea for one person to be responsible for handling all communication.

Depending on the city's process, consider providing the employee with a reasonable amount of time to compose themselves before having to face colleagues.

c. Consider security Issues

Is the employee potentially violent to others or self? Again, it is a good idea to have two management representatives present when delivering a message of discipline. Alert security staff or the local police department if you feel it may be necessary.

d. Documentation

The written documentation of a disciplinary action or investigative results should not just be placed on an employee's desk, emailed, or delivered in the mail. Such information should be hand delivered and explained to the employee. The employee should sign to indicate they received the documentation (not to indicate agreement with the action), and the signature along with the appropriate documentation should be placed in the employee's personnel file.

E. Employee performance issues

1. Capability problems

When a capability problem exists, the employee is not able to do the job properly. Some common causes of capability problems on the job include:

- Lack of knowledge, skills, or abilities.
- Emotional, physical, or health difficulties.
- Lack of understanding of what the job really is and how it fits into the organization.
- Inappropriate or outdated equipment or working spaces.

Possible solutions to these kinds of issues on the job could include:

- Individualized training programs.
- Medical help or employee assistance program support.
- Meet and communicate to better define and agree on job standards or reasonable accommodations.
- Purchase proper equipment or upgrade facilities.

RELEVANT LINKS:

Section III-L, *Termination Letters*.

2. Motivation problems

Motivation problems may occur when an employee lacks the desire or chooses not to do the job properly. Some common causes of motivational problems include:

- Not feeling appreciated.
- Not being allowed to participate in work decisions.
- Not feeling fairly paid compared to others.
- Feeling that rewards and discipline are not fairly administered.

Examples of practices that may help motivate employees include:

- Provide more individual attention.
- Include employee input in the decision-making process.
- Discuss how compensation is determined.
- Reward good performance; deal with poor performers appropriately and consistently.

F. Documentation

The city should have documentation to support all termination decisions, even if the employment is at-will. The extent to which a record must be developed is determined by the character of the employment relationship being terminated.

For example, if the employee is at-will there does not appear to be any requirement the city set forth specific reasons for its decision, but Minnesota law does allow for an employee who has been discharged involuntarily to request in writing from the employer to provide a written statement of the reason for the termination. The city must merely show the decision was not arbitrary or capricious. On the other end of the spectrum, where an employee has a tenure right and property interest in continued employment, formal findings of fact may be required.

Have documentation to support all termination decisions, even if the employment is at-will or probationary. Relevant documentation can include meeting minutes, personnel handbooks identifying the nature of the employment relationship, performance evaluations, disciplinary memos, job descriptions, budget projections, etc. This section identifies some of the methods cities commonly use to document employee performance.

1. Performance evaluations

The performance evaluation form is simply a tool to encourage discussion.

RELEVANT LINKS:

The most common formats used include open-ended reviews requiring the supervisor to input all information and forced-choice reviews requiring the supervisor to select from a group of established or “canned” statements about performance. Some cities use a combination of these two formats. Regardless of the form the performance evaluation takes, it should address the following in some fashion:

- Accomplishments and general assessment of the past performance period (could be six-months or one year).
- Suggestions for improvement/changes based on these accomplishments.
- Goals for the next performance period (maximum one year).
- Adherence to city mission, policies, and practices.
- Supervisor summary comments.
- A question asking, “Does the current job description accurately reflect employee’s responsibilities?”
- Employee comments.

In the interest of removing as much stress as possible on the front end, supervisors should prepare in advance for the actual employee evaluation. Examples of city performance evaluation forms can be obtained from the League. Preparing ahead of time should involve the following:

a. Review the job description

If the job description does not accurately reflect what the employee is actually doing, some action needs to be taken.

Either the employee is not doing what he or she is supposed to and there are performance issues, or the job description needs to be updated to accurately reflect what is expected of that employee.

b. Gather sufficient information

It is impossible for most supervisors to be fully aware of those things their employees are doing on a daily basis. They should be talking to others who interact with the employee.

Supervisors will be missing out on important information if they rely exclusively on what they have personally witnessed throughout the year. Some questions to consider could include:

- What are some of the things this employee does well? Can you provide examples, please?
- What are some areas of improvement you need to see from, this employee? Can you provide examples, please?

RELEVANT LINKS:

Contact HRBenefits@lmc.org for a sample PIP.

See section III-D-4:
Performance Improvement Plan.

- How well does this employee manage their workload and in meeting deadlines?
- What skills does this employee need to further develop?

c. Write things down

Writing things down will better ensure they will be addressed and not overlooked during the performance evaluation.

Be certain the behaviors upon which an employee is being evaluated are related to that employee's particular job. Focus on measurable behaviors instead of feelings. Instead of rating an employee on whether they are a team player, rate the employee on specific actions such as offering to help other employees when they are falling behind, staying late to complete projects, etc. It is important to be honest and share the good and the not-so-good with the employee. In citing items of concern, supervisors should discuss a remedy to the concerns noted. If an employee is only aware a different behavior is desired but does not know what the desired behavior is, having revealed the concern at all is likely only to create anxiety and tension rather than a positive change in practice.

d. Provide a balanced overview

When sharing negative information with an employee, supervisors should try to follow up with at least two examples of positive things the employee was responsible for (of course this may not apply in some disciplinary situations or when preparing to terminate an employee). Whenever possible, supervisors need to space the concerns and praise throughout the review.

e. Develop goals

Before wrapping up the performance evaluation, the supervisor needs to work with the employee to establish clear and measurable goals for the upcoming year. This provides the supervisor with a great reference point for the next performance evaluation. It gives the employee a clear idea of the performance expectations for his/her position.

2. Work plan/PIP

A work plan, (also known as a performance improvement plan (PIP)) is a useful tool when performance issues exist, and both the employee and the city believe the issues can be remedied. A work plan identifies the performance issues, sets forth the actions the employee must take and the goals the employee must meet, and provides a timeline in which to achieve those goals. It should also note the possible ramifications of not meeting the established goals.

RELEVANT LINKS:

[Minn. Stat. § 13.43.](#)

Minnesota Clerks and
Finance Officers Association:
[General Records Retention
Schedule for Minnesota
Cities.](#)

3. Notes to the personnel file

All formal methods of performance evaluation and/or discipline should be documented in writing with a copy given to the employee and the original placed in the employee's personnel file.

Some cities permit the removal of certain performance documents from an employee's personnel file after a period of time. For example, a union contract may state if an employee receives a written reprimand and subsequently performs in a satisfactory manner for the two years following that reprimand, the written reprimand will be removed from the employee's personnel file. The League encourages cities to require all documents placed in a personnel file to remain in a personnel file until that employee is no longer working for the city and in accordance with the Minnesota Government Data Practices Act. It is also worth noting that removing a document from a file does not, and should not, automatically result in destruction of the document. The Minnesota Government Data Practices Act and a city's own record retention schedule should be reviewed, and legal advice procured before destroying any city document.

G. Investigations

The most common reason for investigating is suspected wrongdoing by an employee of the city. Claims of wrongdoing can be brought to the city's attention by not only formal and informal complaints, but also information obtained during exit interviews, anonymous tips, rumors, third party information, and other means. When a city learns of suspected wrongdoing, the first thing that must be done is to ensure the report is credible. If it is, the city should initiate a reasonable inquiry into the facts and circumstances surrounding the allegations. What constitutes a reasonable inquiry varies depending on the nature of the suspected wrongdoing.

For example, when a potential violation of law or primary/essential city policy is involved, the nature of the investigation must be more formal than if the issue is not as critical, like a possible violation of the city's dress code policy. This section addresses the key decisions a city will face when deciding if and how to conduct a workplace investigation. These guidelines are typically used by human resources professionals and employment attorneys when the issue under investigation is of a serious nature, such as alleged sexual harassment. For less serious issues, a city may choose to use the following information as a mere general guideline.

1. Preliminary considerations

The first step in any investigation is to determine who will investigate the allegations.

RELEVANT LINKS:

Before making this decision, it is important to check the city's policies to see if they address who should conduct the investigation and how the process should move ahead. Some key questions to ask:

- Is anyone within the city trained to conduct such an investigation?
- Are there one or more employees who come to mind as credible and who would be able to gain the confidence of employees involved in the investigation?
- Does the investigator have the time to conduct a prompt and thorough investigation?
- What are the charges? Can the anticipated cost be balanced with the level or seriousness of the activity that allegedly took place?
- Who is implicated in the charges? Are any supervisors or managers involved? Is the employee a union member? Is the employee a qualified veteran?
- Does the matter to be investigated involve possible criminal behavior? (If so, the city may need to defer employment investigation and consider referring the matter to a law enforcement agency for criminal investigation).
- If there have been threats of violence or other illegal activity such as theft, law enforcement should be contacted immediately.

2. Investigator characteristics

Regardless of whether the city chooses to work with an external consultant or use an internal resource to conduct the investigation, there are certain things the city should look for in an investigator.

Many cities first look to an in-house or outside attorney as the logical choice for someone to conduct a comprehensive investigation.

The potential impact on attorney-client privilege, however, needs to be considered. Oftentimes, the city will need to use the investigation itself as evidence supporting a defense to a lawsuit. If the city's attorney is used as the investigator, the attorney-client privilege may not apply because the attorney was acting as a fact witness, not a legal advisor, in conducting the investigation.

An investigator should be familiar with the city's policies and have sufficient experience to conduct the interviews and present recommendations to management. The investigator should not have a connection to the individuals or to the subject matter of the investigation as this could call their integrity or the integrity of the investigation into question. Neither the complaining employee nor the alleged wrongdoer should be a direct subordinate of the investigator.

RELEVANT LINKS:

[Minn. Stat. § 13.04, subd. 2.](#)

Section VII, *Reference checks and release of information on current and former employees.*

DPO: [Tennessen Warnings Notice.](#)

Likewise, cities do not want to choose an investigator who is a family member or a close personal friend of the complainant or subject of the investigation.

3. Investigative interviews

There are many things to consider when deciding how to investigate. If the investigation is based on allegations of harassment or threats of workplace violence, the city should consider whether interim actions should be taken during the investigation period to separate the parties involved. In addition to determining who the investigator(s) will be, it is necessary to decide how, when, and where employees will be interviewed.

Advise the complainant the city will be investigating the complaint and generally what the investigation will include. Inform the complainant the information provided will be kept as private as possible, but that it is impossible to provide absolute confidentiality. Also, stress to the complainant he/she is not to discuss the investigation with others to avoid the appearance that he/she is trying to influence the investigation. The complainant should also be advised the city will not tolerate any retaliation for reporting the complaint.

a. Tennessen Warning Notice/Garrity Warning

Depending on the circumstances surrounding the allegations of wrongdoing, a city may or may not need to provide employees with a formal notice prior to questioning them.

The Tennessen warning comes from the Minnesota Government Data Practices Act. It is given at the point of data collection whenever the city requests private or confidential data about an individual from that individual.

When collecting nonpublic data on employees, a city is required to provide a warning or notice to the employee of why the data are being collected and how it intends to use the data; whether the employee can refuse to supply the data and any consequences of either supplying or refusing to supply the data; and the identity of other persons or entities authorized by law to receive the data requested. If the city does not provide a Tennessen warning but collects the private or confidential data, strict limitations may be imposed on the use of the data collected. It is important to note that the circumstances requiring a Tennessen warning are limited to those in which the city is requesting data about the data subject from the data subject. It does not apply to situations in which the city is asking an employee to provide other information such as a description of events witnessed by the employee or information on other employees.

RELEVANT LINKS:

[*Garrity v. New Jersey*, 385 U.S. 493, 875 S. Ct. 616 \(1966\).](#)

LMC information memo:
[Police Department Management and Liability Issues](#). See section B.

However, a city is well advised to provide a Tennessean-like warning when a formal statement is being taken as part of a disciplinary investigation even if the intent is to simply ask the employee about workplace events arising in the scope of employment. This practice protects the employer should private or confidential information be volunteered by the employee or if the questioning leads to discussion of private or confidential matters about the employee.

The Garrity warning comes from the United States Supreme Court case involving police officers who were under investigation for allegedly fixing traffic tickets. The officers were given a choice of either to provide a statement to their employers which may subject them to criminal prosecution or to forfeit their jobs. The Supreme Court held that any employee statements made to the public employer under these circumstances were coerced and the Constitution prohibited their use in a subsequent criminal proceeding

The Garrity warning was thus established. Therefore, if a city forces an employee to answer questions in an investigative interview by threat of disciplinary action, it must inform the employee the statements and any resulting evidence cannot be used in any criminal proceedings against that employee. This warning should be used very sparingly. Only if the city is certain that compelling a statement is in its and the public's best interest, and adequate safeguards are in place for securing the data, should the employee be presented with the choice of either talking or losing his/her job.

The overuse of Garrity warnings in discipline investigations is common and can result in unanticipated negative consequences for the city and the public at large. Before giving a Garrity, and assuming the risks of tainting future criminal proceedings should any self-incriminating statements or the fruits of any self-incriminating statements be leaked in any way outside of the employment investigation, stop and ask the following question: Does the investigation require a compelled (or coerced) statement? The answer is rarely yes.

A safer course of action is to start by requesting the employee provide a voluntary statement. If the employee gives a voluntary statement, no Garrity is required, and the statement itself may be used in a future criminal matter against the employee. A city can simply ask if the employee is willing to provide a response to allegations.

Most employees will want to provide an explanation to the alleged misconduct. If the employee refuses, the city is free to make a determination on the investigation based on the other information gathered or to consider compelling a statement and providing a Garrity warning at that time.

RELEVANT LINKS:

[*NLRB v. Weingarten, Inc.*,
420 U.S. 251 \(1975\).](#)

[HR Reference Manual,
Chapter 6.](#)

It is often best to allow any criminal proceeding to conclude before an employment investigation is initiated since failure to keep the two separate can result in the tainting of both with severe consequences; a worst case scenario is that criminal charges must be dropped, not for lack of evidence, but for a procedural mishap.

b. Interview setup

The interview should be held in a quiet location, where the investigator and interviewee are unlikely to be interrupted. The person being interviewed should be alone with the investigator, unless accompanied by legal counsel.

The general facts of the matter and strategies being considered should not be discussed with any interviewee. Not only could this information confuse a witness, but it is also possible the witness would share such information with others who are not legally entitled to it. Sharing information can also jeopardize the validity of the investigation results by letting witnesses hear information that influences their responses. An investigator should use a variety of questions and with some repetition to test credibility of the witness. Legal jargon should be avoided.

If the interviewee is a union member, the employee may have the right to have a union representative present. This is sometimes called the Weingarten Rule from the U.S. Supreme Court case *NLRB v. Weingarten* which addressed, among other situations, when union representatives may accompany an employee in an investigatory interview or discussion that the employee “reasonably believes” will result in disciplinary action.

c. Investigative questions

The purpose of interviewing is simply to collect information. Therefore, no judgments or conclusions should be made during the interviews.

It is important to prepare for interviews in advance. To do this, list all the individuals who may need to be spoken to. At a minimum, the investigator will need to speak with the person making the complaint as well as the subject of the complaint. In addition, the investigator may need to speak with witnesses and other individuals identified as having direct knowledge of the issue. When determining the best order in which to interview individuals, it usually makes sense to start with the person making the complaint.

In general, interview people most directly involved (and most likely to provide highly useful information) first. Individuals who are likely to have less useful information should be interviewed last, and only if needed.

RELEVANT LINKS:

[Minn. Stat. § 13.43, subd. 2.](#)

[Section VII-A-1, *Release of disciplinary information.*](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(4\).](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(5\).](#)

[LMC information memo, *Data Practices Analyze, Classify, and Respond.*](#)

[Minn. Stat. § 13.43, subd. 2 \(5\).](#)

[Minn. Stat. § 13.825, subd. 2\(a\).](#)

Whether to first interview the subject of the complaint or witness depends on the situation. Interviewing witnesses first, allows the investigator to present the subject of the complaint with all the evidence at once. If the subject is interviewed first, the information gathered can help to determine which questions to ask the witnesses.

The investigative interview conducted with the complainant will be different than the interview conducted with the accused employee. Likewise, the interviews conducted with witnesses will be different than those conducted with the complainant and the accused. It is important the investigator prepares for each of these meetings in advance.

4. Handling collected data

The classification assigned to data generated by an investigation is generally private while the investigation is ongoing. That classification may change for some of the data once there has been a “final disposition of disciplinary action.” Such data will generally remain private, however, if no disciplinary action is taken. There are some situations in which the data will be classified as “confidential” and not available to the subject of the data.

If an investigation concludes with no disciplinary action, such as when a public employer concludes an investigation, but takes no disciplinary action against the employee, then only the limited data regarding the existence of the complaint and its status are public. All other data remain private and no further data regarding the incident may be disclosed, including the employer’s reasons for not taking disciplinary action.

If an investigation concludes with some disciplinary action, then Minnesota law indicates the following become public after the final disposition of a disciplinary action:

- The disciplinary action.
- The specific reasons for the action.
- Data documenting the basis of the disciplinary action, excluding data that would identify confidential sources who are employees of the public employer.

More cities are incorporating the use of portable recording systems (such as police-worn body cameras) in employee work duties. It is possible in the event of an employment investigation that portable recordings – audio and video - may also serve as important information supporting an investigation’s conclusions.

While the law provides for the retention and destruction of these types of data, it also clarifies that portable recording system data documenting the basis for final disposition of discipline are public.

RELEVANT LINKS:

[Minn. Stat. § 13.43, subd. 2\(d\).](#)

[Minn. Stat. § 13.43, subd. 2\(c\).](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(6\).](#)

Specific exceptions: there are three exceptions specifically noted in the statute to the general rule that the city cannot give out any information about a complaint or charge unless and until disciplinary action is taken against an employee:

- An individual who makes a complaint against an employee must be given access to the statement he or she provided when making the complaint.
- The city may display a photograph of a current or former employee to a prospective witness as part of an investigation of any complaint or charge against that employee.
- Certain data related to separation agreements with management employees are public. Specifically, data related to complaints and investigations may need to be disclosed upon request even if the employee resigns. The definition of employees subject to this provision in the law changes based on the size and type of government employer. A city entering into a separation agreement or accepting the resignation of higher-level employee should seek legal advice on the appropriate data classifications.

The above exceptions may require a legal interpretation so the city should proceed cautiously before giving out information about a charge under one of the above-listed exceptions.

5. Arriving at a decision

For any particular event, there are three possible conclusions: the event occurred, the event did not happen, or you are unable to determine if the event occurred. In addition to evaluating the information obtained during the investigation, the following are some key steps to be taken when working to arrive at a decision following the investigation:

- Review personnel files of the complainant and alleged offender to determine whether there were prior offenses and whether the behavior is consistent with prior evaluations and employee conduct.
- Consider further meetings with supervisors of the complainant and the alleged offender to obtain insight on any recent changes in behavior, performance, use of sick leave, etc.
- Evaluate, with an attorney, if necessary, whether the conduct violates any laws; if so, which ones and what the consequences might be. At the beginning of an investigation or at its end, the city may need to notify law enforcement authorities.
- Evaluate whether the conduct really occurred. This may require an assessment of the credibility of all parties. For example, what does each party have to gain or lose by not telling the truth?

RELEVANT LINKS:

LMC MemberLearn Online
Course, [Respect@Work](#).

- Figure out whether there is any other investigation necessary to reach a conclusion or whether a conclusion is even possible.

6. Impact on employees

a. Confidentiality

It is common for an employee to visit with his or her supervisor and ask if he or she can “vent.” In other words, “I don’t necessarily want you to do anything about this; I just want to get it off my chest.”

In this situation, it is important for the supervisor to inform the employee that this may not be possible depending upon the nature of the information about to be shared. In the event a valid complaint is shared, and the supervisor does nothing to address the situation, the city could be liable for not taking action. Listen carefully to what an employee is saying and make sure you have a clear understanding of what the employee expects. For example, if an employee indicates a supervisor is harassing him/her because of his/her race, you would not want to imply that the individuals should “work it out themselves.” Likewise, you may delay a formal investigation if an employee is simply venting about a conflict with a co-worker (provided there are no indications of illegal activity or serious policy violations).

Overreacting or under-reacting can be equally problematic and can quickly escalate a situation that might otherwise be resolved. For additional information, consider enrolling in the LMC’s MemberLearn online course on a manager’s role in creating a respectful workplace.

b. Gathering information

The supervisor (and investigator) should assure any employee providing information that it will be collected and kept in private to the extent possible. While employee complaints should be discussed only with those who have a need to know, a supervisor should never promise complete confidentiality.

A promise of confidentiality has the potential to make an objective and comprehensive investigation very difficult, if not impossible.

c. Disruption in the workplace

Even the most carefully orchestrated investigations in the workplace are generally quite disruptive. Employees might form “camps” based on whom they believe, closed-door meetings may be occurring with increasing frequency, and the grape vine is buzzing with everybody’s guess about what might be happening.

RELEVANT LINKS:

[Minn. Stat. § 13.43, subd. 2\(a\)\(4\).](#)

[Minn. Stat. § 181.932.](#)

[EEOC: Questions and Answers: Enforcement Guide on Retaliation and Related Issues.](#)

[Section III-L, *Open Meeting Law*.](#)
[Minn. Stat. § 13D.05, subd. 3\(a\).](#)

[Minn. Stat. § 13D.05, subd. 2\(b\).](#)

[LMC information memo, *Meetings of City Councils*.](#)

Amidst all of this, the supervisor is expected to keep his or her work team focused on the day-to-day work that needs to get done.

While the supervisor can only share limited information with his or her employee group, it is often helpful to meet with employees and confirm a complaint has been filed and an investigation is taking place.

The supervisor, however, should use care to only release the data deemed public at the time: the status and existence of a complaint. The nature of the complaint and how the investigation will be handled is not public.

d. Employee protection

It is the city's legal responsibility to protect from retaliation employees who make a complaint of employment discrimination, who serve as a witness or participate in an investigation, or who are exercising their rights when requesting religious or disability accommodation.

State and federal law protect employees from being demoted, ostracized, interfered with, restrained, coerced, terminated, or penalized in any way if these actions are or could reasonably be interpreted as being taken in retaliation by an employer.

H. Disciplinary hearings

Some personnel policies or civil service systems require an employee who is subject to a serious disciplinary action such as suspension, demotion, or discipline be entitled to a hearing before a public body with the authority to approve or reverse the decision.

Usually, the hearing is held before the city council, a civil service commission, or another body such as an advisory council or personnel committee.

Often these hearings will be subject to the Open Meeting Law and sometimes will be subject to the provision that allows the governing body to close the meeting for preliminary consideration of the disciplinary issue but allow the employee the option of opening the meeting.

The employee, therefore, must be notified of the meeting so they can make an informed decision about whether to open it. Again, if the purpose of the hearing is to allow the employee to present their side of the story, it is important the employee is given time on the agenda. The employee, therefore, must be notified of the meeting so they can make an informed decision about whether to open it.

RELEVANT LINKS:

[Minn. Stat. § 13D.05, subds. 1\(d\) and 3\(a\).](#)

[Minn. Stat. § 13D.05, subd. 2\(a\)\(1\).](#)

[Section V-A, *Grievance procedures for unrepresented employees*. Section V, *Veterans preference*.](#)

[LMC information memo, *Layoffs and Cost Saving Measures*.](#)

Again, if the purpose of the hearing is to allow the employee to present their side of the story, it is important the employee is given time on the agenda. If the employee does not elect to open the meeting, however, the public body does not have to allow the employee to attend the entire meeting.

Once the body decides to take official action (e.g., to approve the disciplinary action or to revoke it), the meeting must be opened to take that action.

Sometimes employees want to call witnesses, have an attorney present, and treat the hearing like a trial. The public body and the city should consult with an attorney before making decisions about what and what not to allow and during the hearing.

As a general rule, if the employee is going to be allowed to have an attorney present, the city should have its attorney present as well. Although detailed minutes of closed hearings are not required, these meetings must be recorded and when discipline is decided upon, the city should develop a written record setting forth the basis for the discipline.

A city must close a meeting or portion thereof if there will be discussion of “victim identification data” data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults. Depending on the nature of the charges against an employee, this provision may be applicable in a disciplinary proceeding.

Veterans preference hearings and grievance arbitrations for unrepresented employees are discussed in other sections of this chapter.

I. Layoffs and budget cutting measures

Layoffs or workforce reductions refer to terminating employees due to budget cuts or reorganization. Layoffs do not occur because of performance problems or misconduct and can be temporary or permanent. The first step a city should take in a potential layoff situation is to determine who needs to be involved. One of the most important things the city can do is to ensure all key parties are kept informed throughout the process.

For layoff and cost-saving measures reference materials, please refer to the link on the left.

In most cities, the city council has the authority to move forward with an employee layoff, but as referenced below, a city’s personnel policies, union contracts, civil services rules, etc., must be consulted. In general, the city manager in a Plan B city, and the city council in a Plan A city, have responsibility for the terms and conditions of employment.

RELEVANT LINKS:

However, even in a Plan B city, where the city council maintains authority over setting the city budget, if the city manager is deviating substantially from an established city budget, the best practice would be to have the city council vote on any major changes from the city's established budget for the year. Those cities operating under a charter or civil service rules need to review those documents for any language on layoff procedures. When the city is planning for a layoff, the city attorney should be kept informed throughout the process. The city may also want to contact the League with questions about its layoff situation.

1. Layoff checklist

a. What should a city do as an employer to prepare for a potential layoff?

(1) What is the difference between a furlough, a temporary layoff and an indefinite layoff?

Parties often use the terms furlough and layoff interchangeably. Cities may define these terms in personnel policies or union contracts, but it is not common. Absent the city having a definition in the personnel policies or union contracts, there is often not a true distinction in labor law between the two in that they both involve a suspension from employment

The easiest way to distinguish between the two is that a furlough is often thought of as a civilian application of a military term where an individual has a short-term leave of absence. In contrast, a layoff is often thought of as a discharge, whether temporary or long-term.

A furlough is generally perceived as a temporary leave of absence or reduction in work hours such that an employee is relieved of work duties and wages because of economic reasons, lack of work, or other non-disciplinary reasons. Employees who are furloughed typically return to work. The term layoff generally refers to a longer term or permanent elimination of an employee's position due to organizational changes, economic reasons, lack of work or other non-disciplinary reasons.

Furloughs can take many different forms. In its simplest form, a furlough is an individual or group of individuals removed from the work force for a short period of time, or in response to a specific economic situation that parties expect or are hopeful will be resolved in the near future. Furloughs may be voluntary or involuntary. The term furloughs can also include creative approaches to spread the impact among a larger group of employees.

RELEVANT LINKS:

[Minn. Stat. § 465.722.](#)

For example, some employers find a rolling furlough a useful approach in that it is applied universally across all employees but involves only short periods of time (a week or two) one after another so city services can continue to operate. Like other furloughs, there are various costs associated with it, in that employees, (assuming they are not using accrued leave balances for the time they are furloughed), will likely be eligible for unemployment benefits for the week(s) they are on furlough. Furloughs have been common as a short-term approach to funding limitations in recessions.

As noted above, layoffs are often viewed as a longer-term removal from the work force. There is no legal definition of “temporary” vs. an “indefinite” layoff. However, it is possible a city may have these terms defined in its own personnel policies or union contracts. Usually, a “temporary layoff” is seen as in response to a temporary situation where the employer expects the employee may be called back. In contrast, a “reduction in force” is usually seen as longer term where the separation is indefinite or permanent. Because these are working terms rather than technical terms, it is ideal if a city can identify an expected duration of the need for the leave. A city should be careful not to make any promises about the duration of a leave but let the employee know if there are short/long term plans or no plans to return the employee to the job, or that the employee may be returned to work if economic conditions allow. This will allow the employee to determine if they should be looking for another job.

Another good option with non-union employees, would be for the city to lay off indefinitely and employ on an “on-call” basis. With union employees, this would need to be addressed with the exclusive representative prior to implementation.

Another option to reduce a work force is a temporary reduction of hours for some or all staff. These may also be voluntary or involuntary.

Depending upon the degree of reduction in hours and the length the arrangement remains in place, this approach may be viewed as a more limited furlough or layoff.

(2) Consult existing policies and union contracts

Often a city’s personnel policies, union contracts, civil service rules, etc., will address the procedures that must be followed when preparing for a layoff.

If these documents are silent about layoff procedures, past practice should be consulted as a potential guide.

RELEVANT LINKS:

Elkouri, *How Arbitration Works*, 8th Edition, P. 13-165, Section 13.19A (further citations omitted).

As a matter of general labor law, in the absence of any contractual restriction, it is the right of management to determine the number of employees to be used at any given time and to lay off employees in excess of that number.

Generally speaking, with non-union positions, there is no requirement to lay off part-time or seasonal positions before laying off or reducing the hours of full-time positions unless a city's own personnel policy or civil service rules calls for this procedure. The city is generally free to do what makes the most sense from a business standpoint unless it will have a disparate adverse impact on protected groups, as discussed in more detail below.

Union contracts often have provisions requiring probationary, part-time and seasonal positions to be laid off first.

The best practice is to first think through which positions should be laid off and then think through which people are qualified to fill the remaining positions.

Seniority, as a "last hired/first fired" concept, is usually the determining factor within union positions. Because unions represent bargaining units, their seniority considerations are most often limited to seniority among other bargaining unit members. Union contracts vary, but seniority is typically measured utilizing continual service with the city or continual service within a classification with the city. Sound union contract language never permits seniority for employees within a bargaining unit to prevail over any nonunion employees.

The downside of a strict seniority approach is it can, in some situations, lead to retaining employees with less relevant skills, while letting go of others with more versatile skill sets. In considering layoffs, a city will typically look at each job class separately to see which ones it can most easily do without.

In other words, if the city has three maintenance workers, it may decide it can more easily eliminate one maintenance worker position than eliminate a single person classification like the city clerk. In non-union settings, a city may wish to lay off a more senior nonunion employee where there is a demonstrated need to retain the less senior employee (for example the less senior employee has special needed licensure that the senior employee does not). In deviating from seniority as a consideration, it is important the city have a sound and objective reason for doing so. Because seniority tends to also identify workers protected from age discrimination, use of a standard other than seniority should include an analysis of whether there is a disparate impact on a protected group like age. The city must also use an identified objective basis for determining how to apply layoffs in a nonunion setting.

RELEVANT LINKS:

[Minn. Stat. § 465.722.](#)
[Minn. Stat. § 465.72.](#)

As an aside, it is also important for a city to remember that dealing with a budget crisis can be a prime environment for unionization. Where a city has union and nonunion employees, the nonunion employees will be watching to see whether union employees receive preferential treatment because of their union contract language. These situations often highlight the difference between represented and unrepresented employees. A city should avoid taking action to treat nonunion employees less favorably if it wishes to maintain the flexibility associated with the nonunion workforce.

In instances in which all city employees are nonunion, a city should similarly consider whether it is treating its employees in a manner that is likely to encourage organization. The city should always keep in mind, however, that the right to organize is guaranteed in Minnesota state law and the city should not interfere with that right. Creating a positive and fair-handed work environment is not the same as interfering with the right to organize.

Personnel policies, union contracts, and civil service rules should also be consulted to determine what kind of severance payouts (compensatory time, vacation, sick leave, paid time off, etc.), if any, would be due an employee who will be laid off. This is an area where furloughs may be contrasted – it is typical for furloughed employees to retain leave balances rather than have them paid out so that the employee can take time off when they return to work. Two key items to note about severance payouts in layoff situations:

- (1) All compensatory time on the books for non-exempt employees (those eligible for overtime) must be paid out; and
- (2) In certain cases, state law limits the amount of severance pay an employee may receive.

In addition, if a severance package is being offered as an incentive to encourage employees to leave voluntarily, offering it across the board is a good way to avoid potential claims of discrimination.

If the city chooses not to make such a package available across the board, it is important to document the objective business reasons for the decision to only offer the incentive to certain employees.

The city can establish parameters (by policy or resolution) that an employee must meet to qualify for such a severance package, but it should not arbitrarily pick and choose the employees to whom the incentive will be offered. Limited participation severance packages should always be discussed with your city attorney because of the potential for discriminatory impact.

RELEVANT LINKS:

*Firefighters Union Local
4725 v. City of Brainerd*, 934
N.W.2d 101 (Minn. 2019).

When addressing organizational structure issues like a reorganization or layoff, the city will need to consult with the city attorney or labor attorney before acting. This is particularly true where the city has union employees. A good example of the nuances associated with a reorganization or layoff in a union setting was the Brainerd fire case decision. In that case, the Minnesota Supreme Court held the city's decision to eliminate full time firefighters in a bargaining unit and replace them with nonunion paid on call firefighters was an unfair labor practice. It should be noted that this case may not apply where a union representing several positions would remain in existence upon the elimination of some, but not all, of the positions within the bargaining unit.

However, negotiations or a "meet and confer" with the union may be needed to address the potential unfair labor practice issue from the perspective that an agreed upon resolution may not constitute an "interference." Another potential option would be to address the matter through a unit determination process before the Minnesota Bureau of Mediation Services (BMS) process.

A city contemplating whether to contract out (or subcontract) services currently performed by city employees who are in a union should also carefully review its union contract and discuss the matter with the city attorney prior to arriving at a decision to do so. As a general matter, the decision to contract out is an inherent managerial right, unless there is contrary or limiting language in the union contract. However, the effects of contracting out bargaining unit work is typically subject to negotiation and arbitration. A city may want to subcontract services that it currently performs if there are potential cost savings by doing so (e.g., some cities may be looking into contracting police services with the county instead of providing their own police protection). If the city does not negotiate to impasse the effects of a contracting out decision, it will probably be limited in its ability to subcontract during the term of the contract. An arbitrator may rule in favor of allowing subcontracting during a contract period if:

- The action is performed in good faith.
- It represents a reasonable business decision.
- It does not result in the subversion of the labor agreement.
- It does not have the effect of seriously weakening the bargaining unit or important parts of it.

Only very small-scale subcontracting of bargaining unit jobs is likely to meet all four of these factors.

If the city wants to subcontract, it needs to notify the union that it is considering this option (prior to formally making the decision to contract out) and allow the union to negotiate over the effects of that decision (e.g., severance pay and retirement benefits).

RELEVANT LINKS:

LMC information memo,
[Layoffs and HR Cost Saving Measures](#).

If the city and union do not agree on these “effects” issues, a formal impasse should be obtained and declared before moving ahead with the subcontract. Risks of failure of party agreement may include strike/lock out over the issue. The bottom line is that the city should consult with a labor attorney before making any decisions on the subcontracting issue.

The city will probably have to obtain union agreement in order to offer many of the programs described in this section to any employees covered by a collective bargaining agreement. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice.

(3) Document activities in preparation for a layoff

Like any other personnel activity, it is important for the city to document the business reasons for a layoff. From a legal perspective, the city will be better able to defend its actions if documentation shows solid business reasons for eliminating certain positions.

From a management perspective, even if employees are not happy about a layoff, good documentation provides employees with the business reasons for such an action. When employees understand the layoff is not directed at them personally, they are less likely to want to sue the city.

(4) Assess benefit responsibilities

Most employers are required by law to offer employees continuation of group medical benefits for a period of time following employment.

b. How should a city determine which positions to eliminate?

(1) Consider implementing a hiring freeze

A city may want to consider implementing a hiring freeze in lieu of layoffs. A hiring freeze is when a city determines not to fill a vacancy. It is usually implemented across-the-board with few or no exceptions. In other words, any employee who retires or otherwise leaves employment with the city is not replaced. The downside of this type of program is vacancies can occur in jobs sorely needed by the city. For example, if the city operates a hospital or nursing home and registered nurses are scarce to begin with, it may be difficult for the city to leave a position vacant. Or, if the city has a one-person job class with special expertise, such as the city engineer or city attorney, it may be difficult to “do without” that function. In some cases, the city can contract out for the work, but this may not result in any cost savings.

RELEVANT LINKS:

LMC Model Form, [Furlough or Layoff Letter](#).

[38 U.S.C. § 4316](#).

If the city wishes to implement a hiring freeze but include some exceptions to the freeze, it should identify the exceptions up front (either by individual position or by general guidelines) before implementing the freeze. When identifying the exceptions to the freeze, the city should document the business reasons for exempting these positions. This will help the city avoid perceptions of favoritism and help defend claims of discrimination and grievance arbitrations.

(2) Carefully consider which positions to layoff

A city should rely on objective business reasons to decide which employee(s) to lay off. From a legal perspective, state and federal law prevent employers from any employment practice that would discriminate against or have a significant “adverse impact” on any class of people protected by those laws (e.g., Title VII of the Civil Rights Act, Minnesota Human Rights Act). From a management perspective, a city should not use a layoff to deal with employee performance issues.

It is possible the courts or an arbitrator may see this as an unfair labor practice, a deception or a wrongful discharge.

With or without the existence of policies, union contracts, and past practices, the city must carefully think through how a layoff is to be accomplished.

Once the city determines which job class(es) will be affected, seniority (years of service) with the city is often used to determine who will actually be laid off. However, defining “seniority” can be tricky. For example, at your city: Do part-time years of service equal full-time years of service or should part-time service be pro-rated? Do prior years of service count for employees who are rehired? Does time spent on a leave of absence count toward seniority? (Federal law says that time spent on leave covered by the Family and Medical Leave Act and/or for qualified military leave for training or active duty must be counted).

In addition to seniority, a city should consider which employees hold a license (e.g., Class A wastewater operator, building official, commercial driver’s license, etc.) or have special training essential to the provision of certain services to the public. If an employee is less senior than others but happens to be the only one qualified to perform a necessary function, including that employee in the layoff may not be an option.

Cities wanting to utilize performance evaluations as an objective tool, need to review those evaluations to assure they are free from subjective determinations or potential bias, are uniformly performed across the city and utilize rational criteria.

RELEVANT LINKS:

[49 C.F.R. § 382.301.](#)

LMC information memo,
[Parks and Recreation Loss Control Guide.](#)

[Minn. R. 5200.0910.](#)

HR Reference Manual,
[Chapter 2](#), See section XII-B-2-a.

This approach is typically not permitted in union groups where seniority is the sole criteria. It is also not commonly used as a sole determination in nonunion settings because of their often-subjective nature.

Additionally, for furlough or temporary layoff situations, the city will need to be consider how to treat employees on leave with respect to other agency required processes. For example, for a DOT driver, specific rules regarding drug and alcohol testing must be addressed prior to having the worker perform safety sensitive functions again.

For example, according to Federal Motor Carrier Safety Administration regulations, if a driver is considered an employee of the city during the extended (layoff) period, a pre-employment test would not be required so long as the driver has been included in the city's random testing program during the layoff period. However, if the driver was not considered an employee of the city at any point during the layoff period, or was not covered by a program, or was not covered for more than 30 days, then a pre-employment test would be required upon a call back.

For cities with public swimming pools or water parks, it is important to remember the staffing requirements associated with operating those kinds of facilities. The Minnesota Department of Labor and Industry (DLI) prevents lifeguards under age 18 from supervising other lifeguards. DLI has also stated the supervisor cannot be a volunteer but must be a lifeguard employed by the city.

In addition, there are rules from the Department of Health that play a role in the city's staffing of such facilities. As the city is going through the process of determining which employees to include in the layoff, it is important to remain aware of what the resulting layoff group looks like. For example, if the criteria the city is using to determine who will be laid off results in only employees over 50 being impacted, the criteria should be revisited. Likewise, if the layoff group appears to be comprised mainly of women of childbearing age or includes only the employees who recently tried to organize a union, the city should rethink the criteria being used.

Finally, the city needs to consider employees who may currently be away from their jobs with the city for whatever reason (e.g., family leave, military duty, etc.). If the layoff will impact employees who are on a medical-related (or other) leave of absence, it is important to work with the city attorney. Each situation may be covered by a variety of state and federal laws (e.g., Americans with Disabilities Act, Minnesota Human Rights Act, Workers' Compensation, Family and Medical Leave Act, etc.) and should be considered on a case-by-case basis.

RELEVANT LINKS:

[49 C.F.R. § 382.301.](#)

LMC information memo,
*Drug and Alcohol Testing
Toolkit for the City
Workplace.*

(3) For furloughs and temporary layoffs, begin to think through needed steps to plan for the city's recall process

The amount of time the city laid off an employee may impact what the city needs to do to rehire that person. For example, if the employees remained on benefits and it was a shorter duration (for example, less than six months), the city may not have to repeat the entire hiring process to bring the employee back. Some things to consider:

- Consider any drug and alcohol testing that may be required in accordance with Federal Motor Carrier Safety Administration (FMCSA) rules.
- Has there been any gaps in any recalled employee's licenses for the job and how can those be addressed before the employee returns to work?

(4) Think about bumping rights

Some policies or union contracts may specifically permit employees with more seniority to "bump" employees in equal or lower job classes and assume their jobs to avoid being laid off.

In reviewing bumping language, a city needs to determine if the employee who is exercising bumping rights meets the minimum requirements of the position. The employee bumping into the position under a union contract seniority provision typically is not required to meet any preferred requirements.

(5) Review existing contracts

A city may have staffing responsibilities related to certain contracts and programs. For example, the Minnesota Department of Labor and Industry has contracts with many city building departments to perform plan review and/or inspections of public buildings. These contracts are based on two criteria:

- (1) The city must employ a certified building official.
- (2) The city must have adequate staff to provide these services.

A layoff may cause a city to be out of compliance with such a contract. Other city contracts, such as those for police and fire services, may have similar provisions.

(6) Consider veterans preference

Veterans are not given the same rights in a layoff situation as they are in a termination decision.

RELEVANT LINKS:

LMC information memo,
*Veterans Preference in
Discipline, Discharge or Job
Elimination.*

Minn. Stat. § 197.46.

LMC information memo,
*Veterans Preference in
Discipline, Discharge, or Job
Elimination.*

*Early Retirement Incentive
for All Employees*, LMC
Model Policy.
*Early Retirement Incentive
for a Group of Employees*,
LMC Model Resolution.

In general, a city may lay off (or demote) a veteran in situations where the veteran is the least senior employee and the veteran's position is abolished. The job duties of the veteran should not be assigned to other less senior positions as this may imply that the position was abolished in order to avoid the veteran's right to a hearing. Nor should the position continue to exist by some other name, or the position duties merely transferred to another department. To determine if the position is being eliminated "in good faith," the city needs to ask:

- Are the job duties actually eliminated or being re-assigned?
- Is the abolished position continued under some other name or duties transferred to another department?
- If duties are re-assigned, are they assigned to another non-veteran employee with less seniority than the veteran?
- Is the position being abolished in good faith for a legitimate purpose or as a strategy to terminate the veteran?

A layoff notice provided to a veteran should include a statement like the following: *"If you are a veteran as defined by Minn. Stat. § 197.447, you may have certain rights relating to your layoff under the Veterans Preference Act (Minn. Stat. §§ 197.46 and 197.481).*

Pursuant to the Act, you have the right to either petition the District Court for a writ of mandamus or the Commissioner of Veterans Affairs to determine whether the action taken was in good faith. If you wish to pursue either of these remedies, you must do so within 30 days of receipt of this notice."

Unlike other types of terminations of veterans, the city does not need to pay the veteran his or her regular wages during the 30-day period after the notice in cases of good faith layoff.

(7) Carefully consider early retirement incentives

The advantage of offering employees an incentive for early retirement is it can be a fairly painless way to reduce the workforce. By establishing the early retirement incentive as a formal program with a limited "window of opportunity" for participation, the city will be protecting itself against setting a precedent or otherwise committing itself to similar programs in the future. There are, however, some potential pitfalls to avoid with these incentives. In general, the city should:

Offer early retirement incentives across the board to all employees or an entire group of employees (e.g., sworn police officers). If offering the incentive only to one group of employees, the city should be prepared to explain the business reason for offering it only to that group.

RELEVANT LINKS:

EEOC, [Understanding waivers of discrimination claims in employee severance agreements.](#)

[Minn. Stat. § 471.61.](#)

[29 C.F.R. § 1625.22.](#)

[Minn. Stat. ch. 363A.](#)

Auerbach, v. Board of Educ. of the Harborfields Central School Dist., 136 F.3d 104, 113 (2d Cir. 1998).

[29 U.S.C. § 626\(f\).](#)

[Minn. Stat. § 363A.31, subd. 2.](#)

Section IV-A, Mandatory Retirement.

EEOC, [Understanding waivers of discrimination claims in employee severance agreements.](#)

EEOC: [Q&A-Understanding Waivers of Discrimination Claims in Employee Severance Agreement](#), APPENDIX B.

Most commonly, cities offer a specified amount of paid retiree health insurance to employees who elect an early retirement incentive -- usually paid single coverage health insurance for a certain period of time or up to a certain dollar amount. We are not aware of any cities using age 65 as the cutoff for paid retiree insurance, and the League does not recommend this practice based on the possibility it might conflict with state law.

- The city will probably have to obtain union agreement to offer the program to any employees covered by a collective bargaining agreement. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice. Make sure the incentive meets the definition of “voluntary” under Equal Employment Opportunity Commission guidelines and federal law. For example, the city should make sure the employees are given adequate time and enough information to make an informed decision about whether to take the incentive. A decision from the Second U.S. Circuit Court of Appeals referred to employees being given a reasonable amount of time to consider their options. Four months was seen as sufficient in this particular instance. If the city is asking the employees to sign a waiver of rights under the Age Discrimination in Employment Act (ADEA), many specific requirements including time limits apply. For example, an individual employee must be given 21 days and a group of employees must be given 45 days to consider the waiver. A seven-day revocation period must also be provided. According to the EEOC, it is not coercion for the city to notify its workforce that layoffs will be necessary if insufficient numbers of employees do not retire voluntarily unless older workers are the only ones threatened.
- The EEOC regulations also require the employer notify anyone who is being asked to sign a waiver of the job title and ages of all individuals selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. Since a person’s age is private personnel information, cities should document that age information will only be released to city personnel who have a need to receive the information as part of an administration of a human resources function. Sharing age information with city staff and being asked to sign a waiver would likely meet this condition. The city should work closely with its attorney to address all the requirements for waiving rights under ADEA and any other laws.
- Additionally, the Older Workers Benefit Protection Act (OWBPA), which amended the ADEA, mandates specific content and time periods for legally enforceable releases of claims for individuals aged 40 or older.

RELEVANT LINKS:

[Minn. Stat. § 13.43.](#)

HR Reference Manual
Chapter 1, [Employment Basics](#).

29 U.S.C. § 626(f).

[Minn. Stat. § 363A.31, subd. 2.](#)

[Lyons v. Ohio Educ. Assoc. and Professional Staff Union](#), 53 F.3d 135, 140 (3d Cir. 1995).

[“EEOC Compliance Manual: Chapter 3: Employee Benefits,” VI: Early Retirement Incentives](#), U.S. Equal Employment Opportunity Commission.

Under the OWBPA, employers also need to provide workers aged 40 and over a consideration period of at least 21 days when one older worker is being separated, and 45 days when two or more older workers are being separated. Additionally, employees must receive a revocation period of at least seven days. Also, generally, releases of claims must receive a revocation period of at least 15 days under the Minnesota Human Rights Act. During a layoff or as part of a voluntary exit incentive program, two additional requirements are needed to validate the releases: (1) The employer must publicly identify the targeted employees, and (2) the affected employees must be informed in writing of the job titles and ages of all individuals selected for the group program, along with employees in the same job classification or unit that were not selected for the program.

- Establish parameters for the program. For example, the city may want to offer the early retirement incentive to all employees with 10 years or more of service with the city and who have met age and service requirements necessary to receive a public pension benefit. The Sixth Circuit has held early retirement incentive plans that are based on years of service at the time of hire are appropriate, because this factor is not a substitute for age. The EEOC guidelines clearly indicate it is permissible to inform employees that if an insufficient number of employees accept the early retirement incentive, the city will have to consider layoffs, as long as older workers are not the only ones threatened with layoffs simply because of their age or that they are closer to retirement than other employees. The EEOC also makes it clear making an offer that is “too good to refuse” is not considered discriminatory. In other words, designing an incentive that will be particularly attractive to older workers is permissible.
- Establish a “window of opportunity” in which employees can take advantage of the early retirement incentive (e.g., between 6/1/2024 and 10/1/2024). This will ensure the city does not forget to “close the door” on the program once it is no longer needed.
- Be aware early retirement incentives that provide differing benefits based on age could be challenged on the basis of age discrimination. For example, cities sometimes provide retirement incentives that pay the city’s contribution toward health insurance until age 65 or until Medicare-eligible. While the EEOC has issued revised regulations that allow for this, the Minnesota Human Rights Act still might provide the opportunity for a legal challenge of this practice based on age discrimination. Despite the ADEA’s revised regulations, the safest practice is probably still to offer a flat dollar amount (e.g., \$10,000) for all employees meeting the requirements established under the early retirement program.

RELEVANT LINKS:

[Minn. Stat. § 471.61, subd. 2b.](#)

[LMC information memo, *Continuation of Benefits*.](#)

[Minn. Stat. § 465.722.](#)

[Minn. Stat. § 465.722](#)
See section III-K-4-b:
Statutory limitation.

[29 U.S.C. § 626\(f\).](#)
[Minn. Stat. § 363A.31, subd. 2.](#)

[29 U.S.C. § 626\(f\).](#)

[Minn. Stat. § 363A.31, subd. 2.](#)

- Avoid early retirement incentives that have uncertain or uncapped costs to the city (e.g., paying health insurance premiums until the employee finds another job with group health insurance). Instead, cap the costs at a limited number of months or a dollar amount.
Consider the impact of losing a substantial number of highly experienced employees all at once (e.g., losing the most experienced police officers who help train new recruits). At minimum, the city should plan for the loss of that expertise, perhaps by asking the experienced employees to conduct training or write manuals before they leave employment.
- Consider employees who are not yet 65 but are eligible for a public pension fund and how that might impact continuation of health and dental benefits. State law typically requires the city to provide indefinite group health and dental coverage to early retirees who qualify to receive a public pension.

(8) Carefully consider voluntary termination programs

The city may want to consider offering employees a severance benefit if they agree to a voluntary termination of their employment.

It is important the city offer an additional severance benefit (one that is not available under ordinary circumstances) to the employee in return for his or her agreement to voluntarily terminate employment. Using the private sector as an example, a severance benefit often takes the form of a dollar amount (or one week's pay) multiplied by the number of years of service (e.g., \$1,000 x # of years of service or 1 week of pay for each year of service).

It is equally important the city consider requiring the employee to sign a waiver of all rights to sue, grieve, or request a veterans preference hearing in return for the additional severance benefit.

Also, as mentioned above, the Age Discrimination in Employment Act requires certain waiting periods during which the employee can change his or her mind before the agreement is final. Additionally, cities will want to be aware of the revocation period after the agreement is signed – seven days under ADEA and 15 days under the Minnesota Human Rights Act. Finally, it is important to notify the employee of his or her right to consult an attorney before signing the agreement. The best practice is to offer this opportunity across-the-board or within selected job classes, and to be prepared to give a business reason why certain job classes have been selected and others have not. The city should work with an attorney on the agreement to be signed by participating employees.

RELEVANT LINKS:

[Minn. Stat. § 179A.13.](#)

[Minn. Stat. § 471.991 - 999.](#)

[Minn. Stat. § 179A.13.](#)

[Greenway vs. Ind. Sch. Dist. No. 316](#), 673 N.W. 2d 843 (Minn. App. 2004).

The city will have to obtain union agreement to offer this program to any employees covered by a collective bargaining agreement. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice and, thus, should be avoided.

(9) Carefully consider wage freezes, voluntary leave, and other cost-saving measures

Sometimes employers implement wage freezes in addition to, or in lieu of, layoffs and other cost-savings measures.

A wage freeze typically means no merit or performance pay is given during the freeze period, but it can also mean no cost-of-living adjustments or any pay increases whatsoever.

As with most of the programs discussed in this section, a wage freeze is subject to employee complaints of discrimination so across-the-board wage freezes are generally the best practice.

The city may have the right to unilaterally implement a wage freeze in a nonunion environment—depending on what its personnel policies, city charter, or civil service rules say. However, the city typically does not have such a right in a union environment if a union contract is in place calling for wage increases. The city is obligated to implement scheduled wage increases under an existing union contract. It may also be obligated to implement wage increases, even with an expired union contract, if the contract calls for scheduled step increases.

In this case, the city can ask the union to voluntarily accept a wage freeze, but the union has no legal obligation to agree. If the city decides to approach the union about a voluntary wage freeze, it should handle the subject honestly. Let the union know what measures the city will have to consider if it cannot reduce its costs (e.g., layoffs), but do not use this to threaten the union employees specifically.

In addition, the city should approach the union representatives to ask about a voluntary wage freeze; but should not approach employees directly. Talking directly to union employees about terms and conditions of employment typically negotiated in a contract can be seen as an unfair labor practice.

The city must bargain over whether those automatic steps will be implemented in the new contract and if unable to negotiate a freeze, it must continue to award those step increases until a new contract is settled. If the city is in between union contracts (e.g., the current contract has expired and no new contract has been negotiated), then the city may try to negotiate a wage freeze for union employees.

RELEVANT LINKS:

[Minn. Stat. § 179A.13.](#)

[29 U.S.C. §§ 201-219.](#)

However, if the expired contract calls for automatic step/wage increases based on factors like longevity or educational achievements, the city probably cannot unilaterally implement a wage freeze. If the expired contract does not have automatic step/wage increases, the employer can probably freeze wages at the level called for in the expired contract but only while bargaining over the wages and benefits for the next contract period.

Once that contract is settled, the employer must follow whatever terms and conditions have been bargained and agreed upon.

The reality is a union contract will rarely expire unless employees go on strike. State law provides that an existing contract is in effect after expiration until the right to strike matures or until a successor agreement is reached. If employees go on strike (or have the option to go on strike), then the contract provisions are not enforceable. In the instance in which the parties have reached impasse, a city may implement its last best offer. This technically operates as a continuation of the contract. It is also important to note that for essential employees there is no “right to strike;” therefore, the expired contract stays in effect until the new contract is negotiated.

Another way to save personnel costs is to implement a voluntary unpaid leave program or reduce work hours for all employees across the board. While there may be a variety of ways a city could accomplish this, there are several issues cities may want to consider:

- Applying the program across the board to all employees or to one identifiable group of employees is less likely to result in a successful lawsuit.
- Voluntary programs have the advantage of allowing those that can better afford the unpaid leave or reduction in hours to be the ones to step forward. Whenever some employees volunteer and others do not, however, there is a risk of employee morale problems.
- Involuntary programs applicable to all employees are likely to be seen as fair and consistent but may not be the most efficient method of reducing hours. For example, in the winter months, reducing the hours of snowplow drivers at the same rate as golf course employees may not be the most efficient way to use city dollars.
- The city will need to communicate with a union where it has employees covered by union agreement prior to including bargaining unit employees in a voluntary program. Under general labor law principles, what a city may choose to call a program is less important than what it accomplishes – a reduction in the workforce whether by reduced hours, not scheduling an employee or through a voluntary/involuntary furlough all may fall within the definition of a layoff under the union contract. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice.

RELEVANT LINKS:

[29 C.F.R. § 541.710.](#)

[Fact sheet 70 FLSA Furloughs.](#) See scenario 9.

- Consider how any voluntary unpaid leaves of absence would impact participating employees' seniority dates. For non-union employees, the city would probably have the discretion whether to count the unpaid time for seniority purposes. The city should reference its personnel policies to determine what would be the effect of the current language and decide whether it wishes to amend this language.
- Counting the time would provide an additional incentive for employees to voluntarily step forward to take an unpaid leave of absence. For union employees, the seniority issue will likely be outlined in the union contract and any change would have to be negotiated with the union.
- Consider how the city will handle vacation/sick/PTO accruals for typically full-time employees working less than 40 hours per week. Making it clear the city is changing the employee's status to less than full-time eliminates this confusion, but likely will have an impact on vacation and traditional sick leave accruals as employees will then likely be considered "part time" under existing policy or union contract (if applicable) language. Vacation and traditional sick time accruals are probably at the city's discretion for non-union employees in this situation but may require amended language in personnel policies. In the event the city does not have personnel policies, the city may want to go on record stating why it is deviating from its usual practice regarding leave accruals (if the city's usual practice is to prorate benefits for employees who work less than 40 hours).
- Most exempt employees are expected to run a program, a division, or a department. It is difficult to determine how to "cut back" on these responsibilities in a way that realistically translates to cuts in their work hours. Exempt employees are generally expected to work as many hours as it takes to fulfill their responsibilities, and work hours can vary from week to week. Cities will probably need to eliminate specific duties from the job description of an exempt employee to provide realistic ways to cut back on hours.
- Consider the impact on exempt (not subject to the Fair Labor Standards Act) versus non-exempt (subject to the Fair Labor Standards Act/overtime eligible) employees. Nonexempt employees are paid for each hour worked, so furloughed nonexempt employees are simply paid for fewer hours. In the case of public sector exempt employees, a specific rule applies to furloughed employees: "Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced."

RELEVANT LINKS:

Firefighters Union Local 4725 v. City of Brainerd, 934 N.W.2d 101 (Minn. 2019).

LMC information memo,
Public Purpose Expenditures.

Minn. Stat. ch. 268.

There are some issues for cities to consider when applying these cost-saving measures to employees on a voluntary unpaid leave program:

- Assess benefits continuation responsibilities. Consider whether the city will continue to pay its usual share of the health insurance premiums while an employee is on a voluntary unpaid leave. The city can choose to continue to pay its share of the health insurance premiums while the employee is on leave, except for union employees, which may require negotiation first.
- While city expenditures must have a public purpose, such an action could likely be justified as part of cost savings measures (particularly as it may prevent an employee from receiving unemployment benefits) while advancing employee retention. The city should consider taking steps to ensure this does not set a precedent. For non-union employees, this probably means amending personnel policies with the limitation on this benefit noted. For cities without personnel policies, this may mean stating formally on the record this will not set a precedent and it is being done for a limited time only. In the case of union employees, the city will probably want to have a written agreement (i.e., in the contract or via a separate memorandum of agreement) that this will not set a precedent).
- A COBRA notice typically is not issued until there is a loss in coverage – in other words, when the city decides it is no longer going to pay the city’s contribution for the coverage for the employee.
- A benefit to allowing employees to keep the same level of benefits when they have temporarily had their hours reduced is it eliminates the potential controversy related to their status during this period. Another benefit is employees would probably see this as a good faith gesture on the part of the city and, if the city can afford it, this would help maintain morale during what will likely be a trying time for its employees. The downside to such a benefit is the continued cost to the city of the accrued benefits. Employees covered by a union contract will be governed by the terms of that document. Whether a “temporary” status change is permitted will need to be determined by reviewing the union contract. Likewise benefit accruals will be governed by the contract provisions. Any changes to these provisions would need to be negotiated with the union.

c. How does unemployment insurance work?

Most Minnesota cities are directly responsible for unemployment benefits and may not be aware that a layoff will not save the city the employee’s entire wage for quite some time. Unlike private sector employers, most Minnesota cities pay for unemployment insurance on a reimbursement basis.

RELEVANT LINKS:

[Minn. Stat. § 268.07.](#)

[Unemployment Insurance
MN, Information Handbook.](#)

[Minn. Stat. § 268.07, subd. 2.](#)

[MN Unemployment, Shared
Work - alternative to layoff](#)

[Minn. Stat. § 268.068.](#)

This means the city pays the Minnesota Unemployment Insurance Trust Fund an amount equal to the unemployment benefits paid to its former employees

The city should consider this ongoing cost when conducting the financial analysis of how many employees at what salaries need to be laid off to balance the budget. It is important for the city to understand laying off an employee will not immediately save the city that employee's full salary.

Estimate your employee's potential benefit. A weekly benefit amount is calculated by first determining the base period of employment. The base period is typically the first four of the last five completed calendar quarters preceding the week in which an individual filed for unemployment benefits. The weekly benefit amount is the higher of 50 percent of the individual's average weekly wage during either the high quarter of the base period or the total base period. In general, the maximum amount of benefit is the lesser of 26 times the individual's weekly benefit amount or one-third of the individual's total base period wages. The information provided here is only an estimate of the benefit; calculating actual benefits is more complex and determined by statute.

Generally, if the city reduces the work hours of an employee by 20 percent or more and this results in him or her resigning, the employee is likely to be eligible for unemployment benefits. This is true even though employees are often not eligible for unemployment benefits due to resignation under other circumstances.

Minnesota law requires employers to display several informational posters in a physical location where their employees can easily see them. The posters provide safety, wage, and age-discrimination information. A PDF version of the unemployment insurance informational poster is available below for downloading & printing. The Unemployment Insurance poster must be displayed in a prominent place at the worksite. Select from the links below to view, download, or print a poster:

- [English](#)
- [Spanish – DESEMPLEADO? \(UNEMPLOYED?\)](#)
- [Somali – Shaqo la'aan? \(UNEMPLOYED?\)](#)
- [Hmong – Puas yog koj poob hauj lwm? \(UNEMPLOYED?\)](#)

The complete set of required state posters is available from the Minnesota Department of Labor and Industry (DLI). There is no cost for the posters, and they can be printed from the DLI website or ordered as a packet that will be sent to you by mail. Providing an employee with the information from this poster (whether in a special communication or by displaying the poster in a physical workspace) would meet the notice requirement.

RELEVANT LINKS:

[Minn. Stat. § 268.192.](#)

MN Unemployment,
[Employee Information](#)
[Handbook.](#)

LMC Handbook [Liability](#), III-D,
Definition of discretionary
and ministerial acts.

Employers are prohibited from entering arrangements with employees resulting in an employer agreeing not to contest an unemployment claim or failing to submit paperwork regarding an employee's unemployment claim, in exchange for an employee's resignation, leave of absence, temporary or permanent leave from the employer, or a withdrawal of a grievance or termination.

For more information, cities should consult the Minnesota Employer's Unemployment Handbook available on the unemployment insurance page of the Minnesota Department of Economic Security website.

d. What else should a city be aware of?

(1) Build a record

Layoffs will inevitably result in reduced service levels. For example, a city may no longer have the staff to inspect city sewers with the same frequency or the ability to plow snow or sand streets with the same regularity. These reductions in service may well result in an increase in accidents and claims made against local governments. To help insulate the city from potential liability, state law provides cities with statutory discretionary immunity for many of these types of decisions.

In the case of an employee layoff (and corresponding reduced service levels), it is important for the city to create and preserve a good discretionary immunity record. This can be accomplished in several ways. For instance, if the city is no longer going to inspect sewers at the same frequency, the city may want to adopt a revised sewer inspection policy that sets forth new inspection procedures based on a reduced number of public works employees.

Similarly, if the city is going to change its snow plowing practices so it initiates plowing after four inches of snow rather than two inches, it should change its snowplowing policy and explain how the budget and staffing considerations have resulted in the reduced service level.

If an actual policy decision is made, a resolution setting forth the policy or plan can be prepared. The "whereas" sections of such a resolution should document some of the social, political, economic, or other factors supporting the council's decision. Similarly, accurate and complete minutes are excellent records for showing a city council's exercise of discretion.

More information on building the statutory discretionary immunity record can be found in Chapter 17 of the Handbook for Minnesota Cities.

RELEVANT LINKS:

[29 U.S.C. § 2101-2109.](#)

(2) Advance notice

The Worker Adjustment and Retraining Notification Act (WARN), a federal law that requires advance notice to employees in situations of large plant closings or mass layoffs, does not apply to local government entities.

Even though state and federal laws are silent about providing local government employees with an advance notice of pending layoff, the city should consult its own personnel policies, civil service rules, and/or union contracts. These documents may require the city to provide an advance notice to employees. In addition, there may be other benefits to providing advance notice.

For example, employees who feel the city is doing what it can to treat them fairly and humanely may be less inclined to file lawsuits or grievances, or to contest the layoff.

(3) Return to work/recall rights

Union contracts typically address recall rights – including the order of who is to be recalled and how long recall rights exist. In the absence of such language in a union contract, city personnel policies or civil service rules, the city has considerably more discretion. Recalls from layoff should utilize an objective standard. An easy way to think of a recall for process purposes is it as a reverse layoff. The same considerations should apply. Along those lines, it is a good idea for the city to determine its “call-back” criteria in advance and have it approved by the city council so the city can show that the method used was systematic and consistent. Again, a city needs to be sure to review its personnel policies, civil service rules, and/or union contracts as these documents may outline a procedure to follow when calling employees back to work. By using a systematic method, the city can ensure any protected status employees (e.g., veterans, minorities, disabled employees) are treated fairly.

(4) Using volunteers after the layoff

For some cities, volunteers are a way to get work done after an employee layoff has occurred. It is important the city ensures, however, that any volunteer doing work previously performed by an employee is qualified to do such work. In other words, the volunteer should have the same qualifications required of an employee for the position (e.g., background, training, education, certifications, etc.).

If an employee who performs snowplowing is required to have a commercial driver’s license, then a volunteer performing the same function (even if the volunteer is doing it on a very occasional and sporadic basis) should have a commercial driver’s license.

RELEVANT LINKS:

LMC information memo,
[LMCIT Liability Coverage Guide](#), Section II-U,
Volunteers.

[Firefighters Union Local 4725 v. City of Brainerd](#), 934 N.W.2d 101 (Minn. 2019).

LMC information memo,
[LMCIT Workers Compensation Coverage Guide](#), section I-C-7,
Emergency response employees and volunteers.

There is no specific law prohibiting a volunteer from doing a non-union city employee's job duties. However, other laws and contractual obligations may make this either difficult or not practical.

Again, the city will want to make sure the volunteer has all the appropriate licenses and qualifications to be able to do the job.

For union employees, this is a more difficult question. Common layoff language in union contracts requires the layoff of probationary, seasonal, or temporary employees first. It can reasonably be expected unions would object to using someone other than a laid off bargaining unit member to perform union work.

In disputes over such an action, the union may argue the layoff language prohibits this use of volunteers. In addition, the union may argue it constitutes an impermissible contracting out of bargaining unit work. Reference to the limitations on subcontracting in this document should be reviewed prior to making any decisions related to the use of volunteers rather than laid off union employees. The Brainerd fire department case discussed earlier also illustrates the dangers of replacing union employees (whether laid off or not) with volunteers.

Cities need to be aware of the potential liabilities created when using volunteers to replace employees. Emergency response volunteers, such as volunteer firefighters and volunteer first responders, are considered employees for purposes of workers' compensation, and they are covered under the city's workers' compensation coverage. Other kinds of volunteers, such as coaches in recreation programs and volunteers working on city construction projects, are not covered by the city's workers' compensation coverage because they are not considered employees of the city (it is important to note that providing volunteers with a nominal payment for their services does not make them employees nor eligible for workers' compensation coverage).

Volunteers other than emergency response volunteers, however, are protected by LMCIT's volunteer accident coverage, which is provided to all members of LMCIT's workers' compensation program. While benefits are more limited than workers' compensation, it does provide some "no-fault" benefits to volunteers injured while conducting work for the city.

Finally, the definition of nominal pay or expense reimbursement is not always clear. If the payments to volunteers are deemed to be wages, minimum wage and overtime obligations will kick in. It is wise to have your city attorney review any compensation/reimbursement plan established for volunteers.

RELEVANT LINKS:

[MN Unemployment Insurance.](#)

[MN Career Force Centers.](#)

[LMC information memo, Continuation of Benefits.](#)

e. How can a city help employees through this difficult time?

(1) Assign a contact person(s)

Identify one or more employees to be the contact(s) for employee questions that are likely to come about.

Stybel Peabody & Associates, a Boston leadership and outplacement consultant, also recommends maintaining communication and including former employees in events such as alumni networks.

(2) Minnesota Career force Centers

Inform workers they may obtain applications for unemployment benefits and may register for job placement assistance. Employees can visit the State's career development and talent matching resource.

(3) Group health benefits

Educate employees about the benefit continuation options available to them. Make sure they understand the deadlines for electing coverage and for making payments for the continued coverage. If the employee has family coverage, remember the covered family members also likely have continuation options. It is also important to inform employees about the benefits that will be ending with their layoff from city employment (i.e., those benefits that have no requirement for continuation).

(4) Employee Assistance Program

Make contact information for the city's Employee Assistance Program (EAP), if any, available to all employees. The city may even want to consider having a counselor from the EAP talk to employees before or after the layoff occurs. A layoff impacts the employees being laid off, their family members, and the people who still work at the city. Some major health insurance carriers offer EAP benefits as part of their health coverage.

Even if the city does not have an EAP, it may want to consider hiring the services of an EAP on a one-time basis to help employees get through the psychological and financial issues associated with being laid off.

(5) Security

In the interest of both the city and the employees being laid off, the city should be sure to obtain all city items from employees being laid off before they leave employment.

RELEVANT LINKS:

City of Virginia Beach
Communications, [Hillard
Heintze Final Report for
Virginia Beach.](#)

The transition for employees is likely to be difficult. Laid off employees should not be put in the position of having to return to city hall with various pieces of city property because the city forgot to take care of this.

For example, keys to city equipment and keys or access cards to city buildings and facilities should be collected, computer passwords and voice mail codes should be changed, employee identification badges should be retrieved, etc. The use of a termination/separation checklist is a key component of a workplace violence prevention program.

A sample checklist and explanation can be found on page 150-151 in the linked document to the left. It is also a good idea to keep the city's police department informed with the timing of layoff activities.

(6) Outplacement services

Especially if a large number of employees will be laid off, the city may wish to consider providing employees access to outplacement services. Outplacement is the idea of providing current employees who are about to be laid off (or otherwise terminated) with assistance in obtaining new employment. Typically, outplacement is done in conjunction with a consultant. A qualified outplacement consultant might help an employee update a resume, assess job related strengths and weaknesses, identify what is desired in the next job, and help decide if another job is what is wanted immediately or if additional education or skills training would be more appropriate. The consultant may also familiarize the employee with those areas in which a job that meets his/her qualifications and interests is likely to be found. A consultant hired to do outplacement on behalf of the city can provide the level of service the city chooses, from assisting laid off employees with updating their resumes to job counseling and coaching activities.

2. Job elimination/reorganization

Sometimes an employer will attempt to reorganize a work group, division, or department for the sole purpose of eliminating the job of an employee who is not a good performer or has other misconduct issues.

This is not an ideal practice because the true reason for the reorganization is often transparent to a jury, an arbitrator, or a veterans preference panel and can lead to an unfavorable decision for the employer.

If the city wishes to reorganize for other reasons, it should take care to document the reasons for the reorganization. The documentation should answer questions such as:

RELEVANT LINKS:

LMC information memo,
*Veterans Preference in
Discipline, Discharge or Job
Elimination.*

Contact the LMC HR staff to
request a sample last chance
agreement.

- How is the reorganization going to help the city conduct business more efficiently and more effectively?
- How will customer service to residents be improved?
- What priorities have changed in the city that makes this reorganization appropriate?
- Was the decision to reorganize made at the highest levels by top decision-makers for policy-level reasons?
- Will the city save costs by reorganizing the function?
- When was the decision made and did the decision-makers take care to think through all the consequences of the decision?
- Were multiple or alternative plans considered?

By taking the time to answer these questions and document the answers, the city will be better able to defend itself if an employee who loses his job sues the city or files a grievance.

Two final considerations for cities that reorganize a city function in a way that eliminates jobs:

- The veterans preference law generally doesn't apply in a good faith layoff but could apply if the layoff results in duties being reshuffled to less senior, non-veteran employees.
- The city should not expect to rehire for a position that was eliminated anytime soon as this action would likely cause suspicion as to the city's motives for reorganization.

J. Last chance agreements

The term last chance agreement refers to an agreement between an employer and an employee (and a union if the employee is in a bargaining unit) in which the employee is given one final opportunity or last chance to abide by city policies. This type of agreement is sometimes used as a compromise to settle a pending or anticipated grievance over a discharge or another legal situation, or it may be initiated by the city as a final warning to the employee in lieu of termination.

The conditions the employee must satisfy are written down and the parties (i.e., the employee, the city, and the union) sign the agreement. Where there is no union in place, the agreement is between the city and the employee. Where a union is in place, the union "owns" the grievance and must be a party to the last chance agreement for it to be effective.

If a union is ratified in later, it is possible the union may claim it owns the grievance and as such never agreed the last chance agreement.

RELEVANT LINKS:

The most important part of a last chance agreement is the employee agrees termination is the appropriate and only available outcome for a future breach of the terms of the agreement. The “trigger” terms of the last chance agreement detailing conduct that will result in future termination typically relate to the conduct and/or policies that resulted in the parties entering into the agreement but may also be drafted more broadly. The agreement may or may not allow the employee to contest (including through the grievance or arbitration process) whether the triggering conduct occurred as stated. For example, the grievance and arbitration process may be utilized to contest whether there was a breach of policy but if the policy breach is determined, the termination must be upheld under the last change agreement. The incentive for the employee (and union) to enter into a last chance agreement is it is an alternative to facing a termination for a serious breach of policies.

In other words, they waive this right in exchange for the city downgrading the disciplinary action from termination to another, lesser level and for the last chance opportunity. The agreement also specifies if the employee does not meet the conditions contained in the agreement, his or her employment with the city will be terminated.

It is also a good idea to include language in the agreement specifying the employee’s right to consult with legal counsel before signing the agreement.

When a last chance agreement is used with an employee covered by a collective bargaining agreement, it is “outside” of the collective bargaining agreement. In other words, the agreement is a separate arrangement in which the city is giving up a contended right to discharge its employee and the employee forfeits her right to pursue a grievance.

It is certainly possible the last chance agreement itself could be arbitrated, if and when, the employee is discharged for a violation of the agreement, in which case the city will need to show:

- The agreement is enforceable.
- The employee breached the terms of the agreement.
- The agreed-to penalty for the breach is discharge.

A city should consult with an attorney for assistance in drawing up the terms of any last chance agreement. In general, last chance agreements need to show the same content as other contracts, specifically:

- Offer and acceptance.
- Adequate consideration.
- Mutual agreement of parties (e.g., employee, union, city).
- Plain language.
- Representation (attorney, union representative).

RELEVANT LINKS:

[*Longen v. Waterous Co.*](#), 347 F.3d 685 (8th Cir. 2003).

The following considerations, however, are somewhat unique to last chance agreements and should be considered in drafting the document:

- Some arbitrators will establish their own reasonable time period the agreement can be enforced if one is not specified in the agreement. The city may want to consider establishing the timeframe as either indefinite or a relatively long period of time such as five years or more.
- The city should clearly and specifically define what actions or behaviors of the employee constitute just cause for discharge.
- Make sure the union negotiates and signs the agreement (if the employee is covered by a collective bargaining agreement).
- State specifically the agreement does not constitute a precedent to avoid claims by other employees that they too should be given a last chance before discharge.

There are a few other items the city should consider when implementing a last chance agreement:

- Most arbitrators will enforce the remedy (e.g., uphold the discharge) agreed to by the parties in the last chance agreement even in cases where the arbitrator views the discharge penalty as too harsh for the circumstances.
- If the employee clearly breaches the agreement but the arbitrator fails to uphold the discharge, the city can discuss the possibility of a motion to vacate the award with its attorney.
- Last chance agreements generally have not been found to violate disability discrimination laws. It is very important, however, to seek legal advice when entering into such an agreement with an employee who has a disability or could be perceived as having a disability.
- It is also important to note that entering into a last chance agreement will not result in an employee waiving all legal rights related to their future employment. It is simply a mechanism identifying what will happen should a future event take place where a union contract is in place, or the employee is operating under personnel policies with access to some level of binding independent review.

The general prohibition against a waiver of prospective (future) legal rights means the employee will still be able to take other action outside the union contract/independent review process. For example, the employee would still be permitted to file a charge with an agency such as the human rights department for discrimination claims or the department of labor for wage and hour claims.

RELEVANT LINKS:

Contact LMC HR staff for a sample settlement agreement and release.

[29 U.S.C. § 626\(f\)](#).

K. Termination agreements

A termination agreement (also referred to as a separation agreement) refers to an arrangement between an employer and an employee in which the employee agrees to terminate employment voluntarily.

The employee waives his or her right to challenge the termination or to sue the employer under all state and federal laws and union or civil service protections in return for some type of consideration by the employer—usually a severance payment or some other monetary benefit.

Whether a city should consider this type of an arrangement in any given situation is a matter to be discussed between the city's management/policymakers and an attorney. In general, the city may want to consider a termination agreement in the following situations:

- When the employee has specific rights to a hearing, such as the right to a veteran's hearing, grievance arbitration, or a civil service hearing, especially if the employee has the right to more than one of these hearings.
- When it is in the city's best interest to avoid a lengthy legal battle and any resulting negative publicity.
- When it is in the city's best interest to ensure the employee is removed from the workplace quickly and permanently.
- For other legal reasons as assessed by an attorney familiar with public sector employment law.

1. Importance of legal drafting and review

An attorney, preferably one familiar with public sector employment laws, should be consulted and used to draft (or at least review) the termination agreement. Cities are strongly cautioned against using an agreement without the assistance and advice of an attorney.

One reason why legal review is so important with termination agreements is that some laws require certain waiting periods or other procedural requirements before such an agreement will be considered legally binding. For example, the Age Discrimination in Employment Act (ADEA) requires that an employee be given 21 days to consider whether to sign the waiver.

It also requires a seven-day waiting period after the employee signs the agreement in which the employee can change his or her mind and cancel the agreement.

2. Contents of a termination agreement

For the city, the primary advantage of termination agreements is having the employee release the city from any claims under various state and federal laws, union contracts, and civil service procedures. This helps ensure the employee will not be able to bring a successful lawsuit against the city in the future. The city will probably want to have the employee sign a release of claims under:

- The Minnesota Veterans Preference Act.
- The Minnesota Human Rights Act.
- Title VII of the 1964 Civil Rights Act.
- The Age Discrimination in Employment Act.
- The Americans with Disabilities Act.
- Any other local, state, or federal laws relating to illegal discrimination in the workplace on the basis of religion, race, disability, sex, age, or other characteristics or traits.

The city will probably also want the agreement to contain a release from:

- Any claims the employee may have been wrongfully discharged.
- Any claims an employment contract may have been breached.
- Any claims the employee has been harassed or otherwise treated unfairly during employment with the city.
- Any claims the employee has been defamed in any fashion.
- Any claims for punitive and compensatory damages, back pay or front pay, fringe benefits, or attorney fees.
- These should be limited to all current and prior claims.

In most cases, the agreement should also contain, at minimum:

- A statement that the employee acknowledges and confirms his or her resignation and the effective date of that resignation.
- A listing of the benefits and/or severance pay that the city is offering to the employee in exchange for the release of claims.
- A statement that the employee acknowledges the city has fully and properly paid him/her for all hours and work provided and has received all wages, salaries, and earnings to which he/she is entitled.
- A statement that the agreement does not constitute an admission by the city of any wrongdoing.
- A statement that the employee has been advised of his or her right to consult with an attorney before signing the agreement.

RELEVANT LINKS:

[29 U.S.C. § 626\(f\).](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(6\).](#)

[Minn. Stat. § 13.43, subd. 10.](#)
LMC information memo,
Data Practices: Analyze, Classify and Respond.

Section VII, *Reference check and release of information on current and former employees.*

[Minn. Stat. § 13.43, subd. 10.](#)

[Minn. Stat. § 13.43, subd. 10.](#)

[Minn. Stat. § 268.192, subd. 1a.](#)

[Minn. Stat. § 13.43, subd. 2\(e\), \(f\).](#)

- A statement that the employee understands he or she may cancel the agreement for any reason within a certain time period (as required by the ADEA and/or any other applicable laws) and the method for canceling it (such as in writing to a specified city official using certified mail).
- A statement of the specific reasons for the agreement, particularly where more than \$10,000 in public money is involved. The reasons can be as simple and straightforward as: “. . . to avoid the expense and uncertainties of litigation.”

The agreement cannot limit access to or disclosure of personnel data or limit the discussion of information or opinions related to personnel data to the extent that this information would otherwise be accessible to the public. An agreement or portion of an agreement that violates this prohibition is void and unenforceable. Specifically, an agreement cannot be made that would prohibit or limit:

- Discussion, publicity, or comment on personnel data or information that could otherwise be made accessible to the public.
- The ability of the employee to release or consent to the release of data that could otherwise be made accessible to the public.

An agreement can contain a provision that limits the ability of an employee to release or discuss private data that identifies other employees.

The law even goes so far as to prohibit any court order containing terms and conditions limiting access to or disclosure of personnel data or limiting the discussion of information or opinions related to personnel data.

Employers are prohibited from entering into arrangements with employees resulting in an employer agreeing not to contest an unemployment claim or failing to submit paperwork regarding an employee’s unemployment claim in exchange for an employee’s resignation, leave of absence, temporary or permanent leave from the employer, or a withdrawal of a grievance or termination.

Certain data related to separation agreements with management employees are public. Specifically, data related to complaints and investigations may need to be disclosed upon request even if the employee resigns. The definition of employees covered by this provision changes based on the type and size of the government employer. A city entering into a separation agreement or accepting the resignation of a higher-level employee should seek legal advice on the appropriate data classifications.

RELEVANT LINKS:

[Minn. Stat. § 465.722.](#)

Section III-K-4-b, *Statutory limitations*.

[Minn. Stat. § 268.085.](#)

[Minn. Stat. § 268.085.](#)

3. Discussing and delivering the agreement

Ideally, a management representative who is likely to be seen as neutral and objective, such as the city attorney or someone from the Human Resources Department, discusses a termination agreement with the employee. In most cases, it is not ideal for the agreement to be discussed or delivered by the employee's immediate supervisor. It is also a good idea to have more than one management representative in the room to serve as a witness. Finally, a private, neutral setting such as the city attorney's office is generally best for discussions with the employee on the termination agreement.

4. Severance pay

Severance pay refers to a payment made to an employee upon termination of employment—usually for reasons beyond his or her control. For example, severance pay is often given to employees who are being laid off. It is also sometimes offered in conjunction with a termination agreement in which the employee releases the city from any claims and waives their right to sue the city.

In the private sector, a common practice is to give employees one week of pay for each year of service upon termination.

Most Minnesota cities do not offer this type of severance pay as a standard practice or policy, but instead pay out a portion of accrued sick leave at termination. Minnesota law does, however, allow cities to offer severance pay in addition to payment for accrued leave. The law, however, limits how much a city can pay out in severance.

Be aware payments made at the time of an employee's separation from employment can delay the employee's unemployment benefits. For example, if an individual receives ten weeks of pay as severance, he/she is not eligible for the first ten weeks the individual is unemployed (regardless of whether the severance is paid in a lump sum or in regular installments). Generally, vacation pay, sick pay, or other paid time off (also known as PTO) do not delay unemployment benefits if the employee is permanently separated from the city's employment.

If an employment contract (union or otherwise) requires the employer to convert accrued sick pay into severance pay, and the contract specifically calls it severance pay, then it is treated as severance pay under the Minnesota Unemployment Insurance Law as well, and it delays unemployment benefits. For example, if a contract states employees who are separated from employment receive severance pay equivalent to 40 percent of their accrued sick pay balance, then this is severance, not sick pay.

RELEVANT LINKS:

[“Eligibility Requirements,”](#)
Minnesota Unemployment
Insurance.

If the contract just reads employees receive 40 percent of their accrued sick pay at separation and says nothing about it being severance pay, then it would be sick pay and not deductible for permanent separations. More information regarding eligibility requirements can be found by visiting the unemployment link provided to the left.

Some cities provide a one-time, lump sum severance payment. For this approach, the League recommends the city issue the entire separation payment (without withholding taxes or other deductions), issue an IRS Form 1099 for the payment, and include the following language in the separation agreement:

***Employee’s Name** agrees and understands that the city has not made any representations regarding the tax treatment of the sums paid pursuant to this release and agrees that s/he is responsible for determining the tax consequences of such payment and for paying taxes, if any, that may be owed by her/him with respect to such payment. **Employee Name** enters into this Agreement only after consulting with her/his own attorney and or/tax advisor as to the characterization and treatment of such payment.*

*In the event a taxing authority asserts a claim for federal or state income taxes, social security taxes, unemployment taxes, and/or Medicare taxes, **Employee Name** stipulates and agrees that the city is not responsible to said taxing authority for payment of that obligation; and **Employee Name** further agrees to indemnify, defend and hold harmless the city from those claims, including interest and/or penalties if asserted.*

The employee is responsible for correctly characterizing the payment on his/her tax return and paying the appropriate taxes because the employee, and not the city employer, exercises control over completing his/her tax returns.

In some circumstances, the city employer, the employee, or both parties prefer that the severance payment is paid via normal payroll procedures, as reflected on a W-2 tax form. These circumstances include instances where (1) the severance payment includes, in whole or in part, a payout of accrued vacation, sick, or other paid time; (2) the parties agree to an arrangement where the employee will remain on the payroll (but usually on leave) for a period of time before the employment relationship officially ends; and/or (3) other special circumstances exist.

In some circumstances, the city employer, the employee, or both parties may prefer to have both 1099 and W-2 payments.

RELEVANT LINKS:

LMC information memo,
[Veterans Preference in
Discipline, Discharge or Job
Elimination](#).

[Minn. Stat. § 465.722.](#)

[Minn. Stat. § 465.722, subd.
1.](#)

[Minn. Stat. § 465.722, subd.
3.](#)

As with separation agreements in general, cities are strongly advised to seek the assistance and advice of their city attorneys in addressing separation agreement payments and tax treatment.

a. Consideration for waiving rights

For the employee's release of claims/waiver of rights to be legally binding, the employee must receive something in consideration—usually this takes the form of severance pay. It is not enough for the city to offer the employee a payment that he or she would already be entitled to upon termination (such as payment for all or part of accrued leave).

The payment must be above and beyond what he or she would otherwise be entitled to. There is no common practice among Minnesota cities on the type of severance payment that would be offered in consideration for waiving rights/release of claim. It varies greatly between cities depending upon the individual circumstances involved with the termination.

For veterans, it probably does not make sense to offer less than 30 days' pay in consideration for waiving rights. A veteran is entitled, at a minimum, to receive 30 days' pay while he or she considers whether to pursue a hearing.

b. Statutory limitations

Minnesota law sets two different limitations on severance pay, depending on how the employee is classified.

Highly compensated employees may not be paid more than six months of wages under Minnesota statutes (except under certain circumstances outlined below). A highly compensated employee is defined as an employee with estimated annual wages that:

- Are greater than 60 percent of the governor's annual salary.
- Are equal to, or greater than, 80 percent of the estimated annual wages of the second highest paid employee of the local unit of government.

A city may exceed the six-month limitation on wages paid as severance pay to a highly compensated employee if one of the following criteria are met:

- The severance pay is part of an employment contract with the employee that was in effect on Aug. 1, 1993, and the termination occurs before the expiration of the contract.
- The severance pay is part of an early retirement incentive program available to all other employees who meet the specified criteria.

RELEVANT LINKS:

[Minn. Stat. § 465.72.](#)

[Minn. Stat. § 465.722, subd. 4.](#)

[Minn. Stat. § 465.722, subd. 2.](#)

[Minn. Stat. § 465.72.](#)

[Minn. Stat. § 465.72.](#)

- The commissioner of the management and budget determines the position requires special expertise necessitating a larger severance pay guarantee to attract or retain a qualified person.
- The city council adopts a resolution certifying that the employee was employed by the city continuously between Jan.1, 1983 and Dec. 31, 1992; the employee was covered by one or more contracts or agreements which entitled the employee to certain severance pay benefits throughout that 10-year period; the contract or agreement in effect on Dec. 31, 1992 entitles the employee to more than six months wages in severance; and the additional severance pay beyond six months was based on a commitment to provide the employee with a severance guarantee in lieu of a higher level of some other form of compensation.

Even if a city meets the criteria for an exception to the six-month limitation on highly compensated employees, it still may not exceed one year's wages.

The city council must approve any payment of city funds to a highly compensated employee for settling disputed claims, whether or not the claims have actually been filed, or any payment of city funds to a highly compensated employee for terminating a written employment contract.

The approval must occur during a public meeting, and the financial terms of the payment must be made public at the meeting. The effective date of the governing body's approval will be 15 days after the date of the public meeting. During that 15-day waiting period, either the city council or the employee may rescind or reject the payment. The financial terms of the payment must be made public at the meeting.

Severance pay for highly compensated employees does not include payment for accrued vacation, sick leave, and sick leave cashed out to cover the cost of group term insurance provided to retiring employees. It also does not include the city's contribution toward group insurance.

Severance pay must be paid out within five years from retirement or termination of employment. The balance due must be paid to a beneficiary if the employee dies before the payment is completed.

Employees who do not meet the definition of highly compensated may be paid up to one year of severance pay under Minnesota law.

Severance pay for non-highly compensated employees does not include payment for accumulated sick leave or contributions toward group insurance. It must be paid within five years of the retirement or termination of employment. If the retired or terminated employee dies before the payment is completed, the balance due must be paid to the employee's beneficiary.

RELEVANT LINKS:

[29 U.S.C. § 626\(f\).](#)

[Minn. Stat. § 363A.31, subd. 2.](#)

[29 U.S.C. § 626\(f\).](#)

[Minn. Stat. § 181.933.](#)

5. Rescinding the agreement

The Age Discrimination in Employment Act requires that whenever an employee is waiving his or her rights under the law, he or she must be given seven days in which to revoke his or her decision. The Minnesota Human Rights Act requires a rescission period of 15 days. These rescission periods cannot be shortened (neither the city nor the employee can elect to shorten these time periods). The agreement does not become effective until after the applicable rescission periods have passed. Many city employers, therefore, delay payment of the severance or other consideration to the employee until after the rescission periods have expired.

6. “Normal” severance payouts

Although “normal” severance payments (those an employee would be entitled to by policy) cannot be counted as consideration for signing a waiver of rights/release of claims, it is still a good idea to define precisely what those payments will be within the terms of the agreement. This will avoid any confusion later about just exactly what the employee was or was not entitled to.

For example, if all employees who resign after 10 years of service are entitled to a payment equaling 30 percent of accrued sick leave, this entitlement can (and probably should) be spelled out in the agreement. This will avoid any questions or misunderstandings about the issue that might come up later and cause the agreement to fall apart.

7. Attorney review (by employee)

As stated earlier in this section, it’s important to tell the employee he or she can take the agreement to an attorney for review to avoid a later claim that the employee did not have proper legal counsel before signing. In fact, an employer is legally required to advise an employee who is releasing age discrimination claims to consult with an attorney prior to executing a waiver of claims. Any agreement, whether age claims are involved or not, should, again, include a statement that the employee was informed of his or her right to obtain advice from an attorney about the agreement.

L. Termination letters

Under Minnesota law, an employee who has been discharged involuntarily may request the employer provide a written statement of the reason for the termination. The request must be in writing and submitted within 15 working days following the termination. The employer must respond with the truthful reason within ten working days following receipt of the request.

RELEVANT LINKS:

[Minn. Stat. § 181.933, subd. 2.](#)

[Minn. Stat. § 181.81.](#)
[Minn. Stat. § 363A.20, subd. 9.](#)
[Minn. Stat. § 423.076.](#)
[29 U.S.C. §§ 621 - 634.](#)

[29 U.S.C. § 623\(j\).](#)

In most circumstances, it is a good practice for the city to keep the information in the termination letter general. For example, an employee who was terminated during probation might be told that the reason for termination was that they “did not meet the performance requirements of the probationary period.” The employee cannot use the statement furnished by the employer in any action for libel, slander, or defamation against the employer.

IV. Retirement

Demographics show more employees will be leaving the city workforce to retire than for any other reason over the next couple of decades. This section addresses things that should be considered when an employee is preparing to retire from employment with the city.

A. Mandatory retirement

Although Minnesota law seems to permit cities to establish mandatory retirement ages for employees who are 70 years of age or older, federal law, in general, prohibits cities from establishing mandatory retirement ages for most types of employees.

Federal law does permit public employers to establish mandatory retirement ages for police and fire personnel. This federal public safety exemption states that:

- Any state or local government may have a maximum entry age limit for public safety officers.
- Any state or local government that did not have a mandatory retirement age during the previous public safety exemption during 1986-1993, may establish one (except the retirement age may not be lower than 55, which is the federal government’s mandatory retirement age for firefighters).
- Any state or local government that did have a mandatory retirement age during the previous exemption may continue to use that age limit, regardless of whether the age limit is below age 55. If such a jurisdiction wants to change the retirement age, the new retirement age cannot be lower than 55.

Provisions of the act affecting public safety agencies that used age limits during the previous exemption are effective retroactive to January 1, 1994. All other provisions are effective on the date of enactment. Minnesota laws continue to be ambiguous regarding a mandatory retirement age for police or firefighters. The League encourages cities to seek legal advice prior to taking any action regarding mandatory retirement ages.

RELEVANT LINKS:

[PERA: Phased Retirement Option.](#)

[Minn. Stat. § 353.371, subd. 4.](#)

[Minn. Stat. § 353.01, subd. 11a.](#)

[Minn. Stat. § 197.46.](#)

[Minn. Stat. § 43A.16, subd. 1.](#)

[Taylor v. City of New London, 536 N.W.2d 901 \(Minn. Ct. App. 1995\), review denied \(Minn. Oct. 27, 1995\).](#)

[LMC information memo, Veterans Preference in Discipline, Discharge or Job Elimination.](#)

B. Phased Retirement Option (PRO) through PERA

Under the phased-retirement option (PRO) a city can enter a formal arrangement to allow an active member of the PERA General Plan who is at least age 62 to receive a PERA retirement annuity without a formal termination of employment. These types of arrangements help employers reduce the negative impacts when a long-term employee retires by allowing time for “knowledge transfer” from the retiree to new employees. In this arrangement, the employee must substantially reduce his or her work hours while participating in the PRO agreement and this PRO arrangement can only be initiated with an employee who is continuing employment with the same governmental subdivision.

The governing body of the governmental entity has the discretion to determine whether to offer the PRO program to an employee and what the duration of the PRO agreement will be. The employee can continue to work a reduced number of hours while beginning to collect his or her pension. The employee’s earnings under the PRO position would not be subject to the post-retirement annual earnings limits. Employers are required to report to PERA the salary paid, and the compensated hours worked for PRO participants on a pay-period basis.

A 2019 law change eliminated a previously required annual PRO renewal requirement but retained a five-year maximum on a PRO employee arrangement. A PERA required 30-day break-in-service that would normally apply at the time a retirement benefit begins, is required at the end of the PRO arrangement.

V. Veterans’ preference

Qualified veterans have many protections under the law and as such, must be afforded certain benefits from the date of hire. A city may require employees, including veterans, to complete an initial probationary period, defined as no less than 30 days but not exceed two years of full-time equivalent service. However, after serving an initial probationary period for a city, a veteran would not be subject to additional probationary periods, such as for a promotion or new assignment. Thus, once the initial probationary period expires, a veteran may not be removed unless incompetency or misconduct is shown through a removal hearing, or the position the veteran holds is abolished.

RELEVANT LINKS:

[Separation from Employment Checklist](#), LMC Model Form.

Appendix C: Making the decision – a termination checklist.
Appendix D: Preparing for termination checklist.
Appendix E: Notifying the employee of termination checklist.

A. Grievance procedures for unrepresented employees

Many cities have incorporated formal grievance procedures for unrepresented employees in city personnel policies and employee handbooks.

While the procedures may or may not be legally required depending on the language of the policy, these types of grievance procedures generally allow employees to appeal a decision or process through the city's chain of command and help to minimize city liability by providing consistency and higher employee morale.

As with all policies, it is important cities review all pertinent policies including grievance procedures prior to making any discipline decision.

VI. Separation checklists

Checklists provide a guide to help managers and supervisors ensure the appropriate steps are taken in preparation for a staff member leaving employment with the city. This section discusses items commonly found on separation checklists.

Timing can be very important when carrying out the activities listed in this section. How quickly these tasks must be completed will usually depend upon the circumstances surrounding that employee's departure. For example, if the employee is being terminated for disciplinary reasons and has access to a great deal of key information, the employee may be asked to leave immediately with all pass codes, etc., changed right away.

This requires the city to be prepared to address the items listed in this section in the termination meeting with the employee.

On the other hand, if the employee has been a long-term employee and is leaving in good standing with a full month's notice, the city may choose to set up a meeting with the employee and address these items closer to the employee's last day of employment with the city.

A. Sample checklist document

The city may want to consider creating its own termination checklist document based on the sample provided in this manual. The human resources or administration departments of the city usually generate the checklist when they have notice of a pending termination and send it to the supervisor.

RELEVANT LINKS:

[Employment Exit Questionnaire](#), LMC Model Form.

The supervisor completes his or her portion of the checklist and sends it back to HR or administration for completion and filing in the employee's personnel file.

The primary purpose of the checklist is to make sure the city receives back all its property from the employee, addresses computer and other security issues, complies with all legal notice requirements, and gives the employee whatever information needed related to wages, benefits, and insurance.

B. Exit interviews/questionnaires

1. Purpose

Whenever an employee leaves the city, there is an opportunity to gain insight about that employee's experience with the city from a variety of perspectives.

It is important to follow through on this opportunity, as this is the one time when employees are likely to be perfectly honest about their employment experience at the city.

2. Resignations vs. terminations

The city should conduct exit interviews with employees regardless of the method by which they are leaving employment. Exit interviews enable the city to take a proactive approach to managing human resources. While it may be uncomfortable to conduct an exit interview with employees being terminated, they may be able to provide some valuable and honest insights as they "have nothing to lose" at this point.

In addition, more than one city has reported that a comprehensive exit interview prevented a disgruntled employee from retaining an attorney or contacting the EEOC by allowing the employee an opportunity to "vent" and be heard.

3. Topics to cover

The exit interview should focus on what is most important to the business needs of the city. Also, basic separation information can be beneficial to understand why employees are leaving. Questions should be open ended and should focus on:

- Hiring and orientation practices.
- Degree to which the job met the employee's expectations (job description).
- Organizational policies, procedures, and guidelines.
- Training and educational opportunities.

RELEVANT LINKS:

- Promotional or advancement opportunities.
- Effectiveness of supervision received.
- Organization culture in general.
- Pay and benefits.

One of the most common reasons employees give for leaving any organization is “poor supervision.” While an employee might not offer this up as the exact reason for leaving, he or she may hint at this reason in other ways: “I never received any recognition for my work. There were never any interesting projects to work on. I never really felt like I was included or a part of things. No one really seemed interested in my opinion.”

Employees leaving for “a better career opportunity” may need some encouragement before revealing just what prompted them to start looking in the first place. An exit interview does not hold much value if the city is not going to seek out the real reasons why employees are leaving.

4. Who should conduct

Whenever possible, the exit interview should be conducted by someone who does not have a supervisory relationship with the employee. If the city has a human resources director or coordinator, that person is a likely candidate. A smaller city may choose the city clerk or another individual who has been assigned the human resources duties at the city.

Regardless of who is selected to conduct the interview, it is essential the individual is perceived as someone who will take the information provided seriously.

5. Privacy issues

To get the most value out of an exit interview, it is important to reassure the employee the information obtained will be used in a manner that will protect their anonymity. The employee needs to feel they will not be harmed or retaliated against for the remarks they make.

Reassure the employee that information from the exit interview will only be used in a general manner.

Most data from an exit questionnaire or interview is likely to be classified as private data, available only to those within the city who have a business reason for it (e.g., HR, city administrator, etc.). Larger cities should use the data only in aggregate (group) form and not identify any individual employee. While this approach may not be practical for a small city, steps should still be taken to protect the privacy of the data.

[Minn. Stat. § 13.43.](#)

C. Security issues

1. Safety issues

It is the responsibility of the city, as an employer, to provide all employees with a safe work environment. Unfortunately, there are times when the security of the workplace may be at risk. In preparing to dismiss an employee, the city should consider whether there is any potential that the person may be a health or safety risk to himself or herself or to anyone else at the city.

While it may seem impractical to alert the local police department (or other appropriate authorities) when conducting a controversial termination or accepting a disgruntled employee's resignation, it may be better to be safe than sorry. With that said, a best practice is to require personnel to contact local police in advance of any terminations or suspensions when they believe the behavior may escalate into violence.

It is also a good idea to keep the city's police department informed with the timing of layoff activities. When planning for security and equipment issues, it is very important to determine the order in which the tasks must be completed and who will be responsible for each task. Timing can be very important when carrying out these activities.

How quickly these tasks must be accomplished depends upon the circumstances surrounding the termination.

2. Return of city property

It is important that all city property be obtained from the employee before the employee leaves employment with the city.

Depending upon the circumstances surrounding the employee's separation from the city and the kind of equipment that the employee has in possession, this may take place right after the announcement the employee is leaving, or closer to the employee's last day with the city. Some of the more obvious items the city should check for include:

- City vehicle.
- Access keys or cards.
- Cell phone.
- Uniforms.
- Name badges.
- Passwords or access information for any programs or projects on which this employee was working.

RELEVANT LINKS:

- Technology like laptops, city owned cell phones, etc.
- Memberships sponsored by the city.

3. Computer access

When an employee leaves the city, it is important to change any codes assigned to or created by that employee. This includes computer passwords, usernames, voice mail access codes, etc.

4. Facility access

The city should consider all facilities to which an employee has, or may have had, access during his or her employment with the city. Prior to the employee's last day, all keys, access cards, etc., should be obtained and any coded entries should be changed.

D. Final paycheck

1. Resignation

When an employee resigns, the wages earned and unpaid at the time the employee resigns must be paid in full no later than the first regularly scheduled payday following the employee's final day of employment (unless the employee is subject to a collective bargaining agreement with a different provision).

If the first regularly scheduled payday is less than five calendar days after the employee's final day of employment, full payment may be delayed until the second regularly scheduled payday. Total delay must not exceed 20 calendar days following the employee's final day of employment.

2. Termination

When an employee is discharged from a city position, the wages earned and unpaid at the time an employee is discharged are due and payable "immediately" (within 24 hours after demand by the employee). Where city council approval of expenditures is required prior to release of funds, the 24-hour period for payment commences on the date of the first regular or special meeting of the city council following discharge of the employee.

3. Vacation/Annual leave/PTO payout

The city is required to pay accrued vacation to an employee upon termination, unless a policy or practice exists that states the circumstances under which vacation pay is to be forfeited.

[Minn. Stat. § 181.14.](#)

LMC information memo,
[Paychecks.](#)

[Minn. Stat. § 181.11.](#)

[Minn. Stat. § 181.74.](#)
LMC information memo, [IRS](#)
[Audits of City Payroll.](#)

RELEVANT LINKS:

[Hall v. City of Plainview](#), 954 N.W.2d 254 (2021).

LMC model policy:
[Personnel Policy](#).

[Hall v. City of Plainview](#), 954 N.W.2d 254 (2021).

[Minn. Stat. § 177.24, subd. 4.](#)

LMC information memo,
[Paychecks](#).

Based on a 2021 Minnesota Supreme Court case, some standard employee handbook disclaimers may not be enough to rely on to prohibit PTO balance payouts for separating employees. Specifically, in the event of an employee separation and an associated employee's failure to provide sufficient notice to the city to qualify for the payout on the employee's leave balance, it is important to consult the city attorney regarding accrued leave payouts. Some standard employee handbook introductory disclaimers can be viewed as lacking in precision so a more detailed explanation of when accrued leave payments will not be made upon separation is highly recommended and included in the League's model personnel policy.

4. Sick leave payout

Many cities choose not to pay accrued sick leave when an employee leaves (any amount on the books when the employee departs is forfeited), while others pay out a percentage of what remains in that employee's account. Regardless of whether your city pays out all, a portion, or no accrued sick leave upon an employee's departure from the city, it is a good idea to establish a policy clarifying the city's position on what happens to accrued sick leave when an employee leaves.

Again, consult with the city attorney if a city is considering denying payout to a separating employee for any accrued leave balances.

5. Withholding funds on a final paycheck

Minnesota law limits what types of deductions can be made from an employee's paycheck, including final paychecks. It does permit employers to deduct certain unreimbursed expenses relating to uniforms and/or equipment, as listed below, from an employee's final paycheck.

Deductions for up to the full cost of the uniform or equipment as listed below may not exceed \$50. No deductions may be made for the items listed below if said deduction would reduce the wages below the minimum wage:

- Purchased or rented uniforms or specially designed clothing required by the employer, by the nature of the employment, or by statute as a condition of employment, which is not generally appropriate for use except in that employment.
- Purchased or rented equipment used in employment, except tools of a trade, a motor vehicle, or any other equipment that may be used outside the employment.
- Consumable supplies required in the course of that employment.
- Travel expenses in the course of employment except those incurred in traveling to and from the employee's residence and place of employment.

RELEVANT LINKS:

[Minn. Stat. § 181.79.](#)

[Minn. Stat. § 13.43.](#)
LMC information memo,
Data Practices, Analyze,
Classify, and Respond.

Informed Consent for Release
of Information, LMC Model
Form.

[Minn. Stat. § 13.43, subd.](#)
[2\(a\)\(4\), \(5\).](#)

See flowchart in Appendix A:
public vs. private disciplinary
data.

LMC information memo,
Data Practices: Analyze,
Classify and Respond.

Employers are not allowed to make deductions from an employee's wages for any of the following items:

- Lost or stolen property.
- Faulty workmanship.
- Property damage.
- Any other claimed indebtedness. (Unless the employee voluntarily authorizes the deduction in writing after the loss or indebtedness has occurred or unless the employee has a judgment entered against him in court. The authorization must set forth the amount to be deducted each pay period).

A city and employee union can establish an agreement contrary to the requirements regarding lost or stolen property, faulty workmanship, property damage and other claimed indebtedness in a collective bargaining agreement.

VII. Reference checks and release of information on current and former employees

The Minnesota Government Data Practices Act governs what is public information on employees, including former employees, and what is private information. Public information can be released to anyone; private information cannot be released without the permission of the employee (data subject).

Before giving out any private data, a city should require the former employee to sign a written authorization.

Some documents contain a mixture of public and private information, so cities need to be careful to eliminate any private data before giving information to the public if no authorization has been provided.

A. What is public/private?

1. Release of disciplinary information

The Minnesota Government Data Practices Act discusses two scenarios in which disciplinary situations become public information. The first is when a complaint or a charge is filed against an employee.

The second is regarding the final disposition of disciplinary action. Both situations are discussed below.

RELEVANT LINKS:

[Minn. Stat. § 13.43, subd. 2\(a\)\(4\).](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(4\), \(5\).](#)

[Section III-G-4, *Handling Collected Data*.](#)

Keep in mind as a matter of practice, there are times when managers need to share an employee's disciplinary information with certain supervisors within the organization who have a business need to know. It is important supervisors understand the need for confidentiality in a disciplinary process, and that an employee's disciplinary information is only shared with other supervisors who truly have a need to know.

a. Existence and status of complaints and charges

The Minnesota Government Data Practices Act specifies that the existence and status of any complaints or charges against an employee, whether or not any disciplinary action is taken, are public information. Although the terms complaint and charge are not defined in the statute, it is clear that they do cover certain formal situations.

For example, a complaint filed with the city about how a police officer handled a particular arrest is probably the type of complaint intended to be covered by the statute. It is likely a situation where an employee is charged with sexual harassment is intended to be covered by the statute as well.

It is less clear whether the statute was intended to cover less formal situations, such as when co-workers make complaints about an employee coming in late, taking long lunch hours, or other violations of work rules. Generally, if the city considers the complaint or charge to fall under its guidelines for requiring an investigation, it should probably be prepared to release information on the existence and status of the complaint or charge if asked to do so. It is unlikely the city will receive a request for information in less formal situations, but if it does, the city should consult with an attorney before deciding whether to release the information.

When the city does receive a request for information regarding a specific complaint or charge, the city can only disclose the fact that a complaint has been made and its status (e.g., "under investigation" or "investigation completed"). No other information about the complaint or charge is public unless and until disciplinary action is actually taken.

The city cannot release information on what the complaint or charge is about (i.e., the nature of the complaint or charge), who filed the complaint or charge, or any information about any evidence or the investigation. If no disciplinary action is ultimately taken on the complaint or charge, no additional information beyond the existence and status of the complaint can be made public.

RELEVANT LINKS:

[Minn. Stat. § 13.02, subd. 3.](#)

[Minn. Stat. § 13.39.](#)

[Minn. Stat. § 13.43, subd. 8.](#)

[Minn. Stat. § 13.43, subd. 2\(a\)\(5\).](#)

b. Confidential data and harassment data

While most personnel data are available to the employee who is the subject of the data, there are a few situations where it is not. Information that is classified as “confidential” by the Data Practices Act is not available to the employee who is the subject of the data.

One situation in which this can occur is when a city is investigating to prepare to defend itself in a civil legal action (e.g., the city is conducting an investigation because a police officer is alleged to have used excessive force in restraining a suspect and the suspect is threatening to sue the city).

During the investigation, the employee accused of using excessive force is not allowed access to the investigation files. The employee may be allowed access to the files after the investigation is complete and the investigation is classified as “inactive.”

The city, however, should be working closely with its attorney in this situation and should not give out any information unless the attorney advises it to do so.

An employee also cannot access data that would identify the complainant or another witness in a sexual harassment complaint if the city determines it would threaten the personal safety of the complainant or witness or subject them to harassment.

The city, however, must give the employee accused of harassment the identity of the complainant and witnesses once this information is needed for the employee to prepare a defense for any disciplinary proceedings.

c. Final disposition of disciplinary action

The Minnesota Government Data Practices Act specifies the final disposition of disciplinary action is public data. The specific reasons for the action and data documenting the basis of the action are also public data.

Data that would identify confidential sources who are employees of the public body is not public information. Also, since there may be private data that is contained in some of the documentation, the city should review all of the supporting documentation before releasing it.

For example, if the city discharges an employee because the employee is physically unable to perform the duties of the position, any detailed or specific medical information about the employee’s physical condition is probably not public data and should not be released without the employee’s permission.

RELEVANT LINKS:

Section VIII-C, *Required sharing of information*.

[Minn. Stat. § 13.43, subd. 2\(b\)](#).

DPO: [04-002](#).

[Informed Consent for Release of Information](#), LMC Model Form.

Some organizations (e.g., governmental authorities, unions, etc.) may have the right to access certain types of otherwise private data without a release under specific circumstances. For more information, see the Required Sharing of Information section below.

Final disposition occurs when the city has made its final decision about the disciplinary action, after an arbitration proceeding for unionized employees, or when an employee resigns after a final decision by the city. The fact that an employee could take the disciplinary action to court does not delay the final disposition.

The Department of Administration, Data Practices Office (DPO) issued an advisory opinion stating that data relating to a disciplinary proceeding including the arbitration decision, involving an employee who initially was served with a notice of termination but who grieved the action and later was reinstated, is private data.

The DPO reasoned since no discipline is ultimately imposed, there is no basis for releasing any data related to the proceeding. Accordingly, under the DPO opinion, the only data the city can release is the employee's name, the fact that a complaint or charge exists, and that the matter is closed (the city investigated and there was no disciplinary action). Advisory opinions are not legally binding, but they do serve to give cities guidance and there are some legal protections for cities following this advice.

In a situation where a city takes disciplinary action against an employee, the timing of when the information becomes public can vary. For example, it may be best to wait until any grievance rights in your personnel policy or ordinance have expired. Therefore, cities are encouraged to contact DPO, the League, and their city attorney.

B. Other legal issues

1. Authorization to release records

Before releasing any private data on a former or current employee to anyone other than the employee, the city should require the former employee to sign an authorization form. The authorization form should include:

- What information is to be released.
- Who it is to be released to.
- When the release form expires.
- An acknowledgement that the employee understands some of the data are private and not available to the public (such as performance evaluation forms and ratings).

RELEVANT LINKS:

Section VII-A, *What is public/private?*

[Minn. Stat. § 13.43, subd. 11.](#)

[Minn. Stat. § 253B.07.](#)

[Minn. Stat. § 626.87, subd. 2.](#)

[Minn. Stat. § 626.87, subd. 2.](#)

- A release that relieves the city of any liability for releasing the information.
- The date on which the form is signed.

Often, the employing organization will have its own authorization form and present it to the city already signed by the employee. The city should carefully examine the form and make sure it covers the specific points outlined above before releasing any private data on the employee. Public data can be released without the employee's consent.

2. Agreements limiting disclosure

The city cannot enter into an agreement with an employee that would limit the disclosure of personnel data, or the discussion of information or opinions related to personnel data.

3. Releasing information for employee protection

If the city reasonably believes it is necessary to release personnel data to protect an employee from harm to himself or to others, the city can release the data to:

- The person who might be harmed and his/her attorney if needed to obtain a restraining order.
- A screening team evaluating an employee under Minn. Stat. § 253B.07 (e.g., a team screening the individual for commitment proceedings for mental health reasons).
- A court, law enforcement agency, or prosecuting attorney.

C. Required sharing of information

1. Background check information for police officers

The city is required by law to give out employment information on a current or former employee who is the subject of a background investigation, because the employee is applying for a job as a police officer, a job leading to employment as a police officer, or a candidate for employment with a law enforcement agency in any other capacity.

The request for disclosure of employment information must be in writing, must be accompanied by an original authorization and release signed by the employee or former employee, and must be signed by a sworn peace officer or other an authorized representative of the law enforcement agency conducting the background investigation.

RELEVANT LINKS:

[Minn. Stat. § 626.87, subd 3.](#)

[Minn. Stat. § 626.87, subd 4.](#)

[Minn. Stat. § 13.43, subd. 15.](#)

[Minn. Stat. § 13.43, subd. 13.](#)

[Minn. Stat. § 363A.06, subd. 2\(b\).](#)

[Minn. Stat. § 13.43, subd. 6.](#)

[Minn. Stat. § 13.43, subd. 6.](#)

If the city refuses to disclose the employment information, the hiring agency can request the district court issue an order directing the disclosure of the information. Failure to comply subjects the person or entity who fails to comply to civil or criminal contempt of court.

As long as the city is not found to be guilty of fraud or malice, it is immune from civil liability for releasing information under this requirement.

2. Providing information to law enforcement agencies

Private personnel data or confidential data on employees may be given to a law enforcement agency for the purpose of reporting a crime committed by an employee or to assist law enforcement in the investigation of a crime committed by an employee.

3. State agencies

The Minnesota Government Data Practices Act (MGDPA) specifies private personnel data must be shared with the Department of Employment and Economic Development for purposes of administering the unemployment benefits program. In addition, the Minnesota Human Rights Act specifically provides that the MGDPA is not violated when a public entity releases private or confidential data pursuant to a subpoena issued by the commissioner of the Department of Human Rights.

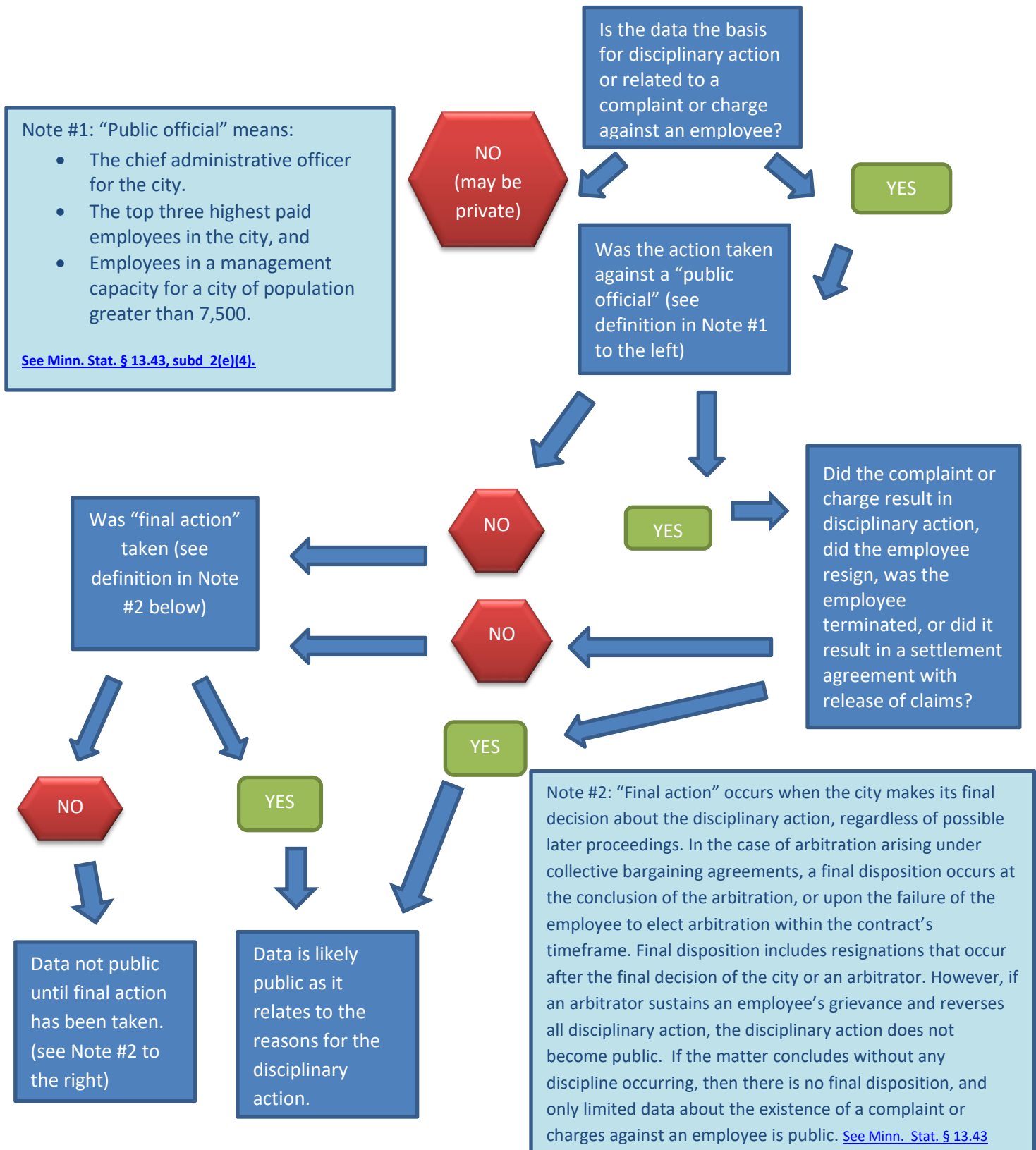
4. Unions

Personnel data must be given to employee unions and the Public Employment Relations Board (PERB) if the data is necessary to conduct an election, investigate and process grievances, and implement the Minnesota Labor Relations Act and Public Employment Labor Relations Act. Employee social security numbers are not necessary to implement these laws.

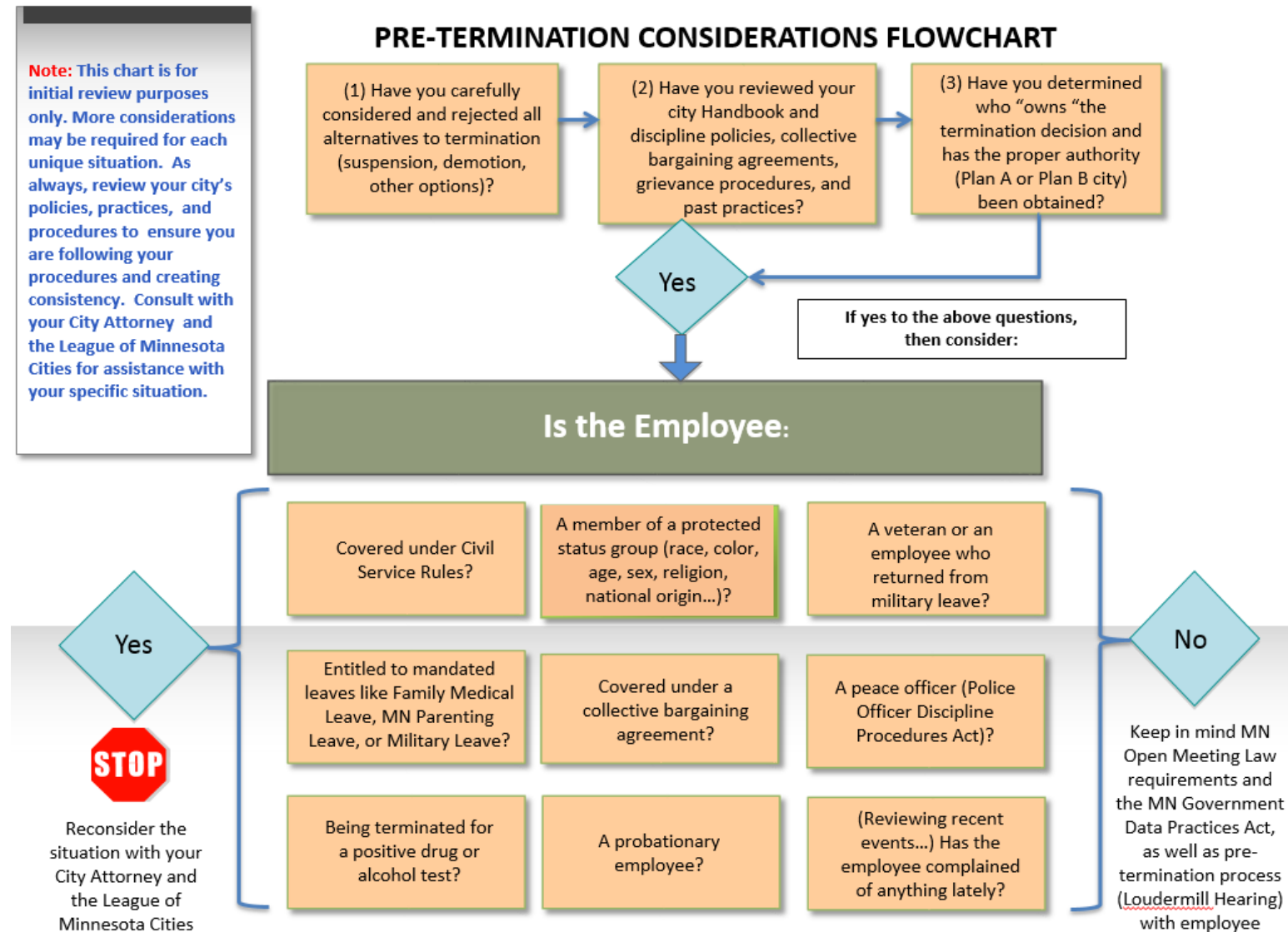
If there is any doubt about whether it is appropriate to give information to a union, the best practice is simply for the city to ask the employee for permission and then document their response.

The Bureau of Mediation Services (BMS) and PERB have the authority to order or authorize the release of information to BMS, PERB, or to the employee union.

Appendix A: Public vs. private disciplinary data



Appendix B: Pre-termination considerations flowchart



Appendix C: Making the decision – a termination checklist

1. Has the proper authority been obtained in advance?

If council:	Open Meeting law and data practices considerations.
If City Manager/Admin:	Obtain appropriate written authorization.

2. Has appropriate “due process” been followed? (More than one may apply.) Have city policies been followed?

Requires due process?	
Union employee	Yes. Hearing required. In addition, employee has right to representation and grievance proceedings.
Veteran employee	Yes. Hearing required. In addition, employee must be notified he/she has 30 days of paid time to request a hearing before external board.
Civil service	Yes. Follow civil service rules.
Peace officers	Maybe; but being a police officer in itself does not mandate due process. Remember, if a formal statement is required, the city must follow the Peace Officer Discipline Act.
Employee handbook, employment contracts, and/or city policies	Maybe. Does the handbook refer to being terminated for cause? Is there a progressive discipline policy? Is there a grievance procedure?
At-will or probationary employee	No. However, the city should still provide a notice of charges and the opportunity for an employee to respond prior to making a final decision. How have similar situations been handled in the past?

3. Has sufficient documentation been prepared?

Examples of important documentation include:

- Documentation of city’s decision and basis for decision
- Copies of letters and information given to employee

- Employee response to charges
- Investigation report
- Records of previous discipline and basis for discipline
- Performance improvement plans
- Performance evaluations
- Employee's job description
- City policies, bargaining agreements, handbook, and contracts
- Supervisor's notes
- Timesheets, expense reports, security tapes

4. Have potential legal claims been considered? Has an attorney been consulted?

Discrimination or harassment	Based on a protected class such as: race, color, creed, national origin, religion, sex, gender, pregnancy, marital status, family status, disability, sexual orientation, age, status with regard to public assistance, membership on a local human rights commission
Disability or other medical issues	<ul style="list-style-type: none"> • Failure to make reasonable accommodations for disability • Failure to allow legally mandated medical leaves • Discrimination based on pregnancy
Whistleblower or other retaliation claims?	<ul style="list-style-type: none"> • Retaliation for reporting suspected illegal activity • Retaliation for participating in an investigation • Retaliation for union activities • Retaliation for engaging in protected speech

Appendix D: Preparation for termination checklist

Task	Responsible	Date	Complete
Final Paycheck and Benefits			
Prepare letter of termination	HR/Admin		
Termination action form	HR/Admin		
COBRA/MN continuation notification	HR/Admin		
PERA refund information	HR/Admin		
Deferred compensation information	HR/Admin		
Schedule exit interview (if appropriate)	HR/Admin		
Prepare/arrange to collect final timesheet	Supervisor		
Determine appropriate pay out of compensatory time, vacation, PTO, and/or sick leave.	HR/Admin		
Mail final paycheck (Generally, within 24 hours of termination)	HR/Admin		
Information regarding employee assistance program or other resources.	HR/Admin		
Security and Equipment			
Notify technology department in advance (change or disable all passwords)	HR/Admin		
Arrange to collect all keys, identification badges, and access cards	Supervisor		

Task	Responsible	Date	Complete
Arrange to collect all city-owned tools and equipment (laptop, cell phone, vehicle, etc.)	Supervisor		
Arrange to collect any city credit cards	Supervisor		
Arrange to collect uniforms	Supervisor		
Work Planning			
Plan for project continuation, coverage and distribution of employee's work	Supervisor/ Admin		
Develop a plan to notify co-workers	HR/Admin Supervisor		

Appendix E: Notifying the Employee of Termination Checklist

Before the meeting:

Do one last final review of the decision.

- ☐ Have due process requirements been met?
- ☐ Did the employee have an opportunity to respond to the allegations?
- ☐ Have the necessary approvals been obtained?

Prepare short key messages. Practice key messages in advance!

- ☐ Purpose of the meeting (to discuss performance.)
- ☐ Brief review of performance plan or previous discipline (1-2 sentences).
- ☐ The decision: “We have decided to end your employment with the city effective ____.”
Or “We have decided to recommend to the council that your employment be terminated.
They will make their decision on ____.”
- ☐ Information related to compensation and benefits.
- ☐ Data practices and the city’s position on references.

Set up the time and location of the meeting.

- ☐ Preferably early in the week, towards the end of the day.
- ☐ Discreet, comfortable location.
- ☐ Co-facilitator to assist and take notes.
- ☐ A best practice is to require personnel to contact local police in advance of any terminations or suspensions when they believe the behavior may escalate into violence.

During the Meeting:

Communicate the decision.

- ☐ Use appropriate tone, be professional and calm.
- ☐ Keep it short (15 minutes).
- ☐ Summarize the previous performance plan or discipline.
- ☐ Be compassionate but direct when communicating the decision.
- ☐ Manage your emotions and stick to key messages. Don’t defend your decision, or argue with the employee. A good response to arguments is, “We’re sorry you feel that way, but we have made our decision”.

Discuss important compensation and benefit issues.

- ☐ Give employee all compensation and benefit information in writing.
- ☐ Highlight important due dates and information.
- ☐ Give final paycheck or mail within 24 hours.
- ☐ Who should the employee contact with questions?

Discuss data practices issues.

- ☐ What references, if any, will you give for the employee?
- ☐ What will you tell co-workers?

Following the meeting:**Help the employee to exit.**

- ☐ End with something positive.
- ☐ Have someone help the employee collect their belongings.
- ☐ Be quick and discreet.
- ☐ Arrange for help if needed.

Manage security issues.

- ☐ Disable passwords and access cards (during the meeting if possible).
- ☐ Collect all city property, keys, identification, etc. from employee (prepare a list ahead of time).
- ☐ Arrange for additional help to be available if needed.

Document the meeting.

- ☐ Complete notes immediately.

Notify co-workers and other affected individuals once final process is complete.

- ☐ Respect employee's privacy.
- ☐ Follow data practices.
- ☐ Set expectations for behavior.