HELP NEWS

The Monthly Newsletter of Helping Employees Learn Prosperity (HELP)

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Welcome!

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Helping Employees Learn Prosperity (HELP) is an IRC 501 (c)(4) charitable non-profit, tax-exempt, non-partisan, independent employee affiliation.

HELP is a Registered Employee Organization with the County of Los Angeles and has a County assigned payroll deduction code.

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Layoff Protections for Local Government Workers

Lately, there has been extensive news coverage of layoffs in the Federal government. On February 11, President Trump signed an executive order implementing the President's "Department of Government Efficiency (DOGE) Workforce Optimization Initiative." The order directed Federal agencies to enact large-scale reductions in force (RIFs). RIF is synonymous with the term layoff.

President Trump also directed Federal agencies to develop reorganization plans (also synonymous with layoffs) no later than March 13, 2025. The administration offered buyouts to some Federal government employees, and separated employment for at-will or probationary employees in the Federal workforce.

Federal workers are not alone. The State of California, facing a significant budget deficit, eliminated 6,500 vacant government jobs. The state said eliminating the vacancies saved $1.2 billion of the state's $322 billion budget. This was just one of the tools the administration was pursuing to save money. The state estimates it will save $2 billion in operating expenses after directing departments to cut 8% of their operating budgets.

On March 19, the City of Los Angeles announced a $1 billion budget shortfall in next year's budget, making layoffs "nearly inevitable," at least according to the City's top budget official. City management advised the City Council about reducing the size of the workforce to balance the budget. "We're not

looking at dozens or even hundreds of layoffs, but thousands," the City's top budget official said. Mayor Karen Bass issued a statement during the council's deliberations, saying her upcoming budget will seek "fundamental change" to city operations. "We must leave no stone unturned. We must consider no program or department too precious to consider for reductions or reorganization," Bass said. Pay raises for city employees are scheduled to take effect in the upcoming budget year and are expected to add $250 million to the shortfall.

Federal, state, county, and city employees are not alone. School districts, including the University of California, are initiating RIFs due in part to funding cuts from both the state and the Federal government. President Trump signed an executive order on March 20, in an attempt to abolish the U.S. Department of Education. In addition to the current challenges facing school districts – particularly declining enrollment in some communities – the reductions at the state and Federal level will likely mean a significant reduction in funding, which is a significant share of the overall revenue for local school districts.

The flurry of negative headlines has left many local government employees concerned about their rights should layoffs become necessary in their agency. This month, we look at the layoff protections that are available for local government employees.

Reasons for Layoffs:

Layoffs can be a method of addressing cash shortages, but this should be seen as a last resort. The employer may implement layoffs for various reasons, such as budget constraints, workload reductions, organizational restructuring, technological advancements, operational adjustments, or changes to services or activities. Under California Government Code §45100, where a reduction in personnel is necessary for economic reasons, the employer shall observe the seniority rule in putting the reduction into effect. Section 45100 is an old law and there are no published court decisions enforcing it. Section 45100 likely applies only to general law cities.

Regardless, it is a starting point for discussions between the employee organization and the employer about the reason for the layoffs and whether the seniority rule will be observed in identifying the individuals who will be affected. The goal should be to protect as many jobs as possible while continuing to provide services. Layoffs for economic reasons typically affect the entirety of the employer's labor force, not just a specific group of employees or departments. Layoffs for lack of work or due to a reorganization typically affect a specific division (e.g., in 2012, when the state eliminated local redevelopment agencies). How layoffs are implemented, including whether any affected employees will be absorbed elsewhere in the workforce, will depend on the negotiated layoff procedure and the reason for layoffs.

Initial Cost-Savings Measures:

Before implementing deep personnel cuts, agencies should implement other cost-savings measures first. These include a hiring freeze; eliminating non-permanent staff, such as contractors or seasonal help; reducing training, travel, and other discretionary expenses; deferring capital improvement projects and other investment in equipment, facilities, and supplies; and using reserves. To the extent that further cuts are necessary, cost savings should come from all levels of the organization, starting at the top. Everyone should contribute if reducing costs is necessary.

Furloughs:

Furloughs are one way to address both the cash-flow and budget problems. During the Great Recession, most agencies implemented furloughs as a cost-savings measure. In general, most employees prefer furloughs over layoffs, especially during an economic crisis. Furloughs are also preferable to pay or benefit cuts because they include a reduction in hours along with any pay reduction. They are also usually temporary. At some point, furloughs end, and employees go back to a regular 40-hour workweek. But the employer must first negotiate over the implementation of furloughs

and its effects, such as how many furlough days will be taken in a pay period and how long furloughs will continue. In City of Long Beach (2012) PERB Decision No. 2296-M, at 23, PERB held that the City did not have the right to unilaterally implement furloughs since the motivation was labor cost savings, not the quality, nature or level of service provided to the public.

MOU & Local Rules:

The first place to look for protection if layoffs become necessary are your local rules. This includes your union contract (MOU), personnel rules and policies, and civil service rules, if applicable. Most employees represented by an employee organization are covered by a layoff policy. This may require the employer to grant employees specific protections like notice, seniority, transfer to vacant positions, bumping, and severance. The rules may also require that other cost savings measures be implemented first, like eliminating vacancies, contractors, probationary, and/or temporary employees before eliminating permanent employees.

If the layoff is for economic reasons, the employer will have likely eliminated vacancies prior to implementing layoffs. The big question then becomes whether the local rules allow an employee who was selected for layoff to "bump" another employee in an equal or lower job classification that has less seniority. The language should specify how seniority is treated. For example, in some instances, seniority is defined as date of hire as a full-time employee. In other instances, seniority is defined as time worked in that job classification. If seniority is narrowly defined, the ability to bump or displace other employees who were hired later will be more limited. However, if seniority is broadly defined, an affected employee may be able to displace an employee in another department in the same or lower classification, even a classification the employee never held before, as long as the affected employee meets the minimum qualifications for the position they are bumping into.

Your employee organization is your protection

The Role of Your Employee Organization:

The employee organization is typically the best protection in the unfortunate event that layoffs become necessary. The employee organization can help provide resources, such as representation, to any employees who are affected. The employee organization can also ensure the employer follows the MOU, policies, and rules, such as those concerning layoffs. Finally, the employee organization can negotiate with the employer and file an unfair practice charge with PERB (Public Employment Relations Board) if the employer refuses to negotiate or follow its rules.

Under state bargaining law, the employer cannot change the terms and conditions of employment of represented employees without providing the employee organization with prior notice and an opportunity to meet and confer about the changes. The right to implement layoffs is typically a management right. The employee organization cannot generally negotiate over the decision to implement layoffs. However, the employee organization can negotiate over the impact/effects of the layoffs. This not only includes

how the layoffs will be conducted (particularly if the MOU, policies, or rules are silent or ambiguous), but also the impact the layoffs will have on the remaining workforce. This can include topics like how the extra work or services will be performed by the workers who remain, and if there will be additional compensation for performing extra duties.

In a legal challenge arising out of the Great Recession, the California Supreme Court said:

> Under the MMBA, a local public entity that is faced with a decline in revenues or other financial adversity may unilaterally decide to lay off some of its employees to reduce its labor costs. In this situation, a public employer must, however, give its employees an opportunity to bargain over the implementation of the decision, including the number of employees to be laid off, and the timing of the layoffs, as well as the effects of the layoffs on the workload and safety of the remaining employees.

Int'l Assn of Fire-Fighters v. PERB (2011) 51 Cal. 4th 259, 277. The employer must give employee organizations timely notice and a reasonable opportunity to negotiate the effects of the layoff decision. Bargaining is required even if the impacts may be speculative and the full extent of the layoff uncertain at the time of bargaining. Newark Unified School District (1982) PERB Dec. No. 225 at p 5. Negotiable effects may include recall and reemployment rights, order of layoff (including seniority), distribution of workload among remaining employees, retraining for laid-off employees, bumping rights, benefits for laid-off employees (medical premiums or pay for unused sick leave), severance pay, reorganizing or reclassifying positions because of layoff, and workload or safety of remaining workers.

In some instances, the decision itself may be negotiable. If there is a no-layoff clause in the MOU, the employer must negotiate the clause out of the contract before it can implement layoffs. Also, if the reason for the layoffs is to save labor costs by transferring work outside the bargaining unit, the decision itself is negotiable. Indio Police Command Unit Assn v. City of Indio (2014) 230 Cal. App. 4th 521, 535-540.

In most cases, if the employer is initiating layoffs, it will begin by providing notice, not just to the affected employees, but also to the employee organization. The employee organization can meet with the employer and discuss the reasons for the layoffs and propose alternatives. This may be appropriate where layoffs are for economic reasons. The MOU is an enforceable contract. This means the employer cannot open the MOU and change the terms while the MOU is in effect without the employee organization's consent. An employer may agree to concessions – such as a furlough, deferral of pay or benefit increases, freezing leave cash-outs or tuition reimbursement, and temporarily freezing step increases or suspending contributions to the 457 or 401(a) retirement plan – to prevent or mitigate any job losses. Any agreement should be reduced to writing with a specific date as to when reductions will be restored. The concessions should be limited to no longer than necessary to get through the fiscal crisis, and there should be regular updates to identify any progress towards pre-set targets.

The employee organization's bargaining rights also include the right to make information requests. This includes financial data, such as any cost savings figures the employer needs to realize to avoid layoffs, or the cost of any alternative proposals made by the employee organization or the employer. The employer's refusal to provide relevant information could serve as basis for an unfair practice charge with PERB, the state agency tasked with overseeing enforcement of the state's bargaining laws.

Filing with PERB may not result in an immediate remedy. PERB claims can take months or years to resolve. However, PERB has jurisdiction to award remedies such as back pay and reinstatement in appropriate cases. PERB can also order the employer to bargain with the employee organization or provide responsive information.

If the parties reach a bargaining impasse, the employee organization can file for factfinding under state law. Under Government Code §3505.4, the employee organization may request that the parties' differences be submitted to a fact-finding panel. The panel shall, within ten days after its appointment, meet with the parties and make inqui-

ries and investigations, hold hearings, and take any other steps it deems appropriate. The panel can issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Under Government Code §3505.5, if the dispute is not settled within 30 days after the appointment of the panel, the factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within ten days of their receipt.

"Emergency Exception" to Bargaining:

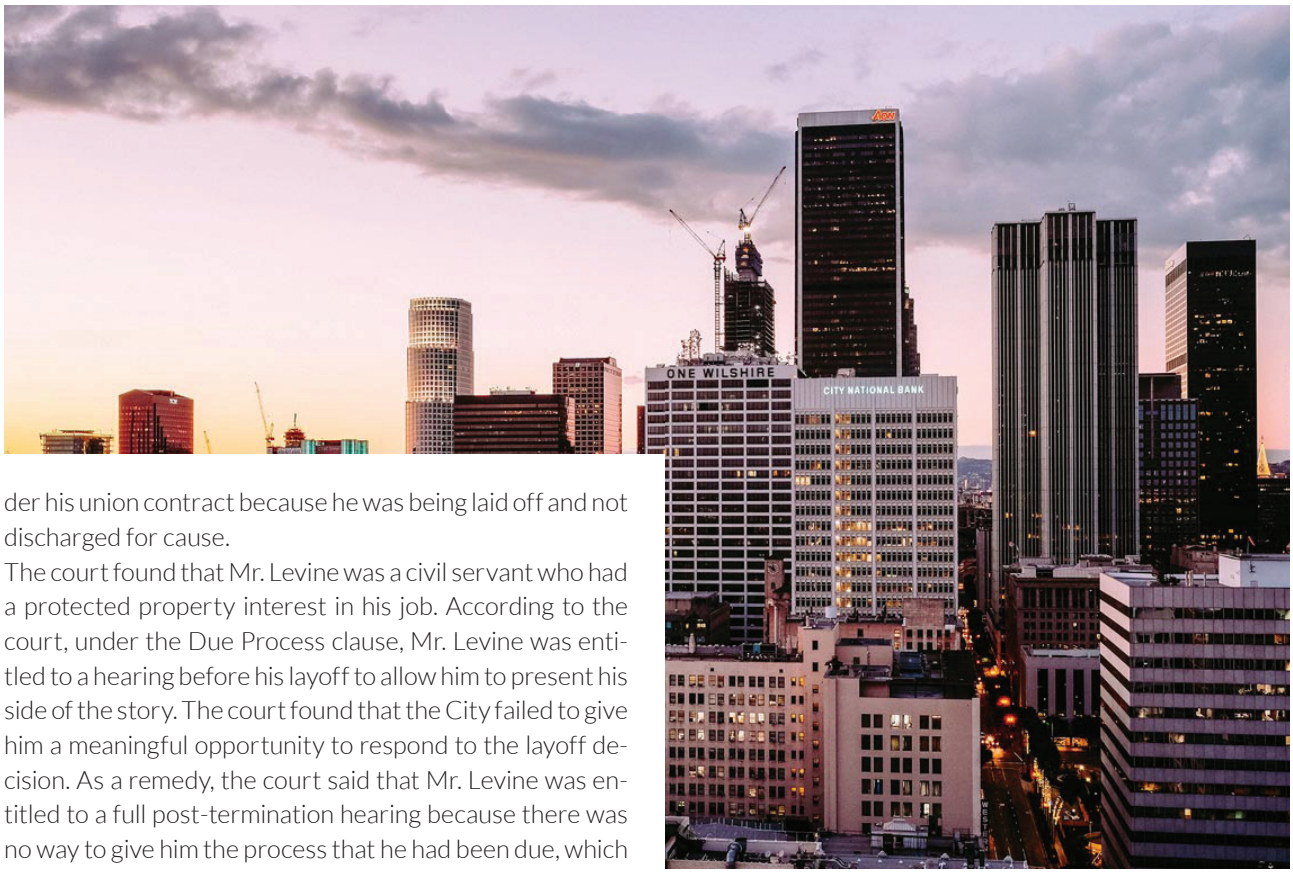
In times of financial distress, the employer will want to move quickly to avoid insolvency. The employer may even declare a fiscal emergency. In the Great Recession, a state employees' union sued then-Governor Schwarzenegger when he declared a fiscal emergency because of the state's budget deficit and cash-flow crisis. Without notifying or bargaining with the unions, he issued an executive order imposing furloughs. Several unions challenged the Governor's actions and won. The California Supreme Court held that the state constitution did not allow him to unilaterally furlough represented employees. Even in a fiscal crisis, the power to alter wages or other terms and conditions of employment was governed by statute. Professional Engineers in California Government v. Schwarzenegger (2010) 50 Cal.4th 989.

The law provides a limited "emergency exception" to bargaining. Government Code §3504.5 allows a public agency to unilaterally adopt a rule or regulation without prior notice so long as the employee association is given notice and an opportunity to meet and confer at the earliest practicable time thereafter. The agency has discretionary power to declare an emergency. The burden is on the party challenging the use of the emergency power to show an abuse of discretion (a high legal threshold to satisfy). Any facts set forth in the emergency declaration are evidence of an emergency. Sonoma County Organization etc. Employees v. County of Sonoma (1992) 1 Cal. App. 4th 267, 274-279. In the Sonoma County case, the County declared an emergency after employees went on unpredictable rolling sickouts and strikes occurring on a sporadic and erratic basis, which the County said impaired operations because department heads had no clue who, if anyone, would show up for work each day. Pursuant to an emergency order, the County let department heads place employees who participated in intermittent work stoppages on unpaid administrative leave. The unions sued, but the County's actions were upheld. PERB now has greater authority than it did at the time of this decision.

In San Francisco Community College District (1979) PERB Decision No. 105, a prior case under a different state bargaining law, PERB took a narrow view of the emergency exception. The district declared a fiscal emergency in 1978 when Proposition 13 took effect and unilaterally withheld step increases and postponed sabbaticals. PERB said the district could not rely on the emergency declaration to circumvent prior bargaining. PERB said the duty imposed by law is simple but unconditional – the duty to meet and confer in good faith on matters within the scope of representation. Uncertainty about the financial effects of Proposition 13 did not allow the district to act unilaterally.

Levine Hearing:

Employees who feel they were targeted for layoff may have rights to a Levine hearing. In Levine v. City of Alameda (2008) 525 F.3d 904, a Federal appellate court held that an employee who was selected for layoff was entitled to procedural due process, including a full evidentiary hearing before a neutral third-party. The City Manager told the employee, Mr. Levine, that he was going to be laid off. Mr. Levine wrote a letter to the City Manager requesting a pretermination hearing regarding his layoff. Mr. Levine believed that the layoff was a pretext and that he was being terminated because the City Manager disliked him. The HR Director wrote a letter back to Mr. Levine, saying he was not entitled to a pretermination hearing un-



der his union contract because he was being laid off and not discharged for cause.

The court found that Mr. Levine was a civil servant who had a protected property interest in his job. According to the court, under the Due Process clause, Mr. Levine was entitled to a hearing before his layoff to allow him to present his side of the story. The court found that the City failed to give him a meaningful opportunity to respond to the layoff decision. As a remedy, the court said that Mr. Levine was entitled to a full post-termination hearing because there was no way to give him the process that he had been due, which was the opportunity to respond before the termination occurred. The court further held that the hearing must be before a neutral third-party, citing precedent that post-termination hearings require an impartial decisionmaker. The court said that people working for the City would not be sufficiently neutral in this case after the extensive litigation.

During the Great Recession, many agencies implemented layoffs. Some employers lacked a seniority rule and instead chose employees for layoffs based on management's evaluation of performance or the employer's need for retained skills and capabilities. Many employees argued the layoffs were pretext to lay off workers for improper reasons (e.g., poor performance, disability, or age). Employees who made these claims were often granted an evidentiary hearing consistent with the
disciplinary procedure. In some instances, this meant arbitration, civil service, or an outside hearing officer.

The Levine case did not draw a distinction between layoffs for economic reasons and layoffs due to reorganization, contracting out, or discontinuation of services. If the employer does not observe the seniority rule in implementing layoffs, particularly when layoffs are necessary for economic reasons, there is a good chance an affected employee has the right to request a full evidentiary hearing to challenge the real reason for why they were selected for layoff.

Conclusion:

If you hear your employer is contemplating layoffs, contact your employee organization for assistance. If you are concerned about the potential impacts of future layoffs, consult your MOU and local rules. Your bargaining committee may consider improving layoff language during the next MOU negotiation if the membership is concerned about a reduction in force.

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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.

2.8% - CPI for All Urban Consumers (CPI-U) Nationally

2.6% - CPI-U for the West Region

3.1% - CPI-U for the Los Angeles Area

2.7% - CPI-U for San Francisco Bay Area (from Dec)

2.9% - CPI-U for the Riverside Area

3.8% - 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: Are there any laws regarding transferring sick time between city jobs? Is this done on a city-by-city basis? Does this happen at the executive level, or is it not allowed? I am contemplating moving to a different organization, but I have a lot of sick time on the books since I have been here a long time. I am concerned about moving over without any sick time.

Answer: No law specifically forbids the transfer of sick leave between public agencies. However, in practice, this is not something that typically occurs. You may be able to negotiate with the new employer to start with sick leave or vacation available on your first day of employment. If you are represented by an employee organization at your new employer, you may be bound by the terms of any existing MOU, as well as any employer personnel policies that are not in conflict with the MOU. Most MOUs do not allow new employees to start with any accruals from a prior agency. However, some employee organizations

have negotiated language into their MOUs to, for example, give the City Manager the discretion to grant initial leave balances to new hires, or to count years of service at prior public agencies toward leave accrual rates. This might allow an employee with 8 years of prior public service to accrue vacation leave at the same rate as an existing 8-year employee. Check the relevant MOU at the new agency (it should be on the agency's website) and ask HR about any rules that apply. You can also ask if you can purchase leave time upon hire, which you might be able to fund with any cash-outs of leave from your prior employer.

Question: **My regular work schedule is Monday - Thursday. Last week, I was told I must take Monday off to have two days off in a row, since I worked overtime on Friday and Saturday for windstorm cleanup. I asked where I should put Monday's hours, but no one had an answer. Today, I was told I must work Friday (my regular day off) to make up Monday's hours. Can the City do that since they had me take Monday off?**

Answer: Unless your MOU requires you to have two days off in a row or you requested the time off, the City should not have required you to take your regularly scheduled Monday off. Most MOUs or City policies have rules governing changes to work schedules that require some notice (typically a few weeks or more) before the City can implement a schedule change. It is unlikely they did this in your case.

If the City is sending you home for safety reasons, because they have determined that you need rest from the overtime you worked during the windstorm cleanup, they should still pay you for that time off. As a public employee, you have a property right to your job, which includes the right to work your regular schedule without being arbitrarily sent home without pay. Sending you home on Monday without pay is like a one-day suspension when you have done nothing wrong to deserve that.

Regardless of whether or not you worked on Monday, the City can require you to work on Friday, just as it did the previous week. However, they should not change your schedule to avoid paying overtime. You should be paid for the hours that you work on Friday, and at the rate of time-and-one-half pay for any hours worked more than 40 in the FLSA workweek.

Question: **Are employers required to provide paid time to shower after exposure to non-toxic sludge on shift?**

Answer: Probably not. This would fall under the FLSA's "donning and doffing" rules. Donning and doffing refers to putting on (donning) and taking off (doffing) uniforms and protective gear or equipment, or in this case, showering and changing clothes at work.

In Steiner v. Mitchell, 350 U.S. 247 (1956) the Supreme

Court set forth the test for whether employers must pay employees when they showered after being exposed to toxic chemicals. In that case, the employees worked at a battery manufacturing plant and were required to shower and change clothes at the end of each shift due to exposure to lead and other toxic chemicals. The employer claimed they were not required by the FLSA to pay the employees for the time spent showering and changing, but the court disagreed. The Court held that time spent on tasks that are an "integral and indispensable part of the principal activity of the employment" must be paid. Time spent showering off toxic chemicals met that test.

Since your question involves non-toxic sludge, rather than exposure to a toxic health hazard, under the FLSA the time spent showering is probably not compensable because it is voluntary and more for your comfort and convenience and is not "integral and indispensable" to your work as a "principal activity of employment." However, compensation can be negotiated into the MOU. If exposure to non-toxic sludge is a recurring issue at work, compensation for the time it takes to shower it off can be proposed in the next MOU bargaining.

Question: Do we have to use leave time for personal appointments away from work for less than 4 hours (usually an hour or two for doctor appointments)? My understanding has been that as a salary employee, the FLSA does not require time from the work schedule to be deducted unless it was 4 hours or more in the day or a full day. My practice has been to advise my director of an appointment where I need to leave early or come in late, but I do not record that on my payroll or use vacation or sick time. We have a new director who said I must use my leave time to cover the short absence and record it on my pay sheet. I asked HR and they agreed. Is that allowed?

Answer: Yes. Although the FLSA prohibits exempt employees from being docked pay for partial-day absences, an employer can require exempt employees to use their accrued leave to cover a partial day absence. However, just because it is legal under the FLSA does not mean it is permitted by your MOU. Check your MOU to see what benefits, if any, apply to those who are exempt under the FLSA. Since exempt employees are expected to complete their work, regardless of how long it takes, without earning overtime for working more than 40 hours in a week, many MOUs provide for additional time off for exempt employees. It is common for MOUs to provide administrative leave that can be used instead of vacation to cover absences. Vacation has a cash value when you leave or retire from the agency. In many cases, administrative leave does not. So, using administrative leave instead of vacation is a smart way to cover a partial day absence. Although much less common, some MOUs allow exempt employees to take partial day absences (under 4 hours) without using their accrued leave. If your MOU does not have special leave provisions for exempt employees, ask your employee organization to consider making proposals the next time they bargain.

Question: I have been directed by my department to go to the city's medical clinic to get a medical clearance that is necessary to renew my commercial driver's license, which is a basic requirement for my job. I've been told I must use my own leave time during working hours, or I can go outside of my normal working hours on my own time if I can secure an appointment after hours. I feel like this is something the city should compensate me for. If I use my own time, I will miss out on overtime pay during the work week in which I must use my own paid leave time. I do not feel like it is fair to have to go on my own time or miss out on overtime pay for something that

is a job requirement. What are my options?

Answer: Yes, if the City is directing you to get the medical clearance, you should be paid for time spent going to the City's clinic to get a medical clearance to renew your commercial driver's license, whether during worktime or after. In 1979, the Department of Labor (DOL) issued an opinion letter stating that time spent undergoing a physical examination required by the employer is compensable, regardless of whether it occurs during normal working hours or outside of them. Similarly, in 1997 and 1998, the DOL said that when the Federal government requires employees to submit to physical examination and drug testing as a condition of the employer's license to operate its business, both the drug tests and physical examinations are for the benefit of the employer, and therefore compensable. More recently, in the context of COVID-19, the DOL reiterated that employees must be paid for time spent going to, waiting for, and receiving medical attention required by the employer during normal working hours, including activities such as obtaining a COVID-19 vaccine dose or undergoing a COVID-19 test when mandated by the employer. These DOL opinions support your right to get paid for medical examinations directed by your employer as a condition of employment. Some employers have policies that provide for how the medical examinations or license renewals shall be handled. Check to see if your employer has a policy, and if so, under what circumstances the time is compensable. Also, if you were directed to go to the clinic, be sure to go and get the medical clearance for your CDL because it is a job requirement, and you do not want to be considered insubordinate. However, call your professional staff, who can reach out to HR, to try and resolve this so that you get paid. You can file a wage claim with the U.S. Department of Labor for any unpaid compensable time.

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What are YOUR questions?

Let us know!

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