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Seemingly Obscure Labor Contract Language You Should Never Ignore

CALPELRA Annual Conference Monterey, California
Wednesday, November 19, 2025
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November 19th, 2025

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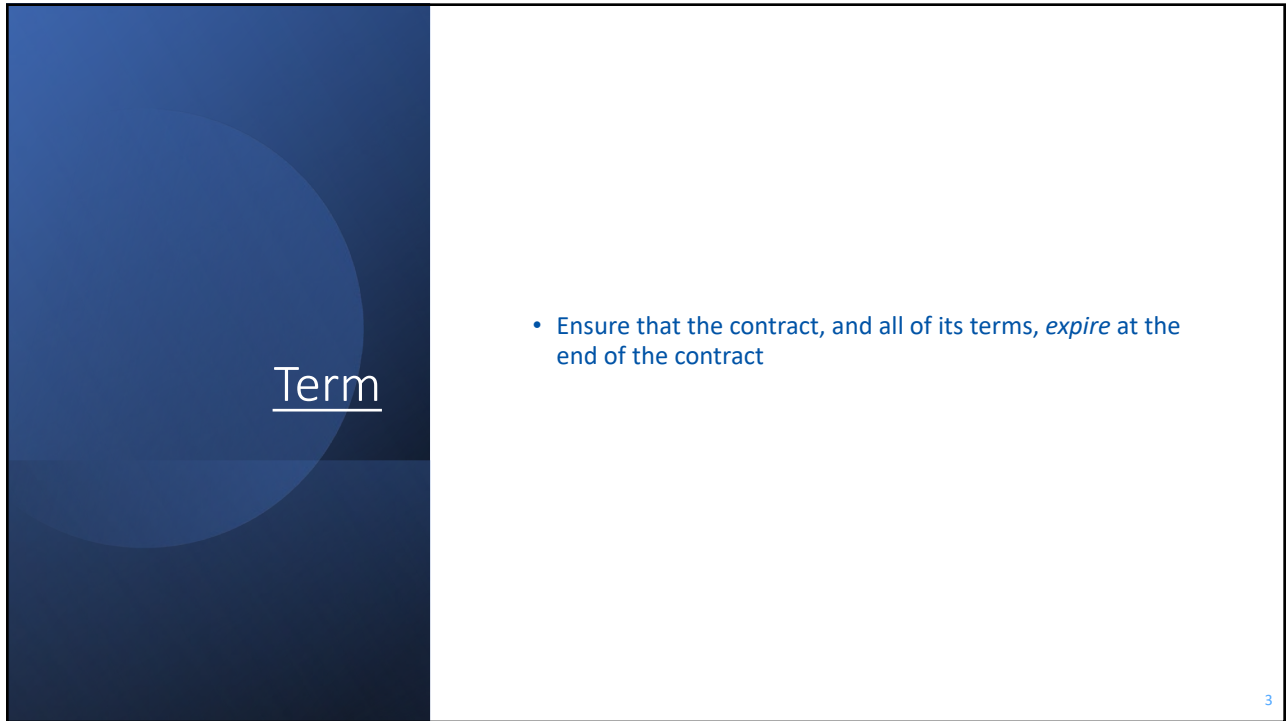
Agenda – Tricky Language Issues in Collective Bargaining

- TERM
- WAGE
- ZIPPER CLAUSE
- DRUG TESTING
- OVERTIME
- HOLIDAYS
- RETIREE HEALTH
- NO STRIKE CLAUSES
- SICK LEAVE
- VACATION
- INVESTIGATIONS
- DISCIPLINE
- OUT OF CLASS PAY
- MANAGEMENT RIGHTS

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Term


- Ensure that the contract, and all of its terms, *expire* at the end of the contract

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Term: Sample MOU Language

The term of this Memorandum of Understanding (“MOU”) shall be for three (3) years commencing at 12:01 a.m. on July 1, 2024 and terminating at 12 midnight on June 30, 2027.



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Term: Sample MOU Expiration Language

This MOU shall be effective July 1, 2023, and together with all the terms, conditions and effects thereof, shall expire as of midnight on June 30, 2026.



Retiree Health



Super expensive obligation

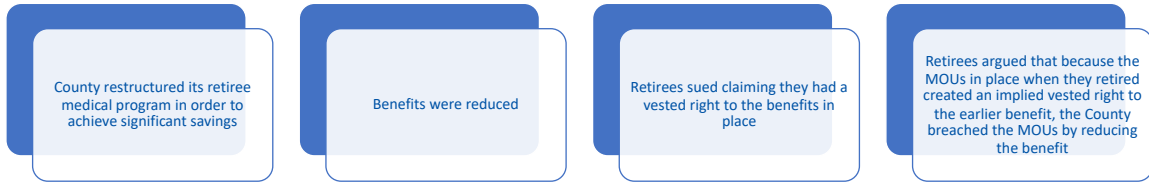


Avoid vested rights claims through obligations connected to express expiration dates



Avoid vested rights claims through language reserving the right to make modifications – at least after expiration of the contract

Harris v. County of Orange, 17 F.4th 849 (2021)



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Harris v. County of Orange





Court ruled in favor of the County



contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement



agreements, as implemented through previous MOUs, were of fixed duration,...the employees had no legitimate expectation that the ... benefits would continue unless they were renegotiated as part of a new ... agreement.

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Wage

- Tie wages to specific dates
- Avoid broad commitments such as wage increases shall be 3% per year effective July 1
- Tie implementation to workable and practical dates that simplify matters for payroll

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Wages: Sample MOU Language # 1

WAGES

d. On January 1 of each successive year, all members of the AFSCME Local 3299 College Service Unit shall receive a 3% General Salary Adjustment (GSA).

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Wages: Sample MOU Language # 2

WAGES

92. Represented employees shall receive the following base wage increases:
- Effective July 1, 2024, represented employees shall receive a 1.5% wage increase.
- Effective January 4, 2025, represented employees shall receive a 1.5% wage increase.



Wage: Sample MOU Language #3

Effective June 28, 2025, base salaries will be increased by five percent (5%) for all represented classifications.

Effective the first full pay period following July 1, 2026, base salaries will be increased by four percent (4.0%) for all represented classifications.

Effective the first full pay period following July 1, 2027, base salaries will be increased by three percent (3%) for all represented classifications.

Consider
"on or after"



Zipper Clauses

Avoid clauses that prevent negotiation over provisions that are not expressly covered in bargaining during the term of the contract

E.g. avoid clauses that state the parties had the full and fair opportunity to negotiate on all topics during negotiations, and each party therefore waives any obligation to negotiate on matters within the scope of representation during the term of the contract.

Avoid the obligation to continue past practices

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Zipper Clause: Sample MOU Language #1

Although nothing in this Agreement shall preclude the parties from mutually agreeing to meet and confer on any subject within the scope of representation during the term of this Agreement, it is understood and agreed that neither party may require the other party to meet and confer on any subject matter covered herein or with respect to any other matter within the scope of representation during the term of this Agreement.

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Zipper Clause: Sample MOU Language #2

Except as provided in this MOU, each party to this agreement voluntarily waives its right to negotiate during the term of this agreement with respect to any matter expressly covered by this MOU [or proposed by that same party during the negotiations leading to this MOU.]

Should any provision of this MOU be rendered unlawful or unenforceable by any subsequent legislative enactment, state regulation or by a court of competent jurisdiction only that provision of the MOU shall be null and void, and all other provisions of the MOU shall not be affected and shall remain in full force and effect.



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Zipper Clause: Sample MOU Language #3

With the exception of a separate MOU covering retirement issues, this MOU contains all of the covenants, stipulations, and provisions agreed upon by the parties. Therefore, for the term of this MOU, neither party shall be compelled, and each party expressly waives its rights to request the other to meet and confer concerning any issue within the scope of representation except as expressly provided herein or by mutual agreement of the parties. No representative of either party has the authority to make, and none of the parties shall be bound by, any statement, representation or agreement reached prior to the execution of this MOU and not set forth herein.



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Drug Testing



Current law: If the agency does not have a drug testing policy, the agency is not permitted to test for drug use even if there is a reasonable suspicion.




Negotiate an effective and clear drug testing policy.

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Medical Examination Language Considerations

The Fire Chief retains the right to subject employees to job-related fitness for duty medical examinations to ensure employees can safely perform the essential functions of their job classifications as specified in established job descriptions. In the event the Fire Chief, after consultation with the Human Resources Director, determines there are identifiable reasons to believe an employee may be unable to safely perform the essential functions of their job classification, an employee shall submit to a fitness for duty medical examination at any time while on duty. The notice provided to the employee directing them to submit to a medical examination does not need to include the identifiable reason(s) for the referral.



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Overtime Protections

- Require that unscheduled overtime be reported within 48 hours
- Consider a FLSA “savings” clause that mandates in the event of a FLSA claim, the agency receives a “credit” against overtime not required by the agency, as well as a reopener to achieve cost neutrality

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Holidays

- Avoid contract language that grants paid holidays whenever the Governor or Federal government declares a new holiday

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Holidays – Avoid Language

“Any day declared a holiday by the Governor of the State of California or the President of the United States is a holiday”



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No Strike Clauses

- Ensure that no strike clauses cover all forms of strikes
- No strike obligations should continue until all required impasse resolution procedures are exhausted



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No Strike Clauses: Sample MOU Language #1

Consider adding:

“During the term of this Agreement and while the Parties are involved in impasse procedures,”

Participation by any employee represented by the Union in picketing with respect to any issue concerning matters within the scope of representation provided or proposed to be provided by the City of San José for employees in this unit, or participation in a strike, including sympathy strikes, work stoppage or slowdown, or any other concerted activity which diminishes services provided by an employee in this unit, or the failure to perform lawfully required work, shall subject the employee to disciplinary action up to and including discharge. Employees may participate in informational picketing in public areas outside of regular work hours (including unpaid lunch time).



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No Strike Clauses: Sample MOU Language #2

No unlawful strike or work stoppages by City employees, as defined in FMC Section 3-624 or applicable state bargaining laws and regulations, shall be caused, instigated, encouraged, condoned, participated in, or honored by the Association or its members during the term of this MOU.



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No Strike Clauses: Sample MOU Language #3

In consideration of the mutual desire of the parties to promote and ensure harmonious relations and in consideration of the Mutual Pledge of Accord, the City agrees that there shall be no lockout or the equivalent of members of the Association, and the Association and its members agree that there shall be no strike or other concerted action resulting in the withholding of service by the members during the term of this MOU. Should such a strike or concerted action by Association members occur, the Association shall immediately instruct its members to return to work. [...] The provisions of this Paragraph C shall not detract in any way from any restrictions imposed by law on strikes and other types of work stoppage by public employees.



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Sick Leave

- Expressly state that sick leave has no cash out value upon separation of employment
- Consider reasonable caps on accrual

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Sick Leave: Sample MOU Language #1

After completion of one year of service, employees who use twenty-eight (28) hours or less of sick leave each payroll year (defined as the year that ends at the end of the last full pay period in December where the pay day is also in December) may convert up to 28 hours of the accumulated unused sick leave to cash during the month of January of the following year. Days not paid for or taken may be used in the future, or paid at separation in accordance with the sick leave buy-back program as referenced in Article 13 of this MOU.



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Sick Leave: Sample MOU Language #2

Such sick leave as provided in Section 20.2 (Accrual), when not used shall be cumulative. The accumulated unused period of sick leave shall not exceed two hundred (200) working days regardless of the length of service. When the maximum has been reached, and thereafter part of the maximum has been used, the number of accumulated sick days may be brought back up to maximum at the applicable rate provided in Section 20.2 (Accrual). [...] All accumulated sick leave shall be canceled when an employee terminates or is terminated, except as provided below for employees hired on or before June 30, 2013.



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Vacation



Current law: Use it or no longer accrue it. Use it or lose it not permissible.



Caps for vacation

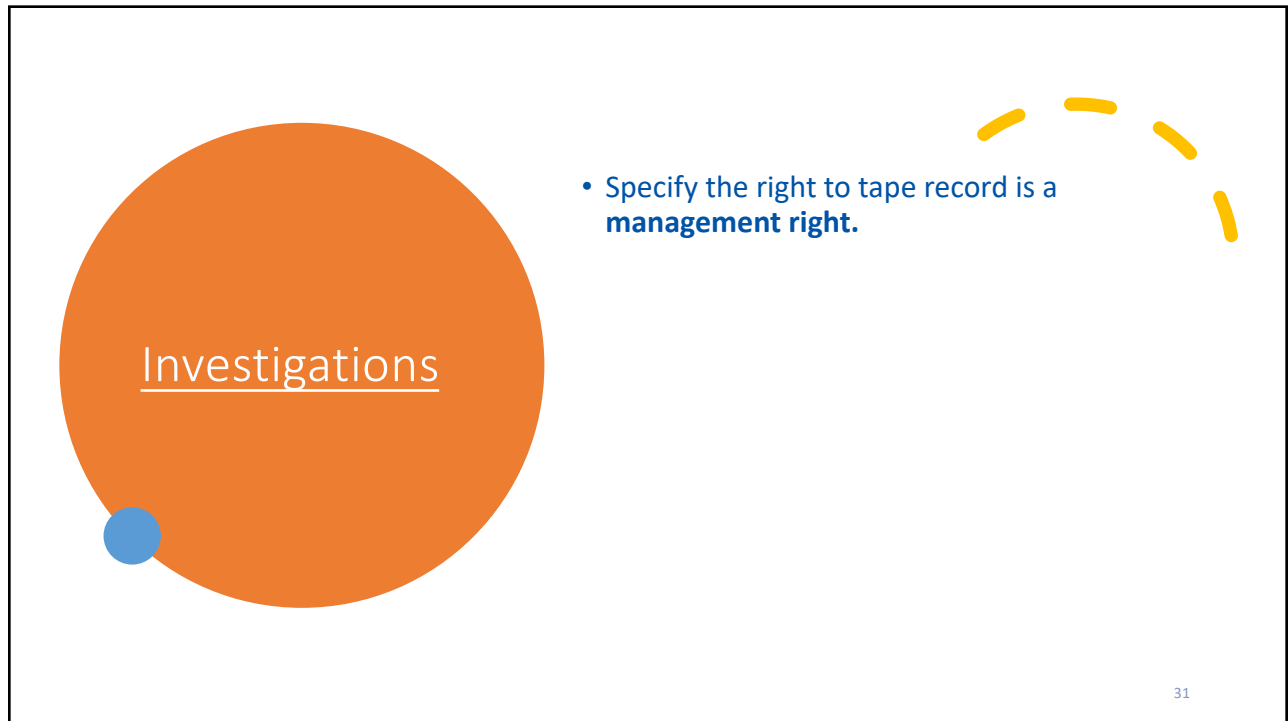
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Vacation: Sample MOU Language #1

Employees may defer vacation earned up to a maximum cumulative total of eight (8) weeks. An employee who has attained maximum accumulation may be required to take all excess earned vacation. Not later than October 1 of each year, the City will advise employees who have attained a maximum accumulation of vacation whether such excess earned vacation must be scheduled as time off prior to March 31. Such time off shall be scheduled in accordance with the provisions of Section 17.2 (Vacation Approval). Accumulated vacation may not be used immediately prior to retirement in order to extend the date of retirement, but shall instead be paid out in full upon retirement.

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Investigations

- Specify the right to tape record is a **management right.**

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Discipline

“Just Cause” is a loaded phrase with lots of surrounding obligations potentially considered by arbitrators

Consider simply a “cause”

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The Seven Tests for Just Cause

1. Fair Notice
2. Prior Enforcement
3. Due Process
4. Substantial Evidence
5. Equal Treatment
6. Progressive Discipline
7. Mitigating and Extenuating Circumstances



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Out of Class Pay

- Consider language placing controls over when an employee is “assigned” to work out of class – e.g., make it in writing

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Management Rights



Management Rights: Sample MOU Language

SECTION 3.00 - CITY RIGHTS

3.01 The City continues to possess exclusively the rights listed below, plus all other rights to which by law the City is entitled. These rights may not be abridged or modified in any way, except by formal legislative action by the City Council (i.e., resolution or ordinance).

The City has the right, and may exercise its discretion:

- 3.01.1 To determine the mission of all constituent departments, commissions and boards;
- 3.01.2 To set standards of service;
- 3.01.3 To determine the appropriate levels of city services, except where defined in the MOU;
- 3.01.4 To take disciplinary action for just cause;
- 3.01.5 To organize and reorganize its departments and affairs, and to otherwise exercise complete control and discretion over its organization;



Management Rights: Sample MOU Language Continued

- 3.01.6 To employ any appropriate means or method to maintain the efficiency of government operations and administration;
- 3.01.7 To determine when an emergency exists and to take all necessary action to carry out its mission in an emergency, including recalling and deploying off-duty personnel and requiring overtime work;
- 3.01.8 To determine the procedures and standards of selection for employment and promotion;
- 3.01.9 To determine the scope of duties and responsibilities applicable to all positions of employment, and determine the content of job classifications;
- 3.01.10 To direct employees, make assignments and require overtime work;
- 3.01.11 To transfer or reassign employees, as outlined in the MOU;
- 3.01.12 To lay off employees by position as a result of: elimination of positions through City Council resolution; lack of work; budgetary considerations (including without limitation lack of funds or a revenue downturn); reorganization; or other related reasons;



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Management Rights: Sample MOU Language Continued

- 3.01.13 Except that any agreement between the City and the Local evidenced by a memorandum of understanding pursuant to GC 3500 et. seq. shall take precedence over any of the above enumerated employee and management rights; and that such memorandum of understanding will be honored in good faith during the life of this contract.
- 3.01.14 Any violation of the policies and procedures created by this MOU may be subject to disciplinary action as defined in this MOU.
- 3.01.15 The above listed rights are subject to the City's duty to meet and confer in accordance with State law.



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