

Transfer of Employees Upon Creating of a District

Initial question: Is there a legal method by which the Polson City Library employees can upon termination as city employees retain their sick leave, etc. as North Lake County Public Library District employees given that the District is willing to assume the associated financial liabilities that may be involved?

Response from Bob Cooper – October 21, 2010

It is MSL's understanding that North Lake County Public Library District (NLCPLD) came into existence on August 2, 2010. It is further understood by MSL that the Polson City Library will cease to exist as of December 31, 2010, and the NLCPLD will begin providing library services as of January 1, 2011. Your question is whether there is a legal method by which employees of the Polson City Library can, upon the termination of their employment, retain their sick leave and annual leave when they become employees of the NLCPLD.

§§ 2-18-617 and 2-18-618, MCA, address, respectively, accumulation of annual and sick leave, as well as cash for unused leave balances upon termination, and transfer of accrued leave when an employee transfers between agencies. For purposes of these two statutes, an "employee" is defined, with limited exceptions not applicable here, as any person employed by an "agency." § 2-18-601(6), MCA. "Agency" is defined as "any legally constituted department, board, or commission of state, county, or city government or any political subdivision of the state." § 2-18-601(1)(a), MCA. Based on these definitions MSL believes that these two statutes would apply to employees of the Polson City Library, as well as to employees of the newly formed NLCPLD.

§ 2-18-617(2)(a)(i), MCA, provides that an employee who terminates employment is entitled upon termination to cash compensation for unused vacation leave. § 2-18-618(6), MCA, provides that an employee who terminates employment is entitled to a lump-sum payment equal to ¼ of the pay attributable to his or her accumulated sick leave. Therefore, if the City takes the position that it is necessary to terminate employees of the Polson City Library prior to the NLCPLD presumably hiring the same people as employees of NLCPLD, the City of Polson can argue that it is only following the letter of the law. However, as discussed below, MSL believes a stronger argument can be made that this constitutes a transfer of employees between agencies.

Both statutes provide that when an employee transfers between agencies of or within the same jurisdiction, there can be no payout but the "receiving agency" must assume the liability for the employee's accrued vacation or sick leave credits. §§ 2-18-617(3) and 2-18-618(6), MCA. Since it appears that the intent of both parties is to have the Polson City Library employees assume the same or similar positions with the NLCPLD, MSL believes the NLCPLD could make an argument that under the Montana statutes cited above those employees must retain their leave credits and the new NLCPLD must assume the liability for those credits – because this really constitutes a transfer between two agencies.

At least in the case of vacation leave credits, there is some support for this argument in a rule adopted by the State of Montana Department of Administration to implement § 2-18-617(3), MCA. Under the draft Interlocal Agreement proposed by the City of Polson, the intent seems to be that there will be no break in service of employment – the Polson City Library will cease to exist on December 31 and the NLCPLD will begin providing library service on January 1. If the

NLCPLD will begin providing services on January 1, there will have to be employees to provide those services. ARM 2.21.234(2) provides:

If a break in service in excess of 5 working days occurs during a change in employment between agencies or the employee accepts a position in another jurisdiction, the employee must receive a lump-sum payment for accrued vacation leave credits and must begin anew the qualifying period for use of leave at the new agency or jurisdiction.

Since there will be no break in service exceeding 5 working days, MSL believes the NLCPLD can make a credible argument that what is really contemplated here is a transfer of employment between agencies, rather than a termination and new hiring of employees. Thus, the current Polson City Library employees should retain the leave balances they have as of December 31 when they begin their jobs with the NLCPLD on January 1.