Municipal Labor and Employment Law In Tough Economic Times

By Richard K. Zuckerman

Tough economic times can present our municipal clients with difficult financial and political problems which we, as municipal lawyers, are often called upon to solve. This article will describe and discuss some of the labor relations-related legal and practical issues which we and our clients need to anticipate and address. It will also present and analyze a variety of creative options available to our clients in successfully confronting and resolving those issues.

While it is obviously important to be able to present to and discuss with our clients with the options which follow, there is a more macro level-type of consideration that I believe needs to be a part of any discussion about what to do with our unions and personnel. I describe it as being careful to counsel our clients to do "the right thing." Phrased another way, just because a client *can* unilaterally do something does not necessarily mean that the client *should* do it. Our role as counsel includes ensuring that this global consideration permeates any discussion about the "what, who, when, where, why and how" of the decision-making process.

Factors our clients should consider prior to making any union or personnel-related decision include, among others, the impact of the decision upon the affected employees and their union, financial and political considerations, public relations and the court of public opinion, and the client's short- and long-term goals and the impact that the options under review will have on each. While each one may be critically important and self-evident in nature, it is surprising how often one or more is ignored or simply forgotten about during the rush to act. Failure to take the time to think them through may cause our clients to make decisions for today which will come back to haunt them, their employees and unions.

Richard Zuckerman

With these thoughts in mind, let us turn to an analysis of some of the types of labor-related decisions a municipal client may unilaterally make; i.e., which the client may implement without prior negotiations with, and the consent of, its affected unions.

Examples of decisions which the courts and PERB have held an employer may unilaterally implement

Abolishing employee jobs/positions

An employer's decision to eliminate jobs due to economic reasons need not be negotiated. *See, e.g., City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971); *Burnt Hills-Ballston Lake Cent. Sch. Dist.*, 25 *PERB ¶ 3066 (1992)*. The decision must, though, be made in "good faith"; *i.e.*, for economic or efficiency reasons, and not in order to skirt an employee's tenure and/or disciplinary hearing rights. *See, e.g., Matter of Young v. Bd. of Educ. of Cent. Sch. Dist. No. 6, Town of Huntington*, 35 N.Y.2d 31, 358 N.Y.S.2d 709 (1974); *James v. Broadnax*, 182 A.D.2d 887, 581 N.Y.S.2d 900 (3d Dep't 1992); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979, 438 N.Y.S.2d 605 (3d Dep't 1981). There are also several potentially applicable statutory, administrative and/or collective bargaining agreement-based layoff and/or recall procedures which need to be considered and implemented in a lay-off situation. *See, e.g., Matter of Young v. Bd. of Educ. of Cent. Sch. Dist. No. 6, Town of Huntington*, 35 N.Y.2d 31, 358 N.Y.S.2d 709 (1974); *James v. Broadnax*, 182 A.D.2d 887, 581 N.Y.S.2d 900 (3d Dep't 1992); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979, 438 N.Y.S.2d 605 (3d Dep't 1981).

As is true with regard to almost all of the examples provided in this article, be sure before acting to confirm that your client's decision is not prohibited or restricted in some way by your collective bargaining agreement. Check too for a provision in the contract that constitutes an affirmative waiver of the union's duty to bargain over the terms and conditions of employment related to your decision. Remember too that, in almost all instances, there will be a duty to bargain over the "impact" of a unilaterally imposed decision following a demand to do so by the affected union. *See, e.g., Matter of Young v. Bd. of Educ. of Cent. Sch. Dist. No. 6, Town of Huntington*, 35 N.Y.2d 31, 358 N.Y.S.2d 709 (1974); *James v. Broadnax*, 182 A.D.2d 887, 581 N.Y.S.2d 900 (3d Dep't 1992); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979, 438 N.Y.S.2d 605 (3d Dep't 1981).

Eliminating or reducing services to the public

An employer does not normally need its union's permission before eliminating or curtailing services to the public. *See, e.g., Matter of Young v. Bd. of Educ. of Cent. Sch. Dist. No. 6, Town of Huntington*, 35 N.Y.2d 31, 358 N.Y.S.2d 709 (1974); *James v. Broadnax*, 182 A.D.2d 887, 581 N.Y.S.2d 900 (3d Dep't 1992); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979, 438 N.Y.S.2d 605 (3d Dep't 1981). The employer may, as a result, unilaterally curtail the level or extent of those services by; *e.g.*, reducing the number of hours during which the services will be offered and then shortening employees' work weeks to conform to the new hours of operation. *See, e.g., Lackawanna City Sch. Dist.*, 13 PERB ¶ 3085 (1980); *but see County of Broome*, 22 PERB ¶ 3019 (1989) (an employer may not unilaterally reduce employees' hours if the total hours or services provided by the employer are not actually reduced). The critical Taylor Law-related aspect of this type of decision is that PERB will require proof of an actual curtailment of services to the public. It will not be sufficient to implement a plan that is only "more efficient" in that it produces the same level of work or services in less working time, or involves having only a "skeleton crew" working.

In order to meet this "curtailment of services" standard, the employer will have to be able to establish its business reasons for the curtailment. It will also likely be required to prove that the curtailment in fact reduced the hours during which services were provided to the public, that affected employees were, as a result, working fewer number of hours, that they were all working the same number of hours following the curtailment (*e.g.*, going from a 35 to a 28 hour week), and that those hours covered the same period of time (*e.g.*, 9:00 a.m. to 4:00 p.m.). *Id.; see also Oswego School District*, 5 PERB ¶ 3011 (1972), *aff'd*, 6 PERB ¶ 7008 (3d Dep't 1973).

Of more critical importance, of course, is whether an employer which implements these actions can concomitantly and proportionately reduce employee salaries. Although the case law is confusing and at times somewhat contradictory, the answer appears to be yes. *See, e.g., Lackawanna City Sch. Dist.*, 12 PERB ¶ 4552 (1979), *rev'd*, 12 PERB ¶ 3122 (1979), *on remand*, 13 PERB ¶ 4543 (1980), *aff'd*, 13 PERB ¶ 3085 (1980) *and compare with Schuylerville Cent. School District*, 14 PERB ¶ 3035 (1981), *Rush-Henrietta Central School District*, 27 PERB ¶ 4631 (1994); *Vestal Central School District*, 15 PERB ¶ 3006 (1982), *aff'd*, 16 PERB ¶ 7020 (3d Dep't 1983); *Onondaga Cortland Madison BOCES*, 37 PERB ¶ 3025 (2004).

Not filling vacancies

This is also known as "attrition." PERB has held that a union's demand that vacancies be filled, or that they be filled within a defined period of time, restricts the employer's right to effect a staff reduction and is, therefore, non-mandatory. *See, e.g., Niagara Falls Police Captains & Lieutenants Ass'n*, 33 PERB ¶ 3058 (2000).

Reducing or changing staffing levels

An employer has the inherent right to determine staffing levels. This includes deciding how many people will be at work at any given time, as well as how many people will perform a particular task such as riding in a patrol car or on a piece of fire apparatus. *See, e.g., City of White Plains*, 9 PERB ¶ 3007 (1976); *State of New York (Dep't of Transp.)*, 27 PERB ¶ 3056 (1994); *Town of Carmel*, 31 PERB ¶ 3006 (1998); *Lake Mohegan Fire District*, 41 PERB ¶ 3001 (2008). Because safety is a mandatory subject of negotiation, (*see, e.g., City of New Rochelle*, 10 PERB ¶ 3078 (1977), *aff'd*, 11 PERB ¶ 7002 (2d Dep't 1978)). PERB will implement a balancing test when an action implicates both staffing and safety concerns. Where an action raises a safety issue, but it is outweighed by the employer's right to establish staffing requirements, the staffing issue must be dealt with, but as part of impact negotiations. *See, e.g., City of*

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White Plains, supra; Lake Mohegan Fire District, supra.

Changing hours/days of operation

As was discussed earlier, it is a management prerogative to decide the time span during which work is to be performed. An employer may, accordingly, decide to increase, reduce or simply shift its hours of operation. *See, e.g., Lackawanna City Sch. Dist., supra.* How the work is to be performed within that time frame may, however, be mandatorily negotiable. *See, e.g., Starpoint Cent. Sch. Dist.*, 23 PERB ¶ 3012 (1990).

Restricting the use of leave time

The number of employees an employer hires and chooses to place on duty at any given time is a managerial prerogative. *See, e.g., Matter of Int'l Ass'n of Firefighters of City of Newburgh, Local 589 v. Helsby*, 59 A.D.2d 342, 399 N.Y.S.2d 334 (3d Dep't 1977), *leave denied* 43 N.Y.2d 649, 403 N.Y.S.2d 1027 (1978). An employer may, therefore, unilaterally reduce the number of available vacation slots so that more employees are on duty at a particular time, (*see, e.g., State of New York (Dep't of Corr. Serv.- Elmira Corr. Facility)*, 39 PERB ¶ 3004 (2006), *citing Town of Carmel*, 31 PERB ¶ 3006 (1998), *conf'd*, 267 A.D.2d 858, 701 N.Y.S.2d 169 (3d Dep't 1999)) even though a reduction in the amount of leave available to an employee must be negotiated. *See, e.g., State of New York (Div. of Military & Naval Affairs) v. New York State PERB*, 23 PERB ¶ 4592 (1990), *aff'd*, 24 PERB ¶ 3024 (1991), *aff'd*, 26 PERB ¶ 7001, 187 A.D.2d 78, 592 N.Y.S.2d 847 (3d Dep't 1993).

Assigning bargaining unit work to non-unit personnel

This is known as, among other things, "subcontracting" (having someone not in the bargaining unit do the work) "civilianizing" (having a civilian rather than; *e.g.*, a police officer, perform the work) and "privatizing" (having private sector employees perform the work). An employer may assign unit work to non-unit personnel in some, but not all, situations.

For example, if the "work" has not been exclusively performed by unit members for a sufficient period of time, there will be no duty to bargain over the decision to subcontract the work. *See, e.g., Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005 (2008), *aff'd*, 42 PERB ¶ 7004 (4th Dep't 2009), *on remand*, PERB Case No. U-26091(7/23/2009); *County of Onondaga*, 24 PERB ¶ 3014 (1991); *Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985). On the other hand, if the reassigned tasks are not substantially similar to those previously performed by unit members, the work may be reassigned without prior negotiation. *See, e.g., Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985). The decision by a school district to subcontract certain programs and services to a BOCES is a non-mandatory subject of negotiation. *See, e.g., Vestal Cent. Sch. Dist.*, 30 PERB ¶ 3029 (1997), *aff'd*, 94 N.Y.2d 409,705 N.Y.S.2d 564 (2000) (employer's decision to contract with BOCES for printing services was not mandatorily negotiable); *Webster Cent. Sch. Dist. v. Public Employment Relations Bd.*, 75 N.Y.2d 619, 555 N.Y.S.2d 245 (1990) (Education Law § 1950 reflects Legislature's intention that school districts' decisions to participate in cooperative educational programs not be subject to mandatory negotiation).

Where there is a significant change in the job qualifications of the personnel needed to perform the work, there may well be no duty to bargain over the decision to remove the work from the unit. *See, e.g., West Hempstead Union Free Sch. Dist*, 14 PERB ¶ 3096 (1981); *Town of Mamaroneck*, 33 PERB ¶ 3010 (2000), *quoting Fairview Fire Dist.*, 29 PERB ¶ 3042 (1996) (substitution of civilian employees for police officers reflects an employer's determination that the specialized training and skills of a police officer are not needed to complete the work). In this situation, a balancing test is invoked, with the interests of the employer and the unit, both individually and collectively, weighed against the other. The transfer of job functions from uniformed to civilian employees and, conversely, from civilian to uniformed employees, constitutes a *per se* change in job qualifications and, thus, a change in the level of service. *Fairview Fire Dist.*, 28 PERB ¶ 4608 (1995), *citing State of New York Dep't of Corr. Servs. v. Kinsella*, 27 PERB ¶ 3055 (1994) (employer's civilianization of uniformed services represented "a *de facto*" change in qualifications), *aff'd*, 29 PERB ¶ 3042 (1996); *see also County of Suffolk*, 38 PERB ¶ 4547 (2005) (where no employee suffered loss of employment or benefits as a result of the transfer of work from police officers to civilians, the balance of employer and employee interests tips in the employer's favor); *see also County of Suffolk*, 38 PERB ¶ 4575 (2005) (county did not violate its duty to bargain when it transferred work from police officers to civilian police operations aides). An employer may also act unilaterally if required to do so due to an outside decision beyond its control. *See, e.g., Germantown Cent. Sch. Dist.*, 25 PERB ¶ 4573 (1992), *aff'd*, 26 PERB ¶ 3003, *aff'd*, 205 A.D.2d 961, 613 N.Y.S.2d 957 (3d Dep't 1994) (unilateral subcontracting out school cafeteria services upheld because the district it was on austerity and statutorily precluded from operating the program).

If negotiations are required over a decision, the employer is responsible for initiating and, absent an emergency, concluding negotiations with the union prior to effectuating the decision. *See, e.g., Wappingers Cent. Sch. Dist.*, 19 PERB ¶ 3037 (1986). Even if there is no duty to bargain over the decision to reassign the unit's work, the employer will still, as previously noted, likely have to bargain over the impact of the decision upon a timely demand by the union that it does so. *See, e.g., Wappingers Cent. Sch. Dist.*, 26 PERB ¶ 3014 (1993).

Implementing sick leave control policies

An employer may unilaterally impose certain sick leave management policies. *See, e.g., Poughkeepsie City Sch. Dist.*, 19 PERB ¶ 3046 (1986). Some specific items, such as requiring an employee to provide a doctor's note, (*see, e.g., Triborough Bridge & Tunnel Auth.*, 15 PERB ¶ 3124 (1980)) rescheduling work for the purpose of controlling sick leave abuse, (*see, e.g., County of Nassau*, 18 PERB ¶ 3034 (1985)), and changing the time when employees must notify a employer of an impending absence (*see, e.g., Spencerport Cent. Sch. Dist.*, 16 PERB ¶ 3074 (1983)), are, in contrast, mandatorily negotiable.

Implementing general Municipal Law §§ 207-a and 207-c-related policies and procedures

An employer may unilaterally implement procedures and policies designed to effectuate the employer's rights pursuant to these statutes. *See, e.g., City of New York*, 40 PERB ¶ 6601 (2007), *citing Schenectady Police Benevolent Ass'n v. New York State PERB*, 28 PERB ¶ 7005 (1995); *but see Vill. of Highland Falls*, 40 PERB ¶ 4525 (2007), *aff'd on other grounds*, PERB Case Nos. U-26843, 26844 (7/23/2009). Certain specific items, such as implementing procedures which involve a change in the extent or amount of employee participation in the process, may have to be negotiated. *See, e.g., Town of Orangetown*, 40 PERB ¶ 3008 (2007) (employer could not unilaterally prohibit employees from videotaping and/or audiotaping initial medical evaluation). Similarly, discontinuing fringe benefit and other payments provided by practice to employees on a GML Section 207-a or 207-c leave of absence must be negotiated, even if there is no statutory entitlement for the employees to receive them. *See, e.g., County of Nassau*, 23 PERB ¶ 4595 (1990).

Assigning certain additional or new job duties

An employer may unilaterally assign job duties which are an inherent aspect of the duties and functions of the position. *See, e.g., State of New York (SUNY Stony Brook)*, 33 PERB ¶ 3045 (2000). If, however, the performance of these additional duties lengthens the workday or significantly increases employees' workload, then the employer must negotiate the assignment. *See, e.g., South Jefferson Cent. Sch. Dist.*, 13 PERB ¶ 3066 (1980). Likewise, requiring employees to perform duties which are not within the inherent nature of their job is a mandatory subject of bargaining. *See, e.g., Fairview Fire Dist.*, 12 PERB ¶ 3083 (1979).

Changing class size

The number of students assigned to a class may be unilaterally changed by the employer. *See, e.g., Pearl River Union Free Sch. Dist.*, 11 PERB ¶ 3085 (1978). Here too, though, the impact of a change in class size is a mandatory subject of bargaining, (*see, e.g., Orange County Community Coll. Faculty Ass'n*, 10 PERB ¶ 3080 (1977)) and also requires compliance with both the Commissioner of Education's Regulations addressing class size (8 N.Y.C.R.R. § 100.2 (l), (j)), and any applicable contractual restrictions.

Changing active employee insurance benefits

An employer may unilaterally change an insurance plan and/or the benefits provided by the plan if the employer does not, in doing so, change a preexisting term and condition of employment. *See, e.g., Unatego Cent. Sch. Dist.*, 20 PERB ¶ 3004 (1987), *aff'd*,134 A.D.2d 62, 522 N.Y.S.2d 995 (3d Dep't 1987), *motion for leave to appeal denied*, 71 N.Y.2d 805, 529 N.Y.S.2d 76 (1988); *see also County of Dutchess*, 32 PERB ¶ 4559, *aff'd*, 32 PERB ¶ 3047 (1999), *aff'd*, 274 A.D.2d 930, 712 N.Y.S.2d 187 (3d Dep't 2000). The employer may, however, otherwise have to negotiate changes to insurance benefits which materially change terms and conditions of employment, (*see, e.g., County of Nassau*, 14 PERB ¶ 4550 (1982)) including a change in the plan itself, eliminating dual coverage, (*see, e.g., City of Mount Vernon*, 18 PERB ¶ 3050 (1985), *aff'd*, 18 PERB ¶ 7018 (Sup. Ct. Albany County 1985), *aff'd*, 126 A.D.2d 824,510 N.Y.S.2d 742 (3d Dep't 1987)) changing the amount of the premium paid by employees (*see, e.g., Triborough Bridge & Tunnel Auth.*, 27 PERB ¶ 3076 (1994)) and changing the amount of employees' co-payments. *See, e.g., County of Yates*, 22 PERB ¶ 3017 (1989).

Employers may have somewhat more discretion to unilaterally affect changes in retiree insurance benefits. New York Law (N.Y. CIV. SERV. LAW § 167-a) requires participating employers to pay a minimum of 50% of the cost of individual premium or subscription charges for the coverage of retired employees and 35 percent for the coverage of their dependents who are enrolled in the statewide health insurance plans. If an employer is contributing more than the minimum levels set forth in the law, then it may in many instances unilaterally reduce to the minimum levels its contributions for retirees' health insurance premiums, unless there is a contrary agreement between the employer and the retiree and/or union. *See, e.g., Lippman v. Sewanhaka Cent. High Sch. Dist.*, 17 PERB ¶ 4521, *aff'd*, 17 PERB ¶ 3049 (1984), *rev'd*, 104 A.D.2d 123, 483 N.Y.S.2d 446 (3d Dep't 1984), *aff'd*, 66 N.Y.2d 313, 496 N.Y.S.2d 987 (1985). Be aware, though, that an employee who retires during or following the expiration of the collective bargaining agreement is deemed to be an active employee for negotiability purposes. *See, e.g., Triborough Bridge & Tunnel Auth.*, 29 PERB ¶ 3012 (1996).

If an employer makes a representation that it will pay a certain cost for the insurance premiums for a retiree, *and* the retiree relies upon this promise in deciding to retire from employment, *and* the employer nevertheless unilaterally reduces its contributions for the retiree, the employer may be estopped and/or otherwise contractually precluded from unilaterally reducing its preexisting insurance contribution level. *See, e.g., Ellen v. Bd. of Educ. of the Union Free Sch. Dist.*, 168 A.D.2d 403, 563 N.Y.S.2d 422 (2d Dep't 1990), *appeal dismissed*, 77 N.Y.2d 939, 569 N.Y.S.2d 612 (1991).

While many public employers may make these decisions without union consent, school districts, BOCES and special act schools are prohibited from doing so unless there is a corresponding diminution in these benefits for their active employees. 2008 N.Y. Sess. Laws Ch. 43. State legislation has been vetoed that would have prohibited *all* public employers from unilaterally diminishing health insurance benefits or contributions made on behalf of retirees or their dependents below the current level unless there was a corresponding diminution in benefits for the active employees.

Implementing public safety employee disciplinary procedures.

Because employee discipline is a prohibited subject of bargaining for certain police, and possibly other public safety, units the employer may establish procedures needed to implement the disciplinary procedures affecting covered employees, and may also refuse to implement previously bargained procedures. *See, e.g., Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Employment Relations Bd.*, 6 N.Y.3d 563, 815 N.Y.S.2d 1 (2006). Whether this applies to a particular unit depends upon, among other things, the law or rule governing the affected employees and when it became applicable. *See, e.g., Town of Walkill*, PERB Case No. U-27426 (7/23/2009) and cases cited therein.

Filing a managerial/confidential petition

Certain managerial and/or confidential employees may be removed from the bargaining unit and made a part of management if they meet the requisite PERB-established standards. A managerial employee is defined as one who "formulates policy" or "may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of the agreement or in personnel administration, provided that the role is not of a routine or clerical nature, and requires the exercise of independent judgment." *See, e.g., Town of Dewitt*, 32 PERB ¶ 3001 (1999), *quoting* N.Y. CIV. SERV. LAW § 201.7(ii).

Whether an employee is confidential is determined by the application of a two-part test. The employee must be designated to assist a managerial employee in the delivery of specific duties (*see* Civil Service Law § 201.7(a)(ii) and act in a confidential

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capacity to the managerial employee. *See, e.g., State of New York (Office of Parks, Recreation & Historic Preservation),* 39 PERB ¶ 3007 (2006).

Implementing employee evaluation/ attendance monitoring/supervisory policies

These may be unilaterally implemented, provided that there is no change in the nature or extent of the employee's involvement in the process. *See, e.g., Newburgh Enlarged City Sch. Dist.*, 20 PERB ¶ 3053 (1987); *Triborough Bridge & Tunnel Auth. & Metropolitan Trans. Auth.*, 21 PERB ¶ 3065 (1988).

Creating a new position and establishing the initial salary

The creation of a new position and establishment of the initial salary are both managerial prerogatives. *See, e.g., Averill Park Cent. Sch. Dist.*, 10 PERB ¶ 4560 (1977). Bargaining may be required with respect to the step placement of a newly hired employee on the salary schedule where a past practice exists regarding same. *See, e.g., Bellmore Sch. Union Free Sch. Dist.*, 34 PERB ¶ 3009 (2001).

Changing the type of equipment to be used

Determining the type of equipment to be used by employees does not require decisional bargaining. *See, e.g., City of White Plains*, 9 PERB ¶ 3007 (1976).

Unilateral action in an emergency situation: compelling need

An employer may unilaterally implement an otherwise negotiable decision where there is a "compelling need" to act in an emergency-type situation, provided that the employer has negotiated to impasse on the issue, and provided further that the employer continues to negotiate following implementation. *See, e.g., Bd. of Educ. of Enlarged City Sch. Dist. of City of Jamestown, NY*, 6 PERB ¶ 3075 (1973) (implementation of school calendar); *see also Wappingers Cent. Sch. Dist.*, 5 PERB ¶ 4512 (1972), *aff'd*, 5 PERB ¶ 3074 (1972) ("compelling need" found where school district, just before the start of a new school year, unilaterally changed teachers' workload where the school district had negotiated with the union to impasse and recognized its continuing obligation to bargain). Financial problems are neither a compelling nor emergency situation. *See, e.g., County of Chautauqua*, 22 PERB ¶ 3016 (1989) (county's interest in economic savings did not constitute a "compelling need" that relieved it of its duty to negotiate over the subcontracting of laundry services).

Areas in Which the Courts and PERB Have Required Employers To Successfully Negotiate with Their Unions Before Acting

Furloughing employees

While an employer may unilaterally direct employees not to report to work, it may not unilaterally decide that the employees should not be paid during their absences. *See, e.g., State of New York (SUNY Albany)*, 16 PERB ¶ 3050 (1983). There may not, however, be a duty to bargain if the employer has an existing practice of offering voluntary furloughs and/or is contractually privileged to act. *See, e.g., Patchogue-Medford Union Free Sch. Dist.*, 28 PERB ¶ 3026 (1995).

Implementing a lag payroll

This is a mandatory subject of negotiation. *See, e.g., County of Orange*, 12 PERB ¶ 3114 (1979), *aff'd*, 76 A.D.2d 878, 428 N.Y.S.2d 724 (2d Dep't 1980); *see also Ass'n of Surrogates & Supreme Court Reporters (City of New York) v. State of New York*, 79 N.Y.2d 39, 580 N.Y.S.2d 153 (1992) (State statute imposing a lag payroll held to violate the U.S. Constitution's contract clause).

Delaying step movement

An employer may not, in the absence of a contractual right or practice to do so, unilaterally delay employees' step movements after a contract has expired. *See, e.g., Cobleskill Cent. Sch. Dist.*, 16 PERB ¶ 4501, *aff'd*, 16 PERB ¶ 3057 (1983), *aff'd*, 105 A.D.2d 564, 481 N.Y.S.2d 795 (3d Dep't 1984), *appeal denied*, 64 N.Y.2d 1071, 489 N.Y.S.2d 903 (1985).

Substitute part-time employees for full-time employees

An employer may not unilaterally replace full-time employees with part-time employees if there has been no change in the nature or level of services. *See, e.g., County of Broome*, 22 PERB ¶ 3019 (1989).

Changing the procedures pursuant to which overtime is earned or paid

While management generally has the right to decide whether overtime is needed, compensation for overtime work is a mandatory subject of negotiation. *See, e.g., Spring Valley PBA v. Vill. of Spring Valley*, 80 A.D.2d 910, 437 N.Y.S.2d 400 (2d Dep't 1981). This includes cost-savings efforts such as eliminating overtime payments until employees have actually worked the applicable federal Fair Labor Standards Act work cycle and/or not counting leave time as time worked for purposes of calculating overtime entitlements.

Discontinuing employment perks

These include employer-provided meals, (*see, e.g., City of Newburgh*, 16 PERB ¶ 3030 (1983)) free bottled water (*see, e.g., County of Nassau*, 32 PERB ¶ 3034 (1999) and coffee, (*see, e.g., County of Nassau*, 25 PERB ¶ 4555 (1992)) and free parking. *See, e.g., NYC Trans. Auth.*, 24 PERB ¶ 3013 (1991).

Early retirement/separation incentives

These are mandatorily negotiable even though (because) they provide a benefit to employees. *See, e.g., Windsor Ass'n of Office Personnel & Sch. Aides*, 17 PERB ¶ 3062 (1984).

Whether the particular action your client is considering falls within the ambit of a non-negotiable management prerogative will ultimately depend upon the specific circumstances before you, as well as any applicable contract provisions, rules, procedures and practices and the current state of the law at PERB. When in doubt about how to provide counsel about the applicable law, be guided by the following principle stated by PERB nearly 40 years ago: "...decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees." *City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971). When in doubt about everything else, be guided by the principle known as: "do the right thing."

Note: Richard K. Zuckerman is a partner in Lamb & Barnosky, LLP in Melville. This article is adapted from my presentation to the New York State Bar Association, Municipal Law Section's Annual Meeting in January 2009.