BEFORE THE VOTE:

Failing to prepare is preparing to fail…

Have to plan as if the override vote fails given the time constraints that you will be operating under post-election. Short window of time and we will get into the legal obligations that need to be complied with in that timeframe in a minute. Doing nothing is the worst thing that you can do.

- Meet in Executive Session in the weeks and months leading up to the vote, under Purpose 2, to develop a strategic plan at the table with unions or individual employees;
- Meet in open session regularly and have frank budget discussions as to how operations and services will be impacted if the override does not pass;
- Look at scheduling special meetings outside of your normal meeting schedule to adequately develop a plan;
- Pick a team (Manager/Administrator; Board member; HR Director; legal (?)) who will speak for your city or town at the bargaining table if you have to meet and negotiate;
- Schedule regular department head meetings to discuss operations if the override fails; identify areas in budgets where further cuts can be made; explore possible alternatives to layoffs; meet with unions outside of formal negotiations to give them a “heads up” as to what is possibly coming and what member or members may be impacted; build trust and open lines of communication.
- Optics are incredibly important at this stage, and really all stages of this process, as there is a likelihood that a neutral third party will examine everything that occurred leading up to a layoff.

<u>You are in the business of labor relations; you have a relationship with your employees and their bargaining agents. Like all relationships, open and honest communication, especially over difficult topics, is vital to the health and sustainability of the relationship.</u>

THE OVERRIDE FAILED…WHAT NOW…

THE LAW:
Civil Service Law – G.L. c. 31
Collective Bargaining Law – G.L. c. 150E

The civil service system is a creature of the nineteenth century and public employee unions did not come along until the twentieth century.

Public sector collective bargaining was meant to co-exist with an employee's individual civil service rights. In the event of a material conflict between civil service law and a collective bargaining agreement, the civil service law takes precedence. See G.L. c. 150E, § 7; Local 1652, Int'l Ass'n of Firefighters v. Framingham, 442 Mass. 463, 477 (2004); City of Fall River v. AFSCME, Council 93, Local 3117, 61 Mass.App.Ct. 404, 411 (2004); Leominster v. Int'l Bhd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 124-125, rev.den., 413 Mass. 1106 (1992).

Whether (1) only the Civil Service law applies to a layoff situation or (2) you are dealing with the layoff of a non-civil service union employee, or (3) if you have an employee who is covered by c. 31 and is a member of bargaining unit, under any of those three scenarios, just know:

1. Civil service law does not preclude abolition of positions; and

2. Under G.L. c. 150E, a decision to reduce the workforce is a core managerial decision and you need not bargain over the decision itself (so-called "Decisional Bargaining) but you do have an obligation to bargain over the method of the reduction and an obligation to bargain over the impacts of the decision on existing/remaining employees' wages, hours, and other terms and conditions of employment.

CIVIL SERVICE LAW – G.L. c. 31

Section 39

Section 41

SECTION 39

G.L. c. 31, § 39 prescribes the procedures to be followed by an appointing authority in selecting employees for layoff, as well as the procedures by which those employees must be reinstated to permanent employment.

FIRST PARAGRAPH OF SECTION 39 BROKEN DOWN INTO SEPARATE PARTS:

If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of…lack of money;

They shall be separated from employment according to their seniority in such unit (last in/first out);

They shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first.

Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions.

The right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.

SECOND PARAGRAPH OF SECTION 39:

Any action by an appointing authority to separate a tenured employee from employment for the reasons… lack of money…shall be taken in accordance with the provisions of section forty-one.

Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service.

As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

SECTION 41

“Except for just cause a tenured* employee shall not be…laid off…nor shall his position be abolished.

Before such action is taken, such employee shall be given written notice by the appointing authority…and shall be given a full hearing…before the appointing authority…

The appointing authority shall provide such employee a written notice…at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty.”

*Public employees whose provisional status leaves them without protection under civil service law do not have standing to contest a layoff by way of an appeal at the Civil Service Commission and are left to enforcement of their rights as members of the collective bargaining units to which they may belong.

IN A NUTSHELL:

1. If you have language in a collective bargaining agreement that provides that the parties will follow civil service law in the event of a layoff, the layoffs would be:
2. Seniority-based;
3. A laid off employee has reinstatement rights for 10 years;
4. The employee is entitled to a hearing pursuant to Section 41 before the action is taken;
5. The employer must provide seven days advanced notice of the hearing, and the notice must have copies of Sections 39 and 40 with the hearing notice; and
6. The employee may, within that seven-day period between receipt of the notice and the hearing, consent to a demotion in lieu of being laid off.

Demotion = Bumping

Permanent civil service employees facing layoffs have "bumping" rights, allowing them to displace less senior employees in the same or lower title within the same department, often within the same job series.

Could lead to a waterfall effect where a layoff or layoffs cascade down through a department.

Appeal Rights

Employees can appeal a layoff or denial of bumping rights to the Civil Service Commission within 10 business days of notice.

A tenured civil service employee terminated by an appointing authority which has failed to follow the requirements of Section 41 may appeal to the Commission. If the employee establishes that "the rights of such person have been prejudiced", the Commission "shall order the appointing authority to restore such person to his employment immediately without loss of compensation or other rights."

Significant monetary exposure that could involve multiple employees and thus, multiple remedial orders.

The Commission is typically processing appeals from appeal filing to issuance of a decision in a timeframe of between 12 and 18 months. The backpay award would be for the entire period of the separation.

COLLECTIVE BARGAINING LAW – G.L. c. 150

Level of services decisions do not require bargaining. Town of Danvers, 3 MLC 1559 (1977).

A public employers managerial right to change the level of services provided does not obviate its duty to bargain over the means and methods by which the public employer achieves that change. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 563 (1983).

MEANS AND METHODS

- Look at your contracts!
- Is there layoff and recall language in your CBAs? What does it say?
- Has a layoff within that bargaining unit happened before and how was the language in the contract implemented?
- Likely to be not as convoluted as the Civil Service process but depends upon the language.
- Even if a contract has negotiated layoff language, there is nothing stopping the parties from otherwise meeting and negotiating an alternative to the language in a contract.
- Whether a contract has language or is silent on the subject of layoffs, timing remains critical and the sequence of events leading up to a layoff will be examined by the DLR when the inevitable ULP is filed.
- Be careful in relying exclusively on broad and ambiguous management rights language in your contracts.

    - The employer bears the burden of demonstrating that the parties consciously considered the situation that has arisen, and that the union knowingly and unmistakably waived its bargaining rights.
    - Waiver will not be found unless the contract language expressly confers upon the employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union.

REMEDY FOR VIOLATION

- The remedial authority that the DLR possesses to correct a violation is akin to the Commission:
  - Cease and Desist;
  - Notice Posting;
  - Return to Status Quo and Bargain;
  - **Make whole back to date of violation;**
  - **Interest on sums owed.**

AT THE BARGAINING TABLE

- Put yourself in the best position to avoid liability:
  - Provide prompt notice to your unions inviting them to the table to bargain;
  - Avoid surface bargaining;
  - Meet and confer at a frequency you may not typically employ under normal conditions (consider several sessions per week; longer sessions may be called for; be flexible);
  - Do not be quick to declare impasse as establishing impasse would be your burden (impasse in negotiations occurs only when “both parties have negotiated in good faith on all bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked);
  - Arbitrary deadlines will likely not help your cause; and
  - Economic exigency is unlikely to be a viable defense against a Charge.

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Local focus. Statewide perspective.

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