

COLORADO MUNICIPAL LEAGUE  
ANNUAL SEMINAR ON MUNICIPAL LAW

# Life After PROPWA for Municipal Employers

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# PROPWA

- Protections for Public Workers Act (C.R.S. § 29-33-101, *et seq.*)
- Establishes rights for certain public employees--including municipal employees--similar to those protected under the National Labor Relations Act (NLRA)
- Government employees not covered by NLRA or Colorado Labor Peace Act

# Sources

- SB 23-111
  - Rules adopted 2/2/24 (7 CCR 1103-17), effective 7/1/24
- SB 24-232
  - Revised rules adopted 8/30/24, effective 12/1/24
- CDLE INFO #15C (does not contemplate new proposed rules)

# Employees are Not Granted Right to Collectively Bargain!



- -103(7) & -104(1)(b)(II)
- Departure from NLRA
- Except in the case of firefighters (Firefighter Safety Act), municipalities cannot be compelled to engage in collective bargaining with employees
  - Unsuccessful legislation proposed right to collective bargaining for municipal employees
  - Successful legislation granted the right to compel collective bargaining to State and County employees (not City and County)

# A Public Employer Shall Not... (-104(3))

- Discriminate against, coerce, intimidate, interfere with, or impose reprisals against any employee for engaging in rights described in the Act
- Dominate or interfere in the administration of an employee organization
- Discharge or discriminate against an employee because they:
  - Participated in complaint pursuant to the Act, or
  - Formed, joined, assisted, or chose to be represented by an employee organization

# Rights Granted to Public Employees

- "Concerted activities"

-104(1)(b)&(d)

- "Expressive activities"

-104(1)(a)&(c)

# Concerted Activities

- Protected, concerted activity for the purpose of mutual aid and protection
  - **Does not** include the activities of a **confidential** public employee or a **managerial** public employee
  - Includes the protected rights of employees set forth in 29 U.S.C. sec. 157, **except collective bargaining**
- Organize, form, join, or assist an employee organization (or refrain from doing so)

# 29 U.S.C. § 157

- Employees shall have the right to self-organization, to form, join, or assist labor organizations, ~~to bargain collectively through representatives of their own choosing,~~ and to engage in other concerted activities for ~~the purpose of collective bargaining or other~~ mutual aid or protection, and shall also have the right to refrain from any or all of such activities



# Concerted Activity Per the NLRB

- “Talking with one or more co-workers about your wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, openly talking about your pay and benefits, and joining with co-workers to talk directly to your employer, to a government agency, or to the media about problems in your workplace”
- “Single employee may also engage in protected concerted activity if they are acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action”
- “Lose protection by saying or doing something egregiously offensive or knowingly and maliciously false, or by publicly disparaging your employer's products or services without relating your complaints to any labor controversy”

# Is it protected?

- Petition to reinstate demoted employee
  - Circulated by colleagues?
  - Circulated by demotee?
- Employee to manager: “If this office is smart, it will support the union drive. If it fails, we’ll dynamite the place.” (INFO #15C, p. 7, Ex. 15)
- During CBA negotiations, an employee bangs the table and calls the City’s attorney “an [f’ing] liar” for saying the City can’t afford raises. (Ex. 16)
- Employee calls the City Manager “an [f’ing] liar” in a public area of City Hall for saying the City can’t afford raises. (Ex. 17)

# Concerted Activity – What About *Weingarten* rights?

- NLRB: “Among the rights protected by Section 7 is the right of employees, upon request, to have their representative present during an interview that the employee reasonably believes could lead to discipline.”
- “While under current Board law, only union-represented employees have this right, the NLRB General Counsel is asking the Board to return to its previous rule that all employees have the right, whether represented by a union or not.”

# Confidential Public Employees (-103(5)(b)(I))

- "Develops or presents the positions of the employer with respect to employer-employee relations, contributes significantly to the employer's decision-making in connection with such positions, or accesses confidential information, including the employer's non-public planning or strategy information, in connection with the development, presentation, or decision-making of the employer's positions with respect to employer-employee relations" **or**
- "Provides legal advice to the employer as the employer's attorney related to [PROPWA] or other labor relations matters."

# Confidential Public Employees?

- HR business partner
- HR Payroll Clerk
- Assistant City Attorney – Civil Litigation



# Managerial Public Employees (-103(5)(b)(II))

- An executive-level public employee with significant decision-making authority including the authority to develop employer policies or programs or administer an agency or other subdivision of the employer
- Does not include a non-policymaking employee even if the employee oversees, manages, or directs other employees
  - Except firefighter “supervisor”, as defined in section 29-5-203(15)

# Managerial Public Employees?

- Assistant Plant Manager
- Deputy City Manager – Information Technology



# Expressive Activities

- Discuss or express the public employee's views regarding public employee representation, workplace issues, or the rights granted under the Act
- Fully participate in the political process while **off duty and not in uniform**, including:
  - Speaking with members of the public employer's governing body on terms and conditions of employment and any matter of public concern
  - Engaging in other political activities in the same manner as other citizens of Colorado, without discrimination, intimidation, or retaliation



# Exception to Protection of Expressive Activities (PROPWA Rule 4.2.2)

- PROPWA expressive activity shall not be protected if it is pursuant to or part of duties that the public employee either:
  - Is paid by their public employer to perform; or
  - Otherwise has a responsibility to perform under a directive from their public employer.
- *Garcetti*

# Management Rights: Scope and Limits (PROPWA Rule 4.4)

- Activity that results in **material disruption** of a public employee's duties, a public employer's operations, or the delivery of public services is not protected activity;
  - Except that an employer's or other individual's disagreement with the content or viewpoint expressed through an employee's activity or strike by employees does not constitute material disruption
- A public employer may limit the rights of a public employee to the extent necessary to maintain the nonpartisan role of the employer's nonpartisan legislative, judicial, or election-related staff

# Can we do this?

- After disputes with management, an employee (a) urged others not to work at the employer, and (b) said it “wasn’t possible to wipe the slate clean” with her managers. (INFO #15C, p. 2, Ex. 1) Can the City discipline?
- Uki is a state legislative budget analyst. Off duty, Uki mocks a major political party’s state officials on social media. Uki is fired when a newspaper reports Uki’s posts. (p. 5, Ex. 13)



# Time, Place, and Manner Restrictions (PROPWA Rule 4.2.3) – Public Forum

- A place qualifies as a “public forum” open for expressive activity by the public, including by public employees, if it has been traditionally open to such activity, or was opened for such activity by a public entity
- In a public forum, expressive activity is unprotected if the activity is contrary to a limitation on the time, place, or manner of such activity that:
  - is set and enforced on a content-neutral and viewpoint-neutral basis;
  - is narrowly tailored to serve a significant governmental interest; and
  - leaves open ample alternative channels for the activity that are known and available to the public employee

# Time, Place, and Manner Restrictions (PROPWA Rule 4.2.3) – Non-Public Forum

- Expressive activity in places **other than a public forum** is unprotected if it is contrary to a limitation on the time, place, or manner of such activity that is:
  - Reasonable in light of the purposes of the forum; and
  - Viewpoint-neutral

# Management Rights: Scope and Limits (PROPWA Rule 4.4)

- Even if a public employee did or may engage in PROPWA protected activity, adverse action - termination, discipline, or other action that may deter protected activity - is not unlawful under PROPWA if it is not imposed (or disproportionately imposed) in whole or in part to discriminate against, interfere with, or otherwise deter protected activity.

# Management Rights: Scope and Limits (PROPWA Rule 4.4)

- A public employer rule, policy, or action shall not:
  - Impermissibly interfere with or retaliate against protected activity, including if it was enacted or enforced in response to protected activity as a way to interfere with or retaliate against such activity; or
  - Be overly broad or vague in a way that may be reasonably understood as impermissibly interfering with or retaliating against protected activity, when read by a public employee dependent upon their job who acts reasonably, and in good faith, in interpreting the potential restriction in light of factors such as past practice, the nature of the workplace, and the field of work

# Can we do this?



- Non-confidential/managerial HR manager provides union with counter-arguments to rebut City Manager's position during negotiations that the City can't afford raises. City fires them. (INFO #15C, p. 8, Ex. 21)
- An employer prohibits employees seeking union recognition from seeking signatures during breaks and active working time. The employer prohibits talking or sharing material about non-working topics during active working time, but not breaks. (Ex. 22)



# Employer Expressive Activity

- Public employers may express views, including engaging in conversations, with public employees about the advantages and disadvantages of employee organizations and collective bargaining. In doing so, such expression:
  - (A) may include general views on employee organizations, or predictions of the effects of unionization on the employer, to the extent such predictions have a basis in objective fact as demonstrably probable consequences beyond employer control; but
  - (B) may not include or be accompanied by actions reasonably tending to discriminate against, interfere with, or otherwise deter protected activity, such as an economic (or other) threat of the employer's own volition, a promise of a benefit for foregoing or causing others to forego protected activity, or creating an impression of surveillance - whether or not protected activity is actually interfered with, deterred, or surveilled

# Enforcement (-105)

- Employees may file claims for "unfair labor practices", i.e., PROPWA violations, with the CDLE; 6 month limitation period
- Division might not disclose name of party if deemed unnecessary (5.1.1.F)
- Will not investigate if within the scope of a CBA dispute resolution process with binding arbitration
- If complaint is sufficient, will require employer to answer
- Investigation, including interviews
- Able to keep sources confidential (!)
- Burden of proof on charging party/preponderance
- Division makes decision; either party can request hearing

# Enforcement (-105) - Remedies

- Damages to compensate losses caused by the unfair labor practice (e.g., backpay, lost dues for employee organization, and other direct or foreseeable pecuniary harm)
- Reinstatement or instatement with same seniority status the employee would have without the violation, or, if unfeasible, front pay with benefits
- Order to cease and remedy violations and effects thereof, including by modifying or rescinding policies, practices, or agreements, and provide notice of changes
- Any other relief authorized by available statutes
- Appeal to Court of Appeals on the basis that decision was arbitrary, capricious, or an abuse of discretion

# Thank You!

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