High "C's" Ahead: Public Employer Collective Bargaining, and Contractual and Constitutional Hurdles in Concessionary Bargaining

by Ronald Kramer



The worst recession since perhaps the Great Depression has caused many public employers to have to do something never contemplated before: lay off or furlough employees, or otherwise seek concessions in bargaining. Setting aside the political, public relations, and personnel issues public employers must address when cutting costs, the fact is public sector employers, unlike their private-sector counterparts, are largely unionized (in those states where organizing is allowed) and subject to constitutional hurdles. This places unique challenges on them that can delay if not derail planned force reductions, furloughs or hours reductions. The largest hurdles, the holy trinity of trouble, all begin with the letter "C": collective bargaining, contract issues, and constitutional issues.

Collective Bargaining

Possibly one of the biggest hurdles public employers face in cost-cutting is the duty many have to "bargain" with public employee unions. From an outside perspective, this might not sound burdensome, and employee input may help identify additional or alternative cost-cutting measures. Indeed, many public employers have been pleasantly surprised at the willingness of their unions to work constructively to reduce costs. But this duty to bargain, combined with unique provisions of public bargaining statutes and just plain politics, has made it difficult for many public employers to cut costs. The recent actions taken by several states to curb bargaining rights are, in part, a response to this dilemma.

In states where public employees are represented, their employers are obligated to recognize and bargain in good faith with the unions. While states vary in terms of what issues are subject to bargaining, in general, absent an express statutory exclusion, actions taken by employers to cut costs which impact employee wages, hours, and terms and conditions of employment generally are considered mandatory subjects of bargaining.[1] Thus, in some states, mandatory subjects often can include economically motivated layoffs,[2] furlough days,[3] and reductions in hours of work.[4] In both the private and public sectors this means that, unless the parties have already negotiated over such an issue or the union has waived its right to bargain, the employer is obligated to provide the union with notice of the proposed change and a chance to bargain over both the decision and its effects. Even where the decision taken is not a mandatory subject of bargaining (and is, thus, permissive), the employer generally is still obligated to bargain over the impact and effects of the decision, if requested to do so.[5]

At this point, the comparison between the public and the private sectors ends. In the private sector, an employer obligated to bargain over a decision need only bargain to an impasse, and then, is permitted to unilaterally implement its decision. Where only impact bargaining is at issue, the employer must give sufficient notice for the union to engage in impact and effects bargaining, but there is no requirement, necessarily, that the parties reach an impasse before implementation. Instead, a private employer's obligation is to provide the union with sufficient notice so that it has an opportunity to bargain "in a meaningful manner and at a meaningful time."[6] Ultimately, if it is prepared to withstand any resulting bad publicity or a strike, a private company can, through "hard" bargaining, either force an agreement or lawfully impose it at impasse, even if its union is uncooperative. Private sector unions are often willing to negotiate concessions in difficult economic times, whether because employees do not wish to strike or because they recognize that companies can (and do) go out of

business. Thus, for a variety of reasons, committed private-sector employers often can achieve the concessions they need.

In the public sector, three major hurdles appear. First, while some employees have the right to strike if an agreement cannot be reached, and public employers have the right to unilaterally implement a final offer upon reaching an impasse, generally, public safety employees (and in some states, other employees, as well) have no right to strike. Instead, they often have the right to engage in interest arbitration to resolve any bargaining disputes. This may also be true for impact and effects issues bargaining. Why is that a problem?

- Often, during the pendency of interest arbitration proceedings, the employer is prohibited from implementing its decision, meaning that it cannot implement the cost-saving measures it needs. Unions are well aware of this, and some will do whatever they can to delay and drag out the process.

- Statutorily-required interest arbitration considerations such as the "inability to pay" and "the interests and welfare of the public" are not necessarily given much credence as reasons to freeze salaries or cut costs, given that municipalities almost always can either raise taxes or redistribute monies. For example, an arbitrator once adopted a union's proposed 8% pay increase over a city's proposed wage freeze, despite the city's near-bankrupt status. The arbitrator found that, because the employer was responsible for providing fire services, it had an "obligation of funding increases in wages" because it "[could not] expect that the fire fighters, who, by law, are denied the economic weapon of striking, to suffer a cut back in wages due to the loss of the purchasing power of the dollar."[7]

- In deciding how to rule, interest arbitrators generally look to external comparables (i.e., what a public employer's neighbors have negotiated). Many such contracts, however, may have been negotiated before the recession, or are based on internal comparability (such as keeping police pay increases in line with firefighter increases). Moreover, different communities rely on different mixes of tax revenue, as well (sales tax versus property tax), and some have a greater legal authority in raising revenue by taxing (home rule). In a bad economy, few communities are, arguably, truly comparable, yet public employers are still going to be compared to their theoretically-comparable neighbors.

- Given that many states have "winner-take-all" baseball-style arbitration, either for the entire contract (e.g., Wisconsin) or for economic issues (e.g., Illinois), communities rolling the dice on complete pay freezes or mandatory furlough days take a big risk of losing everything. This forces many to make more generous proposals than they really should, simply because they are afraid of losing.

- Unions often have no or little incentive to settle when the alternative is interest arbitration. Unless the public employer is prepared to make its final arbitration offer less beneficial than its final off-the-record offer —something hard to do when an employer is seeking cuts— unions truly have little to lose.

Given all of this, public employers may wish their employees had the right to strike, instead, or that employee bargaining, strike, and interest arbitration rights were more limited, as is the case in Wisconsin, Ohio, and elsewhere.[8]

Second, even when a public employer need not bargain over a decision to, for example, lay off employees, it must still bargain the *effects* of the decision—something that can delay implementation. It may be that the state requires that the parties first reach an impasse in effects negotiations, or engage in interest arbitration over effects issues. Even where an impasse is not required, some states, such as California, place specific conditions upon an employer implementing a decision prior to impasse. For example, such requirements include that: (1) the implementation deadline not be arbitrary, but based on important managerial interests that would be undermined if missed; (2) that there be sufficient advance notice to allow for meaningful negotiations; and (3) that the employer bargain in good faith.[9] Creative unions will use effects-bargaining requirements to delay or prevent implementation.

Third, it is much easier for unions to bring public and political pressure to bear on public employers than private employers. A public employer's elected officials are often susceptible to public employee and resident pleas that reducing the number of police officers and firefighters, for example, will undermine public safety. When it comes to reducing police and fire staff, public employers often face internal resistance from their own police and fire chiefs. Public safety may not actually be undermined by the cuts, but that is always a matter of opinion, and the public, and even the elected officials, are often not in a real position to know what force levels are truly necessary. Similarly, when a strike instead of interest arbitration is the option, public officials often are reticent to force the issue because of the public outcry that can arise when strikes occur. Given the political and public pressures brought

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to bear on public employers seeking concessions, it is easier for some elected officials to decide to simply ignore their financial problems and continue to reduce reserves to critical levels.

This is particularly troublesome when elected officials demand that management cut employee costs but take away management's ability to lay off employees if cost savings cannot be obtained through other means. While the legitimate risk of a force reduction will bring many unions to the table to discuss alternatives that will save employee jobs but still cut costs, where there is no risk of a layoff, unions have little incentive to deal. This is especially true in cases where, instead of the unilateral implementation of concessionary proposals at an impasse, the employer must try its luck in interest arbitration.

Concessionary bargaining is never easy, but it is especially difficult where, given interest arbitration, the employer does not control its own destiny and its governing body is easily susceptible to the whims of employees and public pressure. These largely unique public sector difficulties have led to efforts in several states to limit public employee bargaining rights: the burdens of bargaining over layoffs or furlough days are not a problem if they are no longer mandatory subjects of bargaining. The need to negotiate cuts in health insurance, or pay changes, is not an issue if the state, by statute, imposes limitations on how beneficial insurance can be, and caps pay increases at the cost of living. Even interest arbitration risks are minimized if laws are enacted to limit what the arbitrator can impose, or if interest arbitration and the right to strike are eliminated all together.

Contractual Issues

Many public employers needing to reduce costs have employees who are covered by current collective bargaining agreements. Options the employer may consider taking – layoffs, for example – may already have been negotiated. Unfortunately, some public employers have found that not all options have been fully negotiated; other options are those they may have no contractual ability to take; and the existence of contractual language authorizing some actions will not necessarily prevent litigation.

For example, although employers may have negotiated the right to lay off employees or reduce hours of work, that does not mean they can just do it. Many employers do not negotiate the impact and effects of a layoff into their contracts. Unless the union, in negotiations, has waived its right to engage in such bargaining through an entire agreement or zipper clause, then generally, the union still has the right to bargain over the impact and effects. Unions have used this in the past to cause delay, and even to try to improperly renegotiate the layoff decision.[10]

Unions also may disagree that the contracts even permit the layoffs. To the extent the contractual language does not provide the employer with the unfettered right to lay off, many creative unions will argue that the layoff is outside the employer's negotiated authority.[11] Moreover, while an employer may think it has the right to act based upon broad "management rights" language or based upon management's inherent "reserved rights," a state labor relations board may disagree. Labor boards are often hesitant to find that a union waived its right to bargain over an issue unless the language is clear and unambiguous.[12]

Second, employers may be surprised to find how many cost-cutting options are *not* permitted under their collective bargaining agreements. Furlough days are a very popular cost-cutting measure, but many arbitrators have held that employers cannot impose them absent clear contractual language. Why? Because employees forced not to work are, in a sense, being laid off, and most contracts require that employees be laid off in a certain order.[13]

Similarly, a few employers have been prevented from reducing hours of work because of contract language that has been read to guarantee employees a certain number of hours of work per week (assuming, of course, they are not on layoff).[14] Many arbitrators reading different contract language have found otherwise, however.[15] These decisions are very dependent upon the contract language in the particular case.

Third, and most important, the option many employers want to take —reducing or deferring pay increases —is simply out of the question under most contracts, absent the union's agreement. Almost every contract addresses pay and benefits. Bargaining mid-contract over issues already negotiated is generally considered a permissive subject of bargaining.[16] The union can agree to bargain, but is under no obligation to do so. The only way for an employer to get concessions from a union on issues which already have been negotiated (e.g., pay and benefits) is with the union's voluntary agreement. Unless the public employer has the political fortitude to exercise the options it can legally take to cut costs absent an agreement (usually layoffs), a union has little incentive to reopen a contract and give up benefits it bargained hard to obtain. Even when an employer is prepared to take the difficult actions necessary to cut costs if the union is not willing to agree to less painful concessions, some unions would rather force the employer to lay off employees than engage in the shared sacrifice that many public employers would prefer.

Constitutional Issues

Of all employers, only public employers need to be concerned about the U.S. and state constitutions. While many issues arguably can arise from a constitutional setting, two are of note: procedural due process, and interference with contracts.

A. Procedural Due Process

Under the Fourteenth Amendment to the U.S. Constitution, public employees with a property interest in their jobs have certain due process protections. In *Cleveland Bd. of Educ. v. Loudermill*, the Supreme Court concluded that the Ohio Civil Service Statute, which established a "just cause" standard for discharge with specific termination procedures, had to provide certain minimal due process requirements.[17] In particular, where a public employee dismissible only for cause did not

receive a full pre-termination hearing, the employee was entitled to notice and a limited opportunity to be heard prior to termination, to be followed by a more comprehensive post-termination hearing.[18] Many public employees have property interests in their employment because of similar civil service laws or policies that prohibit their discipline without cause, and almost every unionized employee has similar protections as a result of contractual just-cause discipline provisions.

In a layoff, an employee is being deprived of employment. Public employers are faced with the troubling question of whether employees with property interests in their jobs, who are subjected to a reduction in force, are entitled to pre-deprivation notice and some sort of opportunity to be heard prior to the reduction, assuming they are afforded full due process rights after the layoff. There are basically two separate lines of court authority on this issue, both of which indicate that, in many situations, pre-deprivation due process may not be necessary. Given possible ways around these cases, however, public employers need to tread cautiously.

One arguable line of federal cases describes the so-called "reorganization exception." These treat a job elimination or layoff as a complete "exception" to the requirement for a pre-deprivation hearing.[19] The underlying logic of the reorganization exception is that when a public employer eliminates a position without engaging in an individual evaluation of the performance and disciplinary record of a particular employee, providing a *Loudermill* hearing would be superfluous because there is nothing for the employee to clarify. Unlike the discharge-for-cause context, where an employee may wish to "give his side of the story," there is literally no "side of the story" in the non-performance-based layoff or reorganization context.

The potential problem in relying on the reorganization exception is there is an exception to the rule: An employee who alleges that the "reorganization" is really a pretext for a discriminatory or retaliatory motive is entitled to a pre-deprivation hearing.[20] The key to this exception, however, is that the employee must request the meeting.[21] Further, when a public employer is not eliminating an entire classification, or not laying off employees in accordance with factors unrelated to performance (like seniority or by location), the reorganization exception will not apply.[22]

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The second line of cases also suggests that a public employer does not have to give a pre-deprivation hearing to each employee facing a furlough.[23] Analyzing the reasoning behind *Loudermill*, these courts find that, under certain circumstances, post-deprivation hearings will suffice in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[24] Courts often balance three factors in determining whether a pre-deprivation hearing is necessary. For example, in *Washington Teachers' Union Local #6 v. Bd. of Educ. of the Dist. of Columbia*,[25] the D.C. Circuit weighed the following three factors based on *Loudermill* and *Mathews v. Eldridge*[26] in determining whether the board of education deprived approximately 400 teachers of due process by laying them off without notice and an opportunity to be heard: (i) the private interests at stake; (ii) the risk of an erroneous deprivation and the underlying value of additional safeguards; and (iii) the government's interests, including the burden of requiring pre-deprivation hearings. Although the first factor justified holding pre-deprivation hearings, the court concluded that the last two factors weighed heavily in favor of the employer. The court also took into account the existence of a post-deprivation hearing process. Other courts applying the same balancing test have found that a pre-deprivation hearing was unnecessary.[27]

The problem with both lines of authority is that there is no blanket declaration that pre-deprivation hearings are unnecessary. Depending upon the line of authority applied and the circumstances, employees may be entitled to pre-deprivation due process. In either event, absent receiving complete due process prior to a reduction in force, employees with property interests who are being laid off must be provided with post-deprivation due process.

Given that many smaller layoffs are done face-to-face, with employees being told why they are being laid off and given some opportunity to respond, these meetings will likely be sufficient to meet any *Loudermill* pre-deprivation requirements. In mass layoff situations, a public employer may not be in a position to meet with every employee, so another way to address this issue would be to have any layoff notice include an offer for the employee to meet with a supervisor to discuss any "questions or concerns" that the employee might have about the furlough, before the employee is laid off. This notice would provide those employees who desire an opportunity to be heard before the layoff with the chance to do so. In some cases, however, employers simply do not have time to give advance notice of a layoff.

Given the lack of clarity in this area, public employers should be cautious when addressing this issue, and err on the side of caution: There are simply no guarantees.

B. Interference with Contracts

Attempts to legislate away extant contractual obligations bring into play the Contract Clause of the U.S. Constitution and its state parallels. The

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U.S. Constitution provides that "[n]o state shall ...pass any ... Law impairing the Obligation of Contracts... ."[28] The courts have formulated a three-part analysis for harmonizing the demands of the Clause with the necessarily reserved sovereign power of the states to provide for the welfare of its citizens.[29] This analysis looks at (1) whether there has been an impairment of a contract,[30] (2) whether the state law has, in fact, operated as a substantial impairment of a contractual relationship,[31] and (3) whether that impairment is, nonetheless, permissible as a legitimate exercise of the state's sovereign powers.[32] *Baltimore Teachers Union v. Mayor and City Council of Baltimore*[33] is one of the few cases to find that the substantial impairment of an employment contract did not violate the Contract Clause. There, the City implemented a furlough plan due to a severe financial crisis caused by state aid cuts, in which most employees lost the equivalent of 2.5 days of pay. Teachers and police employees, who had been parties to collective bargaining agreements, sued, claiming that the salary reductions violated the Contract Clause.

Applying the three-part test, the U.S. Court of Appeals for the Fourth Circuit found no violation had occurred. The court first determined that the City, through its funding and ratification of the agreements with the employees' unions, intended to and did enter into contractual relationships which it later impaired, given that the teaching and police staff received less in salaries than the contracts required.[34] Second, the impairment was found to be "substantial," as case precedent indicated that impairments were at least "substantial" when the right abridged was one that had induced the parties to contract in the first place.[35] The salary reductions at issue constituted a substantial impairment of the employees' contract with the City because, in the employment context, "there likely [was] no right both more central to the contract's inducement and on the existence of which the parties more especially rely, than the right to compensation at the contractually specified level."[36] As for the third prong (the impairment as a legitimate exercise of the state's sovereign powers), the court noted that, when a state acts to impair private contracts, "'courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'"[37] However, given that here, the City's self-interest was at stake since it was a contracting party, "'*complete* deference' to legislative assessments of the reasonableness and necessity for modifying public contracts [was] not appropriate,"[38] but at least some deference to legislative policy decisions was to be given.

Accordingly, the lower court, which had found a violation, erred because it gave no deference whatsoever to the City's determination of the reasonableness and necessity of the salary reductions, and instead, simply determined that the City could have shifted the burden to another program or raised taxes.[39] Applying such a standard would mean that no impairment of a government contract could ever survive constitutional scrutiny. Instead, the court's task was "to ensure through the 'necessity and reasonableness' inquiry that states neither 'consider impairing the obligations of [their] own contracts on a par 'with other policy alternatives' or 'impose a drastic impairment when an evident and more moderate course would serve its purposes equally well,' ... nor act unreasonably 'in light of the surrounding circumstances.'"[40] The Fourth Circuit determined that the City did neither: it was legally required to balance the budget, took measured steps to absorb extraordinary reductions in revenue, resorted to the temporary furlough plan only after taking other measures (such as layoffs) and determining that it had no better alternative. It made reductions that were no greater than necessary to meet the shortfall, and ended the reduction as soon as it could. Moreover, the furlough plan was designed to deal with a broad, generalized social and economic problem (in this case, avoiding the reduction in basic services and the breakdown of government) and extended the burden to basically all City employees equally. The court further recognized that, given public employees serve the public, their expectations should be defined, at least in part, by the public interest. "It should not be unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public demands sacrifice."[41] In the end, the court found that the City's modification of the collective bargaining agreements was an impairment permitted by the Contract Clause.

The Second Circuit, also, has found that the Contract Clause was not violated when a fiscal oversight board, created by state statute to oversee the City of Buffalo's finances, exercised its statutory authority to impose wage freezes in violation of the City's collective bargaining agreements.[42] No one questioned that the City faced a very real fiscal emergency. In order for the impairment of the contracts to survive constitutional challenge under the less deferential scrutiny standard applied by the court (which passed on whether a higher level should apply, even though the state had initiated the freeze, as opposed to the City, the contracting party), the court found that it had to be shown that the state did not: (1) consider impairing the contracts to be on par with other policy alternatives; (2) impose a drastic impairment when an evident and more moderate course would serve its purpose equally well; nor did it (3) act unreasonably in light of the surrounding circumstances. Here, the freeze was found to be reasonable and necessary because: it was enacted only as a last resort, after other measures (freezes for non-contract employees, school closings, and layoffs) had been tried and failed; the wage freeze was temporary and prospective in nature; and the alternative of additional layoffs and school closures was more drastic.[43]

The majority of courts addressing this issue, however, have found a Contract Clause violation. *Massachusetts Community College Council v. Commonwealth of Massachusetts*,[44] which considered and criticized *Baltimore Teachers Union*, is one example. There, Massachusetts had enacted a temporary furlough policy as "'the least painful means of conserving and utilizing the commonwealth's available monies during [an] extraordinary period of fiscal constraint while permitting the

continuation, without any interruption, of the provisions of vital services.'"[45] State employees (other than judges) earning $20,000 a year or more were given the option of taking unpaid days off; working without pay and receiving, as a bonus, paid vacation days the following year; or working without pay and receiving a bonus upon termination. Had the furlough not been implemented, the Commonwealth's secretary of finance was aware of few other options to reduce spending, with additional layoffs or a shutdown of the state government being highly likely.

Ultimately, a court concluded the law violated the Contract Clause. The furlough program indisputably impaired the provisions of the employees' union contracts—contracts negotiated during the same fiscal year in which the furlough law was enacted. The court, relying on precedents such as *Baltimore Teachers Union,* found that, while courts disagreed as to other points, they almost all agreed that a unilateral reduction in contractually-established salary obligations, such as the mandatory furlough program, substantially impaired contract rights. The court further determined that once a substantial impairment had been shown, "the State has the burden of demonstrating that the impairment was both reasonable and necessary to serve an important state purpose."[46] The impairment here was not reasonable: *Baltimore Teachers Union* appeared to be the only exception to the judicial rejection of state attempts to back out of obligations to pay future compensation to its employees pursuant to collective bargaining agreements. There, the court claimed, the Fourth Circuit had inappropriately granted "substantial deference" to the City's judgment, as if it were dealing with private contracts, and exercised little independent judgment on the reasonableness or necessity of the City's action.

The Massachusetts court ruled that the impairment was not reasonable if the problem sought to be resolved existed at the time the contractual obligation was incurred.[47] Further, if the foreseen problem had changed between the time of contracting and the time of the attempted impairment, but changed only in degree and not in kind, the impairment was not reasonable. The Commonwealth had been projecting a deficit of over $100 million dollars at the time it executed the contracts and, although that projection had grown considerably as of the date the furlough program was implemented, the court concluded that the worsening fiscal problems were reasonably foreseeable when the agreements were signed.[48] Any difference was a difference in degree, not in kind, and thus, the impairment of the cntracts violated the Constitution.

The Massachusetts Supreme Court was right in at least one respect: There are numerous decisions where courts have found state attempts to impair rights under collective bargaining agreements violated the Contract Clause.[49] Public employers wishing to legislate away contracts they can no longer afford face difficult constitutional hurdles.

Public employers are best advised to carefully consider these issues and work though possible alternatives and legal risks before taking action: otherwise, projected cost-savings measures may be overturned by courts, arbitrators, and labor boards.

Conclusion

During one of the deepest recessions in recent memory, public employers face difficult choices as they try to balance their budgets without reducing or eliminating critical public services. Public employers in states with public employee bargaining rights must often work their way through bargaining and contractual obligations in their efforts to solve their financial crises, without impairing the provision of essential governmental services. All public employers also need be mindful of their constitutional obligations, both state and federal. Public employers are best advised to carefully consider these issues and work though possible alternatives and legal risks before taking action: otherwise, projected cost-savings measures may be overturned by courts, arbitrators, and labor boards after costly litigation that such employers can ill afford.

Editor's Note: An earlier version of this article was published in the American Bar Association's publication, 42 URBAN LAWYER 73 (No. 3, Summer 2010).

Notes

1. While selected decisions from various states are referenced herein, and general traditional labor relations principles commonly recognized under the National Labor Relations Act and many state labor acts are discussed, each state's law is different. The reader is encouraged to review his or her own state's law carefully before drawing any conclusions at to the applicability of the principles stated herein to his or her own situation.
2. *Compare* Central City Sch. Dist. 133, 9 PERI ¶ 1051 (Ill. ELRB 1993) (economically motivated layoff decision is a mandatory subject of bargaining, given that a union may be in a position to propose alternatives that would reduce costs); *with* Int'l Ass'n of Fire Fighters, Local 188 v. PERB, 51 Cal. 4th 259, 245 P.3d 845, 120 Cal. Rptr. 3d 117 (Cal. 2011) (layoff decision due to financial adversity is not a mandatory subject of bargaining, but employer must bargain over the number of employees to be laid off, the timing of the layoffs, and the effects of the layoffs on the workload and safety of the remaining employees); Metro. Council No. 23 and Local 1277 of AFSCME v. City of Center Line, 414 Mich. 642, 660-61, 327 N.W.2d 822, 829-30 (Mich. 1982) (layoff decision not a mandatory subject of bargaining); Civil Serv. Employees Ass'n, Inc., Local 1000, AFSCME, and New Rochelle Hous. Auth., 21 NYPER (LRP) P3054; 1988 NYPER (LRP) LEXIS 2052 (NY PERB 1988) (same); White Oak Borough, 39 PPER 159; 2008 PPER (LRP) LEXIS 139 (Pa. LRB Hrng Exmnr 2008) (same).
3. *See, e.g.*, Township of Maplewood, 2009 NJPER (LRP) LEXIS 68 (N.J. PERC 2009) (no obligation by employer,

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subject to state civil service laws, to temporarily lay off all employees given it is a management prerogative embodied under regulations, but enjoining the actions of non-civil service jurisdictions to engage in temporary layoffs or furloughs by reducing the work week to four days, given temporary layoffs/furloughs are considered changes to employee work hours, pay levels, and unpaid leave time—all mandatory subjects of bargaining); 36th District Court v. Michigan AFSCME Council 25, Case No. 285123, 2009 Mich. App. LEXIS 2054 (Mich. Ct. App. Sept. 29, 2009) (unpubl.) (finding it an unfair labor practice to unilaterally impose furlough days, since employer reduced the number of days worked by each employee, something that was mandatory and violated unambiguous contract language).

4. Georgetown-Ridge Farm Community Unit District 4, 10 PERI ¶ 1044 (IELRB 1994); Plymouth-Canton Community Sch. and Plymouth-Canton Paraprofessional Ass'n, 3 MPER (LRP) P21,145; 1990 MPER (LRP) LEXIS 115 (MERC 1990) (duty to bargain over the decision to reduce hours of work); Palmerton Area Sch. Dist., 30 PPER (LRP) P30,176; 1999 PPER (LRP) LEXIS 229 (Pa. LRB Hrng Exmnr 1999) (reducing hours of work mandatory subject of bargaining).

5. Int' Ass'n of Fire Fighters, Local 188 v. PERB, 51 Cal. 4th 259, 245 P.3d 845, 120 Cal. Rptr. 3d 117 (Cal. 2011) (must bargain over effects of layoffs); Metro. Council No. 23 and Local 1277 of AFSCME v. City of Center Line, 414 Mich. 642, 660, 327 N.W.2d 822, 829-30 (Mich. 1982) (same).

6. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 681-82 (1981).

7. *See* City of East St. Louis and IAFF Local 23, No. S-MA-87-25 at 12 (1987) (Traynor, Arb.).

8. For example, on June 14, 2011, the Wisconsin Supreme Court upheld collective bargaining legislation (2011 Wisconsin Act 10, passed on February 25, 2011) that eliminated most public sector collective bargaining. State ex rel. Ozanne v. Fitzgerald, 798 N.W.2d 436 (Wis. 2011).

9. Little Lake Sch. Dist., 27 PERC 121, 2003 PERC (LRP) LEXIS 103 (Cal. PERB ALJ 2003).

10. State, Dep't of Cent. Mgmt. Serv. v. ILRB, 384 Ill. App. 3d 342, 892 N.E.2d 1207 (Ill. Ct. App. 2008) (dismissing bad-faith effects bargaining claims against employer, where employer had not engaged in delay tactics, was willing to meet at reasonable times to bargain, and the union's proposals were directed at the layoff decision rather than its effects).

11. *See, e.g.*, Ark. Educ. Ass'n, 94 Lab. Arb. Rep. (BNA) 1190 (1990) (Allen, Arb.) (layoff proper in face of significant operating fund deficit, even if deficit was caused by "mismanagement," where contract permitted reduction in force during "financial crisis" that "shall include operating fund deficit," was silent as to cause of deficit, and employer has authority and responsibility, within specified limitations, to regulate manpower levels to conform with budget constraints).

12. *See, e.g.*, Chicago Park District v. ILRB, 354 Ill. App. 3d 595, 820 N.E.2d 61 (Ill. App. Ct. 2004) (despite contract language expressly: (i) giving employer the right to lay off; (ii) giving the employer the right "in the interest of efficient operations, to establish schedules departing from the normal workday or workweek;" and (iii) providing that "nothing contained herein shall be construed as a guarantee of hours of work per day or per week or as preventing the District ... from restructuring the normal workday or workweek," employer breached its duty to bargain when it unilaterally reduced employee work); Township of Maplewood, 35 NJPER 70, 2009 NLPER (LRP) LEXIS 68 (NJ PERC 2009) (contractual management rights' clause that did not specifically address or authorize temporary layoffs found insufficient: a "waiver of the right to negotiate a change in a term or condition of employment will not be found unless the collective bargaining agreement clearly and unequivocally authorize[s] such unilateral change.").

13. *See, e.g.*, United Elec., Radio and Mach. Workers of America, Local 155 and Wells Fargo Alarm Serv., 19 LAIS 3733; 398 AAA 13, (1991) (Loewenberg, Arb.) (furlough program must be negotiated before it could be officially implemented); Ace Hardware Corp., 88 Lab. Arb. Rep. (BNA) 594 (1986) (Thornell, Arb.) (while contract gave employer the right to lay off, employer violated contract by "laying off" the eight least senior employees every Friday, for that amounted to placing the eight employees affected on a 32-hour workweek, an action contrary to the contract); Wayne State University, 76 Lab. Arb. Rep. (BNA) 368 (1981) (Cole, Arb.) (requiring each employee to take ten days off without pay violative, where days off without pay must be viewed as days of work force reduction and layoff within the meaning of the contract); 36th District Court v. Michigan AFSCME Council 25, Case No. 285123, 2009 Mich. App. LEXIS 2054 (Mich. Ct. App. Sept. 29, 2009) (unpubl.) (in an unfair labor practice case, the imposition of furlough days off contravened contract language providing for a standard workweek consisted of five scheduled days of 7.5 hours, with no ability for the employer to reduce the work week).

14. *See, e.g.*, Yaffe Printing Co., 101 Lab. Arb. Rep. (BNA) 1019 (1993) (Pelofsky, Arb.) (closing facility on Fridays and hence scheduling employees for less than a full week of work violative, where regular lay-offs were to be by seniority, and work week was to consist of five days of work and 40 hours).

15. *See, e.g.*, PPG Indus, Inc., 126 Lab. Arb. Rep. (BNA) 1529 (2009 (Sellman, Arb.) (no violation where employer reduced weekly hours of work of select employees – there was no reduction in number of employees working each week; no indicia of any layoff; and reduction of hours was permitted by contract); Georgia-Pacific Corp., 120 Lab. Arb. Rep. (BNA) 1035 (1994) (Nicholas, Arb.) (no violation where employer reduced maintenance mechanics' hours of work where agreement provided that there was no guarantee of 40 hours of work per week, and that schedules were subject to change); Eagle Crest Foods, 95 Lab. Arb. Rep. (BNA) 482 (1990) (Stephens, Arb.) (no violation where employer

scheduled the most junior first-shift employees for four-day workweek in attempt to avoid "full-scale layoff," even though contract required "layoff" or reduction in "work force" by plant-wide seniority).
16. *See, e.g.*, St Clair Intermediate Sch. Dist. v Intermediate Educ. Ass'n/MEA, 458 Mich. 540, 552-68, 581 N.W.2d 707, 714-21 (Mich. 1998) (midterm modification of a mandatory subject of bargaining is prohibited, absent agreement of both parties).
17. 470 U.S. 532, 541 (1985).
18 *Id.*; Gilbert v. Homar, 520 U.S. 924, 929 (1997).
19. *See* Whalen v. Mass. Trial Ct., 397 F.3d 19 (1st Cir. 2005); Misek v. City of Chicago, 783 F.2d 98, 100-01 (7th Cir. 1986); Kavakich v. Bentleyville Borough, No. 06-1114, 2008 WL 2563377 (W.D. Pa. 2008); Campana v. City of Greenfield, 164 F. Supp. 2d 1078 (E.D. Wis. 2001); Upshaw v. Metro. Nashville Airport Auth., 207 Fed. App'x 516 (6th Cir. 2006) (acknowledging the existence of the so-called "reorganization exception" without deciding whether adopt it); Hartman v. City of Providence, 636 F. Supp. 1395, 1410 (D.R.I. 1986) (collecting cases).
20. *Whalen*, 397 F.3d at 19; *Misek*, 783 F.2d at 100-01; West v. Grand County, 967 F.2d 362, 368 (10th Cir. 1992) (finding, without needing to decide whether a pre-deprivation hearing was always necessary, that one was necessary before an employee's job was eliminated when the employee alleged that the reorganization was a "sham" designed to get rid of her).
21. Dwyer v. Regan, 777 F.2d 825, 833 (2d Cir. 1985), *modified*, 793 F.2d 457 (1986).
22. *Whalen*, 397 F.3d at 25 (where performance factors played a role in a layoff, employee was entitled to pre-deprivation notice and an opportunity to be heard); *but see* Washington Teachers' Union Local #6 v. Bd. of Educ. of the Dist. of Columbia, 109 F.3d 774, 780 (D.C. Cir. 1997) (applying balancing test to find that pre-termination due process was not required in a layoff of 400 teachers based, in part, on performance).
23. "Arguable" in the sense that both lines of cases can be read together. Courts in the "reorganization exception" cases often just cite the exception and case support predating *Loudermill*, yet courts expressly applying the balancing test generally come to the same conclusion.
24. United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (internal quotations and citations omitted); *see also* Gilbert v. Homar, 520 U.S. 924, 930-34 (1997) ("This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause.").
25. 109 F.3d 774 (D.C. Cir. 1997).
26. 424 U.S. 319, 335 (1976).
27. *See* Mayfield v. Kelly, 801 F. Supp. 795, 798 (D.D.C. 1992) (interests behind *Loudermill* apply differently in a reduction in force, since it is not a "for cause" removal); Ryman v. Reichert, 604 F. Supp. 467, 470 (S.D. Ohio 1985) (applying *Eldridge* factors); Odynocki v. S. Univ. at New Orleans, 2006 U.S. Dist. LEXIS 80929, 2006 WL 3230348 (E.D. La., Nov. 3, 2006) (applying balancing test to find tenured faculty member laid off as a result of Hurricane Katrina was not deprived of due process, given the substantial governmental need to reduce costs in light of the hurricane, the infeasibility of a pre-deprivation process, and the post-deprivation process he received). *Cf.* Kiser v. Naperville Cmty. Unit, 227 F. Supp. 2d 954 (N.D. Ill. 2002) (denying motion to dismiss where plaintiff was the only employee whose job was eliminated: whether the separation was bona fide was at issue, and plaintiff also apparently had been denied a post-deprivation hearing).
28. U.S. Const. Art. I, §10, cl. 1.
29. United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977).
30. *Id.* at 17.
31. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).
32. *United States Trust Co. of New York*, 431 U.S. at 21.
33. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012 (4th Cir. 1993).
34. *Id.* at 1015. The court rejected arguments that somehow, these agreements incorporated provisions within the Baltimore City Charter which permitted such reductions. *Id.*
35. *Id.* at 1017 (*citing* El Paso v. Simmons, 379 U.S. 497, 514 (1965)).
36. *Id.* at 1018.
37. *Id.* (citing *United States Trust Co. of New York*, 431 U.S. at 23).
38. *Id.* (citing *United States Trust Co. of New York*, 431 U.S. at 26 (emphasis added)).
39. *Id.* at 1019.
40. *Id.* at 1020 (citing *United States Trust Co. of New York*, 431 U.S. at 30-31).
41. *Id.* at 1021-22.
42. Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362 (2d Cir. 2006). The court also rejected claims that the freeze violated the Takings Clause. 464 F.3d at 373-76.
43. *Id.* at 371-72. Notably, the court rejected the plaintiffs' claims that the freeze was unnecessary because other alternatives, such as tax increases and services cuts, existed. *Id.* at 372.
44. 649 N.E.2d 708 (Mass. 1995).
45. *Id.* at 710-11.
46. *Id.* at 712-13.
47. 649 N.E.2d at 713 (citing *United States Trust of New York*, 431 U.S. at 32).
48. *Id.* at 715-16.
49. *See, e.g.*, Opinion of the Justices (Furlough), 135 N.H. 625, 609 A.2d 1204 (1992) (proposed law requiring employees under contract to take unpaid leave violative because the state had numerous other options available, such as raising taxes or reducing services); Chiles v. United Faculty, 615 So. 2d 671, 673 (Fla. 1993) (abrogation of contractual pay increases violated Florida's Contract Clause); Ass'n of Surrogates & Supreme Court Reporters v. State, 79 N.Y.2d 39, 47, 580 N.Y.S.2d 153, 156, 588 N.E.2d 51, 54 (N.Y. 1991) (a salary deferral or "lag payroll" program violative, as state's choices in fiscal crisis "did not include impairing contract rights to obtain forced loans to the State from its employees"); Ass'n of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992) (same); Condell v. Bress, 983 F.2d 415 (2d Cir. 1993), *cert. denied*, 507 U.S. 1032 (1993) (same); Carlstrom v. State, 694 P.2d 1 (Wash. 1985) (expected and foreseeable financial emergency did not justify refusal to implement bargained-for salary increases). ML