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# COUNTY ADVISORY BULLETIN

**CAB**

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## **LAYOFFS AND FURLOUGHS UNDER CIVIL SERVICE LAW**

**\*\*UPDATED July 15, 2020\*\***

Updated text has been **bolded**

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With the inevitable shortfall of sales tax, casino revenue, state general fund receipts which will reduce the Local Government Fund distribution, and other revenue declines resulting from the economic downturn due to the COVID-19 pandemic, Counties will need to look at reducing their expenditures. For most public employers, personnel costs comprise a substantial portion of expenditures. As a result, Counties may need to consider layoffs and/or furloughs as a means to reduce expenditures. In addition, some departments may be experiencing a reduction in the workload during the pandemic. This memo summarizes the civil service laws governing layoffs and furloughs. These standards apply to classified civil service employees. Counties have more flexibility dealing with unclassified employees. Because this memo is general in nature, Counties should consult with their legal advisors prior to implementing layoffs and furloughs. This memo does not address layoffs or furloughs under collective bargaining agreements. Counties should refer to those agreements when addressing bargaining unit employees.

### LAYOFFS

Layoffs are governed by sections 124.321 through 124.328 of the Ohio Revised Code. Pursuant to 124.321, employees may be laid off due to a lack of funds, lack of work or a result of a job abolishment. 124.321(B)(2) states a lack of funds means an appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset a deficiency or projected deficiency of funding for programs funded by the federal government, special revenue

accounts, or proprietary accounts. Whenever a program receives funding through a grant or similar mechanism, a lack of funds shall be presumed for the positions assigned to and the employees who work under the grant or similar mechanism if, for any reason, the funding is reduced or withdrawn. The appointing authority is responsible for determining if there is a lack of funds.

According to 124.321(C)(2) a lack of work means an appointing authority has a current or projected decrease in workload that requires a reduction of current or projected staffing levels in its organization or structure. The determination of a lack of work shall indicate the current or projected decrease in workload and whether the current or projected staffing levels of the appointing authority will be excessive.

A job abolishment means a permanent deletion of a position for reasons of economy for lack of work, for reasons of economy or due to the reorganization for the efficient operations of the appointing authority. In general, there is significant overlap between the reasons for a layoff and a job abolishment. Under the current economic situation, it is likely layoffs due to lack of funds or lack of work will be used.

Appointing authorities should prepare a written rationale justifying the layoff. This rationale does not need to be extensive but it should, at a minimum, explain the reasons (lack of funds and/or lack of work) for the layoff. Either an explanation of the underlying reasons for the layoff should be included or documentation attached to the statement of rationale. For County Commissioners, this rationale should be adopted by a formal resolution.

Under section 124.322, whenever a reduction in the work force is necessary, the appointing authority shall decide in which classification or classifications the layoff or layoffs will occur and the number of employees to be laid off within each affected classification. This is a significant point. County appointing authorities have the right to determine the classifications for layoffs to occur. The order of layoff within the affected classifications is based on the employees' length of service. Some classifications can be subject to substantial reductions while others can be left unaffected by layoff depending on funding sources and the employer's needs.

Section 124.323 provides employees shall be laid off within the affected classifications in the order of part-time probationary, part-time permanent, full-time probationary, and full-time permanent. Within these categories, layoffs are based on seniority. The statute uses the term retention points instead of seniority but the result is the same. It is the appointing authority's responsibility to calculate retention points for all employees in the affected classification(s) and classification series. An employee receives a full retention point for each completed bi-weekly pay period as a full-time employee with the appointing authority and one-half point for each bi-weekly pay period served with the appointing authority as a part-time employee.

Employees may have displacement rights (bumping) based on their seniority (retention points) as compared to other employees in the same classification series. A

classification series is not directly defined by the statute. In general, a classification series will include, for example, social service worker 1, social service worker 2 and social service worker 3. Please note that some classifications may not be part of a series and other times, the series for purposes of civil service law may not be clear. It is important to review this part of the layoff process with legal counsel. Ohio Revised Code section 124.324 provides:

A laid-off employee has the right to displace the employee with the fewest retention points in the following order:

1. Within the classification from which the employee was laid off;
2. Within the classification series from which the employee was laid off;
3. Within the classification the employee held immediately prior to holding the classification from which the employee was laid off, except that the employee may not displace employees in a classification if the employee does not meet the minimum qualifications of the classification, or if the employee last held the classification more than three years prior to the date on which the employee was laid off.

If, after exercising displacement rights, an employee is subject to further layoff action, the employee's displacement rights shall be in accordance with the classification from which the employee was first laid off. An employee cannot displace into another classification if they do not meet the minimum qualifications of the position. In addition, employees can never "bump up". For example, a part-time employee cannot displace a full-time employee with fewer retention points. Similarly, an employee in a lower classification in a classification series cannot displace an employee in a higher classification in the same series, regardless of their relative seniority. (e.g. an account clerk 1 cannot displace an account clerk 2.)

Employees have five days to decide if they will exercise their displacement rights. The appointing authority can adopt a plan for a paper layoff process. This process allows the appointing authority to conduct layoffs and displacement among employees before issuing formal notices. This approach will allow the employer to address issues such as displacement rights before notices are sent to employees and could result in more efficient layoff process.

Because layoffs result in an employee's loss of pay, all classified civil service employees outside of probation are entitled to a pre-separation conference before the effective date of a layoff. A pre-separation conference is similar to a pre-disciplinary conference. An employee should be given written notice of the reasons for the proposed action (the statement of rationale), a summary of the evidence supporting the proposed action and an opportunity to respond. The notice should be provided at least 24 hours in advance of the conference. The employee should be permitted to respond at the conference or in writing or they can waive the conference.

The formal notice of layoff should be in writing. If the Board of County Commissioners is the appointing authority, the layoff must be approved by a resolution passed in an open meeting of the Commissioners. The notice must be provided at least 14 days in advance of the effective date of layoff if served by hand-delivery or 17 days in advance if served by certified mail. The notice should contain the following information:

1. The reason for the layoff;
2. The employee's retention points;
3. Statement of displacement rights, if any;
4. Notice of the employee's right to appeal the layoff in writing to the State Personnel Board of Review within 10 days of the notice. Include the SPBR's address- 65 East State St., 12<sup>th</sup> floor, Columbus, Ohio 43215;
5. Placement on a recall list for 12 months of the effective date of layoff and obligation to maintain an updated address with the appointing authority;
6. The right to payout of accrued but unused vacation leave. Note- Employees can choose to keep the balance with the County if there is a likelihood of reinstatement in the near future.

Employees can be required to work during the 14/17 day notice period or be placed on administrative leave with pay.

Pursuant to 124.326, employees who have been laid off or have, by virtue of exercising their displacement rights, been displaced to a lower classification in their classification series, shall be placed on appropriate layoff lists. Those employees with the most retention points within each category of order of layoff shall be placed at the top of the layoff list to be followed by employees ranked in descending total retention order. Laid-off employees shall be placed on layoff lists for each classification in the classification series equal to or lower than the classification in which the employee was employed at the time of layoff. In other words, employees could be recalled to the classification from which they were laid off or to a lower classification in the same classification series. Employees have reinstatement rights for 12 months from the effective date of the layoff.

As stated above, laid off employees in the classified civil service may file an appeal from a layoff with the State Personnel Board of Review (SPBR). It is unlikely a hearing before the SPBR will occur sooner than four months after the layoff under current circumstances with a decision several months later. At the hearing, the County will have the burden of proof to establish the justification for the layoff and that it met all procedural requirements.

Before using the statutory provisions to lay off employees, an appointing authority is permitted, but not required to seek out and accept voluntary layoffs. Usually, voluntary layoffs are a result of employers surveying employees in the affected classification(s) to determine if any are willing to accept a lay off. Often such layoffs are temporary and appointing authorities should enter into a written understanding with the

employee that would include terms of the layoff and the employee's recall rights. It is possible employees accepting a voluntary layoff could be eligible for unemployment compensation.

### UNEMPLOYMENT COMPENSATION

Laid off employees are entitled to receive unemployment compensation. Employees laid off due to circumstances resulting from the COVID-19 pandemic will be entitled to unemployment from the first day after the layoff. The normal seven day waiting period has been waived as has the requirement for recipients to be looking for work. The amount of unemployment has been temporarily increased under the CARES Act. As a result, employees will be entitled to an additional \$600 per week above the regular unemployment compensation until July 31, 2020. This amount is funded by the federal government. In addition, the CARES Act provides federal funding for one-half of the regular unemployment received by the employee. Normally, the County would be responsible for this entire amount as a reimbursing employer.

Under current law, employees are entitled to up to 26 weeks of unemployment compensation. This amount has been extended by 13 weeks through December 31, 2020. The cost of the extended unemployment benefits is also paid for by the federal government.

### FURLOUGHS AND MODIFIED WORK SCHEDULES

Classified civil service employees can be furloughed or reduced in hours in accordance with O.R.C. sections 124.393 and 124.394. These options can be effectuated sooner and more easily than layoffs but they do not provide as much financial relief for the County. The provisions of these statutes are available to appointing authorities if:

1. A fiscal emergency declared by the governor under O.R.C. § 126.05;
2. A lack of funds as defined by O.R.C. § 124.321;
3. For reasons of economy as defined by O.R.C. § 124.321.

Essentially, the same lack of funds determination applies as with layoffs. Unlike layoffs, these cost savings programs only apply to lack of funds, not to lack of work.

Under section 124.393(B)(1), a County appointing authority may establish a mandatory cost savings program applicable to its non-bargaining unit employees. The cost savings program involves a furlough of no more than 80 hours per employee during each State fiscal year. Since the State fiscal year is July 1 to June 30, this means Counties can take advantage of this furlough for 80 hours per employee before June 30, 2020 and 80 hours on or after July 1, 2020 for a possible total of 160 hours in calendar year 2020.

The program may be administered differently among employees based on their classifications, appointment categories, or other relevant distinctions. As a result, County appointing authorities can pinpoint where the cost savings are needed. The 80 hours does not have to be applied consecutively. The 14 day notice provision for layoffs does not apply. Moreover, employees selected for the cost savings program have no displacement rights and cannot appeal to the SPBR. Any cost savings program for employees under the jurisdiction of the Commissioners must be approved by resolution.

A county appointing authority implementing a cost savings plan must have written guidelines to explain the plan. These guidelines do not need to be extensive. Again, for Commissioner employees, this plan should be approved by resolution.

As stated above, the appointing authority has significant discretion in how the 80 hours will be served. Employers can simply assign employees to be off work for consecutive days or assign periodic days, up to 80 hours to be off work without pay. Employees who are furloughed for 80 consecutive hours will be entitled to unemployment benefits while those serving sporadic days throughout the year will not receive such benefits. There are many more possible options. The details should be in the written guidelines.

When implementing this plan, Counties should be mindful of how they are treating employees who are exempt from overtime under the Fair Labor Standards Act. Since these employees cannot be reduced in pay during a work week without possibly destroying the exemption, these employees should be required to serve a minimum of a full work week at a time.

**On June 11, 2020, the Ohio General Assembly passed HB 481 which was signed by the Governor on June 19, 2020. This bill implemented provisions relating to the federal CARES Act. In addition, this bill amended O.R.C. section 124.393 to provide as follows:**

**(D)(1) A county, township, or municipal corporation appointing authority may establish a mandatory cost savings program applicable to its exempt employees in the event of a fiscal emergency or lack of work due to COVID-19. Each exempt employee shall participate in the program of mandatory cost savings for not more than four hundred eighty hours, as determined by the appointing authority, in state fiscal year 2021. The program may include, but is not limited to, a loss of pay or loss of holiday pay. The program may be administered differently among employees based on their classifications, appointment categories, or other relevant distinctions.**

**(2) A county, township, or municipal corporation appointing authority that establishes a mandatory cost savings program under division (D)(1) of this section shall issue guidelines concerning how the appointing authority will implement the cost savings program.**

**This new provision expands an appointing authority's ability to furlough employees who are exempt from collective bargaining above the 80 hours provided under 124.393(B)(2). Under this amendment, an appointing authority may furlough exempt employees for up to 560 hours in State fiscal year 2021 (July 1, 2020 through June 30, 2021). This potential leave includes 80 hours based on a fiscal emergency plus up to 480 additional hours in the event of a fiscal emergency or lack of work due to COVID-19. The right to furlough based on a lack of work is a new addition to the statute.**

**For purposes of this new language, lack of work has the same meaning as in O.R.C. section 124.321 which provides:**

**Lack of work means an appointing authority has a current or projected decrease in workload that requires a reduction of current or projected staffing levels in its organization or structure. The determination of a lack of work shall indicate the current or projected decrease in workload and whether the current or projected staffing levels of the appointing authority will be excessive.**

**Therefore, in addition to the 80 hours of furlough due to a fiscal emergency, the appointing authority may furlough employees for an additional 480 hours provided such a furlough is necessitated by a fiscal emergency or lack of work arising from COVID-19. This section means an appointing authority can furlough exempt employees if it is experiencing a lack of funds relating to COVID-19. It also allows furloughs if an appointing authority's workload is reduced for COVID-19 related reasons.**

Section 124.394 allows an appointing authority to implement a modified work schedule for the same fiscal reasons as the cost savings program. The program may provide for a reduction from the usual number of hours worked during a week by employees immediately before the establishment of the program by the appointing authority. The reduction in hours may include any number of hours so long as the reduction is not more than fifty per cent of the usual hours worked by employees immediately before the establishment of the program. If employees will be reduced to less than 30 hours per week for an extended period, employers should be mindful of health insurance benefits and the Affordable Care Act.

The program may be administered differently among employees based on classifications, appointment categories, or other relevant distinctions. The program can be administered in different ways depending on the needs of the employer. Again, there are no notice requirements under the statute and no appeal rights for employees. Employees with reduced work schedules under this program may be entitled to unemployment benefits depending on the amount of the reduction. For Commissioners' employees, the program must be approved by a resolution. As with the cost savings program, Counties should be careful how the modified work schedule is implemented for overtime exempt employees.

A summary of the relevant layoff/furlough statutes is attached.

## **Furloughs, Modified Work Weeks and FFCRA leave**

**One question that arises under the various state and federal employment laws is how to coordinate paid leave and layoffs, furloughs and modified work weeks. Under the Families First Coronavirus Response Act, employees are entitled to paid leave for certain qualifying reasons. This leave includes paid sick leave for up to two weeks if an employee is diagnosed with COVID-19, required to be quarantined due to exposure to COVID-19 or seeking medical treatment relating to COVID-19. Employees may be entitled to up to 12 weeks of leave at two-thirds pay for absences due to the unavailability of school or day care for COVID-19 reasons.**

**Employees taking FFCRA leave are not protected from a layoff, furlough or modified work week that is otherwise valid under Ohio law. If one of these actions is justified by a lack of funds or lack of work, appointing authorities can include employees who are using FFCRA leave in the layoff, furlough or modified work week. While employers cannot discriminate against employees for using FFCRA leave, these employees are not entitled to any special protection. For example, if all employees in a particular department or division are subject to a furlough, those employees taking FFCRA leave can and should be treated the same as other employees not taking this type of leave.**

**Because these issues can be technical, appointing authorities should consult with legal counsel and human resources professionals when developing plans for layoffs, furloughs and/or modified work weeks.**



STATUTORY PROVISIONS FOR LAYOFF AND FURLOUGHS

<b>Employer Action</b>	<b>Statute</b>	<b>Reason for Action</b>	<b>Seniority</b>	<b>Displacement Rights</b>	<b>Notice</b>	<b>Unemployment Benefits</b>	<b>Recall Rights</b>
Layoff	124.321	Lack of Funds	Yes	Based on seniority in affected classification and classification series along with prior positions held in past 3 yrs.	14-17 days	Yes	12 months
Layoff	124.321	Lack of Work	Yes	Based on seniority in affected classification and classification series along with prior positions held in past 3 yrs.	14-17 days	Yes	12 months
Job Abolishment	124.321	For Reasons of Economy, Permanent Lack of Work (at least 1 yr. or reorganization for efficient operations)	Yes	Based on seniority in affected classification and classification series.	14-17 days	Yes	12 months
Cost Savings Days (Furloughs)	124.393	Lack of Funds	No	None	None in law but 24 hrs. is recommended	Depends	Not Applicable
Modified Work Schedule	124.394	Lack of Funds	No	None	None in law but 24 hrs. is recommended	Depends how much employee is reduced	Not Applicable
Please note this chart is a short summary of the requirement under civil service law. Please review the memo for more detailed information.							

## UNEMPLOYMENT BENEFITS ESTIMATOR

The link below connects to the Ohio unemployment benefits estimation tables. These charts are not a determination of benefits and do not guarantee payment or eligibility. This information is provided to inform CCAO members of estimated benefits for employees who may qualify.

It should be noted that the tables do not include the additional \$600 per week in additional unemployment benefits provided by the federal Coronavirus Aid, Relief, and Economic Security Act. These additional funds are available until July 31, 2020.

<https://ccaο.org/wp-content/uploads/Ohio-Unemployment-Insurance-2020-Benefits-Chart.pdf>