

# **RISK MANAGEMENT BULLETIN**

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## **Furloughs and Layoffs of Public Sector Employees In Troubled Economic Times**

In the current economic downturn, millions of Americans have lost their jobs. Unemployment has increased to levels not seen since the 1980s. Much of the job loss has occurred in private industries, but the public sector has also felt the pain of layoffs. Decreasing tax revenues and expanding budget deficits have forced state and local governments to make difficult decisions regarding their workforces. Between September 2007 and September 2009, more than 110,000 jobs were shed from state and local governments across the country and the trend continues. This number includes more than 40,000 teachers as well as nearly 4,000 uniformed police officers and firefighters. Closer to home, Governor O'Malley announced in January 2010 that the State would be cutting 200 positions, 44 of which were occupied. The City of Annapolis recently laid off over two dozen employees. These are the first layoffs in the city's history. The City of Hagerstown, also facing a revenue gap, recently announced that it might furlough employees and cut services. Last year, Harford County announced five unpaid furlough days for government employees between July 2009 and April 2010.

Clearly layoffs and furloughs are among the most visible means of closing budget gaps. A layoff is the temporary suspension or permanent termination of employment of an employee or (more commonly) a group of employees for business reasons, such as the decision that certain positions are no longer necessary or a business slow-down or an interruption in work. Originally the term "layoff" referred exclusively to a temporary interruption in work, as when factory work cyclically falls off. However, in recent times the term is commonly used to refer to the permanent elimination of a position. Generally, a furlough is a temporary leave of absence from employment, more commonly known as a "temporary layoff." It may be voluntary or involuntary. It is usually unpaid, but the employee still continues to receive benefits, such as health care. Furloughs have increasingly been extended to white-collar workers in both the public and private sectors including state and local governments. Furloughs are viewed as a more "humane" alternative to permanent layoffs and enable employers to retain skilled and experience employees who will be needed when the economy eventually rebounds.

*Founding Organizations*



Apart from layoffs and furloughs, many state and local governments have implemented hiring freezes and mandated pay cuts. Others have offered buyouts schemes in order to encourage more senior employees to retire early. In the end, all these cost-cutting measures, whether they involve layoffs or not, impose real economic burdens on the livelihoods of public employees.

Layoffs and even furloughs for economic/budgetary reasons can result in other unforeseen consequences, such as law suits by employees alleging that an employee's layoff was discriminatory or retaliatory. Under federal law, such claims could arise under statutes including, but not limited to Title VII of the Civil rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Consequently, when challenged, a local government must be able to articulate a legitimate, non-discriminatory reason as to why the employee was laid off or furloughed. A workforce reduction in response to an economic downturn is such a legitimate reason. However, while a general workforce reduction may explain why a group of employees was laid off or furloughed, the local government must be able to explain why the particular employee who has sued was included in the group.

Also, layoffs and furloughs may face other legal hurdles, including alleged violations of the Contract Clause of the United States Constitution (U.S. Const. Art. I, § 10, cl. 1.) ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.") To pass constitutional muster, a State or local government when enacting legislation that constitutes a substantial impairment of its own contracts, such as employment contracts or union contracts, must demonstrate that the legislation is reasonable and necessary to serve an important public purpose. Recently, the United States District Court for the District of Maryland found that an Employee Furlough Plan (EFP) enacted by Prince George's County violated the Contract Clause. (*Fraternal Order of Police v. Prince George's County*, 645 F. Supp. 2d 492 (2009)). The EFP required 5,900 employees to take eighty (80) unpaid hours during FY 2009, effectively cutting the annual salaries of all covered employees by 3.85%. The EFP was challenged by public safety unions, AFSCME and the AFL-CIO. The County claimed that it resorted to the EFP to protect the fiscal integrity of the County and that it chose not to use any reserve funds to address the budget shortfall because wise fiscal policy dictated that reserve funds only be used for "one-time" as opposed to "on-going" expenditures, such as salaries. The unions contended that EFP was not necessary because the county had adequate reserves at its disposal to offset the budget shortfall. The Court sided with the unions, concluding that the County had not demonstrated that it had reached a "break point" that made the furloughs a necessity. Finally, the court warned that "[t]he County is not free to pick and choose whether to impair its own financial obligations in order to remedy its financial woes . . . ."

So, although local governments are allowed to implement temporary or permanent layoffs, as well as furloughs of their employees, they must remain vigilant against even the appearance of discrimination and must avoid violating the Contract Clause. As to discrimination, any local government contemplating layoffs needs to evaluate whether the layoffs will disproportionately impact employees who belong to a protected class. Important questions to ask include:

- Are the layoffs or furloughs necessary or are there other steps short of layoffs or furloughs that could be taken?
- Will the layoffs or furloughs disproportionately affect older employees, disabled employees, women, or other minorities?
- If the employee challenges the layoff or furlough in court or other venue, is there sufficient evidence (documentary or otherwise) to defend the decision to layoff or furlough of the employee?

In implementing layoffs and furloughs, local governments should adhere to established policies, if they exist. Written notifications of layoffs or furloughs should be clear, concise, and to the point. If employees are spoken to directly about impending layoffs or furloughs, comments of a personal nature should be avoided, as well as any comments about any employees' individual work performance. More than one official should be present when an employee is notified that he or she is about to be laid off or furloughed. Post-layoff comments should also be kept to a minimum as they may also be used to advance an employee's discrimination claim.

Once layoffs or furloughs are implemented, it is important for the local government not to hire someone to fill a vacated position shortly after the layoff or furlough. This gives the appearance of pretext which can be used in any employment discrimination lawsuit. New hires at a later date to meet agency needs, or giving raises and/or promotions to remaining staff to increase morale, generally will be viewed as business decisions in which the courts will not interfere. To ensure that layoff or furlough decisions do not run afoul of the anti-discrimination laws, the local government's attorney should be consulted at all stages of the process, and the employment action should be approved by the local governing body. To minimize the harsh impact of permanent layoffs, local governments, where feasible, may approve severance packages for all affected employees.

As to the Contract Clause, the focus will be whether the impairment of negotiated employment contracts is reasonable and necessary. Reviewing courts will examine the magnitude and timing of furloughs or layoffs, as well as efforts made by the local government to exhaust other alternatives.

In sum, budgetary constraints are a legally recognized basis for implementing layoffs and furloughs. As long as budgetary issues are the basis for layoff or furlough decisions, local governments should be insulated against potential liability. Courts have recognized that an employee claiming that a layoff was a mere pretext for discrimination is not afforded an opportunity merely to engage in second-guessing of an employer's business decisions. The anti-discrimination laws do not require local government or other employers to make proper decisions, only non-discriminatory and non-retaliatory ones. Keeping these principles in mind will assist all of us in seeing through difficult economic times.

If you have questions concerning this issue, please contact John F. Breads, Jr., Director of Legal Services at [jbreads@lgit.org](mailto:jbreads@lgit.org) or telephone 1-800-673-8231.

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