Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

Management Rights Newsletter

A Labor Relations newsletter for our clients designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

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The RWGM Newsletter is published every quarter. All past and present Newsletters are available on our website at http://rwgmlaw.com/news/labor-newsletters/

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MANDATORY/NONMANDATORY SUBJECTS OF BARGAINING

Knowing the difference between mandatory and non-mandatory subjects of negotiation and to be able to accurately categorize a matter as either mandatory or non-mandatory can be quite useful in the labor-management setting. If either party proposes changing a provision which is a mandatory subject of negotiation, parties must bargain in good faith with respect to that proposal. Refusal to negotiate with respect to a mandatory subject of negotiation is an improper practice under the Taylor Law. Conversely, if a matter is non-mandatory, the parties are not required to negotiate, but may agree to do so. Insistence by a party to negotiate with respect to a non-mandatory subject of negotiation is also a violation of the Taylor Law.

Terms and conditions of employment are seen as mandatorily negotiable. The Taylor Law defines the phrase "terms and conditions of employment" as "salaries, wages, hours, agency shop fee deduction, and other terms and conditions of employment." Unfortunately, the definition does not provide much guidance to distinguish between other mandatory and non-mandatory subjects of bargaining. However, there is an abundance of PERB and court rulings to give practitioners a handle on the distinction. The following is a nonexclusive list of topics that have been found to be mandatory subject of negotiation:

- Salary increases
- Overtime pay
- Longevity pay
- Premium pay for holiday work, hazardous duty, or special assignments
  Payment/reimbursement for the cost of education of training
- Changes in the kind and/or level of health insurance benefits
- The right to change health insurance carriers
- The amount of employees' copayments for health insurance
- Changes in dental benefits
- Life insurance benefits

- Sick leave; establishment of a sick leave bank
- A requirement of proof of illness for sick leave
- Union leave time
- Personal leave
- Vacation leave
- Bereavement leave
- Number of holidays
- Availability of free parking for employees while at work
- Procedures for the evaluation of employees
- Disciplinary procedures
- The length of the workday
- Uniform allowance
- The impact of the exercise of a management prerogative
- Grievance procedures
- Reduction of length of a meal break
- Implementation of a dress code
- Demands that relate to the employees' comfort

The following is a nonexclusive list of non-mandatory subjects of negotiation:

- Qualifications for appointment and employment
- Decision to eliminate jobs or reduce services
- Decision to lay off employees temporarily because of lack of work
- Demand that a minimum number of employees are on duty at all times
- Number of employees on duty on a particular piece of equipment
- Creating and filling new positions
- Standard or criteria used for evaluation/promotion
- Contents of a job description setting forth the essential duties of a position
- Benefits for employees not in the bargaining unit (e.g. health insurance benefits for already retired employees)

It should be noted that while a public employer can act unilaterally with respect to non-mandatory subjects not covered in the collective bargaining agreement, the impact of the decisions is mandatorily negotiable.

Employers and employee organizations must also be aware that certain subjects are explicitly prohibited, by statute or case law, from negotiation. The Taylor Law states only that "any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries" are prohibited subjects of negotiation. Similar to mandatory and non-mandatory subject, the courts and PERB have been left to determine the meaning of "prohibited subjects."

One form of prohibited subject is one where the subject is unconstitutional. For example, in *Griffin v. Coughlin*, the Court of Appeals determined that granting paid release time for religious observance purposes, without charge against leave credits available to all employees, is unconstitutional. As a result, this form of leave would be a prohibited subject of bargaining. The following is a non-exclusive

list of prohibited subjects of negotiation:

- Benefits for former employees who have already left service
- Demotion of competitive class employees
- Lie detector usage in criminal investigations
- Maintenance of union membership
- Procedure for criminal investigations of employees
- Vacation accrual while on maternity leave
- Agency fee payments for those who do not wish to join the Union.

Transfer of Police Officers: Town Law § 153

NYS Town Law § 153 provides that a Police officer who transfers from one town police department to another town or village police department in the same county "shall receive credit with the department to which he is transferred for time served on the police force … as though the full time had been served with the department to which he has been transferred, for purposes of seniority, promotion, pensions and general administration." The question is whether such credit also applies to transferee's pay rates.

In *Mamaroneck PBA, Inc. v. New York State Public Employment Relations Bd.*, 66 N.Y.2d 722 (1985), the Court of Appeals dealt with a related issue – whether longevity pay for transferees was a mandatory subject of negotiation, or precluded from negotiation by Town Law § 153. The Court found that longevity credits for purposes of pay were governed by the Town Law and so were not subject to collective bargaining under the Taylor Law. It stated:

> The fact that neither the Town Law nor the Westchester County Police Act includes the words "longevity pay" does not require a contrary conclusion, for both refer to seniority, promotion, and pension rights all of which are matters involving substantial pecuniary benefits related to length of service. Moreover, failing to give transfer credit for the purpose of computing longevity pay would serve to discourage transfers and to undermine the purpose of the [law] to place the transferee squarely in the shoes of the officer who has served all such time in the town to which the transfer is made.
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> Id. at 725.

The *Mamaroneck* case remains good law and, indeed, the question does not appear to have been litigated since. Transferees should receive longevity pay consistent with Town Law § 153, and pay levels equivalent to those who serve in the at-issue Town Police Department over the same number of years of service (see also, NYS Civil Service Law § 70, as amended).

NYS Requires Reasonable Accommodation for Domestic Violence

A recently enacted law extends employment protections for domestic violence victims by requiring employers to provide certain reasonable accommodations to victims who require leave, absent the

showing that doing so would cause an undue hardship upon the employer. These accommodations include permitting the employee's absence from work for "a reasonable time" to:

- Seek medical attention for injuries caused by domestic violence for either themselves or a child victim;
- Obtain services from a domestic violence shelter, program or rape crisis center as a result of the domestic violence; Obtain psychological counseling related to incident(s) of domestic violence, either for themselves or a child victim;
- Participate in safety planning and take other action to increase safety from future incidents (including temporary or permanent relocation); or
- Obtain legal services, assisting in the prosecution of the offense, or appearing in court in relation to the incident(s) of domestic violence.

Note that leave cannot be taken to obtain services for a child victim if the employee is the perpetrator of the violence against the child. These accommodations must be provided, absent a showing by the employer that doing so would pose an undue hardship (considering the size of the business and the type of operation in which the business is engaged.)

Employees must provide reasonable advance notice where feasible, but the law acknowledges that this will not always be possible. If the employee cannot provide reasonable notice, they must provide "certification" to the employer within a "reasonable time" after the absence to confirm their need for leave falls under this provision. Certification may include a police report, a court order, other evidence from a court or prosecutor, documentation from a shelter, medical provider, counselor, or other domestic violence advocate from whom the employee was seeking services related to domestic violence.

Employers can require the employee to charge accrued leave time concurrent with this leave where available, and any absence that cannot be charged to leave will be considered leave without pay (for which the employee cannot be disciplined.) Employers must also continue the employee's health insurance coverage during any such leave. The law also clarifies that it is unlawful for an employer to refuse to hire or terminate an individual because of their status as a "domestic violence victim," or to otherwise discriminate against them in compensation or terms and conditions of employment.

The law takes effect November 18, 2019. There is no legislatively provided definition of a "reasonable time" to be absent pursuant to this section. Employers should be sure to notify and train all supervisors on this new requirement, as these supervisors will likely be the ones receiving the leave requests. Supervisors need to be aware that these requests cannot be denied unilaterally without consideration to the laws' requirements, and preferably, prior consultation with Human Resources and/or counsel to ensure the proper accommodations are provided. Supervisors and employers must also be aware that documentation related to domestic violence, particularly related to children, is subject to confidentiality. As a result, certification from courts or other related services may be heavily redacted or limited in detail. This does not render it ineffective certification. Any documentation received which contains personal or sensitive information regarding domestic violence victims should be treated with confidentiality and sensitivity.

Federal Department of Labor – New Overtime Rule

The U.S. Department of Labor ("DOL") has finalized amendments to the FLSA regulations regarding which employees are eligible for overtime. As you know, certain employees are exempt from overtime requirements if they a) make more than a certain salary threshold, and b) their primary duty qualifies them as executive,

administrative or professional employees (known at the "white-collar" exemptions.) The salary threshold for these exemptions, which was previously $23,600/year ($455/week), has been raised to $35,568/year ($684/week.) This change means that any employee making less than $35,568/year will be eligible for overtime, regardless of whether their duties meet the requirements for those white-collar exemptions.

The new rule also increases the threshold for "highly compensated employees" from $100,000 to $107,432 per year. Employees may qualify for the highly compensated employees exemption if they make more than this amount and perform at least some job duties associated with executive, administrative or professional employees, even if that duty is not their primary duty.

Employers will now be able to use non-discretionary bonuses and incentive payments (such as commissions) paid to employees to satisfy up to 10% of these salary requirements. Bonuses required by collective bargaining agreements generally count as non-discretionary bonuses, including items such as shift differential, longevity, and sick leave bonuses.

The DOL enacted similar changes in 2015 under the Obama administration (but with even higher salary levels), but those regulations were put on hold by litigation and ultimately never took effect. These new rules will take effect January 2020, barring any similar judicial interference.

Employers should review the salary levels of all employees who currently are deemed non-exempt and ensure that none of them now fall below the threshold for the applicable exemption (either as a white collar administrative, professional or executive employee, or a highly compensated employee.) Employees who now fall below the white collar exemption salary level, after considering any non-discretionary bonuses to cover up to 10% of the threshold, will now be eligible for overtime. Highly compensated employees who fall below the new level must be evaluated to determine whether they meet the more stringent primary duty test for a white collar exemption.

TRAINING

By now most have undertaken the state-mandated Sexual Harassment Prevention training. If you have not done so, please contact Karen Pelland at kpelland@rwgmlaw.com