

Layoffs and HR Cost-Saving Measures

Learn about options for reducing staff through furlough or temporary or indefinite layoffs. Determining positions to eliminate and considerations raised by labor contracts, veterans' preference laws, early retirement incentives, and voluntary termination programs. Find out about assessing your benefit responsibilities and what to consider when recalling employees. Learn about using alternatives to staff reduction, such as hiring or wage freezes, use of voluntary unpaid leave, and reduction in work hours. Discover resources for helping employees with job loss.

RELEVANT LINKS:

I. Layoffs and budget cutting measures

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.

In most cities, the city council has the authority to move forward with an employee layoff but, as is referenced later in this document, a city's personnel policies, union contracts, civil service rules, etc., must be consulted in preparation. 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. 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 particular layoff situation.

II. Differences 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.

RELEVANT LINKS:

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. 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 were common as a short-term approach to funding limitations in the 2007 recession.

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.

RELEVANT LINKS:

Elkouri v. Elkouri, How Arbitration Works, 727-28 (6th ed. 2003).

City of Morris v. AFSCME Council 65, PERB Case No. 83-PP-85-B (Flagler, 1983). (Contact hrbenefits@lmc.org For a copy of the case).
St. Catherine University v. International Union of Operating Engineers, Local 70, FMCS Case No. 09-03705 (Miller, 2009).

Local 113 v. St. Paul's Church Home, Inc., FMCS Case No. 030627-51398-7 (Toenges, 2004). (Contact hrbenefits@lmc.org For a copy of the case).
Metropolitan Council and United Association of Steamfitters, Pipefitters and Service Technicians, Local 455, BMS Case No. 09-PA-1019 (Jacobs, 2009).

AFSCME Council 65 v. City of Slayton, BMS Case No. 85-PP-119-B (Johnson, 1985).

Independent School District v. Rochester Association of Education Office Personnel, BMS Case No. 98-PA-1084 (Bryant, 1998).
[Minn. Stat. § 465.722](#).

Another good option with non-union employees, would be for the city to layoff indefinitely and employ on an “on-call” basis, as long as these options are not prevented by any applicable Personnel Policies. 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. For involuntary reduction of work hours of Union employees, there is a split of arbitration decisions on whether a reduction in hours violates contractual seniority and layoff provisions. There have been a number of grievance arbitrations in Minnesota in which the arbitrator has ruled that a unilateral furlough is a violation of the collective bargaining agreement. There have also been grievance arbitration awards where the arbitrator has found that a furlough was not a violation of the negotiated language of the collective bargaining agreement. As such, under these circumstances, cities should review the applicable collective bargaining agreements and consult with their city attorney.

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.

III. Layoff checklist

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

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

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.

RELEVANT LINKS:

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 (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. It is common in seniority/layoff article to see the “order of layoff” to require that temporary/seasonal employee are laid off prior to the layoff of regular full-time bargaining unit members.

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.

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.

RELEVANT LINKS:

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

[Firefighters Union Local 4725 v. City of Brainerd](#),
934 N.W.3d 101_N.W.
(Minn. 2019).

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.

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.

RELEVANT LINKS:

Shenango Valley Water Co., 53 LA 741 (McDermott, 1969); Independent School District 88 v. School Service Employees Union, Local 284, 503 N.W.2d 104 (Minn. 1993).

However, when a city is considering reorganization involving union employees, the city may need to consider a "meet and confer" or even negotiations with the union prior to implementing the reorganization, depending on the specific circumstances and contract language at issue. These collaborative processes help cities prevent a potential unfair labor practice claims arising out of reorganization." Another potential option, when appropriate, would be to address the matter through a unit determination process before the Minnesota Bureau of Mediation 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 provisions.

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). 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.

RELEVANT LINKS:

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

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

Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice.

B. 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 and objective business reasons for eliminating certain positions. From a management perspective, even if employees are not happy about a layoff, good documentation and a sound rationale 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.

C. Assess benefit responsibilities

1. Health and dental continuation

Neither federal nor state law requires employers to continue to provide health coverage (or employer contributions for health coverage) during layoffs or furloughs, unless the employee is entitled to leave under the Family Medical Leave Act (FMLA).

However, layoffs and furloughs may trigger continuation rights under federal or state law. Whether a reduction in hours under a furlough constitutes a qualifying event for purposes of these continuation coverage laws requires further analysis.

The Consolidated Omnibus Budget Reconciliation Act (COBRA) generally covers group health plans (e.g., medical, dental, vision, health FSA, health reimbursement arrangement, EAP, etc.) maintained by employers with 20 or more employees.

COBRA requires public sector employers to offer a temporary extension of group health coverage (referred to as “continuation of coverage”) to certain qualified beneficiaries (typically employees, former employees, spouses, former spouses, and dependent children) for up to 18, 29, or 36 months, depending on the qualifying event. One such qualifying event can include termination of employment or a reduction in hours worked. Minnesota law also requires public sector employers (of any size) to offer continuation coverage for health, dental, vision, and life insurance upon a termination of employer or a reduction in hours worked.

COBRA generally requires the city to distribute an election notice to each qualified beneficiary (which may include the employee, the covered spouse, and the covered dependent children).

RELEVANT LINKS:

As the memo linked to the left notes, the timeframe is generally within 14 days of the qualifying event, but in cases where the city is also the plan administrator, (which is typically the case), then the notice required upon a termination of employment or reduction in hours, must be provided within 44 days of the qualifying event or, if the plan provides continuation coverage and notice periods begin on the date of the loss of coverage, within 44 days of the date on which coverage is lost. For this notification, DOL COBRA regulations provide that a single election notice, addressed to a covered employee and covered spouse, is sufficient if they reside at the same address. Minnesota law has a similar notice requirement.

In general, COBRA and Minnesota Continuation laws provide that if the employee loses coverage due to a reduction in hours or job loss, that the employee is entitled to at least 18 months of coverage at his or her own expense.

Thus, due to a layoff, if an employee ceases to be eligible for the City's health plans, then the employee should be offered COBRA and/or Minnesota continuation coverage due to the employee's reduction in hours. However, the City could agree, as part of the layoff, to pay the employee's continuation premiums subject to collective bargaining, etc.

Also note that most insurance carriers in Minnesota have indicated they will waive any hours requirements for employees who have been temporarily laid off or furloughed. The City should check with its carrier, but if the carrier has taken such a position then the City could, at its discretion, continue to treat this employee as an eligible active employee. The City's decision to do so should be documented. Thus, in the case where the group health plan permits laid-off or furloughed employees to continue participation in the group health plan, then there likely is no need to offer continuation coverage at this time because there is no loss of coverage.

Note, however, that the COBRA regulations specifically provide that if an employee's cost of coverage increases due to a reduction in hours, that change constitutes a loss of coverage triggering a requirement to offer COBRA coverage. Accordingly, if the employee remains eligible during the layoff but the City decides to reduce its contributions, COBRA continuation coverage should be offered.

If benefit eligibility is extended during the period of layoff or furlough, the City will need to address additional issues, such as how to collect any premiums owed by the employee during the layoff/furlough, whether to terminate coverage if premiums are not paid in a timely manner, when to reinstate coverage upon the employees return to work (assuming coverage terminated during the layoff/furlough), etc. The City should review its leave policies and governing plan documents to determine whether these issues are already addressed.

RELEVANT LINKS:

LMC website, [Federal Health Care Reform](#).

2. Life and disability continuation

Some life insurance and long-term disability insurers are allowing coverage to be extended for a limited time after employees are furloughed. In other words, some carriers are waiving the “actively-at-work” policy requirements. Since this waiver is not standard, a city will want to contact its insurers to find out if this waiver is applicable. Depending on the policy, employees losing life insurance coverage as a result of layoffs may have the right to convert the policy to an individual policy.

3. ACA considerations

Under the federal Affordable Care Act (ACA), an employer with 50 or more full-time employees that sponsors a group health plan must offer minimum essential coverage to at least 95% of its full-time employees (and their dependents), and such coverage must meet affordability and minimum value requirements under the Code to avoid employer shared responsibility penalties. Additional information on the ACA can be obtained through the link on the left.

Under COBRA rules, in the case of a reduction in hours or a furlough, it would seem an employee would no longer be considered a full-time employee and due to those circumstances, would no longer be offered city group health coverage. However, if the City is an applicable large employer under the employer shared responsibility requirements and it determines eligibility for the health plan using the look back measurement method, a full-time employee who is temporarily laid off will typically remain eligible for coverage during the layoff so long as he/she remains an employee due to the fact that his/her full-time status is generally fixed during the stability period.

Applicable large employers should be aware that if a full-time employee who is temporarily laid off or furlough remains a full-time employee, whether the city continues to make its health plan contribution may affect the affordability of the coverage.

Additionally, applicable large employers will also want to be aware of how breaks-in-service can affect the employer shared responsibility requirements. In general, a break-in-service is a period of time during which an employee is not credited with any hours of service under the employer shared responsibility rules. If a break-of-service is at least thirteen (13) weeks in length, when the employee returns to work the city can treat the employee as a new employee for purposes of the employer shared responsibility requirements (e.g., penalties will not apply if the employee is not offered coverage immediately upon return to work).

RELEVANT LINKS:

[PERA](#)

[26 C.F.R. § 1.125-4.](#)

[26 C.F.R. § 1.125-4.](#)

Except as provided below, an employee returning to work after a break-in-service that is less than thirteen (13) weeks in length is treated as an ongoing employee and generally should be offered coverage immediately if he/she is a full-time employee in order to avoid potential penalties under the employer shared responsibility requirements.

Applicable large employers will also want to consider the Rule of Parity under the ACA when it recalls an employee back from a furlough and how the leave. The Rule of Parity, as cited from the IRS regulations, is as follows: “For purposes of determining the period after which an employee may be treated as having terminated employment and having been rehired, an applicable large employer may choose a period, measured in weeks, of at least four consecutive weeks during which the employee was not credited with any hours of service that exceeds the number of weeks of that employee’s period of employment with the applicable large employer immediately preceding the period that is shorter than 13 weeks (for an employee of an educational organization employer, a period that is shorter than 26 weeks).”

Thus, for determining whether an employee is a full-time employee (who could trigger a penalty if he/she is not offered coverage immediately upon returning to work), the period of absence for the furlough must exceed the duration of the employee’s period of employment immediately before the break in service for the employee to be treated as new, rather than ongoing, employee.

4. PERA service credits

In the event of a layoff or seasonal leave of absence, a PERA member will receive service credit for up to three months even though no contributions are reported. For example, school employees who work only nine months and who are laid off over the summer months receive service credit for all 12 months.

5. Cafeteria plan elections

A section 125 plan is authorized under the part of the IRS code that enables and allows employees to take taxable benefits, such as a cash salary, and convert them into nontaxable benefits. One of the rules associated with the Section 125 plan, is that employees' cafeteria-plan elections are generally irrevocable until the beginning of the next plan year, unless there are certain specific circumstances, known as “qualifying events,” in play. The Internal Revenue Service (IRS) Code Section 125 contains provisions defining “qualifying events” which allow mid-year changes to medical, dental, vision, life, health, flexible spending account (health FSA) and/or dependent care flexible spending (DCAP) plan elections.

RELEVANT LINKS:

Under IRS rules, an employee can make a change to their FSA (health or DCAP) election if the employee, the employee's spouse, or the employee's dependent loses employment, and the loss of employment affects eligibility under a plan. For example, if an employee's spouse loses employment and eligibility for benefits through his/her employer, an employee can generally increase his/her FSA elections.

When the city is placing an employee on a furlough, it does not necessarily trigger a participant's ability to change one or more of his or her elections under a cafeteria plan. The city will need to carefully review their cafeteria plan document to determine if coverage under the cafeteria plan (including the health FSA and/or DCAP) ends when an employee is no longer actively working. If eligibility ends, elections will automatically be revoked (subject to the employee's possible right to elect to continue coverage under the health FSA pursuant to COBRA). If eligibility is not impacted by the furlough, the furlough itself will not constitute a "qualifying event" triggering the ability to make an election change. However, other events may occur at the same time that constitute "qualifying events."

With dependent care assistance plans, when there is a change in the cost of a dependent care provider or a daycare closes, for example, this is often a qualifying event that may trigger a midyear election change. The midyear election change must correspond to the event; or in other words, not needing daycare means a participant can decrease an election, whereas needing daycare would allow for an increase in a participant's DCAP election. The election changes may include starting, stopping, or modifying a DCAP election, depending on the employee's situation. In many cases, when a furloughed employee is called back to city work and day care reopens/is needed again, this would likely trigger another change (to increase dependent care election).

6. Leave Accruals

Leave accruals are dictated by the city's own personnel policy, past practice or union contract. If none of these documents state what will happen in the event of a layoff, the city can generally make its own decision about non-union employees but may need to negotiate with the union for union-covered employees. If a city decides to continue leave accruals during a furlough or layoff, employees would probably see this as a good faith gesture on the part of the city and, if the city can afford it, could help maintain morale during what will likely be a trying time for its employees.

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

A. 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 that are 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.

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.

B. Carefully consider which positions to layoff

A city should rely on objective business reasons to decide which employee(s) to layoff. 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 prorated?

RELEVANT LINKS:

49 C.F.R. § 382.301.
FMCSA: Must all drivers who do not work for an extended period of time be pre-employment drug testing each season when they return to work?

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 (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 simply 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. 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 to be 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 to be an employee of the company at any point during the layoff period and was not covered by another employer's drug testing program, then a pre-employment test would be required.

For those 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 (DOLI) prevents lifeguards under age 18 from supervising other lifeguards. DOLI has also indicated that 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.

RELEVANT LINKS:

[49 C.F.R. § 382.301.](#)

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 (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 (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.

C. 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 in order 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. Refer to pertinent information on under Section 2 of this document.
- 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?

D. 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.

E. Review existing contracts

A city may have staffing responsibilities related to certain contracts and programs.

RELEVANT LINKS:

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

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.

F. Consider veterans preference

Veterans are not given the same rights in a layoff situation as they are in a termination decision. In general, a city may layoff (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.

G. Carefully consider early retirement incentives

The advantage of offering employees an incentive for early retirement is that it can be a fairly painless way to reduce the work force. 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

RELEVANT LINKS:

[Early Retirement Incentive for All Employees](#), LMC Model Policy.

[Early Retirement Incentive for a Group of Employees](#), LMC Model Resolution.

[EEOC, Understanding waivers of discrimination claims in employee severance agreements](#), Minn. Stat. § 471.61.

[29 C.F.R. § 1625.22](#).

[Auerbach, v. Board of Educ. of the Harbor fields Central School Dist.](#), 136 F.3d 104, 113 (2d Cir. 1998).

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 consider:

1. Across the board offers

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. 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 that are 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 human rights law.

2. Union agreements

The city should notify unions if they intend to offer a retirement incentive to union employees, and potentially give the union an opportunity to meet and discuss the retirement incentive plan. If Union employees agree to the retirement incentive, the Union will need to be a party to the retirement incentive agreement. Cities should consult with their city attorney or labor attorney regarding this issue. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice.

3. Incentives are voluntary

Make sure the incentive meets the definition of “voluntary” under Equal Employment Opportunity Commission guidelines. For example, the city should make sure that the employees are given adequate time and enough information to make an informed decision about whether to take the incentive. In the Auerbach case linked to the left (which is not binding in Minnesota), the court 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 under the ADEA. For a valid waiver under the Minnesota Human Rights Act (MHRA), there is a 15-day rescission/revocation period.

RELEVANT LINKS:

[29 U.S.C. § 626\(f\).](#)

[Minn. Stat. § 363A.31, subd. 2.](#)

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

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 under the ADEA. For a valid waiver under the Minnesota Human Rights Act (MHRA), there is a 15-day rescission/revocation period. These rescission periods run concurrently. According to the EEOC, it is not coercion for the city to notify its work force that layoffs will be necessary if insufficient numbers of employees do not retire voluntarily unless older workers are the only ones threatened. (Use the link on the left for additional guidance from the EEOC on age discrimination issues).

The EEOC regulations also require that 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 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 the ADEA and any other laws.

4. Older Workers Benefit Protection Act (OWBPA)

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 age 40 or older. Under the OWBPA, employers also need to provide workers age 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 14 days under the Minnesota Human Rights Act. These revocation periods run concurrently. During a layoff or as part of a voluntary exit incentive program, two additional requirements are needed to validate the releases. The employer must publicly identify the targeted employees, and secondly, 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.

5. Set parameters 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

RELEVANT LINKS:

[*Lyons v. Ohio Educ. Assoc. and Professional Staff Union*, 53 F.3d 135, 140 \(6th Cir. 1995\).](#)

[*Hazen Paper Co. v. Biggins*, 507 U.S. 604, —, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 \(1993\).](#)

EEOC: [Guidance Section 3 Employee Benefits](#).
EEOC: [Informal Discussion Letter](#).

[Minn. Stat. § 471.61, subd. 2b.](#)

of service with the city and who have met age and service requirements necessary to receive a public pension benefit. In the Lyons case to the left, the Sixth Circuit held that 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 that it is OK to let employees know 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 that making an offer that is “too good to refuse” is not considered discriminatory.

6. Window of opportunity

Establish a “window of opportunity” in which employees can take advantage of the early retirement incentive (e.g., between 6/1/2020 and 10/1/2020). This will ensure the city does not forget to “close the door” on the program once it is no longer needed.

7. Beware differing benefits based on age

Be aware early retirement incentives that provide differing benefits based on age could be challenged based on 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.

8. Avoid uncertain or uncapped costs

Avoid early retirement incentives with 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.

9. Loss of experienced employees

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.

RELEVANT LINKS:

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

[Minn. Stat. § 465.722](#).

[Minn. Stat. § 465.72](#).

LMC HR Reference Manual
[chapter 3](#). See page 63
Statutory limitations.

10. Pre-age 65 employees

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. See link to the left for additional information on Minn. Stat. § 471.61.

H. 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).

Cities need to be aware there are limits on severance packages in the public sector. Please refer to "Statutory Limitations under Severance Pay" section of the Discipline and Termination Section of the HR Reference Manual.

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

Also, the Age Discrimination in Employment Act requires certain waiting periods (see "Early Retirement Incentives" subsection above and "Termination Agreements" subsection in this document) 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 MHRA. 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.

The city should notify unions if they intend to offer a voluntary termination agreement to union employees, and potentially give the union an opportunity to meet and discuss the voluntary termination plan.

RELEVANT LINKS:

[Minn. Stat. § 471.991-999.](#)

[Minn. Stat. § 179A.13.](#)

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

If Union employees agree to the voluntary termination plan, the Union will need to be a party to a union employee's voluntary termination agreement. Cities should consult with their city attorney or labor attorney regarding this issue. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice and, thus, should be avoided.

I. 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 awarded 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 non-union 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 that calls 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:

However, if the expired contract calls for automatic step/wage increases based on factors like longevity or educational achievements, the city cannot unilaterally implement a wage freeze. If the expired contract does not have automatic step/wage increases, the employer may be able 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.

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. The appropriate actions for a city to take when addressing the possibility of a wage freeze for union employees upon the expiration of a contract will depend on the specific facts and circumstances at that city. As such, cities should consult with their city attorney and/or labor attorney when addressing the possibility of a wage freeze for union employees. 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:

1. Across the board application

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.

2. Employee morale

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.

3. Fairness versus efficiency

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.

RELEVANT LINKS:

Elkouri v. Elkouri, How Arbitration Works, 727-28 (6th ed. 2003).
City of Morris v. AFSCME Council 65, PERB Case No. 83-PP-85-B (Flagler, 1983). (Contact hbenefits@lmc.org For a copy of the case).
St. Catherine University v. International Union of Operating Engineers, Local 70, FMCS Case No. 09-03705 (Miller, 2009).
Local 113 v. St. Paul's Church Home, Inc., FMCS Case No. 030627-51398-7 (Toenges, 2004). (Contact hbenefits@lmc.org For a copy of the case).
Metropolitan Council and United Association of Steamfitters, Pipefitters and Service Technicians, Local 455, BMS Case No. 09-PA-1019 (Jacobs, 2009).
AFSCME Council 65 v. City of Slayton, BMS Case No. 85-PP-119-B (Johnson, 1985).
Independent School District and Rochester Association of Education Office Personnel, BMS Case No. 98-PA-1084 (Bryant, 1998).

4. Union agreements

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 leave or reduction in hours 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. For involuntary reduction of work hours of union employees, there is a split of arbitration decisions on whether a reduction in hours violates contractual seniority and layoff provisions. There have been a number of grievance arbitrations in Minnesota in which the arbitrator has ruled that a unilateral furlough is a violation of the collective bargaining agreement. There have also been grievance arbitration awards where the arbitrator has found that a furlough was not a violation of the negotiated language of the collective bargaining agreement. As such, under these circumstances, cities should review the applicable collective bargaining agreements and consult with their city attorney. Communicating directly with union employees on matters of pay and benefits could be construed as an unfair labor practice.

5. Seniority dates

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 to the definition or calculation of seniority as outlined in the union contract would have to be negotiated with the union.

6. Vacation, sick and PTO accruals

Consider how the city will handle vacation/sick/PTO accruals for typically full-time employees working less than 40 hours per week.

RELEVANT LINKS:

[Fact sheet 70 FLSA Furloughs.](#)

[29 C.F.R. § 541.710.](#)

See Section III-C, Layoff checklist – Assess benefit responsibilities.

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 sick leave accruals as employees will then likely be considered "part time" under existing policy or union contract (if applicable) language. Vacation and 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 with regard to leave accruals (if the city's usual practice is to prorate benefits for employees who work less than 40 hours).

7. Impact on exempt versus non-exempt employees

Consider the impact on exempt (not overtime eligible) versus non-exempt (overtime eligible) employees. Nonexempt employees are paid for each hour worked, so furloughed nonexempt employees are simply paid for fewer hours. Exempt employees, however, must be treated differently with respect to furloughs or a reduction in work hours.

Under #9 of the linked DOL guidance to the left, and the FLSA regulations, [29 C.F.R. § 541.710\(b\)](#), 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. Some courts have interpreted this provision in the FLSA to mean that when exempt employees are furloughed or their hours are reduced for just one day in a series of weeks, those employees lose their exempt status for the occurs.

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. Based on the above, it is important for cities to tell exempt employees subject to a furlough or reduction in hours to keep an accurate record of the hours they actually work.

8. Assess benefits responsibilities for voluntary leave programs

In addition, the information covered in the section noted to the left, here are some issues for cities to consider when applying these cost-saving measures to employees on a voluntary leave.

RELEVANT LINKS:

[Firefighters Union Local 4725 v. City of Brainerd](#), 934 N.W.3d 101N.W. (Minn. 2019).

[Minn. Stat. § 268.07](#).

a. Benefit continuation responsibilities

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 for non-union employees while the employee is on leave if unaddressed or permitted by the Personnel Policies. For union employees, the city should consult the union contract to determine continuation of benefits, and if unaddressed, the city in consultation with its city attorney and/or labor attorney, will likely need to enter an agreement with the union providing for the continuation of benefits. 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 period 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.

b. COBRA notices

A COBRA notice typically is not issued until there is a loss in coverage—in other words, when the city decides they are no longer going to pay their contribution for the coverage for the employee.

c. Maintaining benefit levels

A benefit to allowing employees to keep the same level of benefits when they have temporarily had their hours reduced is that it would eliminate the potential controversy related to their status during this period.

Minnesota law requires employers to display several unemployment 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:

RELEVANT LINKS:

[Minnesota Department of Labor and Industry \(DLI\).](#)

[MN Unemployment, Help and Support employee handbook.](#)

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

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.

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 web site (follow link in left column).

V. What else should a city be aware of?

A. 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, Liability, of the Handbook for Minnesota Cities (linked to the left).

RELEVANT LINKS:

[29 U.S.C. § 2101-2109.](#)

B. Advance notice

The Worker Adjustment and Retraining Notification Act (WARN), a federal law requiring 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 law 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 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, grievances or to contest the layoff.

C. 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 that it is 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.

D. 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 in that position (background, training, education, certifications, etc.) If an employee who does snowplowing is required to have a commercial driver's license, then a volunteer doing 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:

*Firefighters Union Local
4725 v. City of Brainerd*,
934 N.W.3d 101
N.W. (Minn. 2019).

LMC information memo,
[LMCIT Workers
Compensation Coverage
Guide](#), section II C. 7, City
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 that 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. More information about such coverage is available in the LMCIT risk management memo, LMCIT Workers' Compensation Coverage Guide. 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 the League or 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.](#)

VI. Helping employees through this difficult time

A. 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, a Boston leadership and outplacement consultancy, also recommends maintaining communication and including former employees in events such as alumni networks.

B. 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 (follow links in left column).

C. 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).

D. Employee assistance program (EAP)

In the stressful landscape of a layoff amidst the COVID-19 global health crisis, it can be helpful if the city provides contact information for a city's EAP (if there is one in place). The city may even want to consider having a counselor from the EAP devoted to 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.

E. 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:

Vbgov, [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.

F. Outplacement services

Especially if many 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.

VII. 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 veteran's 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:

- How is the reorganization going to help the city conduct business more efficiently and more effectively?
- How will customer service to residents be improved?

RELEVANT LINKS:

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

- 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 or her 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 veteran's 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.