March 2023 News

Nuts & Bolts – Out-of-Class Assignments

Despite widely publicized headlines about layoffs in the tech industry, and to a lesser extent in banking and the housing industry, the labor market continues to remain strong well into 2023. Especially in California's public sector, many agencies are still reeling from labor shortages. Although most are aggressively hiring – particularly for hard-to-fill job classifications – recruitment and retention has been much more challenging for agencies than it was during the Great Recession. Those who lived through that era might recall layoffs, hiring freezes, work furloughs, and positions being eliminated or de-funded.

The pendulum has certainly swung in the other direction in recent years! Many agencies cannot fill vacancies fast enough. This can cause a ripple effect throughout the workforce. Even in those agencies that prefer filling positions through internal recruitments, personnel policies and civil service rules typically emphasize the merit principle over speed in hiring decisions. Between eligibility lists, multiple rounds of interviews, and job offers, it can take months or even a year or longer before a position is filled. This phenomenon is not new, and it leads to an age-old question – who is doing the work in the interim? This month, we look at a few considerations to keep in mind when being asked to perform interim assignments, acting assignments, or out-of-class assignments.

Classification Structure: Most agencies have clearly defined classification structures. In fact, private firms that perform classification studies for public agencies have been swamped with requests to review the employer's existing classification system. These studies consider whether job titles and job descriptions need to be revised due to changes in what the job entails and how work is assigned. The classification structure typically assigns a higher salary to progressively higher-level work. In some cases, that may be a ladder series within a job family. For example, a grade one level, grade two level, senior or journeyman level, and then possibly a supervisor or manager position. In other cases, it may divide work between an "assistant" or "coordinator" level and an "analyst" level.

Job Description: Regardless of how it is defined, the starting point is always the job description. If you believe you're being assigned work outside your job classification, start by comparing the job description for your job with that of the job duties in a position you think you are performing. If the other job description lists the duties that you are being asked to perform, and your own job description does not list those duties, there's a good chance you have a viable case for requesting additional pay or a classification upgrade.

MOU/Personnel Rules: Although it goes by different names in different places, most labor contracts (MOUs) and personnel policies include language about premium pay or specialty pay for employees who are asked to work outside their job description. Out-of-class pay, higher-class pay, acting pay, additional duties pay, special assignment pay, *etc*., are all common terms used to describe a similar concept: When does an employee who performs duties that are the core responsibilities of another job class receive more pay?

Job classes are often listed in your MOU with negotiated pay levels. They are defined by written job descriptions. If the duties you perform are mostly on a different job description, especially if it's higher paid work, check your MOU's working out-of-class section. Violations of your job classification may be enforceable like other rights or benefits covered by your MOU. The employer can respond by taking away the higher paid duties in lieu of providing extra pay going forward, but they cannot say "there's no budget for this" or "it's other duties as assigned" if you are truly working outside your position.

Temporary Upgrade Pay: CalPERS includes premium pay known as "Temporary Upgrade Pay," which is defined as "compensation to employees who are required by their employer, or governing body, to work in an upgraded position/classification of limited duration." (Cal. Code of Regulations § 571(a)(3)). This is only pensionable for Classic

Members. It is not available to New Members (employees hired after January 1, 2013). Even if a pay increase is not pensionable, it does not mean you are not entitled to more pay if the MOU or personnel rules provide for increased pay. It just means that the additional pay will not be counted towards your retirement calculations.

Limits on Acting Assignments: Government Code §20480 limits how long a local public agency employee can work in an out-of-class appointment. Under this code section, a "vacant" position refers to a position that is vacant during an active recruitment for a permanent appointment. There must be a vacancy and recruitment. It does not refer to a position that is temporarily available due to another employee's leave of absence or as part of a temporary project.

Effective January 1, 2018, Assembly Bill 1487 added language to this section that limits out-of-class appointments to 960 hours per fiscal year and imposes a penalty for work more than this limit. It applies to public agencies that have contracted with CalPERS. Agencies must identify, track, and report hours an employee works to ensure each employee is compensated for the work according to an MOU or publicly available pay schedule. The Bill is designed to limit the time an employee serves in a temporary upgrade assignment. CalPERS requires agencies to certify "out-of-class appointments" for each member no later than 30 days following the end of each fiscal year.

If the appointment exceeds 960 hours in a fiscal year, the employer must pay CalPERS the penalty, which is three times the amount of the difference between the compensation paid for the out-of-class appointment and the compensation that otherwise may have been paid and reported to CalPERS for the employee's permanent position, in accordance with a publicly available pay schedule. The penalty applies for the entire period the employee works in an out-of-class appointment. The employer must also pay a $200 administrative penalty.

Additional Pay: The MOU or Personnel Rules will usually identify the amount of pay an employee should receive for working out-of-class. If the employee is moved into a higher-level position (*e.g.,* an acting assignment, interim assignment, or temporary upgrade), the language might provide for a 5% increase, or the bottom step of the higher-level position. If the employee is not moved into a higher-level position but performs some of the work in a higher-level position, the language might provide for a 5% increase based on the rate of pay the employee currently earns. The specific rate of pay and terms governing out-

of-class assignments are negotiable between the employee organization and the agency. The language can be renegotiated in future MOU negotiations, too.

Should I File a Grievance? A common consequence of understaffing is that employees wear multiple hats. For example, you may enjoy being busy or learning new skills, and management may enjoy giving you this "training opportunity." But if left unaddressed, your willingness to learn multiple roles can be abused. You may be doing higher paid work for less money. You may be overdue for a reclassification or a desk-audit.

An employee should consider filing a grievance if they are not getting the additional pay that is identified in the MOU or personnel rules. An employee might also consider filing an out-of-class grievance if the assignment drags on for an extended period. These assignments should not be indefinite. An extra five percent is nice, but it's no substitute for holding the higher-level position and getting annual increases within the salary range for the higher-level position. The 960-hour rule that CalPERS uses is a good benchmark to evaluate whether the out-of-class assignment is dragging on too long.

An employee might also consider filing a grievance for working out-of-class if the employer is not recruiting for the vacancy. An employee who is assigned to serve in an acting status might have a leg up on others for the recruitment, since they will be performing the duties of the position already. Many employees do not want to file a grievance while they are competing for the higher-level position during an open recruitment. But if the employer never opens a recruitment, that's not much of a concern, and an employee may quickly come to feel like they are being taken advantage of. Filing an out-of-class grievance may result in the duties being reassigned or might finally convince the agency to open a recruitment.

Obey-Now-Grieve-Later: If directed to perform work outside of your job classification, it's always best to do as directed unless doing so puts your safety at imminent risk. This is called "obey-now-grieve-later." You can always request additional pay, ask for training, or even ask that the duties not be assigned to you. All three are possible remedies to a grievance. But you do not want to refuse a direct order from your management. Doing so could subject you to possible discipline for charges of insubordination.

News Release - CPI Data!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

6.4% - CPI for All Urban Consumers (CPI-U) Nationally

6.3% - CPI-U for the West Region

5.8% - CPI-U for the Los Angeles Area

4.9% - CPI-U for San Francisco Bay Area (from December)

7.3% - CPI-U for the Riverside Area

6.4% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I am a Parks employee. I put in for a vacation request to my supervisor. The dates I am requesting off are more than two months from the date of my request. My supervisor denied my request because of "short staffing." This is the second time in a short period that I've been denied for the same reason. What protections do we have to prevent vacation requests from being denied?

Answer: Generally, employers have the right to choose to deny paid time off requests, and to create their own rules about how long in advance employees should request time off. But these rules must first be negotiated with the employee organization. If the Department is unilaterally imposing a new requirement, the employee organization can file a grievance with the agency and ultimately an unfair practice claim with the Public Employment Relations Board.

Staff shortages are an accepted, and common, reason for employers to deny vacation requests. It is concerning that your employer believes that staff shortages are so severe that they cannot accommodate a vacation request two

months in advance! This is plenty of advance notice, assuming other employees have also not received approval for the same time off you are requesting.

Check your MOU or your personnel rules and contact your professional staff for help. Check and see if the language specifies how long in advance employees should make vacation requests. If there is a specific time frame identified, or even just language that employees must give "reasonable" advance notice, you may have a good grievance. If your supervisor denies every vacation request you submit and cannot provide alternative dates for you to take a vacation, you can grieve the fact that the employer is denying you a negotiated benefit.

Question: Are employee paychecks subject to disclosure under the California Public Records Act? If so, can they be provided without any personal or private information redacted? If not, what must be redacted for it to qualify for disclosure? I'm concerned about my paycheck being released. My hope is that my employer can refuse to disclose it in its entirety, but if not, I want to know what can be redacted.

Answer: Individual paychecks are probably not subject to disclosure, and to the extent they are, much of the information on the check would need to be redacted. Public records are generally subject to disclosure under the California Public Records Act (CPRA), except where such information violates an individual's right to privacy. The California Supreme Court has ruled that the names, job titles, and gross salaries of public employees are public records. Disclosure does not constitute a violation of an employee's right to privacy. (*International Federation of Professional and Technical Engineers v. The Superior Court of Alameda County* (2007) 42 Cal.4th 319). More recent cases say that the amount an individual receives in retirement benefits is also a public record. There has not been a case concerning individual paychecks specifically, versus more general information about an employee's salary and pension amounts.

However, whenever a public agency responds to a CPRA request, they must balance the public's right to view public records with an individual's right to privacy. There are numerous categories of information that public agencies are

prohibited from releasing due to privacy concerns, such as "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Gov't Code §6254(c)). This includes employee medical records, workers' compensation claims, and disability accommodation requests. It includes home addresses, home telephone numbers, personal cell phone numbers, and birthdates. It includes performance evaluations and performance improvement plans.

Another exception is known as the "catchall" provision. (Gov't Code §6255). It says that even if the record does not fall within an exemption found under §6254, the record can still be withheld if the government can demonstrate that on the facts of a particular case the public interest is served by not making the record public and withholding the information clearly outweighs the public interest served by disclosure of the record. The exceptions – including the catchall – are interpreted narrowly.

Remember too that MOUs and salary ranges are already subject to disclosure and are publicly available on most agencies' websites. So, information on a paycheck that might be disclosable is available through other less intrusive means. That should weigh heavily against disclosure if a court had to rule on an agency's use of the catchall provision.

Question: I heard a state law that says lunch breaks must be taken within the first 5 hours of a work shift. That is not happening. I asked Human Resources. They said it does not apply to them. Can they really make me work more than 5 hours without a lunch break?

Answer: Human Resources is likely correct. Under California law, private employers must provide employees with a meal period of at least 30 minutes when the work period is more than five hours. (Labor Code §512). But meal and rest break requirements found in the Labor Code and Industrial Welfare Commission (IWC) Orders generally do not apply to public employees. (8 CCR §11040 1(B)) (meal and rest breaks "shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district").

One exception is for commercial drivers – such as bus drivers and sanitation truck

drivers. (*See* IWC Order No. 9-2001 and Labor Code §512.5) (extending meal and rest break provisions to "commercial drivers employed by governmental entities"). Public agencies that employ these workers can avoid *penalties* by providing for meal periods in their collective bargaining agreements, even if these are "on duty" meal periods. (*Araquistain v. Pacific Gas & Electric*, (2014) 229 Cal.App. 4th 227). Another exception is for city employees who exceed 120 hours of work in a week. In those cases, an employee is entitled to three hours of mealtime during every 24-hour work period. (Labor Code §1900).

This means public agencies can generally schedule meals and rest periods less frequently than is allowed for in the private sector. But check your MOU and personnel rules. Many agencies do have policies regarding meal and rest periods. If your MOU or personnel rules do have specific terms concerning when meal breaks should be taken, and your employer has violated those terms, then you should consider filing a grievance to address this issue. If there are no rules, let your employee organization know. They may be able to negotiate for these terms in the next MOU negotiation.

Question: How long can I be out sick before I must produce a doctor's note? I looked under sick leave in our MOU and I do not see any language about it. I wonder if I missed it. Maybe I'm looking in the wrong place. I called out sick today. The secretary of the department made a rude comment to me that "you better get yourself a doctor's note." I've never had to get a doctor's note before. Now I'm concerned that I'll be asked, and I want to know what I should do. Do I have to get a doctor's note every time I want to use sick leave?

Answer: Probably not every time. Under California's sick leave law – the Healthy Workplaces, Healthy Families Act of 2014 – employers cannot deny employees the right to use their accrued and available sick leave or retaliate against a worker who does so. Employers are also not allowed to withhold sick leave from employees because they did not provide details about the nature of their illness. Keep in mind the law does not extend to employees covered by a collective bargaining agreement, if the agreement contains its own paid sick leave policy,

and meets several requirements, such as allowing for arbitration of paid sick leave disputes. (Labor Code §245.5(a)).

The sick leave law does not say whether employers can or cannot require employees to show documentation. Requiring a doctor's note would only be unlawful if it violates the MOU or rises to the level of interfering with a worker's right to use their accrued sick time.

Many public sector MOUs and sick leave policies allow management to request a doctor's note for sick leave absences that exceed a certain duration – for example, three days – or where management has reason to believe there is an abuse of sick leave. Under state law, your employer can also require you to provide advanced notice where an absence is foreseeable. If the need is unforeseeable, the employee must provide notice of the need for leave as soon as practicable.

Other laws may also protect your need for leave. California's Kin Care law – Labor Code §233 – allows employees to use one-half of their annual sick leave accrual to attend to an illness of a child, parent, spouse, or domestic partner of the employee. Employers cannot deny an employee the right to use this sick leave or discriminate against an employee for using or attempting to exercise their right to this leave. But employers are not prohibited from requesting documentation.

The California Family Rights Act (CFRA) and the Federal Family Medical Leave Act (FMLA) also prohibit employers from interfering with an employee's right to take leave under those laws. This includes leave for a serious medical condition or to care for a family member with a serious medical condition. But employers are specifically allowed to request documentation from the employee's medical provider.

In general, the employer may have a good reason for asking for more information – for example, to determine if the need for leave was foreseeable, if it was for the employee's own illness or that of a family member, or to see if the absence might qualify towards Kin Care, CFRA, or FMLA, or if there is a pattern or circumstances to indicate a possible abuse of sick leave. If you are asked to provide a doctor's note, consider first asking the employer why a note is being requested. If you think the employer is

overreaching, then contact your professional staff for help.

Question: I'm an inspector, and a few of my colleagues came to me asking what's the legal allowable practice for the bureau or department manager to continue monitoring the whereabouts of their staff with City vehicles? We are under the impression that our whereabouts are in question only if there is a complaint from a resident. Now we are beginning to wonder if we are subject to daily monitoring. For example, one of us was asked by the manager why he was at a certain location (within the city) for lunch and not where he was told to go. Another was questioned why his vehicle didn't move on a particular day, which was because he was driving another vehicle. Can they do this, and if so, what protections do we have? How do we know when it has crossed the line?

Answer: Yes, if it's a City vehicle, the employer can track your whereabouts and is not limited to only those instances where a resident complained, unless the policy or labor contract says otherwise.

Public agencies in California often install GPS equipment in City vehicles to reduce the risk of collisions or guard against theft of City property. Some GPS systems trigger notices when a vehicle is left idle for a certain amount of time, traveled outside of a designated area, exceeds a designated speed, or is parked for an extended period. This does not necessarily mean your every move is being monitored, but certain activity or inactivity may trigger a GPS alert.

Since most government work is carried out in public, your right to privacy at work is limited. Cameras cannot be installed in places where you have a reasonable expectation of privacy (*e.g.,* restrooms or dressing areas). But there is generally no reasonable expectation of privacy in open-air cubicles, shared workspaces, or City fleet vehicles.

Labor board decisions also confirm that installing surveillance equipment is often considered a management right to carry out the operations of the workplace. *Colgate-Palmolive* (1997) 323 NLRB 515; *State of California* (2009) PERB Dec. No. 2062-S. This includes GPS equipment on fleet vehicles, as well as rear or forward-facing vehicle cameras, both of which are

becoming more common. Management should disclose when they install new equipment, or when expanding the scope of existing equipment, to avoid privacy claims.

Contact your employee organization, who can help get answers and bargain over the impact of management installing this equipment, at least insofar as it affects your terms and conditions of employment. In most cases, this means negotiating over how any data is collected or used in disciplinary matters. Part of this bargaining obligation includes the duty to provide, upon request, any relevant information, such as what data is collected and how it is used in discipline. Your employee organization may also be able to negotiate a written policy or side letter agreement that memorializes any agreement reached on this subject. Ideally, this would identify the scope of any surveillance, the worksites affected, and who has access to the information and under what circumstances.

California law does prohibit GPS tracking devices, but it contains an exception for the owner of the vehicle. Cal. Penal Code §637.7. Since the City owns the vehicles you drive, this exception would apply. A new law – AB 984, which went into effect in January of this year – allows tracking technology to be installed on fleet and commercial vehicles. Employers must provide notice of the specific activities that will be monitored, the type of data collected, and the dates, times, and frequency that monitoring will occur. Employers must also inform employees whether the data gathered might be used to make employment-related decisions, including discipline and termination, and allow employees to disable monitoring during off-work hours.

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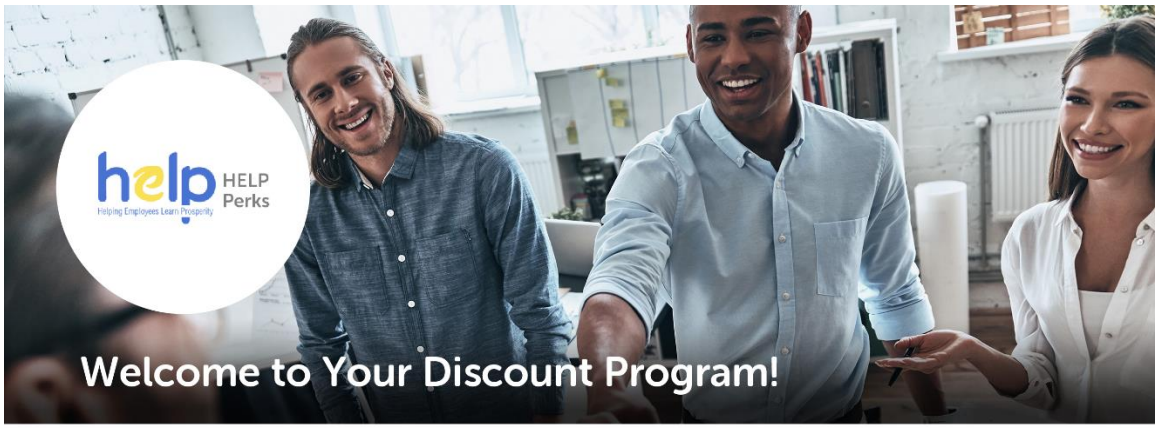

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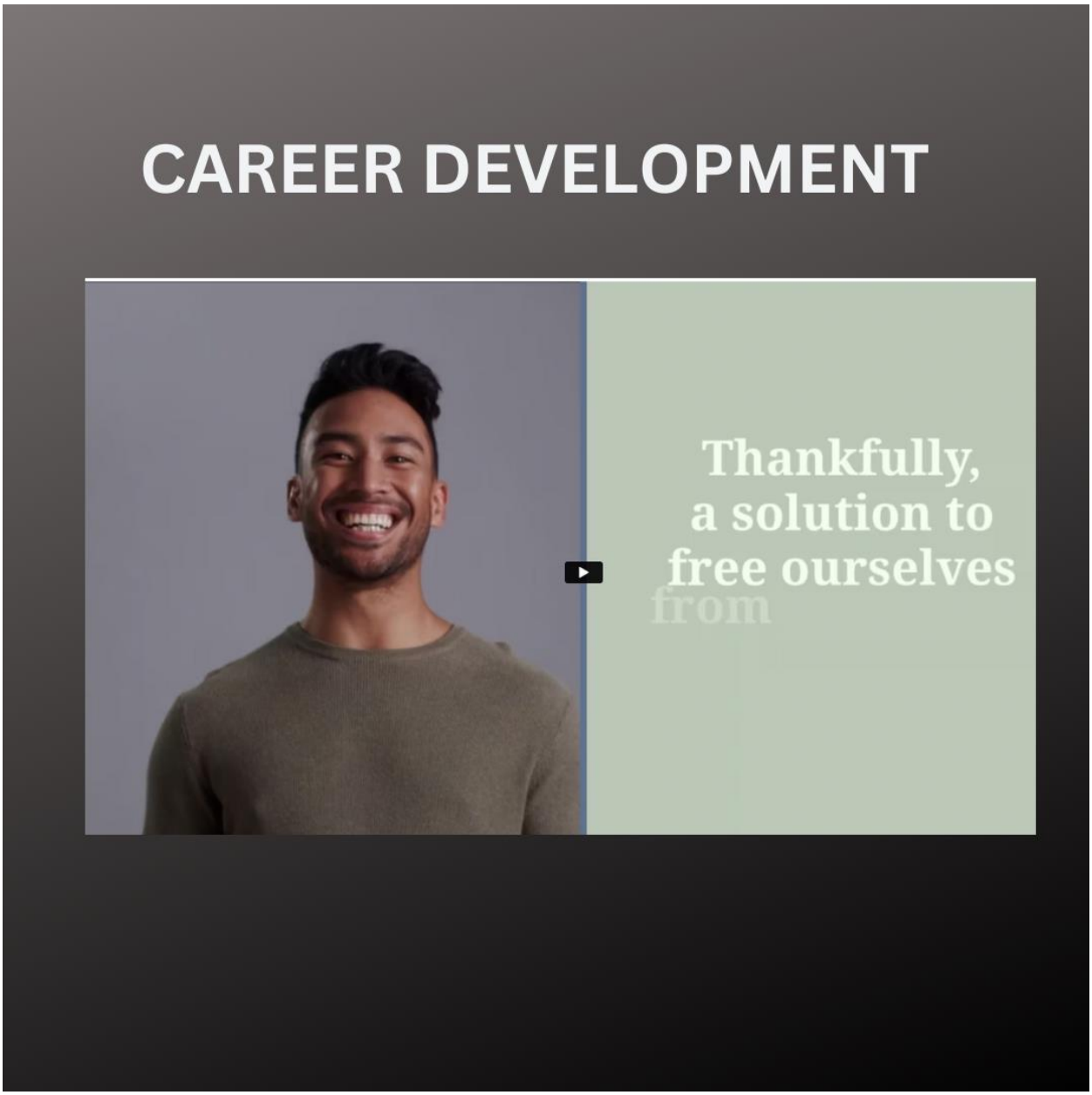
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